WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STACEY SAUNDERS, ***Applicant,*** **vs.** **LOMA LINDA UNIVERSITY MEDICAL GROUP, permissibly self-insured,** ***Defendant.***	**Case No. ADJ8107354** **(San Bernardino District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted applicant's petition for reconsideration of the panel's earlier December 10, 2014 Opinion And Decision After Reconsideration (December 10, 2014 Decision) in order to further study the issues presented. In the December 10, 2014 Decision, the panel rescinded the June 19, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that applicant "is entitled to medical treatment requested by her treating physician, [Donald Kim, M.D.], to include pool therapy," and awarded that treatment. (Bracketed name added.) In the accompanying Opinion on Decision, the WCJ wrote that defendant's utilization review (UR) suffered a "material procedural defect" as described in the earlier en banc decision of the Appeals Board, *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon I*), because the UR physician was not competent to evaluate the clinical issue involved in the proposed treatment.

The panel rescinded the WCJ's June 19, 2014 decision because the Appeals Board in the interim revisited the issues addressed in *Dubon I* in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.) (*Dubon II*). In *Dubon II*, the Appeals Board majority affirmed the holding in *Dubon I* that an untimely UR decision is invalid, but further held that *all* other disputes concerning UR must be addressed through the Independent Medical Review (IMR) process established by the Legislature as part of Senate Bill 863 (SB 863) and as set forth in Labor Code sections 4610.5 and

4610.6.[1] The panel concluded that the WCJ's authority to award the treatment was not legally supported because the holding in *Dubon II* applied to the dispute in this case concerning the competency of the UR physician to evaluate the clinical issue involved in the treatment request.

As part of the December 10, 2014 Decision, which is incorporated by this reference, the panel also took permissive judicial notice of the post-trial June 26, 2014 IMR determination upholding the UR denial of authorization, citing Evidence Code section 452(c), section 5903 and Appeals Board Rules of Practice and Procedure, Rule 10856(c) (Cal. Code Regs., tit. 8, § 10856(c)) in support of that action. The panel further concluded that under *Dubon II* the June 26, 2014 IMR determination could only be appealed by applicant pursuant to the IMR appeal process contained in section 4610.6(h).[2]

In a separate opinion, Commissioner Sweeney wrote as part of the December 10, 2014 Decision that the facts of the case appeared to support provision of the pool therapy, but that she concurred with the decision to rescind the WCJ's June 19, 2014 Findings And Award because *Dubon II* is an en banc decision that is 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].)

Applicant contends that the decision in *Dubon II* is incorrect and should be rescinded, that the June 26, 2014 IMR determination should not have been received into evidence, and that the WCJ's June 19, 2014 award is supported by substantial evidence and should be affirmed.

An answer was not received from defendant.

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[1] Further statutory references are to the Labor Code unless otherwise stated.

[2] Section 4610.6(h) provides in pertinent part as follows: "A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed...within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal: (1) The administrative director acted without or in excess of the administrative director's powers. (2) The determination of the administrative director was procured by fraud. (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5. (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability. (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion."

The December 10, 2014 Decision is rescinded as the Decision After Reconsideration, but the WCJ's June 19 2014 Findings And Award is not reinstated. The holding in *Dubon II* continues to be binding authority, and it does not allow a finding in this case that the UR is invalid because of a material procedural defect. However, the panel should not have taken judicial notice of the June 26, 2014 IMR determination pursuant to Evidence Code section 452(c) as part of the December 10, 2014 Decision because it appears from the face of the document that the IMR determination did not issue within the time period mandated by section 4610.6(d). As with an untimely UR, an untimely IMR is invalid.

The time periods for completion of IMR contained in section 4610.6(d) are intended to protect injured workers from delay in receiving necessary medical treatment. If an IMR determination does not issue within the time periods established by section 4610.6(d), the medical treatment dispute is no longer covered by the section 4610.5 IMR process, and it may be heard and decided by a WCJ at a section 5502(b)(1) expedited hearing pursuant to the WCAB's authority under section 4604 to determine controversies arising under that Chapter of the Labor Code.[3]

The December 10, 2014 Decision is rescinded as the Decision After Reconsideration, and the case is returned to the WCJ for a decision on whether an IMR determination issued within the time allowed by section 4610.6(d) following applicant's request for IMR, and if not, whether the proposed treatment is supported by substantial medical evidence and should be awarded.

BACKGROUND

The factual background is provided in the December 10, 2014 Decision and is not repeated in detail. In essence, applicant's treating physician requested defendant's authorization for pool therapy as reasonable medical treatment. Defendant submitted the request to UR and applicant does not dispute that a timely UR decision issued denying certification of the treatment request.

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[3] Section 4604 provides in pertinent part as follows: "[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5."

Section 5502(b)(1) provides in pertinent part that an expedited hearing may be obtained to determine, "The employee's entitlement to medical treatment pursuant to Section 4600, except for treatment issues *determined* pursuant to Sections 4610 and 4610.5." (Italics added.) In that a treatment dispute has not been properly "determined" by an IMR that does not timely issue within the allowed time, section 5502(b)(1) authorizes such a determination by the WCAB.

Applicant challenged the UR denial by requesting an expedited hearing to present her contention that there was a "material procedural defect" in the UR process as described in *Dubon I* because the UR physician was not qualified to determine the appropriateness of the proposed treatment. At or near the same time, applicant also challenged the UR decision by requesting IMR.[4] While IMR was pending, the WCJ conducted an expedited hearing on April 1, 2014, as requested by applicant. The WCJ agreed with applicant that the UR suffered a "material procedural defect" as described in *Dubon I*, and further determined that the medical treatment was supported by substantial medical evidence, and it was awarded as part of the WCJ's June 19, 2014 decision.

After the WCJ issued the June 19, 2014 decision, the IMR organization issued a determination dated June 26, 2014, which states that defendant's UR denial was upheld.

Dubon II thereafter issued on October 10, 2014. In that decision, the Appeals Board affirmed the conclusion in *Dubon I* that a UR decision is invalid if it does not timely issue, but further held that "where a UR decision is timely, IMR is the sole vehicle for reviewing the UR physician's expert opinion regarding the medical necessity of a proposed treatment, even if the UR process did not fully comply with section 4610's requirements." (*Dubon II*, 79 Cal.Comp.Cases at pps. 1310-1311.)

In the December 10, 2014 Decision, the panel concluded pursuant to the holding in *Dubon II* that it was error for the WCJ to invalidate the UR in this case because it was not shown to be untimely and for that reason the WCJ's June 19, 2014 decision was rescinded. The panel also took judicial notice of the June 26, 2014 IMR determination pursuant to Evidence Code section 452(c) as part of the December 10, 2014 Decision, and further ordered that the June 26, 2014 IMR determination be "given effect" in place of the WCJ's June 19, 2014 decision.[5]

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[4] These seemingly inconsistent actions were necessitated by the statutory time requirements that apply to both processes. An injured worker must request IMR of a UR decision within 30 days or IMR is barred. (Lab. Code, § 4610.5(h)(1).)

[5] The panel wrote in footnote 4 of the December 10, 2014 Decision, in pertinent part, as follows: "It appears that the Appeals Board may also take permissive judicial notice of the June 26, 2014 IMR determination pursuant to Evidence Code section 452(c), which authorizes judicial notice of 'Official acts' of the state's executive department."

Applicant now challenges the December 10, 2014 Decision, both for its reliance upon *Dubon II* in setting aside the medical treatment award, and for taking judicial notice of the June 26, 2014 IMR determination.

Dubon II continues to apply with respect to the UR in this case. However, it appears that the June 26, 2014 IMR determination should *not* have been received into evidence by the panel pursuant to Evidence Code section 452(c) as part of the December 10, 2014 Decision. The IMR determination states that the application for IMR was received on January 29, 2014, and the IMR determination issued on June 26, 2014, which is far more than the 45 days allowed by statute and rule, as discussed herein. If the IMR determination is invalid because it did not issue within the time period established by section 4610.6(d), as it appears, the WCAB may hear and determine the controversy, and the WCJ may award the proposed treatment if it is supported by substantial medical evidence.

DISCUSSION

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) In most instances this can be done by looking at the plain meaning of a statute because the words of the statute, "generally provide the most reliable indicator of legislative intent." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575].)

With regard to the IMR process, section 4610.6(d) specifies that the IMR organization "*shall* complete its review and make its determination…within 30 days of the receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director." (Emphasis added.) In addition, section 4610.6(a) requires that the IMR organization "*shall* conduct the review in accordance with this article and any regulations or orders of the administrative director" and Administrative Director (AD) Rule 9792.10.5(a)(1) in turn provides that the claims administrator "shall" provide all relevant documents to the IMR organization, and those documents are to be received "within fifteen (15) days" or less after the matter has been assigned for IMR. (Cal. Code Regs., tit. 8, § 9792.10.5(a)(1).) Thus, under the statute and AD Rules, the time allowed for an IMR determination to issue is 45 days or less. (Cf. Cal. Code Regs., tit. 8, §§ 9792.10.4(a)(5), 9792.10.7(g)(1).)

As defined by the Labor Code, " 'Shall' is mandatory and 'may' is permissive." (Lab. Code, § 15; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 904 [42 Cal.Comp.Cases 131] (*Morris*) ["In light of this clear statutory language [in section 15], and the evident purpose of the provision, there can be no question but that section 3800 imposes a 'mandatory duty' on the county..."]; cf. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 ["the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory"].)

By using the word "shall" in section 4610.6(d), it appears from the plain language of the statute that the Legislature intended to establish mandatory time frames within which IMR must be completed. This would ordinarily end the inquiry, except that statutory language cannot be considered in isolation and the entire substance of the statute must be examined in order to construe the language in context and to harmonize its different parts. (*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1].)

With regard to the time periods specified in section 4610.6(d), the IMR statute does not directly state the consequence if IMR is not timely completed within the required time. This raises a question of statutory interpretation because an IMR determination is described in section 4610.6(g) as a "determination" of the AD. In this way IMR is unlike UR, which is the defendant's obligation to perform. (See, *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]; *Dubon I, supra.*)

The provisions of the statute may allow IMR to be characterized as governmental action.[6] For that reason, it is necessary to address whether the time periods expressed in section 4610.6(d) are properly construed to be mandatory as plainly expressed on the face of the statute by use of the word "shall," or if they are merely directory. This is because a requirement in a statute that directs the government in the conduct of business, but does not limit the effect of the governmental action if the

[6] In that it is concluded that the section 4610.6 time periods are mandatory, it is not necessary to address the question of whether the independent IMR organization's failure to timely act is properly considered "governmental" action.

requirement is not met, may be construed to be directory instead of mandatory depending upon the statutory design. (*French v. Edwards* (1871) 80 U.S. (13 Wall.) 506 [20 L.Ed. 702, 703] (*French*).)

In *French*, a debtor's entire large parcel of real property was sold by the sheriff to pay a judgment for unpaid taxes and related costs, notwithstanding that the statute authorizing the sale provided that only "the smallest quantity" of the property should be sold as necessary to satisfy the debt. The issue addressed by the Supreme Court was whether the departure of the public officer from the requirements of the statute rendered the sale invalid. In addressing the issue, the Court first considered the distinction between provisions in a statute that are "directory," and those that should be construed as "mandatory," writing as follows:

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. *But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid.* The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise. (*French*, *supra*, 80 U.S. at p. 511, emphasis added.)

The Court in *French* analyzed the language in the statute under consideration and concluded that the intent of the statutory language was to protect the property owner. For that reason, the Court invalidated the tax sale of the debtor's property by the Sheriff because it did not comply with the statutory requirement, writing as follows:

> [T]he sale of the sheriff in the case before us cannot be upheld. The provision of the statute, that he shall only sell the smallest quantity of the property which any purchaser will take and pay the judgment and costs, *is intended for the protection of the taxpayer.* It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal…
>
> It is plain to us, upon a consideration of the different statutes of California upon this subject, that whilst the legislature of that State intended to prevent by the strictest proceedings the possibility of any property escaping

> its proportional burden of taxation, *it also intended by the provision in question to guard against a wanton sacrifice of the property of the taxpayer*. (*French, supra*, 80 U.S. at pps. 511-512, emphasis added.)

The California Supreme Court has long followed the view of the Court in *French* that a statute is to be construed as mandatory or directory as best protects the citizens and serves the public purpose of the statute. (*County of Calaveras v. Brockway* (1866) 30 Cal. 325, 343 ["The primary rule in the construction of statutes is to so read them as to give force and effect to the intent of the Legislature; and when the object of the act is to subserve some purpose in which the public are interested, Courts will hold a provision to be mandatory or directory as will best subserve that purpose, if it will reasonably bear such construction."]; *People ex rel. Board of Supervisors v. Board of Supervisors* (1867) 33 Cal. 487, 492 ["When a statute specifies the time at or within which an Act is to be done, it is usually held to be directory, *unless time is of the essence of the thing to be done*, or the language of the Act contains negative words or shows that the designation of the time was intended as a limitation of power, authority or right," emphasis added]; *East Bay Municipal Utility Dist. v. Garrison* (1923) 191 Cal. 680, 686 ["Whether the terms of a statute which provides that a particular act shall be done within or at or before a specified time are to be construed as mandatory or merely directory, in the absence of an express provision of law declaring them to be one or the other, must be determined from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time"]; *Francis v. Superior Court of Los Angeles County* (1935) 3 Cal.2d 19, 28 [" 'It is, of course, difficult to lay down a general rule to determine in all cases when the provisions of a statute are merely directory and when mandatory or imperative, but of all the rules mentioned, the test most satisfactory and conclusive is whether the prescribed mode of action is of the essence of the thing to be accomplished, or, in other words, whether it relates to matters material or immaterial -- to matters of convenience or of substance,' " quoting *Gallup v. Smith* (1890) 59 Conn. 354]; *Pulcifer v. County of Alameda* (1946) 29 Cal.2d 258, 262 ["In the absence of express language, the intent must be gathered from the terms of the statute construed as a whole, from the nature and character of the act to be done, and from the consequences which would follow the doing or failure to do the particular act at the required time."]; *Morris, supra*; *In re Richard S.*

(1991) 54 Cal.3d 857; *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133 [time limit construed to be directory and not jurisdictional because statute supported the alternative remedy of a petition for writ of mandate if action was delayed]; cf. *People v. Allen* (2007) 42 Cal.4th 91, 101 (*Allen*) ["The availability or unavailability of alternative remedies may have an important bearing on whether a procedure is to be accorded 'directory' or 'mandatory' effect"].)

The Supreme Court provided additional guidance on how this question of statutory language is to be addressed in *People v. McGee* (1977) 19 Cal.3d 948 (*McGee*). In that case, a defendant was convicted of a felony for making a false statement in violation of California Welfare & Institution Code section 11483. In reversing the conviction, the Court held that the state had a mandatory duty under the statute to seek restitution prior to bringing the criminal action. The Court addressed its consideration of the statutory language, writing as follows:

> [T]his issue turns on the question of whether the provisions of section 11483 should be accorded 'mandatory' or 'directory' effect. As we point out, much semantic confusion has persisted in the past with respect to the mandatory-directory terminology. The decisions, however, establish that *statutory procedures designed to protect individuals* who are the subjects of adverse governmental action *should generally be accorded mandatory effect*, so that a failure to comply with applicable procedures invalidates any sanctions taken against them. (*Id,* 19 Cal.3d at pps. 954-955.)

The Supreme Court has consistently affirmed the principle that statutory language is to be given mandatory effect when it is intended for the protection of the citizen. (*People v. Gray* (2014) 58 Cal.4th 901 [statute required warning notices, but provision at issue was not for the benefit of defendant]; cf. *City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905 [City substantially complied with statutory posting requirement by personally serving the owner with notice]; *Allen, supra* [The phrase "Prior to the termination of a commitment" created a mandatory deadline].)

Turning to the language of section 4610.6(d), it is apparent from the face of the statute that the purpose of the time frames for completion of IMR is to protect injured workers by requiring prompt determination of medical treatment disputes.

Timely provision of reasonable medical treatment is a cornerstone of workers' compensation, and the WCAB is mandated by the California constitution to "enforce a complete system of workers'

compensation" that includes "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury," and "to accomplish substantial justice in all cases *expeditiously*." (Cal. Const., Article XIV, § 4, emphasis added; see also, Lab. Code, § 4600; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93] ["notice of injury provides the employer with the opportunity to render medical assistance and *if he fails to avail himself of the opportunity promptly, he has neglected to provide treatment within the meaning of section 4600*," emphasis added] (*McCoy*); *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441] ["the purpose of securing proper medical care and speedy recovery must take precedence over the goal of minimization of cost"] (*Zeeb*); *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566] ["Section 4600 requires...some degree of active effort to bring to the injured employee the necessary relief"].)

When the UR section 4610 process fails to reach a determination within the allotted time, the request for treatment authorization remains unaddressed. (Lab. Code, § 4610(g); *Sandhagen, supra*; *Dubon II, supra.*) As the Supreme Court wrote in *Sandhagen* in addressing UR, "the Legislature intended utilization review to ensure quality, standardized medical care for workers *in a prompt and expeditious manner*. To that end [UR] *balances the dual interests of speed and accuracy*, emphasizing the *quick resolution of treatment requests*..." (*Sandhagen, supra*, 44 Cal.4th at p. 241, emphasis added.)

For these same reasons, section 4610.6(d) requires that an IMR determination must be made within specified times. Regardless of how a treatment dispute is addressed, the employer is liable to promptly provide reasonable medical treatment.

As discussed in *Dubon II*, SB 863 was enacted in 2012 to amend the procedures for resolving post-UR disputes over the "medical necessity" of treatment requests, but it did not change the procedural requirements of section 4610 for UR decisions. (*Dubon II, supra,* 79 Cal.Comp.Cases at p. 1312; Stats. 2012, ch. 363.) Nor did SB 863 amend section 4604 to remove WCAB jurisdiction to determine non-medical disputes regarding the timeliness of UR.

In *Dubon II*, as in *Dubon I*, the Appeals Board majority reasoned that when a UR decision is not timely issued in compliance with statutory deadlines, there is no valid UR dispute for IMR to resolve.

(*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1306; citing *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 363 [75 Cal. Comp. Cases 81] ["A dispute does not legally arise unless the employer prompts the utilization review in a timely fashion."].) As the Appeals Board observed in *Dubon II*, the issue of timeliness is a legal dispute. (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1307.)

As with an untimely UR, the issue of timeliness of an IMR determination is a legal dispute that is within the jurisdiction of the WCAB. (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1309; cf. Lab. Code, §§ 4604 and 5300; see also Cal. Code Regs., tit. 8, § 10451.2(c)(1)(C).)

The Legislature's intention to mandate that IMR decisions issue within the times specified in section 4610.6 is evidenced by its 2012 Notes regarding SB 863. In those Notes the Legislature recognized in paragraph (d) that the prior system of resolving treatment disputes was "time consuming" and further in paragraph (f) that IMR was to "be more expeditious" than that process. Moreover, in section 139.5(d)(3)(B), the Legislature required the IMR organization to submit reports on how it ensures that its reviews "are timely."

The Legislature's concern about timeliness is written into the design of the IMR statute in several areas, including the time within which an employee must request IMR, and the time within which an employer must comply with an IMR determination. (Lab. Code, § 4610.5(h)(1) ["employee may submit a request for independent medical review to the division no later than 30 days after the service of the utilization review decision"]; Lab. Code, § 4610.5(k) [failure to timely pay or authorize treatment determined by IMR to be reasonable subjects employer to an administrative penalty in addition to any other fines and penalties that are due].)

The workers' compensation statutes are to be "liberally construed" with the purpose of "extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, § 3202.) This principle is turned on its head if all the time provisions in the IMR statute are construed to be mandatory except for the time periods within which IMR determinations must issue.

The mandatory nature of the time requirements is particularly illustrated by section 4610.5(n), which requires that when there is an "imminent and serious threat to the health of the employee" all necessary information and documents must be delivered to the IMR organization within 24 hours of

approval of the request for review, and why section 4610.6(d) expressly provides for "expedited" completion of IMR "within three days of the receipt" of that information. It is the injured worker who suffers the consequence of debilitating pain, prolonged periods of missed work, increased disability or death if reasonable medical treatment is delayed or denied.

> "The primary purpose of industrial compensation is to insure to the injured employee and those dependent upon him adequate means of subsistence while he is unable to work *and also to bring about his recovery as soon as possible* in order that he may be returned to the ranks of productive labor." (*Union Iron Works v. Industrial Acc. Com.* (*Henneberry*) (1922) 190 Cal. 33, 39-40 [9 I.A.C. 223], emphasis added.)

The purpose of bringing about recovery as soon as possible is frustrated if the time periods in section 4610.5 are construed to be directory because the provision of necessary treatment is delayed if IMR is not concluded within the specified time. Treatment delayed is treatment denied.

An untimely IMR, like an untimely UR, is invalid. Similarly, the remedy for the injured worker is the same as when a UR does not timely issue and is invalid. If an IMR determination does not issue within the statutorily prescribed time, the medical treatment dispute is no longer covered by the section 4610.5 IMR process. As with an untimely and invalid UR, the WCAB may then hear and determine the controversy pursuant to section 4604 at a section 5502(b)(1) expedited hearing. The WCAB is bound by the same statutory standards as the IMR medical professionals in deciding whether medical treatment should be provided.[7] If the proposed medical treatment is supported by substantial medical evidence it may be awarded.

Accordingly, both the December 10, 2014 Decision and the June 19, 2014 Findings And Award of the WCJ are rescinded as the Decision After Reconsideration. The case is returned to the WCJ for a

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[7] Upon a finding of untimely IMR, the WCAB/WCJ must determine the propriety of the treatment request based upon substantial medical evidence including that the proposed treatment is supported by the MTUS. (See, Lab. Code, § 4600(b) ["medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27."].) The employee may meet this burden by showing that the treatment is within the presumptively correct MTUS. (Lab. Code, § 4604.5(a).) Or, as further provided in section 4604.5(a), the employee might rebut the MTUS presumption of correctness. (Lab. Code, § 4604.5(a) ["The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury"].)

decision on whether an IMR determination issued within the time allowed by section 4610.6(d) following applicant's request, and if not, whether the proposed treatment is supported by substantial medical evidence and should be awarded.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 10, 2014 Opinion And Decision After Reconsideration of the Workers' Compensation Appeals Board is **RESCINDED**.

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 19, 2014 Findings And Award of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level for further proceedings and decision by the workers' compensation administrative law judge in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

MARGUERITE SWEENEY

I DISSENT (SEE SEPARATE DISSENTING OPINION),

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 10 2015

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

STACEY SAUNDERS
LERNER, MOORE ET AL.
LAW OFFICES OF ROBERT BAKKE

JFS/abs

SEPARATE DISSENTING OPINION OF COMMISSIONER ZALEWSKI

I dissent. I would affirm the earlier December 10, 2014 Decision for the reasons expressed in it and below. It is apparent that the Legislature intended to make IMR the exclusive process for determining a medical treatment dispute that is not finally resolved by UR, by having an independent medical professional decide the issue based upon uniform, evidence-based treatment standards. The entire purpose of the IMR statute is defeated if the whole process is declared invalid because of a delay in its completion.

The IMR process was not established in a vacuum. As the majority notes, SB 863 was enacted *after* the Supreme Court's decision in *Sandhagen*. It is presumed that the Legislature was aware of the Court's judicial interpretation of its previously enacted UR statutes when it subsequently enacted IMR as part of SB 863. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 298 [56 Cal.Comp.Cases 476].)

As the Appeals Board wrote in *Dubon II*, the Legislature did not make changes to the UR process when it enacted SB 863 and the IMR provisions of section 4610.5 are properly construed to be adjunctive to the section 4610 UR process. Importantly, as discussed in *Dubon II*, section 4610.5(c)(3) defines a determination that may be appealed to IMR as one that issues *pursuant* to section 4610. By defining a UR decision as a decision made "pursuant to section 4610," the Legislature showed that when it enacted IMR it was cognizant of the Supreme Court's holding in *Sandhagen* that UR was a mandatory process with compulsory procedural and substantive requirements. (See *Sandhagen, supra,* 44 Cal.4th at pp. 240-241.)

When the Legislature enacted UR, it provided that medical treatment decisions be determined consistent with the Medical Treatment Utilization Schedule (MTUS) promulgated by the AD pursuant to section 5307.27.[8] (Lab. Code, § 4610(c).) The use of the MTUS as part of the UR process established a

[8] Section 5307.27 provides as follows: "On or before December 1, 2004, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases."

uniform standard of reasonable medical treatment based upon "evidence-based, peer-reviewed, nationally recognized standards of care." (Lab. Code, § 5307.27.)

Following the decision in *Sandhagen*, the Legislature enacted the IMR process as part of SB 863 to assure that the same evidence-based treatment standards that apply in UR pursuant to section 4610.5(c)(2), continue to apply to address treatment disputes not resolved by UR.[9] As with sections 4610(b) and (c), which require *every* employer to establish a UR process that "*shall* ensure that decisions based on the medical necessity to cure and relieve of proposed medical treatment services are consistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27," section 4610.5 similarly makes IMR applicable to "*any dispute* over a utilization review decision," and requires that any such dispute, "shall be resolved *only*" by IMR. (Emphasis added.)

Moreover, the Legislature provided in SB 863 that an IMR determination "shall be presumed to be correct," and further that the IMR determination cannot be set aside unless it is successfully appealed on one or more of the grounds specified in section 4610.6(h). Untimeliness is *not* listed as a ground for appeal of an IMR determination in section 4610.6(h). This is consistent with the fact that the specified remedy for a successful appeal of an IMR determination pursuant to section 4610.6(h) is the conduct of a new IMR. (Lab. Code, § 4610.6(i).) Conducting a second IMR is pointless if the only concern with the first IMR is that its issuance was delayed.

In sum, the process for resolving medical treatment disputes that the Legislature implemented as part of SB 863 requires that *all* medical treatment disputes following UR be determined through IMR by medical professionals using evidence-based, uniform treatment standards. The Legislature expressly declared in section 4610.6(i) that, "*In no event shall* a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization." (Emphasis added.)

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[9] As set forth in section 4610.5(c)(2), the standards and the order they are to be applied are as follows: "(A) The guidelines adopted by the administrative director pursuant to Section 5307.27. (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service. (C) Nationally recognized professional standards. (D) Expert opinion. (E) Generally accepted standards of medical practice. (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious."

The majority acknowledges that the AD is charged with the responsibility of conducting IMR. In this way, IMR is distinctly different than UR, because IMR is governmental action, unlike UR, which is performed by the employer. The Legislature's intention in adopting the IMR process and making it governmental action performed under the auspices and control of the AD is evidenced by the Legislative history of SB 863.

In its 2012 Notes regarding SB 863, the Legislature observed in paragraph (d) that the system of resolving medical treatment disputes in effect at the time IMR was implemented "does not uniformly result in the provision of treatment that adheres to the highest standard of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment." In paragraph (e) of the 2012 Notes, the Legislature explained its purpose in enacting the IMR process, as follows:

> [H]aving medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provisions of [SB 863] establishing independent medical review are necessary to implement that policy.

The Legislature further explained in paragraph (f) of the 2012 Notes that that IMR was a "new state function," and that it was necessary for the state to contract for IMR because of its "special and unique nature," and to assure "sound determinations of disputes over appropriate medical treatment" by obtaining the "unbiased medical expertise of specialists," that was not available through the civil service system.

Under the IMR statute, the AD contracts with the IMR organization to "conduct reviews" and to "*assist the division* [of workers' compensation] in carrying out *its* responsibilities." (Lab. Code, § 139.5(a)(2), emphasis added.) The IMR organization and medical professionals who are "retained to conduct reviews shall be deemed to be consultants" who assist the AD in performing IMR. (Lab. Code, § 139.5(b)(1).) Services provided by the IMR organization are also specifically declared by the Legislature to be a "*state function*" as described in Government Code section 19130(b)(2). (Lab. Code, § 139.5(f), emphasis added.) As such, the Legislature "specifically *mandated or authorized the performance of the work by independent contractors.*" (Gov. Code, § 19130(b)(2), emphasis added.) The AD reviews and approves employee requests for IMR. (Lab. Code, § 4610.5(k).) A determination

by the IMR organization "*shall be deemed to be the determination of the administrative director* and shall be binding on all parties." (Lab. Code, § 4610.6(g), emphasis added.)

While the majority appears to accept that IMR is governmental action, it fails to construe the IMR statute consistent with the Legislature's intention that *all* medical treatment disputes that remain after a valid UR decision be decided through the IMR process by independent medical professionals using evidence-based, uniform treatment standards.

As the majority notes, a statutory time period that involves governmental action may be construed as directory or mandatory depending upon the design and purpose of the statute. Here, the Legislature has shown through its 2012 Notes and statutory language that the entire purpose of the IMR statute is to have all treatment disputes following UR be decided by independent medical professionals using uniform, evidence-based treatment standards. That entire purpose is defeated if an IMR determination is declared invalid only because additional time was needed to assure that the review process was completed as the Legislature intended.

As conceded by the majority, statutory time provisions that guide the conduct of governmental action but do not provide for a limit upon its effect if the time requirement is not met, like the statute at issue in this case, are generally construed to be directory. (See e.g. *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145 [statutory time for issuance of decision found to be directory]; *In re Richard S.* (1991) 54 Cal.3d 857, 866 [the word "shall" in court rules construed to be directory]; *Gowanlock v. Turner* (1954) 42 Cal.2d 296, 301 [directory language in city charter did not require that employees work certain hours]; *Woods v. Department of Motor Vehicles* (1989) 211 Cal.App.3d 1263, 1257 [statute allowing 30 days for conduct of hearing construed to be directory]; *Castorena v. City of Los Angeles* (1973) 34 Cal.App.3d 901, 908 [reapportionment ordinance valid although enacted subsequent to charter designated directory deadline]; *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 673 ["[P]rovisions defining time and mode in which public officials shall discharge their duties and which are obviously designed merely to secure order, uniformity, system and dispatch in the public bureaucracy are generally held to be directory"]; cf. *Cake v. City of Los Angeles* (1913) 164 Cal. 705, 709-710 [tax assessment valid even though not adopted

within time limit prescribed by statute]; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 931 [wage resolution valid though enacted prior to date specified in city charter]; *Garrison v. Rourke* (1948) 32 Cal.2d 430, 434-436 [judicial decision valid though rendered after statutorily prescribed period].)

There is no question that the Legislature intended to guide the AD on when an IMR determination should issue by including time frames within section 4610.6(d). However, the Legislature did *not* declare that an IMR is invalid if it does not issue within those time frames and, most importantly, *no* provision was made in the law to allow medical treatment disputes to be determined by the WCAB if the time frame was not met. To the contrary, as noted above, the Legislature expressly provided in section 4610.5(b) that treatment disputes following UR are to be resolved "*only* in accordance" with section 4610.5, and provided in section 4610.6(i) that, "*In no event shall* a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization." (Emphasis added.)

Construing the section 4610.6(d) timeframes as "directory" is in furtherance of the overall statutory design because it promotes the Legislature's goal of assuring that the objective medical treatment standards identified in section 4610.5(c)(2) are uniformly applied by medical professionals in *all* instances to resolve treatment disputes following a valid UR decision. Invalidating an IMR determination because it did not issue within the section 4610.6(d) timeframe is in direct conflict with the expressly intended purpose of the IMR statute.

The Legislature requires that every medical treatment dispute that remains after a UR decision be addressed through IMR in order to assure that medical necessity is objectively and uniformly determined by medical professionals based upon the MTUS and other recognized standards of care. IMR is governmental action performed under the auspices and control of the AD, and an IMR determination is a determination of the AD. The Legislature provided guidelines in section 4610.6(d) on when an IMR determination should issue, but it enacted no provision that invalidates an IMR determination if it is not made within those section 4610.6(d) timeframes, and it made no allowance for the WCAB to determine treatment disputes after they are submitted to IMR. In light of the expressed legislative intent and

statutory design of IMR, the section 4610.6(d) timeframes are properly considered to be directory and the IMR determination in this case is valid even if it does not issue within those timeframes.

I would affirm the panel's earlier December 10, 2014 Decision.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 10 2015

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

STACEY SAUNDERS
LERNER, MOORE ET AL.
LAW OFFICES OF ROBERT BAKKE

JFS/abs