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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

THOMAS HOGENSON,
Applicant,

vs.

**VOLKSWAGEN CREDIT, INC.; AIG CLAIMS
SAN DIEGO, on behalf of INSURANCE
COMPANY OF THE STATE OF
PENNSYLVANIA,**

Defendants.

Case No. ADJ2145168 (GOL 0096589)
(Oxnard District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Reconsideration has been sought by defendant, with regard to a decision filed on April 3, 2014.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED.**

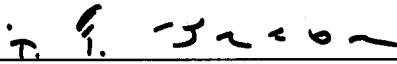
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1 IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in
2 the above case, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the
6 Oxnard District Office or any other district office of the WCAB and shall *not* be e-filed in the Electronic
7 Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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10 
11 DEIDRA E. LOWE

12 **I CONCUR,**

13
14 

15 FRANK M. BRASS



16
17 
18 RONNIE G. CAPLANE

19
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 JUN 18 2014

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

24 **THOMAS HOGENSON**
25 **GHITTERMAN, GHITTERMAN & FELD**
26 **LAW OFFICES OF JAMIE SKEBBA**



27 abs

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

WCAB CASE NO. : ADJ2145168

THOMAS HOGENSON

vs.

VOLKSWAGEN CREDIT, INC.

WCALJ:

SCOTT J. SEIDEN

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Not in issue
Date of birth: November 19, 1955
Date(s) of Injury: August 9, 2000
Parts of Body Injured: Neck, arm, back
Manner in Which Inj. Occ.: Not in dispute

2. Identity of Petitioner: Defendant
Timeliness: The petition is timely
Verification: The petition is verified

3. Date of Issuance of Order: April 3, 2014

4. Petitioner's Contention:
 - 1) The WCJ erred in finding jurisdiction to hear a medical treatment dispute.
 - 2) The WCJ erred in finding MPN physicians are not subject to UR.
 - 3) The WCJ erred in finding UR

- reports inadmissible at a trial on the issue of medical treatment.
- 4) Applicant's entitlement to the requested medical treatment

II PROCEDURAL OVERVIEW

Applicant sustained an admitted industrial injury to his back and neck on August 9, 2000.

One of Applicant's treating physician(s), Michael Kenly, M.D., was selected from within Defendant's MPN. Dr. Kenly submitted an RFA for three medications which were either fully or partially denied by Utilization Review (hereinafter UR). There is a pending IMR process.

III DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cure that defect.

Defendant first contends the WCJ lacks jurisdiction to hear the controversy over this particular medical dispute. In this case, Applicant has raised two issues. First, the admissibility of a UR report and determination at a hearing regarding the MPN physician's treatment request. Secondly, whether Defendant's having an MPN precludes Defendant from using the Utilization Review process with request for treatment from their own MPN physician.

In *Dubon v. World Restoration* (2014) 79CCC313, the WCAB stated, “IMR solely resolves disputes over medical necessity . . .

The two issues above are not for determination by the IMR process but rather over a statutory construction and interpretation of evidentiary admissibility and the use of an MPN as legislative approach to giving Defendant a greater control over medical care and treatment. In regards to jurisdiction, the questions presented in this case rest with the WCAB and not IMR.

As all have written and acknowledged, medical costs and continuing treatment became such a problem that our entire system was imploding.

Even after enactment of SB228, SB 899 was enacted as urgency legislation to a great extent due to medical and associated costs.

The purpose of all of this legislation was to not only control these costs and give employers greater control over medical care and treatment, but also to ensure that prompt medical care and treatment is provided to the Applicant.

Against this backdrop, the legislature created the Utilization Review procedure in L.C. § 4610. This has time specific limitations within which to initiate a utilization review of the treating doctor’s recommendations for treatment. The Defendant can then either approve, modify, delay or deny the requested treatment.

Subsequent to this enactment, the California Supreme Court in *State Comp. Ins. Fund vs. WCAB (Sandhagen)* 4Cal.4th 230 wrote that the only mechanism for a defendant to question treatment was through Utilization Review. This case did not involve an MPN physician since it was decided prior to the enactment of the MPN

statutes.

The legislature next enacted Article 2.3 which created Medical Provider Networks. This now gave the Defendant even greater control over medical care and treatment. A defendant was now able to assert total control over the choice of Applicant's treating physician. A defendant controls what doctors are invited to participate in the MPN and the defendant may then oust the physician from the MPN.

The only right of the injured worker is to select a physician from defendant's list and Applicant may then change up to a total of three times to another doctor within defendant's MPN. It even provides a mechanism for the defendant to re-assert control if Applicant is treating outside of its MPN.

The physicians within the MPN are employed by contract with the defendant and are directed to provide treatment pursuant to MTUS and AECOM.

L.C. § 4616.3 provides for disputes over medical treatment by allowing the Applicant to go to up to two additional doctors to obtain treatment, should Applicant disagree with the treatment being provided by the first MPN physician.

L.C. § 4616.4 provides an independent medical reviewer to review treatment records and make recommendations, again at the employee's request. Same as the method for appealing a UR denial, which may only be done by the employee.

There is nothing in the MPN chapter, which makes reference to the defendant having the ability to challenge the treatment recommendations of the MPN doctor. Since the MPN, statutes were enacted after the Utilization Review statutes, if UR were to apply in connection with an MPN doctor's treatment recommendations it

would have provided so.

8 CCR 9767.7(g) states: [t] he employer or insurer shall permit the employee to obtain the recommended treatment within the MPN. The covered employee may obtain the recommended treatment by changing physicians to the second opinion physician, third opinion physician, or other physicians.

This regulation suggests the employer must authorize the treatment recommended by it MPN physicians.

L.C. § 4616.6 expressly excludes any other report from consideration in these cases. It provides, “[n]o additional examinations shall be ordered by the Appeals Board and no other reports shall be admissible to resolve any controversy arising out of this Article.”


The MPN statutory scheme excludes the use of Utilization review reports from consideration in disputes over treatment by the employer’s treating physician. Further, given the statutory construction described hereinabove, either a Defendant may have an MPN and control who the treating physician is or the Defendant cannot require Applicant to treat within an MPN but may submit all treatment requests through the UR/IMR process.

In light of the medical reporting of the MPN physician, Michael Kenly, M.D., Applicant has met his burden of showing the sought after treatment was both reasonable and necessary and in accordance, his request for authorization is following with AECOM and MTUS.

VI
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Date: 5/14/14



SCOTT J. SEIDEN
Workers' Compensation Administrative Law Judge

Dated: May 14, 2014
Service by mail on parties shown
with an X on the official, address record.
By: Cynthia Weber

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

05-14-2014

OFFICIAL ADDRESS RECORD

OAR for Report and Recommendation on Petition for Reconsideration

Case Number: ADJ2145168

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