WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTORIA SHANLEY, ***Applicant,*** **vs.** **HENRY MAYO NEWHALL MEMORIAL HOSPITAL; and TRAVELERS INSURANCE CO.,** ***Defendants.***	**Case No. ADJ795505 (LAO 0794863)** **OPINION AND DECISION AFTER RECONSIDERATION**

On February 13, 2014, we granted reconsideration of the November 27, 2013 Finding of Fact to further study the factual and legal issues. This is our Decision after Reconsideration.

In the November 27, 2013 decision, the workers' compensation administrative law judge (WCJ) found that the utilization review (UR) decisions issued by defendant on August 6, 2013 did not violate Labor Code section 4610[1] or Administrative Director (AD) Rule 9792.9 (Cal. Code Regs., tit. 8, § 9792.9).[2] Defendant's UR decisions denied Dr. Mealer's July 26, 2013 request for authorization of a lumbar MRI and an EMG of the lower extremities.

In her Petition for Reconsideration, applicant contends that: (1) the UR physician, Albert Bisson, M.D., was not qualified to conduct the UR because he is not an orthopedist or an orthopedic surgeon, as required by section 4610(e) and AD Rule 9792.9(f); (2) Dr. Bisson was not qualified to conduct the UR because he is not licensed in California, as required by section 4610(e) and AD Rule 9792.9(f); (3) the UR decisions were not communicated by phone/fax within 24 hours, in violation of section

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[1] All other statutory references are to be Labor Code.

[2] All references to Rules of the AD are two regulations found in Title 8 of the California Code of Regulations.

4610(g)(3)(A) and AD Rule 9792.9(b)(4); and (4) the UR decisions were not signed by Dr. Bisson as required by section 4610(e) and AD Rule 9792.7(b)(1).

No Answer to the petition was received. However, the WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied.

Applicant's first, second, and fourth contentions may be quickly resolved. In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc opinion) (*Dubon II*), the Appeals Board held that a UR decision may be invalid only if it is untimely and that all other disputes concerning a UR decision must be resolved by independent medical review (IMR). Accordingly, we lack the authority to address applicant's first, second, and fourth contentions.[3]

We turn now to applicant's third contention.

In *Bodam v. San Bernardino County/Department of Social Services* (2014) 79 Cal.Comp.Cases ___ [2014 Cal. Wrk. Comp. LEXIS 156], the Appeals Board held that, under the provisions of section 4610(g)(1) and (g)(3)(A) and AD Rule 9792.9.1(e)(3): (1) a defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision; (2) a UR decision that is timely made but is not timely communicated is untimely; and (3) when a UR decision is untimely and, therefore, invalid, the necessity of the medical treatment at issue may be

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[3] In passing, however, we do observe the following.

With respect to applicant's first contention, section 4610(e) and AD Rule 9792.6.1(w) provide that the UR reviewer must be "a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services" and that the requested services must be "within the scope of the physician's practice." There is no requirement that the UR physician must be an orthopedist or orthopedic surgeon if the requesting physician is one. Here, defendant's UR decisions reflect that Dr. Bisson is a physician who specializes in physical medicine and rehabilitation. Applicant has presented no evidence, or even argument, that a physician who specializes in physical medicine and rehabilitation is not competent to assess whether a lumbar MRI or an EMG of the lower extremities is medically necessary, or that such services are outside the scope of the practice of a physician who so specializes.

With respect to applicant's second contention, section 4610(d) and AD Rule 9792.6.1(o) require only that the "Medical Director" who oversees a defendant's UR program must be licensed in California. Moreover, AD Rule 9792.6.1(w) expressly provides that a UR physician may be "licensed by any state or the District of Columbia." Here, defendant's UR decisions reflect that Dr. Bisson is licensed in Oklahoma and Texas.

With respect to applicant's fourth contention, AD Rule 9792.9.1(e)(5) requires that a UR decision "shall be signed by either the claims administrator or the reviewer." Therefore, contrary to applicant's assertion, Dr. Bisson's signature was not legally required.

determined by the WCAB based upon substantial evidence. (2014 Cal. Wrk. Comp. LEXIS 156, at *3.)

Under section 4610(g)(1), a prospective UR decision must be made within "five working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician." However, under section 4610(g)(3)(A), as clarified by AD Rule 9792.9.1(e)(3), there are the additional requirements that: (1) within 24 hours after the UR decision has been made, the decision must be communicated to the treating physician either by telephone, fax, or email; and (2) within two business days after the decision has been made, written notice of it must be sent to the treating physician, the injured employee, and the injured employee's attorney (if represented). (See *Bodam, supra*, 2014 Cal. Wrk. Comp. LEXIS 156 at *5-*8.) These time limits start running from the date the UR decision is actually made, even if the UR decision is made in a shorter timeframe than that permitted by section 4610(g)(1). (*Id.* at *6-*7.) Moreover, both the 24-hour and two business day requirements must be met; it is not sufficient to meet only one of them. (*Id.* at *5, *7-*8.)

The defendant has the affirmative burden of proving that its UR process was timely. (§§ 3202.5, 5705.)

Here, the documents in evidence reflect that, on July 30, 2013, defendant received the July 29, 2013 request for authorization (RFA) from the treating physician, Dr. Mealer, together with copies of his July 26, 2013 narrative report and his July 26, 2013 PR-2.

In response, defendant issued two UR decisions (Exhibits 4 & 5), which both listed a "Determination Date" of "08/06/2013." Also, the IMR applications attached to each of the UR decisions similarly specify a "Date of UR Decision" of "08/06/2013." We conclude, therefore, that defendant made its UR decisions on August 6, 2013, which was within five *business* days of its July 30, 2013 receipt of the RFA because the third and fourth calendar days were a Saturday and a Sunday (August 3 and 4, 2013).

Accordingly, the two UR decisions themselves were timely. Therefore, the question becomes whether the UR decisions were timely communicated.

The evidence establishes that, on the same date that defendant issued its August 6, 2013 UR decisions, it mailed these decisions to applicant, her attorney, and Dr. Mealer. Therefore, defendant met the two business days requirement of section 4610(g)(3)(A) and AD Rule 9792.9.1(e)(3).

Thus, the only remaining question is whether the two August 6, 2013 UR decisions were communicated by phone, fax, or email to Dr. Mealer within 24 hours after the decisions were made.

The only evidence presented regarding this question is as follows: (1) both UR decisions refer to a "peer to peer" "contact date" of "08/06/2013" (i.e., the same date as the UR decisions); (2) both UR decisions state that the "[p]eer to peer [contact] was unsuccessful"; and (3) both UR decisions state that the "contact type" was "phone – left message" and that the "contact person" was "Jennifer D." whose "contact role" is "requesting provider."

We conclude that this evidence is not sufficient to sustain defendant's burden of proof that it timely communicated its August 6, 2013 UR decisions to Dr. Mealer by phone, fax, or email within 24 hours after the decisions were made. Most significantly, the two August 6, 2013 UR decisions merely state that a phone message was "left," *without specifying the nature or content of the phone messages.* Therefore, defendant has not shown that the messages it left gave notice to Dr. Mealer that it had made UR decisions denying his treatment requests. Additionally, the statements that "[p]eer to peer [contact] was unsuccessful" further failed to prove that the UR decisions were communicated to Dr. Mealer by phone within 24 hours after the decisions were made.

Under *Dubon II* and *Bodam*, defendant's August 6, 2013 UR decisions are rendered invalid because of its failure to timely communicate those decisions to Dr. Mealer by phone, fax, or email within 24 hours and, therefore, the issue of medical necessity must be determined by the WCAB, not IMR.

Accordingly, we will rescind the WCJ's November 27, 2013 Finding of Fact and substitute a new finding that the two UR decisions are invalid. We will return the matter to the trial level for the WCJ to determine in the first instance whether the lumbar MRI and the EMG of the lower extremities are medically necessary.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Finding of Fact issued by the workers' compensation administrative law judge on November 27, 2013 is **RESCINDED** and that the following Finding of Fact is **SUBSTITUTED** therefor:

FINDING OF FACT

1. Defendant's two utilization review decisions of August 6, 2013, which, respectively, denied Dr. Mealer's request for lumbar MRI and for an EMG of the lower extremities, are invalid because defendant failed to carry its burden of proving that they were timely communicated to Dr. Mealer by phone, fax, or email within 24 hours after the decisions had been made.

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IT IS FURTHER ORDERED that the issues of whether the lumbar MRI and the EMG of the lower extremities recommended by Dr. Mealer are medically necessary is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 2 6 2014

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

VICTORIA SHANLEY
GLAUBER BERENSON
GOLDMAN, MAGDALIN & KRIKES

NPS/bea

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTORIA SHANLEY, ***Applicant,*** **vs.** **HENRY MAYO NEWHALL MEMORIAL HOSPITAL; TRAVELERS INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ795505 (LAO 0794863)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by applicant, with regard to a decision filed on November 27, 2013.

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

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 13 2014

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

VICTORIA SHANLEY
GLAUBER BERENSON
GOLDMAN MAGDALIN & KRIKES

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