

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 Case No. ADJ971954 (OAK 0113623)

4 **LEO VIGIL,**

5 *Applicant,*

6 vs.

7 **MILAN'S SMOKED MEATS; STATE
8 COMPENSATION INSURANCE FUND,**

9 *Defendants.*

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND DECISION
AFTER RECONSIDERATION**

10
11 Defendant seeks reconsideration of the October 7, 2014 Findings And Award of the workers'
12 compensation administrative law judge (WCJ) who found that defendant untimely served its January 28,
13 2013, March 20, 2014 and April 10, 2014 utilization review (UR) denials of applicant's primary treating
14 physician's Request for Authorization (RFA) for prescription refills of Norco and Pennsaid, and further
15 found that there was no change in applicant's condition as described in *Patterson v. the Oaks Farm*
16 (2014) 79 Cal.Comp.Cases 910 (significant panel decision) (*Patterson*) that makes the provision of those
17 medications no longer reasonably necessary to cure or relieve the effects of the stipulated industrial
18 injury applicant sustained to his back and left leg while working for defendant as a truck driver on
19 January 22, 1982. It was further stipulated as part of the award entered on October 29, 1990, that the
20 admitted industrial injury caused 56 1/2% permanent disability and need for medical treatment.

21 Defendant contends that its UR denials were timely served on applicant and there was no need to
22 serve his attorney because the claim was settled by stipulated award more than 20 years ago, and further
23 contends that the WCJ should have found the UR denials to be valid in accordance with the en banc
24 decisions of the Appeals Board in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313
25 (*Dubon I*) and *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (*Dubon II*).

26 A response to defendant's petition was received from applicant. The WCJ was not available to
27 provide a Report And Recommendation On Petition For Reconsideration.

1 Reconsideration is granted. Defendant was not obligated to show that there was a change in
2 applicant's condition or circumstances that allowed it to stop providing the requested medications
3 because the ongoing use of a narcotic medication like Norco is subject to periodic review, unlike the
4 nurse case manager services at issue in *Patterson*.¹ However, the WCJ correctly determined that
5 defendant's UR decisions were not timely served on applicant or his attorney and are invalid for that
6 reason. Thus, the WCJ was authorized to determine the medical necessity of the requested medication
7 and he correctly determined that its use is supported by substantial medical evidence in light of the entire
8 record and should be provided applicant.

9 **BACKGROUND**

10 The WCJ provides a summary of the background facts and reasons for his decision in his
11 Opinion on Decision, in pertinent part as follows:

12 "The dispute herein involves requests from [applicant's primary treating
13 physician, Rodger Orman, M.D.,] for a prescription for Pennsaid topical
14 solution [2]%, 40gtts #4 and a renewal of Norco 10/325mg #240.² It
15 appears, according to applicant's brief, that he resides on a country lane in
16 Twain Harte, California, and that, at some juncture, he advised the claims
17 examiner that he was having problems with his mail being delivered to his
18 street address. This was occurring because his mailbox was located on a
19 country road, a distance from his home, and his mail was being tampered
20 with. Consequently, he furnished the claims examiner with his post office
21 box, i.e., P.O. Box 1221.

22 "Dr. Orman had been providing applicant with medical care pursuant to his
23 above-referenced [October 29, 1990 stipulated] Award for several years.
24 There is no indication that, during that time period, applicant's condition
25 had been changing. Dr. Orman recently notified applicant that there arose
26 some problems in getting medications authorized by the claims examiner,
27 though this apparently had never been a problem before, given applicant's
28 medical award. Consequently, applicant then contacted the claims
29 examiner, who informed him that she had begun referring Dr. Orman's
30 treatment requests to utilization review, and as a result, Dr. Orman's
31 prescriptions started being denied by way of UR.

32 ¹ We take judicial notice that "Norco" is the brand name of an analgesic medication made by combining acetaminophen, a
33 non-narcotic pain reliever known by its brand name "Tylenol," with hydrocodone, an opioid pain medication. (Evid. Code, §
34 452(h); website at <<http://www.drugs.com/norco.html>> as of December 15, 2014; website at
35 <<http://www.drugs.com/acetaminophen.html>> as of December 15, 2014>.)

36 ² We take judicial notice that Pennsaid is the brand name of an analgesic topical solution made with the nonsteroidal anti-
37 inflammatory drug diclofenac sodium (known by the brand name "Voltaren"), that is used to treat osteoarthritis pain in the
38 knees. (Evid. Code, § 452(h); website at <<http://www.pennsaid.com/>> as of December 15, 2014.) The WCJ wrote in his
39 Opinion that Dr. Orman requested a 1 1/2% solution of Pennsaid, but the physician's March 14, 2014 RFA prescribes the "2%
40 new formulation," and that is substituted in the quotation.

1 "Defendant, through its utilization review contractor, CID Management,
2 did send applicant a document in an envelope that was addressed to P.O.
3 Box 1221, Twain Harte, California 95383 (Defendant's Exhibit D). The
4 envelope offered into evidence bears a 'return to sender stamp' dated
5 December 24, 2013. Nevertheless, a subsequent envelope was addressed to
6 applicant at his residence address of 16399 Estralita, Sonora California
7 95370. (Defendant's Exhibit E). Like Exhibit D, this envelope bears a
8 'return to sender' stamp,' which is dated March 4, 2014.

9 "Having been informed by applicant that he did not receive any UR
10 denials, the claims examiner sent him UR denials of January 28, 2013,
11 March 20, 2014 or April 10, 2014, on June 11, 2014 (Defendant's Exhibit
12 G). These were sent to applicant's Twain Harte post office box, but there
13 is no indication that applicant's attorney was copied with this transmittal,
14 nor were they sent to applicant's attorney prior thereto. According to
15 defendant's trial brief, it served applicant's attorney with the medical
16 reports and records on July 24, 2014.

17 "I am persuaded that UR denial was defective on two grounds here. The
18 first ground is that applicant was not provided with timely notice that Dr.
19 Orman's treatment requests were denied through UR. The second ground
20 is defendant's failure to serve applicant's attorney with medical reports and
21 with the UR denials, in a timely manner. I also find [in accordance with
22 the holding in *Patterson*] that utilization review should not have been
23 initiated in this case, at all, because there is no showing that applicant's
24 condition had changed such that he no longer needed a prescription to,
25 either Norco or Pennsaid, at the dosage that he was already receiving. All
26 of these grounds are quite critical in the instant case, inasmuch as applicant
27 has an award of further medical care, and therefore applicant has a vested
right to receive treatment reasonable and necessary to cure or relieve the
effects of his industrial injury. Given the entire medical record, I am
persuaded that I possess jurisdiction to decide the dispute as to applicant's
entitlement to these medications, and, accordingly, I find both of them
reasonable and necessary to cure or relieve the effects of applicant's
industrial injury.

"Firstly, defendant has not provided the undersigned with any explanation,
as to why the claims examiner, and/or CID Management, sent UR denials
to applicant's residence, rather than to his post office box, despite the fact
that previously, as demonstrated by Exhibit D, she had been apprised of the
address where applicant wished his correspondence to be sent so that he
received his mail in a timely manner....Once applicant informed the claims
examiner that he was having problems receiving mail sent directly to his
Estralita Street residence, and that he had secured a post office box for
delivery of his mail, it became defendant's obligation, in the exercise of
due diligence, to send correspondence to that post office box, rather than
directly to applicant's residence, especially given time constraints, such as
deadline to file an IMR application.

"Sending UR denials to the wrong address does not, in this trier of fact's
opinion, discharge defendant's obligation to communicate UR denials in a
timely manner...Evidence Code Section 641, has not been satisfied by
defendant. While Evidence Code Section 641 provides that a letter
correctly addressed and properly mailed is presumed to have been received

1 in the ordinary course of the mail, not all of the UR denials were indeed
2 sent to the correct address, and therefore it cannot be presumed that
3 applicant received them prior to the June 11, 2014 transmittal. Since I
4 must conclude, given the record before me, that June 11, 2014 was the first
5 time that applicant saw the UR denials, I must also conclude that defendant
6 has not satisfied [California Code of Regulations, title 8, section] 9792.9.1,
7 which sets forth the applicable time frames for service of UR denials...

8 "If the UR denial is timely and valid, the issues of medical necessity shall
9 be resolved through the IMR process. However, the Board in [*Dubon I*]
10 held that a UR decision is invalid if it is untimely or suffers from material
11 procedural defects that undermine the integrity of the UR decision,
12 whereas, conversely, minor technical or immaterial deficiencies are not
13 enough to invalidate a defendant's UR determination. Should the
14 defendant's UR be found to be untimely, [*Dubon I*] holds that the IMR
15 process is not the method of determining the necessity of a requested
16 medical treatment, but rather, this is to be determined by the Appeals
17 Board based upon substantial medical evidence, although it remains
18 applicant's burden to establish the medical necessity of the treatment...

19 "Moreover, there is no indication that the claims examiner ever advised
20 applicant to contact his attorney regarding the UR denials, prior to June 11,
21 2014...There is no indication that either a Substitution of Attorney or a
22 Dismissal of Attorney was ever filed in this case. I can see no justification
23 for failure to serve applicant's counsel with treatment reports or UR
24 denials, *regardless of the age of this case*...

25 "Thus, the undersigned possesses jurisdiction to determine the
26 reasonableness and necessity of Norco and Pennsaid, by way of substantial
27 medical evidence. That evidence exists here, in the form of Dr. Orman's
progress reports (Applicant's Exhibit 2), wherein he has noted that both
these medications have proven effective in reducing applicant's pain and
maintaining his functionality. Dr. Orman further observes that applicant is
fearful of submitting to surgery. One can hardly fault the applicant for this
fear. Fortunately, his use of Norco and Pennsaid allows him to tolerate his
symptoms, in lieu of surgery." (Bracketed material substituted and added
for clarity, emphasis in original, original footnotes omitted.)

28 DISCUSSION

29 After the WCJ issued his decision, the relationship between the WCAB and the UR and IMR
30 processes was further addressed by the Appeals Board in *Dubon II*. In that decision, the Appeals Board
31 affirmed the holding in *Dubon I* that an untimely UR decision is invalid, but modified *Dubon I* by
32 further holding that all UR disputes *other than timeliness* must be resolved by IMR.

33 Here, the WCJ found that defendant's URs were not timely communicated to applicant and his
34 attorney and are invalid for that reason. We agree. A defendant's obligation to timely serve UR
35 determinations on the injured worker and his or her physician was recently addressed in a Workers'

1 Compensation Appeals Board significant panel decision, *Bodam v. San Bernardino Department of*
2 *Social Services* (November 20, 2014, ADJ120989) 79 Cal.Comp.Cases ____ (significant panel decision)
3 (*Bodam*).³ In *Bodam*, the panel held as follows:

- 4 “(1) A defendant is obligated to comply with *all* time requirements in
5 conducting a UR, *including the time frames for transmittal and*
6 *communication of the UR decision*;
- 7 (2) A UR decision that is timely made but not timely communicated or
8 timely transmitted is invalid for those reasons;
- 9 (3) When a UR decision is untimely and invalid for that reason, the
10 medical treatment at issue may be determined by the WCAB based upon
11 substantial evidence.” (Emphasis added.)

12 By definition, the UR decision in this case was “prospective” because the UR was conducted
13 before the requested medications were obtained. (Cal. Code Regs., tit. 8, § 9792.6.1(s).) When
14 addressing a prospective RFA, Labor Code section 4610(g)(1)⁴ provides as follows:

15 “Prospective ... decisions shall be made in a timely fashion that is
16 appropriate for the nature of the employee’s condition, not to exceed five
17 working days from the receipt of the information reasonably necessary to
18 make the determination, but in no event more than 14 days from the date of
19 the medical treatment recommendation by the physician.”

20 It appears from the record that the UR decisions were timely made by defendant in this case, and
21 applicant does not contend otherwise. However, the UR decision was not thereafter timely
22 communicated to applicant or to his attorney as required by the applicable statute and the Rules of
23 Practice and Procedure of the Appeals Board (Appeals Board Rules).

24 Section 4610(g)(3)(A) provides in pertinent part as follows:

25 “Decisions to approve, modify, delay, or deny requests by physicians for
26 authorization prior to ... the provision of medical treatment services to
27 employees shall be communicated to the requesting physician within 24
hours of the decision. Decisions resulting in modification, delay, or denial

24 ³ Significant panel decisions are not binding precedent in workers’ compensation proceedings; however, they are intended to
25 augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed “significant”
26 unless, among other things: (1) it involves an issue of general interest to the workers’ compensation community, especially a
27 new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed
the decision and agree that it is significant. (See *Elliott v. Workers’ Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn.
3 [75 Cal.Comp.Cases 81]; *Larch v. Workers’ Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); 25
Cal. Workers’ Comp. Rptr. 197 [News Brief, August 1997].)

⁴ Further statutory references are to the Labor Code.

1 of all or part of the requested health care service *shall be communicated* to
2 physicians initially by telephone or facsimile, and *to the physician and*
3 *employee in writing* within 24 hours for concurrent review, or *within two*
4 *business days of the decision for prospective review*, as prescribed by the
5 administrative director.” (Emphasis added.)

6 As discussed in the WCJ’s Opinion, the evidence shows that the UR denials were *not* timely
7 communicated within two business days to applicant at the mailing address he provided defendant’s
8 adjuster. In addition to failing to timely communicate the UR decisions to applicant, defendant also
9 failed to timely communicate the UR reports to his attorney.

10 Appeals Board Rules, Rule 10608 provides that medical reports and information, including
11 reports by UR physicians must be served upon the injured worker’s attorney, in pertinent part as
12 follows:

13 “Service of all medical reports, medical-legal reports, and other medical
14 information on parties and lien claimants *shall* be made in accordance with
15 the provisions of this section...‘Party’ shall mean: (A) an injured
16 employee...or (D) the attorney or non-attorney representative....

17 “After the filing of an application or other case opening document...the
18 party...*shall serve copies* of the reports in its possession or under its
19 control on the requesting party...*within 10 calendar days*...” (Cal. Code
20 Regs., tit. 8, § 10608, emphasis added.)

21 The duty to serve medical information upon the injured employee’s attorney within 10 calendar
22 days is described as a “continuing duty” of the defendant in Appeals Board Rule 10615. (Cal. Code
23 Regs., tit. 8, § 10615.) In this case, it is clear from the record that defendant did not timely serve
24 applicant’s attorney with copies of the UR determinations and reports within 10 calendar days as required
25 by Rule 10608.

26 The failure to timely serve the UR reports on applicant and his attorney rendered the URs invalid,
27 and allowed the WCJ to determine if provision of the requested medication is supported by substantial
28 medical evidence in light of the entire record. (*Dubon II, supra; Bodam, supra; cf. Lamb v. Workers’*
29 *Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen’s Comp.*
30 *Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

31 As discussed by the WCJ in his Opinion, he correctly found that the reporting of Dr. Orman
32 supports the continued provision of Norco and Pennsaid to applicant because they both had proven to be

1 efficacious and they allowed applicant to avoid undesired surgery. (Applicant's Exhibit 2; Defendant
2 Exhibits K, L, M, N.)

3 Use of the prescription medication Norco is also supported by the applicable Medical Treatment
4 Utilization Schedule and Chronic Pain Medical Treatment Guidelines (Guidelines).⁵ (Cal. Code Regs.,
5 tit. 8, § 9792.24.2.) The Guidelines generally support the use of opioids for relief of chronic back pain,
6 but identify problems with long-term use that may outweigh its efficacy in some situations. (Guidelines,
7 pp. 46-62.) In all instances, the Guidelines describe a need for periodic evaluation of the use of opioids
8 in order to avoid addiction and other problems associated with long-term usage. (*Id.*) It is this latter
9 requirement that distinguishes this case from the facts in *Patterson, supra*, which the WCJ relied upon in
10 issuing his award.

11 In *Patterson*, the applicant sustained serious injuries to multiple body parts that involved
12 treatment from physicians in different specialties and other providers. The parties' Agreed Medical
13 Evaluator opined that the use of a nurse case manager would be reasonable to assist applicant with her
14 ongoing need for medical treatment, and an order was entered authorizing the provision of those services.
15 However, applicant later had some disputes with her nurse case managers, and defendant *for that reason*
16 unilaterally terminated the provision of all nurse case manager services. When applicant challenged
17 defendant's action by seeking an expedited hearing to compel the continued provision of the nurse case
18 manager services, defendant argued that applicant was required to submit a request for authorization
19 (RFA) for submission to UR.

20 The WCJ and Appeals Board panel in *Patterson* disagreed with defendant's contention that
21 applicant was required to submit an RFA for nurse case manager services, and held that defendant was
22 obligated to continue to provide the nurse case manager services that were previously authorized and
23 ordered as reasonable medical treatment in the absence of a change in applicant's condition or
24 circumstances that rendered the continued provision of those services unreasonable. (*Patterson, supra*,
25 79 Cal.Comp.Cases at pp. 911-912.)

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27 ⁵Online at: <https://www.dir.ca.gov/dwc/DWCPPropRegs/MTUS_Regulations/MTUS_ChronicPainTreatmentGuideline.doc>,
as of December 15, 2014.

1 Unlike the nurse case manager services involved in *Patterson*, the provision of opioid medication
2 in this case is subject to ongoing periodic review because of the nature of the treatment. This is
3 evidenced in the Guidelines which describe a need for periodic evaluation of the use of opioids in order
4 to avoid addiction and other problems associated with long-term usage. (Guidelines, pp. 57-58.) For that
5 reason, we amend the WCJ's decision to limit the provision of Norco to five refills as requested by Dr.
6 Orman in his March 14, 2014 RFA. (Defendant's Exhibit K.) Subsequent requests for opioid medication
7 may be submitted to utilization review by defendant.

8 Defendant was not obligated to show that there was a change in applicant's condition or
9 circumstances that supported the cessation of its authorization of Norco because the ongoing use of that
10 opioid medication is subject to periodic review, unlike the nurse case manager services at issue in
11 *Patterson*. However, the WCJ correctly determined that defendant's UR decisions were not timely
12 served on applicant or his attorney and are invalid for that reason as discussed in *Dubon II*. The WCJ
13 also properly determined that provision of the medications requested by Dr. Orman is supported by
14 substantial evidence in light of the entire record, and that they should be provided to applicant, but with
15 the limit of five refills of Norco as prescribed by Dr. Orman in his March 14, 2014 RFA.

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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for reconsideration of the October 7, 2014 Findings
3 And Award of the workers' compensation administrative law judge is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
5 Compensation Appeals Board that the October 7, 2014 Findings And Award of the workers'
6 compensation administrative law judge is **AFFIRMED**, except that Finding of Fact 7 and Finding of
7 Fact 8 and the Award are **RESCINDED**, and the following are **SUBSTITUTED** in their places:

8 **FINDINGS OF FACT**

9 ****

10 7. Defendant's utilization review decisions were not timely served on applicant or on his
11 attorney, and the utilization reviews are invalid for that reason.

12 8. The provision of the medications Norco and Pennsaid is supported by the reporting of
13 applicant's primary treating physician, Rodger Orman, M.D., as reasonably necessary to cure and relieve
14 the effects of applicant's industrial injury, and defendant is ordered to provide them as set forth by
15 Dr. Orman in his March 14, 2014 Request For Authorization (Defendant's Exhibit K) to include
16 Pennsaid topical solution 2% new formulation and Norco 10/325mg #240 with five refills.

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18 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
19 Compensation Appeals Board that defendant is to provide applicant with the medications requested by
20 his primary treating physician as set forth in Finding of Fact 8 above.

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the case is returned to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

Rick Dietrich **DEPUTY**

RICK DIETRICH

I CONCUR,

F. M. Brass

FRANK M. BRASS

Marguerite Sweeney

MARGUERITE SWEENEY



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 19 2014

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

**LEO VIGIL
BOXER & GERSON
STATE COMPENSATION INSURANCE FUND**

[Handwritten signature]

JFS/abs