**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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| **MARK ANDRONICO,**<br>***Applicant,***<br>**vs.**<br>**LA ROCCA SEAFOOD, INC.; EMPLOYERS COMPENSATION INSURANCE COMPANY,**<br>***Defendants.*** | **Case No. ADJ9105259**<br>**(Oakland District Office)**<br><br>**OPINION AND ORDER GRANTING DEFENDANT'S PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION** |

Defendant seeks reconsideration of the March 4, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that the "Utilization Review in this matter is invalid," that the WCAB "has jurisdiction over the medical dispute presented," that "Applicant is entitled to further medical care, specifically to include the spinal surgery recommended by his treating physician," and entered an order to that effect.

It is admitted that applicant sustained industrial injury to his neck, back, left shoulder, left elbow, and head while working for defendant as a manager and delivery driver on July 3, 2013.

Defendant contends that the WCAB does not have jurisdiction to determine the necessity of medical treatment, and that the WCJ's findings that the UR is invalid and that the treatment request is appropriate are not supported by substantial evidence.

An answer to defendant's petition was received from applicant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending, in part, that the petition be dismissed because it was filed by a different law firm than the one that represented defendant at the trial on December 30, 2013, and otherwise recommending that reconsideration be denied.

Defendant requested to file a supplemental petition in response to the WCJ's Report. Applicant requested to file a supplemental answer to defendant's supplemental petition. The parties' requests to

file supplemental pleadings are approved as allowed by the Appeals Board Rules of Practice and Procedure, Rule 10848, and they have been considered. (Cal. Code Regs., tit. 8, § 10848.)[1]

Defendant's petition is accepted because a Substitution Of Attorneys was filed on or about March 21, 2014, as shown by the clerk's date stamp, which is before the petition was filed on April 1, 2014.[2] (Cal. Code Regs., tit. 8, § 10230.)

Reconsideration is granted and the March 4, 2014 Findings And Award is rescinded as our Decision After Reconsideration. The UR physician was qualified to make a determination regarding the back surgery, but his UR determination is otherwise defective because important relevant medical history information was not addressed. The case is returned to the WCJ for development of the record by the treating physician regarding the requested surgery, further proceedings and a new decision by the WCJ.

## BACKGROUND

The WCJ describes the procedural background in his Report as follows:

> "On December 30, 2013, this matter came on for Expedited Hearing before the undersigned on the issue of Applicant's need for a spinal surgery being recommended by his surgeon, Kenneth Light, M.D.
>
> "On January 1, 2014, the undersigned issued a Findings of Fact and Order, together with a Notice of Intention to Resubmit. Among other things, I found that 'The record is in need of further development on the issue of the timeliness and valicity (sic) of Defendant's Utilization Review.' I Ordered the parties to file documents responsive to the issues raised in the Opinion on Decision and noticed my intention to admit such documentary evidence (subject to objection by either party) and resubmit the matter for decision. Specifically, I noted that the treating physician's request had been made pursuant to Labor Code Section 4610(g)(2), which requires a decision within 72 hours. Although there was evidence offered at Hearing as to when the decision was made, there was no evidence as to when the treater's Request for Authorization had been received. I therefore requested documentary evidence on this issue from either or both parties. It was also unclear on the basis of evidence available whether the treatment being recommended was within the practice of the Utilization Review ("UR") doctor. Again, I requested that the parties 'furnish any other

[1] Rule 10848 provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party."

[2] The image of the Substitution Of Attorneys in EAMS has two different and overlapping date stamps. The earlier date appears to be March 21, 2014, which is the date that is separately stamped on the accompanying proof of service that shows service of the document by mail on that date.

> documentary evidence which they believe is probative on this issue.' Neither party sought removal of the Findings of Fact and Order.
>
> "Defendant filed three additional documents on February 7, 2014. Applicant neither filed any documents nor objected to Defendant's exhibits within the timeframe given in the Notice of Intention. Defendant's exhibits were admitted into evidence, and the matter was resubmitted for decision on March 5, 2014. The same day a Findings and Award issued."

In his Report the WCJ explains that he determined that defendant's UR was defective because Labor Code section 4610(e) requires that the UR physician be "competent to evaluate the specific clinical issues involved in the medical treatment services, and where the services are within the scope of the physician's practice..."[3] In the view of the WCJ as expressed in his Report, the spinal surgery request reviewed by the UR physician was not within the scope of his practice as described in section 4610(e) because he had not performed any spinal surgery for at least ten years before making the UR determination. The WCJ did not reach the question of whether the UR physician had an inadequate medical record as also contended by applicant because of his conclusion that the UR was defective due to the UR physician's lack of proper qualifications.

## DISCUSSION

We disagree with the WCJ that the UR is defective because the treatment sought by applicant was not within the scope of the UR physician's practice and he was not qualified to evaluate the specific clinical issue as required by section 4610(e). The UR physician, Donald Dinwoodie, M.D., identifies himself as an orthopedic surgeon and a member of the American Academy of Orthopaedic Surgeons and the California Orthopedic Association. A physician's specialty, or area of board certification, or level of clinical practice, is not dispositive of his or her competency. Section 4610(e) requires only that the doctor be competent to evaluate the specific clinical issues, and that the services at issue are "within the scope of the physician's practice." Both of those requirements are present in this case because the clinical issue involves orthopedic surgery and the UR physician is an orthopedic surgeon. Applicant has not shown that the requirements of section 4610(e) were not met.

[3] Further statutory references are to the Labor Code.

While we disagree with the WCJ concerning Dr. Dinwoodie's qualifications to render a UR opinion, we do agree with the WCJ's finding that the UR determination is defective. This is because the UR physician did not address a portion of applicant's medical history that is directly relevant to the requested treatment, likely because he did not have a complete medical record. In the November 19, 2013 UR denial (Joint Exhibit 102), Dr. Dinwoodie writes as a supporting reason for denying authorization that applicant had not been attending therapy and "the question would be whether other conservative means have been exhausted." That portion of Dr. Dinwoodie's response fails to consider the UR determination issued the month before on October 9, 2013, in response to Dr. Lights' request to provide the conservative treatment of aqua therapy (Exhibit 3). In that earlier UR determination a different UR physician denied authorization for the requested aqua therapy on the grounds that "Further supervised therapy is not medically necessary at this point." Dr. Dinwoodie's failure to address that earlier UR report is a material defect in his UR determination because he indicated in his UR report that conservative treatment options needed to be exhausted before surgery would be considered.

Turning to the procedural issues, the Appeals Board addressed the process that applies to medical treatment disputes after the Legislature's implementation of the IMR process as part of SB 863 in the en banc decision *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon*).[4] In *Dubon*, as in this case, the applicant contended that the defendant's UR concerning requested medical treatment was procedurally flawed, and the WCJ had jurisdiction to determine the treatment dispute. However, the WCJ in *Dubon* held that disputes over alleged procedural defects in a defendant's UR denial must be resolved through the IMR process and that the WCAB has no authority to determine the issue of medical treatment even if defendant's UR is procedurally defective. The Appeals Board disagreed with the WCJ's determination, and based upon its review of the statutes, regulations and case law held in *Dubon* as follows:

"1. IMR solely resolves disputes over the medical necessity of treatment requests.

[4] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].

Issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB.

2. A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.

3. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.

4. If there is a timely and valid UR, the issue of medical necessity shall be resolved through the IMR process if requested by the employee."

In *Dubon*, the Appeals Board concluded that the defendant's UR process in that case, "suffers from material procedural defects that undermine the integrity of the UR decision because the UR physicians were not provided with adequate medical records." For that reason, the case was returned to the WCJ for determination on whether the requested medical treatment was reasonably required.

In this case, the UR process was similarly flawed as shown by the UR physician's expressed concern that conservative treatment options had not been exhausted, when a complete record would have shown that a different UR physician determined the month before that conservative treatment proposed by Dr. Light was not medically necessary. This is the kind of material procedural defect that undermines the integrity of a UR determination as discussed in *Dubon*. Accordingly, as held in *Dubon*, the treatment issue is now to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving that the requested treatment is reasonably required.

In his October 17, 2013 report, Dr. Light wrote as follows in recommending anterior discectomy and disc replacement arthroplasty at C5-6 and C6-7:

> "The usual denial in this case is that disc replacement is experimental. In fact, it is not experimental. It has been done in Europe for over 35 years. It has been done in this country at least for the last six years. There are multiple studies including Med Analysis which show that disc replacement arthroplasty is superior to spinal fusion for the treatment of herniated discs and nerve root entrapment. I understand there may be an objection that

> two levels is non-FDA approved. In fact, two-level is FDA approved. Recent approval has been given to LDR for two-level disc replacement. The advantages of disc replacement are clearly the operation is much smaller, patients are able to use their neck immediately, they did not require a collar, the recovery is usually very good immediately after surgery, and healing takes place over a period of three months. Pain with disc replacement is less than that with spinal fusion as proven in multiple studies. Neurologic recovery is better than with fusion in multiple studies, and disc replacement places less stress at the adjacent disc levels, therefore decreasing the need for adjacent level surgery. Due to the severe nature of the symptoms, despite conservative treatment over three months, I would recommend that this patient have surgery."

Dr. Light's discussion of the proposed surgery generally supports its authorization as reasonable medical treatment, but the request for authorization requires development. Where the medical record requires further development, supplemental opinion may be obtained from the physician who has already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Development of the record should occur expeditiously in this case in light of the delay that has already occurred and because of the importance of the treatment issue.

The type of surgery proposed by Dr. Light is not addressed in the American College of Occupational and Environmental Medicine's Occupational Medicine Practice (ACOEM) Guidelines or the Medical Treatment Utilization Schedule. For that reason, additional information is needed from him regarding that specific surgery before it can be ordered as reasonably necessary medical treatment. This additional information includes the identification of studies that show disc replacement arthroplasty to be superior to spinal fusion, as noted by Dr. Light in his October 17, 2013 report. In addition, Dr. Light should specifically cite medical guidelines or articles that address the identification of patients for whom the procedure is medically appropriate, and he should also provide further detail concerning the FDA approval of two-level disc replacement that is noted in his October 17, 2013 report.

After the record has been developed and following further proceedings, the WCJ should issue a new decision concerning the requested medical treatment, with a complete explanation of the reasons for his determinations.

///

For the foregoing reasons,

**IT IS ORDERED** that defendant's petition for reconsideration of the March 4, 2014 Findings And Award of the workers' compensation administrative law judge is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 4, 2014 Findings And Award of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level for development of the record, further proceedings and a new decision by the workers' compensation administrative law judge in accordance with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**MARGUERITE SWEENEY**

**I CONCUR,**

DEPUTY

**RICK DIETRICH**

FRANK M. BRASS

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

JUN 02 2014

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

**MARK ANDRONICO**
**BOXER & GERSON**
**SHAW JACOBSMEYER CRAIN & CLAFFEY**

**JFS/abs**

WORKERS' COMPENSATION APPEALS BOARD
DIVISION OF WORKERS' COMPENSATION
STATE OF CALIFORNIA

**MARK ANDRONICO v. LA ROCCA SEAFOOD, INC.**
**and EMPLOYERS COMPENSATION INSURANCE COMPANY**
**WCAB CASE NO.: ADJ9105259**

JUDGE STANLEY E. SHIELDS

**REPORT AND RECOMMENDATION**
**ON PETITION FOR RECONSIDERATION**
**FILED BY STRANGER TO ACTION**

## ISSUES PRESENTED

A. Whether the undersigned's finding, and, by extension, the finding of the Workers' Compensation Appeals Board in *Jose Dubon v. World Restoration, Inc., and State Compensation Insurance Fund* (2014) 79 Cal.Comp.Cases 313 [hereinafter, sometimes *"Dubon"*] that, where the defendant's Utilization Review is found untimely or suffers from material procedural defects, the issue of medical necessity is not subject to Independent Medical Review, but is to be determined by the WCAB based upon substantial medical evidence, is error.

B. Whether the WCJ's finding that Utilization Review in this case was invalid is supported by substantial medical evidence.

C. Whether substantial evidence supports the medical necessity of the treatment Ordered by the WCJ.

D. Whether the Workers' Compensation Appeals Board has any duty to consider a Petition for Reconsideration filed by a stranger to the action. [Issue raised, *sua sponte,* by WCJ.]

## INTRODUCTION

On December 30, 2013, this matter came on for Expedited Hearing before the undersigned on the issue of Applicant's need for a spinal surgery being recommended by his surgeon, Kenneth Light, M.D.

On January 1, 2014, the undersigned issued a Findings of Fact and Order, together with a Notice of Intention to Resubmit. Among other things, I found that "The record is in need of further development on the issue of the timeliness and valicity (sic) of Defendant's Utilization Review." I Ordered the parties to file documents responsive to the issues raised in the Opinion on Decision and noticed my intention to admit such documentary evidence (subject to objection by either party) and resubmit the matter for decision. Specifically, I noted that the treating physician's request had been made pursuant to Labor Code Section 4610(g)(2), which requires a decision within 72 hours. Although there was evidence offered at Hearing as to when the decision was made, there was no evidence as to when the treater's Request for Authorization had been received. I therefore requested documentary evidence on this issue from either or both parties. It was also unclear on the basis of evidence available whether the treatment being recommended was within the practice of the Utilization Review ("UR") doctor. Again, I requested that the parties "furnish any other documentary evidence which they believe is probative on this issue." Neither party sought removal of the Findings of Fact and Order.

Defendant filed three additional documents on February 7, 2014. Applicant neither filed any documents nor objected to Defendant's exhibits within the timeframe given in the

Notice of Intention. Defendant's exhibits were admitted into evidence, and the matter was resubmitted for decision on March 5, 2014. The same day a Findings and Award issued.

At Trial, Defendant was represented by the Law Firm Peterson, Colantoni, Collins and Davis. At the time both decisions were rendered and through the last date for filing a Petition for Reconsideration (25 days from March 5, 2014), the Peterson law firm continued to represent Defendant. In fact, pursuant to California Code of Civil Procedure Section 284, the Peterson firm continues to represent Defendant in this action. No timely Petition for Reconsideration has been filed by Defendant's legal representative.[1]

However, a complete stranger to the action, Shaw, Jacobsmeyer, Crain, and Claffey filed a Petition for Reconsideration on April 1, 2014. If this were a Petition filed by Defendant, it would be considered timely, and it is verified. No Answer has been received from Applicant.

The entire Opinion on Decision issued March 5, 2014 is relevant to the issues presented and is therefore reprinted *verbatim:*

## INTRODUCTION

> Applicant Mark Andronico, while employed as a manager/delivery driver by La Roca Seafood on July 3, 2013, sustained injury arising out of and occurring in the course of employment to his neck, back, left shoulder, left elbow, and head.
>
> Mr. Andronico has been treating with Kenneth Light, M.D., since July 18, 2013. On November 14, 2013, Dr. Light issued a Request for Authorization for Medical Treatment ("RFA") requesting authorization for a two-level disc replacement. (In a report dated November 13, 2013, Dr. Light identifies the discs as C5-6 and C6-7.) On November 18, 2013,

[1] More about this in the Discussion.

Donald Dinwoodie, M.D., issued a Utilization Review report recommending non-certification.

This matter came on for Expedited Hearing on the issue of Applicant's entitlement to the surgery proposed by Dr. Light. Mr. Andronico testified on his own behalf.

## BOARD JURISDICTION

In the prior decision, I presented approximately three pages of argument and citations as to why the Workers' Compensation Appeals Board would have jurisdiction over this dispute **if** Defendant's Utilization Review were either untimely or otherwise invalid. Since that decision, the Workers' Compensation Appeals Board has issued an *en banc* decision, *Dubon v. Workers' Compensation Appeals Board* (2014) 79 Cal.Comp.Cases ___,[2] in which it was expressly held that:

> A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.
>
> If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.

## PROPRIETY OF UTILIZATION REVIEW DECISION

### Timeliness.

Applicant contended that Defendant's Utilization Review of Dr. Light's recommendation for surgery was untimely. At Expedited Hearing, the parties presented as Joint Exhibit 101, a Request for Authorization ("RFA") from Dr. Light, dated November 14, 2013, indicating that "the patient faces an imminent and serious threat to his or her health." In such a circumstance, Labor Code Section 4610(g)(2)

[2] Defendant has pointed out that I gave an incorrect citation for *Dubon,* which I acknowledge.

requires that a decision be made by Utilization Review within 72 hours. Because it was not clear on the evidence presented whether the decision had been made within 72 hours, no determination could be made as to the timeliness of the decision, and I Ordered that the record be developed on this issue.

Defendant's Exhibit D, filed in response to the Order to Develop the Record, is a letter from the claims examiner asserting that the Utilization Review was not performed in connection with the November 14, 2013 RFA but rather in connection with an October 17, 2013 report (unaccompanied by an RFA), which Defendant states was received by mail on November 8, 2013. Assuming that Dr. Light's report was, in fact, not received by the carrier until November 8, 2013, the Utilization Review decision would have been timely pursuant to Labor Code Section 4610(g)(1).

No documentation was received allowing a determination as to whether there was a timely denial of Dr. Light's November 14, 2013 RFA; nor is it clear to the undersigned if one or the other request for authorization trumps the other.

Based on the statements contained in Exhibit D, I find that the Utilization Review denial was timely.

**Competency of Utilization Review Doctor.**

Applicant contends that the Utilization Review doctor was not competent to comment on the issue presented—namely, the need for an anterior discectomy and disc replacement arthroplasty at C5-6 and C6-7. The only information supplied about the U.R. doctor at Hearing was that he has a Board Certification from the American Board of Orthopaedic Surgery.

Labor Code Section 4610(e) provides that:

> No person other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services, and where the services are within the scope of the physician's practice, requested by the physician may modify,

delay, or deny medical requests for authorization of medical treatment for reasons of medical necessity to cure and relieve.

Here, the Utilization Review doctor lists himself simply as an orthopaedic surgeon. A doctor's "specialty" or area of board certification is not dispositive of his competency and neither term is even mentioned in the above-cited statute. The statute requires that the doctor (1) be competent to evaluate the specific clinical issues, and (2) the services at issue must with (sic) "within the scope of the physician's practice." "Practice" here is the key word.

The Legislature envisioned that a reviewing physician must not only be "book learned" on the issue but the service at issue must be part of his or her practice—implying practical, in addition to theoretical—knowledge.

Based on the above, I Ordered the record to be developed to determine if the Utilization Review physician, Donald Dinwoodie, M.D., has the appropriate background to be eligible to modify, delay, or deny the specific medical treatment at issue. I specifically Ordered Defendant to furnish an affidavit under penalty of perjury from Dr. Dinwoodie confirming whether or not he has performed an anterior discectomy and disc replacement arthroplasty anytime in the last 10 years. I also indicated that the parties could furnish any other documentary evidence which they believed to be probative on the issue.

In response, Defendant filed Exhibits E and F, respectively, a letter from Dr. Dinwoodie, and his *Curriculum Vitae*. It is noted that no affidavit under penalty of perjury was filed. The letter from Dr. Dinwoodie confirms that he has not performed a spinal surgery in the last ten years. He states, "I choose not to perform spine surgery," but states that "review of spinal procedures is well within the scope of my practice as a Board-certified orthopedic surgeon." Dr. Dinwoodie's C.V. reveals him to be a 63 year old orthopedic surgeon who received his education and training in Canada. In the period from 1979 to the present, he states

he has been an Agreed Medical Evaluator, an Independent Medical Evaluator, a Qualified Medical Evaluator, and to have participated in the Worker's Compensation Physician Advisory Panel (among other things). He is a member of the American Academy of Orthopaedic Surgeons and the California Orthopedic Association.

The question recurs: is an anterior discectomy and disc replacement arthroplasty within the "practice" of an orthopaedic surgeon who "chooses" not to do spine surgery and hasn't done such a surgery for at least ten years? I believe that the statute is clear that a utilization review physician is only allowed to "modify, delay, or deny" specific medical treatment "where the services (at issue) are within the scope of the physician's practice." I believe that Dr. Dinwoodie's written statement makes clear (and nothing in his C.V. is to the contrary) that the spinal surgery at issue is not within his "practice."

I do not consider this to be a "minor technical or immaterial defect," but a "material" defect which "undermine(s) the integrity of the UR decision." I therefore find the UR decision invalid.

**Sufficiency of Medical Record Review.**

In light of the decisions reached, above, I find that there is no need to reach the issue whether, as Applicant contends, Dr. Dinwoodie was provided with an inadequate medical record upon which to make a determination.

## NEED FOR MEDICAL TREATMENT

As the Board has pointed out in *Dubon* and other cases, the mere invalidity of Utilization Review is insufficient to allow a finding of need for specific medical treatment. It remains Applicant's burden to prove necessity. In this case, I find that the collective reports of Dr. Light provide substantial medical evidence that Mr. Andronico is in need of the spinal surgery recommended.

## DISCUSSION

### A. STATUS OF PETITIONER.

I start with the last issue noted on page 1 of this Report because it may save the Workers' Compensation Appeals Board some time.

As recited, above, the Law Firm Peterson, Colantoni, Collins and Davis has been the law firm for Defendant in this action.

California Code of Civil Procedure ("CCP") Section 284 provides:[3]

> The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:
>
> 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;
> 2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

In this case, there has never been a Substitution of Attorneys filed with the Board, as required by CCP Section 284(1). Neither has there been any Order of the Workers' Compensation Appeals Board, or application by Defendant or an attorney for such an Order, as required by CCP Section 284(2). Accordingly, the Law Firm Peterson, Colantoni, Collins and Davis remains Defendant's legal representative in this matter.

It is noted that the Shaw, Jacobsmeyer law firm did file a Notice of Representation with the Board on April 3, 2014. However, even if this were to somehow be construed as a sufficient compliance with CCP 284, it must be pointed out that the Notice of Representation was filed **two days after** the running of the statute for the filing of a Petition for Reconsideration. Thus, *assuming arguendo,* that Shaw, Jacobsmeyer had the authority to

[3] Title 8, Calif. Code of Regulations Sec. 10774 states, in pertinent part: "Substitution or dismissal of attorneys ***must be made*** in the manner provided by Code of Civil Procedure Sections 284, 285 and 286." (Emphasis added.)

represent Defendant in this matter on April 3, 2014, there is no evidence that they represented Defendant on the date the Petition for Reconsideration was filed.

Under the circumstances as described above, I believe the only possible response of the Board is to dismiss the Shaw, Jacobsmeyer Petition for lack of standing and/or untimeliness.

**B. CORRECTNESS OF *DUBON*.**

Petitioner mounts a collateral attack on the Board's *en banc* decision in *Dubon*. Petitioner concedes that the Board *may* have been correct in determining that "the WCAB may determine issues of timeliness and procedural matters concerning Utilization Review." (Petition, p. 4.) "However[,] the Board then jumps to the next step of concluding that it has jurisdiction to resolve issues of medical necessity." *Id.* Petitioner claims that such a result is inconsistent with "the remainder of the statutory scheme" embodied in Labor Code Sections[4] 4610, 4610.5, and 4610.6. Petitioner claims that the purpose of the changes made in these statutes by SB863 was to have medical professionals, not judges, determine the necessity of requested treatment.

It should be pointed out that, at the same time changes were made in Sections 4610, 4610.5, and 4610.6, changes were made to Section 5502, governing Expedited Hearings. Current Labor Code Section 5502(b)(1)(A) provides that the following issue is subject to the jurisdiction of the Workers' Compensation Appeals Board at Expedited Hearing:

> The employee's entitlement to medical treatment pursuant to Section 4600, except for treatment issues determined pursuant to Sections 4610 and 4610.5.

In *Sandhagen v. Cox & Cox Construction* (2004) 69 Cal.Comp.Cases 1452, an *en banc* decision (*Sandhagen I*), the WCAB ruled that the UR time deadlines set forth in Labor Code

[4] All further references to statute refer to the Labor Code, unless otherwise noted.

section 4610(g)(1) are mandatory, that a Defendant who fails to meet the deadlines is precluded from using the UR process, and that a late-generated UR report is inadmissible as to the particular medical treatment issue in controversy. *Sandhagen I* also found that a defendant, as an alternative, could utilize Labor Code section 4062(a) to obtain a Panel Qualified Medical Evaluation to attempt to rebut the findings of the treating physician. This case was appealed to the Court of Appeal and eventually reached the California Supreme Court. The Supreme Court left the Board's (and Court of Appeals') findings regarding the mandatory nature of the Utilization Review timelines undisturbed, while expressly finding that a defendant may ***not*** utilize Labor Code section 4062(a) as an alternative to Labor Code section 4610 (thus reversing the Board and the Court of Appeal). *See State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen II).*

Although Petitioner points out that *Sandhagen* was decided when a somewhat different statutory scheme was in place (*i.e.,* resort to Labor Code Section 4062(a)), SB863 did nothing to overturn, repeal, or otherwise change the Supreme Court's holding that an untimely UR is basically *void ab initio.*

Section 4610.5 **only** comes into play when there is "any dispute over a utilization review decision regarding treatment." Where a UR decision is *void ab initio,* Section 4610.5 is not implicated. As set out, above, the Supreme Court has already determined that an invalid utilization review under Section 4610 is nothing at all.

The Legislature is charged with knowledge of the entire statutory scheme, including decisional law, when it writes legislation. The Legislature may make a decision which

overrules an appellate or even supreme court determination, but such an intention must be stated explicitly.[5]

Nothing in SB 863 purports to negate the Supreme Court ruling in *Sandhagen,* and the concurrent legislation allowing the Appeals Board to make decisions at Expedited Hearing pursuant to Labor Code Section 3600 confirms that the Legislature foresaw that, in some cases, UR would either never be undertaken or would be accomplished in such a sloppy and negligent way as to negate any possibility of its being substantial, or even admissible, evidence.

**A. WHETHER THE UTILIZATION REVIEW IS INVALID.**

Petitioner next contends that the undersigned was wrong to find that the service at issue was not within the UR doctor's "practice." Petitioner cites testimony from the Applicant and a letter from Applicant's attorney essentially denigrating Dr. Dinwoodie's qualifications. Petitioner questions my assertion that the "Legislature envisioned that a reviewing physician must not only be 'book learned' on the issue but the service must be part of his or her practice. Petitioner goes on to point out that Dr. Dinwoodie has the same board certification as Dr. Light.

As set forth, above, the undersigned gave Defendant an opportunity to demonstrate that their UR doctor's practice included the specific treatment at issue. Specifically, I Ordered Defendant to furnish an affidavit under penalty of perjury from Dr. Dinwoodie confirming whether or not he had performed an anterior discectomy and disc replacement arthroplasty anytime in the last 10 years. Defendant did not provide a signed affidavit from Dr. Dinwoodie

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[5] The fact that the California Legislature is well aware of how to accomplish this is found in former Labor Code Section 4750.5, effective from 1983 to April 19, 2004, which stated: "An employee who has sustained a compensable injury and who subsequently sustains an unrelated noncompensable injury, shall not receive permanent disability indemnity for any permanent disability caused solely by the subsequent noncompensable injury. The purpose of this section is to overrule the decision in *Jensen v. WCAB,* 136 Cal.App.3d 1042."

but rather an unsworn statement and a *Curriculum Vitae* ("CV"). The CV confirmed that Dr. Dinwoodie has been in practice for about 35 years, and his letter confirms that he has not performed a spinal surgery in the last ten years. He states, "I choose not to perform spine surgery," although he defends his right to comment on the issue.

Petitioner appears to claim that two persons who have an equivalent professional license are equally placed to comment on a medical procedure. However, the Legislature did not require that a UR doctor have an equivalent professional license to that of the treating physician but rather that he or she be "competent to evaluate the specific clinical issues involved in the medical treatment services," and that the services be "within the scope of the physician's practice."

According to *Webster's Dictionary,* "practice" means, among other things, frequently repeated or customary action; habitual performance; a succession of acts of a similar kind; usage; custom; customary or constant use; skill or dexterity acquired by use; expertness; actual performance; application of knowledge, as opposed to theory.[6] Taking Dr. Dinwoodie at his unsworn word, his "practice" has been to not perform spinal surgeries—whether for 10 years or the whole 35 years of his practice not being clear from his statement. If Dr. Dinwoodie's statement had been sworn, I would be willing to certify him as an expert in how not to do a spinal surgery.

In regard to the several paragraphs Petitioner has devoted to the Applicant's testimony and Applicant's attorney's letter questioning the expertise of Dr. Dinwoodie, a review of my

[6] I am unable to resist repeating the old saw: Tourist to old man in New York City: "How do you get to Carnegie Hall?" Old man: "Practice!"

Opinion on Decision would reveal that I gave absolutely no weight to the hearsay testimony and argument.

Finally, in regard to Petitioner's argument that equivalent licenses should equate to equivalent competence and practice—let us suppose that a utilization review process applied to the practice of workers' compensation attorneys. A lifelong applicant's attorney would be a poor evaluator of a defense attorney's handling of a contribution case because applicant's attorneys never handle such cases; by the same token, a lifelong insurance defense attorney would be a poor evaluator of a Subsequent Injuries Fund claim or an Uninsured Employers' claim—even though both attorneys have the same license and even work in the same area of law. UR decisions have to be made on a short timeline; there really isn't time to consult a Nolo Press book or some other source of information to make a determination outside one's field of expertise.

The record here adequately demonstrates that Dr. Dinwoodie's practice does not include spinal surgery, and therefore his UR review violates Labor Code Section 4610(g), and the report is *void ab initio*.

**B. WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE PROVISION OF MEDICAL TREATMENT ORDERED.**

The discussion of this issue in the Opinion on Decision was quite abbreviated. Petitioner claims that the treating physician has not provided substantial evidence that "the treatment requested is compliant with the Medical Treatment Utilization Guidelines (sic) (MTUS) adopted by the Administrative Director." (Petition, p. 8.)

First of all, it should be noted that the UR doctor specifically reported that the "MTUS Guidelines are not utilized" in making *his* determination to deny medical care.

Second, the MTUS Guidelines for "Neck and Upper Back Complaints," is found at Title 8, Calif. Code of Regs., Sec. 9792.23.1. This regulation sets out appropriate medical care prior to surgery and appropriate post-surgical care but does not set out anywhere what would be considered appropriate indications for surgery. For that, we are referred back to the ACOEM Practice Guidelines, 2nd Edition (2004) [see 9792.23.1(a)] (hereafter, "ACOEM Guides").

In discussing surgical considerations, the ACOEM Guides recommends, at page 183, "Careful preoperative education of the patient regarding expectations, complications, and short- and long-term sequelae of surgery, and indications clear for failed conservative care treatment and history, exam, and imaging consistent for specific lesion." The interested reader will find the careful preoperative education indicated in Dr. Light's various reports (Applicant's Exhibits 2 and 4) and Applicant's testimony at Trial (Minutes of Hearing and Summary of Evidence, pp. 4-5). The history of failed conservative treatment will be found in the same places.[7] The imaging consistent with the specific lesion will be found in Applicant's Exhibit 5, a series of MRI's.

I also note that the ACOEM Guides, at page 180, recommend referral for surgery for patients who have: persistent, severe, and disabling shoulder or arm symptoms and unresolved radicular symptoms after receiving conservative treatment. In this regard, I would point to Dr. Light's report of December 5, 2013 (Applicant's Exhibit 2) which states in the very first sentence, "Michael Andronico is a patient who has had ongoing severe neck pain with pain radiating down his left arm which has been severe and disabling."

[7] See, especially, the first paragraph of Dr. Light's December 5, 2013 report (Applicant's Exhibit 2).

I continue to believe that the record, as a whole, more than supports Dr. Light's recommendation for surgery.

**RECOMMENDATION**

Dismiss Petition for Reconsideration. Alternatively, deny on the merits.

I also urge the Board to consider sanctions against the Petitioner here. As demonstrated, above, the law firm that filed the Petition for Reconsideration has no standing to file such a Petition. Petitioner should not be allowed to waste the Board's time for its own gratification. I also note that the Petition is accompanied by a Verification, signed by Richard Jacobsmeyer, Esq., at a time when he quite clearly did not legally represent the Defendant in this action. This misrepresentation to the Board is also clearly a sanctionable offense.

Dated: April 16, 2014

Stanley E. Shields
Workers' Compensation Judge

**Served by mail on all parties listed on the Official Address record on the above date.**

BY: Ben Aguilar Date: 04/16/2014

1. BOXER GERSON OAKLAND, US Mail
2. EMPLOYERS COMP SAN FRANCISCO, US Mail
3. LA ROCCA SEAFOOD INC, US Mail
4. MARK ANDRONICO, US Mail
5. PETERSON COLANTONI SAN FRANCISCO, Email
6. SHAW JACOBSMEYER OAKLAND, US Mail (courtesy copy)