WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EDILBERTO CERNA ROMERO, *Applicant,* vs. STONES AND TRADITIONS; STATE COMPENSATION INSURANCE FUND, *Defendants.*	Case No. ADJ7803069 (Oakland District Office) OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the December 30, 2015 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that a utilization review (UR) decision dated August 12, 2015, was untimely. The WCJ nevertheless found that defendant properly denied the treatment requested. The WCJ found that a UR decision dated September 14, 2015 was timely as to two treatment modalities but was untimely as to H-wave supplies and oxycodone. The WCJ found that the use of the H-wave device and further prescription for oxycodone are reasonable and necessary to cure or relieve applicant from the effects of his injury.

Defendant contends that both UR decisions were timely, and therefore the WCJ did not have jurisdiction to determine whether the treatment was medically necessary.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration. For the reasons discussed below, we will grant reconsideration and find the second UR decision was timely.

In his Report, the WCJ summarized the relevant facts as follows:

> "Applicant's primary treating physician is Dr. Douglas Grant. According to defendant's verified petition, the treatment measures recommended in a request for authorization (RFA) received August 4, 2015, were "pain psychology," acupuncture, and Lidoderm patches. The psychological treatment was approved, the acupuncture was modified from "unknown" to six sessions, and the Lidoderm was disapproved ("non-certified"). The UR decision is dated August 12, 2015, although it states that it was made on

the previous day. (A decision made on August 11, 2015, would be timely; one made the following day would not.)

The second UR decision, as summarized in the opinion on decision, "concerned colonoscopy, oxycodone, omeprazole and an H-wave device [footnote omitted] and was received by defendant on September 1, 2015. On September 8, 2015, the UR vendor contracted by defendant State Compensation Insurance Fund (SCIF) directed a request for further information to Dr. Grant, asking about a history of gastrointestinal bleeding. The UR decision, dated September 14, 2015, approved the colonoscopy but disapproved the other measures. At trial, applicant conceded that the decision was timely as to omeprazole because the request for information bore upon that medication."

In the decision under review, I found the first UR decision untimely, because of a lack of evidence that any action was actually taken on August 11, 2015, but, reaching the merits, upheld the UR determination. I found the second UR to be timely only with respect to the one recommendation – omeprazole, used to treat gastrointestinal distress and bleeding – about which the UR personnel had sought further information, so as to that I had no jurisdiction to undo the UR decision. As to the other two recommendations, I concluded that the extension of time provided under section 4610, at subdivision (g), [footnote omitted] did not apply to treatment not the subject of a request for further information, rendering the UR decision untimely as to those.

Turning, therefore, to the merits, I found sufficient support in Dr. Grant's reporting to award both (H-wave device and oxycodone), with certain reservations concerning his need to review and consider the utilization reviewer's expressed doubts before continuing those measures indefinitely." (Report, pp. 1-2.)

Labor Code section 4610(g)(1) requires that prospective or concurrent UR decisions "shall be made in a timely fashion ..., not to exceed five working days from receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician." Thus, section 4610(g)(1) provides two alternative timelines within which the determination must be made.

Pursuant to her authority, the Administrative Director adopted Rule 9792.9.1 which addresses UR standards, timeframes, and procedures for requests for authorization submitted on or after January 1, 2013.[1] A request for authorization must be made on a DWC Form RFA. (Cal. Code Regs., tit. 8, §

[1] Although section 4610 does not specifically give the Administrative Director authority to implement its provisions, the Administrative Director has general rulemaking authority. (Lab. Code, § 5307.3; see also § 133.) An administrative agency is authorized to "fill up the details" of the statutory scheme by adopting regulations to promote the purposes of legislation and to

9792.9.1(a).) Rule 9792.9.1(c) provides that the UR timeframe is extended when "additional information is requested necessitating an extension under subdivision (f)." (Cal. Code Regs., tit. 8, § 9792.9.1(c).) In turn, Rule 9792.9.1(f)(1)(A) provides that once an RFA is submitted, the timeframe for UR decisions may be extended if, as relevant here, "the claims administrator or reviewer is not in receipt of all of the information reasonably necessary to make a determination." (Cal. Code Regs., tit. 8, § 9792.9.1(f)(1)(A).) In cases where additional information is necessary, "a reviewer or non-physician reviewer shall request the information from the treating physician within five (5) business days from the receipt of the request for authorization." (Cal. Code Regs., tit. 8, § 9792.9.1(f)(2)(A).) Once the additional information is requested, if the additional information requested "is not received within fourteen days from the receipt of the completed request for authorization for prospective or concurrent review ... the reviewer shall deny the request with the stated condition that the request will be reconsidered upon receipt of the information." (Cal. Code Regs., tit. 8, § 9792.9.1(f)(3)(A).)

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc), we held that when a UR determination is timely made, Independent Medical Review (IMR) is the sole mechanism for reviewing the UR physician's expert opinion regarding the medical necessity of a proposed treatment.

With respect to the August 12, 2015 UR decision, we do not have sufficient information to determine whether it was timely, so we will not disturb the WCJ's decision. Given that the WCJ upheld the UR determination, it does not appear that defendant is aggrieved by the WCJ's finding.

The September 14, 2015 UR decision was a prospective review of the PTP's RFA for four different treatment modalities. The UR physician requested additional information pertaining to two of the treatment modalities and issued a decision within 14 days as required by Labor Code section 4610. The WCJ reasoned that the UR physician should have issued a decision regarding the two treatment modalities for which no additional information was required within 5 days. We disagree. Rule 9792.9.1

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carry it into effect. (*Ford Dealers Assn. v. Dept. of Motor Vehicles* (1982) 32 Cal.3d 347, 362; *Kugler v. Yocum* (1968) 69 Cal. 2d 371, 376.) "Moreover, standards for administrative application of a statute need not be expressly set forth; they may be implied by a statutory purpose." (*People v. Wright* (1982) 30 Cal.3d 705, 713.) The agency's authority "includes the power to elaborate the meaning of key legislative terms." (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 800.)

provides that an RFA triggers the timelines for completing utilization review and does not contemplate different timelines for different treatment requests within an RFA. Accordingly, the September 14, 2015 UR decision is timely as to all modalities requested as part of the RFA.

For the foregoing reasons,

IT IS HEREBY ORDERED that defendant's Petition for Reconsideration of the December 30, 2015 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 30, 2015 Findings and Award is **RESCINDED** and the following is **SUBSTITUTED** in its place:

FINDINGS OF FACT

1. The utilization review decision dated August 12, 2015 is untimely.

2. Applicant is not entitled to the treatment denied by the August 12, 2015 utilization review decision.

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3. The utilization review decision dated September 14, 2015 is timely.

WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

KATHERINE ZALEWSKI

FRANK M. BRASS

CONCURRING, BUT NOT SIGNING

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 22 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

BOXER & GERSON, LLP
STATE COMPENSATION INSURANCE FUND
EDILBERTO CERNA ROMERO

MWH/ebc

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board
JUDGE CHRISTOPHER MILLER

Edilberto Cerna Romero v. Stones and Traditions
WCAB No. ADJ7803069

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on January 22, 2016, defendant seeks reconsideration of the decision filed herein on December 30, 2015, in this case, which arises out of an admitted injury, on March 28, 2011, to the low back and left hand, elbow and arm of a laborer. Submitted for decision were the timeliness and, if untimely, the propriety of two utilization review (UR) decisions by defendant State Compensation Insurance Fund's (SCIF's) UR designee. Petitioner, hereinafter defendant, contends in substance that both decisions were timely, and therefore the appeals board is without subject-matter jurisdiction to review their correctness. Applicant has not filed an answer.[1] I will recommend that reconsideration be denied.

FACTS

Applicant's primary treating physician is Dr. Douglas Grant. According to defendant's verified petition, the treatment measures recommended in a request for authorization (RFA)

[1] Although a party is not required to file an answer to a petition for removal or reconsideration, it is commonly viewed as an appropriate practice. *See, California Workers' Compensation Practice,* Continuing Education of the Bar, section 21.44; *State Farm Fire and Cas. Co. v. Wkrs. Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622]. The appeals board and appellate courts are "not required to search the record in an attempt to develop answers to the contentions of the petitioner and [are] entitled to assume that the petitioner's statement of facts is accurate and that the contentions advanced are meritorious." *Id.,* citations omitted. Any answer must be filed within ten days of service of the petition (§ 5905), and if service is by mail five days are added (Code Civ. Proc. § 1013, imported into workers' compensation law by § 5316). However, the judge's report and recommendation is due 15 days after the filing of the petition, so as a practical matter if the responding party uses all of the allotted time to file an answer, including the extension, it is impossible for the trial judge to consider it when preparing that report. In fact, this report was delayed in the vain hope of receiving an answer. All statutory references not otherwise identified are to the California Labor Code.

received August 4, 2015, were "pain psychology," acupuncture, and Lidoderm patches. The psychological treatment was approved, the acupuncture was modified from "unknown" to six sessions, and the Lidoderm was disapproved ("non-certified"). The UR decision is dated August 12, 2015, although it states that it was made on the previous day. (A decision made on August 11, 2015, would be timely; one made the following day would not.)

The second UR decision, as summarized in the opinion on decision, "concerned colonoscopy, oxycodone, omeprazole and an H-wave device[2] and was received by defendant on September 1, 2015. On September 8, 2015, the UR vendor contracted by defendant State Compensation Insurance Fund (SCIF) directed a request for further information to Dr. Grant, asking about a history of gastrointestinal bleeding. The UR decision, dated September 14, 2015, approved the colonoscopy but disapproved the other measures. At trial, applicant conceded that the decision was timely as to omeprazole because the request for information bore upon that medication."

In the decision under review, I found the first UR decision untimely, because of a lack of evidence that any action was actually taken on August 11, 2015, but, reaching the merits, upheld the UR determination. I found the second UR to be timely only with respect to the one recommendation – omeprazole, used to treat gastrointestinal distress and bleeding – about which the UR personnel had sought further information, so as to that I had no jurisdiction to undo the UR decision. As to the other two recommendations, I concluded that the extension of time provided under section 4610, at subdivision (g),[3] did not apply to treatment not the subject of a request for further information, rendering the UR decision untimely as to those.

[2] This is as presented by the parties at trial, and [ ] by inference from the UR documents and medical reporting. The RFA I found in the records (Exh. MM) does not match precisely.

[3] All statutory references not otherwise identified are to the California Labor Code.

Turning, therefore, to the merits, I found sufficient support in Dr. Grant's reporting to award both (H-wave device and oxycodone), with certain reservations concerning his need to review and consider the utilization reviewer's expressed doubts before continuing those measures indefinitely.

DISCUSSION

Defendant contends, first, that the first UR decision under study was timely completed because it states that it was made on the fifth working day after receipt of the RFA being considered, despite the fact that the decision is dated on the sixth working day. (Defendant does not contest my finding that the UR decision itself was correct. In this sense, defendant is not aggrieved by that finding, and for this reason alone it may be that reconsideration of the finding should be denied.) My decision to the contrary, as to timeliness, was based primarily on a failure of the evidence to demonstrate that defendant, or more accurately the UR provider with which SCIF contracts for this purpose, actually made a decision on the fifth working day, which was August 11, 2015. Defendant cites Exhibit AA, which it calls a "Screenshot of UR Portal Tab" as proof that it made a decision on August 11, 2015, but the document itself appears to contain dates in September, 2015, not August, 2015, and in any event has not been authenticated by a witness (neither party offered testimony at trial) and is far from self-explanatory. The same things are true of the other exhibit cited (Exh. DD) and, as well, exhibit BB. In its petition, defendant avers that the evidence shows that "a phone call was placed to [ ] Dr. Grant's office to communicate the decision on 8/11/2015," but I am afraid that the evidence does not in fact show that, and again there was no testimony to that effect. The only indication I have found of a decision being made on August 11, 2015, is the statement in the

decision dated August 12, 2015, that it was somehow made the day before. I remain unpersuaded that such a statement is enough to establish such a fact.

With respect to the second UR decision, defendant contends essentially that there is no requirement in either the statute or the relevant regulations that UR of different modalities of care be conducted under different timelines when further information is sought about only some of those modalities.[4] The rationale for my decision that the ultimate UR decision was untimely as to two recommended measures is explained in the opinion as follows:

> Factually, two things are without doubt: The UR decision dated September 14, 2015, is timely with respect to those measures (colonoscopy and Omeprazole) about which further information was requested, and untimely if that request is ignored. Applicant contends that UR of the two items (oxycodone and H-wave) that were not the subject of the request for information was due five working days, not 14 calendar days, from the RFA. Defendant counters that only one UR, for all four items, was legally required, and the deadline for that UR was extended to the 14-day period by the request for information. On this issue, defendant cites *Crawford v. Wkrs. Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 1344 (writ denied), in which a split panel of the appeals board held that a request for information by UR extended the timeline to complete the process, where there was inconsistent evidence of when the information (MRI reports) was submitted – that is, before or after the request for information. The case is not directly on point: It does not specifically address what happens when further information is requested on some, but not all, of the modalities covered

[4] Defendant also argues that a judge is not a doctor, and cannot reasonably know what treatment is intended for what purpose, so as to determine exactly what a request for information pertains to. The point is well taken, with respect to medical expertise. However, in this case Dr. Grant has explained in his reports why he is prescribing oxycodone and H-wave (pain), and why he is prescribing a colonoscopy and Omeprazole (gastrointestinal distress); the UR inquiry about gastrointestinal bleeding is also clear, in terms of what treatment pertains to the request for information.

in a single RFA.[5] In fact, I was surprised to find no authority on that issue, controlling or otherwise.

As stated by the Supreme Court in *State Compensation Ins. Fund v. Wkrs. Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981], "the Legislature intended utilization review to ensure quality, standardized medical care for workers in a prompt and expeditious manner. To that end, the Legislature enacted a comprehensive process that balances the dual interests of speed and accuracy, emphasizing the quick resolution of treatment requests, while allowing employers to seek more time if more information is needed to make a decision." To be sure, the deadlines in section 4610 are tight ones, and they have proven to be a challenge for claims administrators and utilization reviewers to meet. However, those facts are the direct result of legislative changes whose purpose is well expressed in the quoted section of *Sandhagen*.

Looking at the four treatment measures covered in the September 14, 2015, UR decision, it does appear that two are related to the gastrointestinal inquiry made by UR, and two are unrelated to that inquiry. As to those (colonoscopy and omeprazole) for which further information was sought, the UR decision is clearly timely, making the denial of omeprazole subject to mandatory IMR. As to those (oxycodone and H-wave) for which further information was not sought, the UR decision is untimely, making the denial of both the proper subject of review by the WCAB.

Defendant argues that nothing in the statute or regulations requires, or allows, the application of one deadline (five working days) for treatment not subjected to a request for further information and another (14 calendar days) for treatment subjected to such request. However, neither do I find clear authority to the contrary. (Defendant cites one case, *Crawford v. Wkrs. Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 1344 (writ denied), in support of its

[5] That some things in a multiple-modality RFA were the subject of defendant's inquiry in *Crawford* and others were not is implied but not stated in that decision, and in any event that is not the holding.

position. However, that report is a digest of the WCAB decision prepared by the publisher's editors (customarily true where a petition for writ of review has been summarily denied) and does not clearly reveal that there were some recommendations in that case that were *not* the subject of that defendant's request for further information.) I believe the passage from *Sandhagen* quoted above adequately expresses the need that a measure of alacrity be applied to the UR process, and in this case those things about which defendant's utilization reviewer had no questions deserved a decision within five working days. (The reader is reminded that it was the UR decider who decided to put all decisions regarding the September RFA in a single decision.)

Again, defendant does not challenge the merits of the decision, meaning the medical reasonableness and necessity of the treatment awarded.

RECOMMENDATION

I recommend that reconsideration be denied.

Respectfully submitted,

Dated: February 16, 2016

CHRISTOPHER MILLER
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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