WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAENA SOUTHARD, ***Applicant,*** **vs.** **HALLMARK GREETING CARDS; ARROWOOD INDEMNITY,** ***Defendants.***	**Case No. ADJ218782 (STK 0182206)** **OPINION AND DECISION AFTER RECONSIDERATION**

In order to further study the issues, we previously granted applicant's petition for reconsideration of the September 29, 2014 Findings And Order of the workers' compensation administrative law judge (WCJ), who found in pertinent part that the March 26, 2014 Independent Medical Review (IMR) determination "was untimely."[1] The WCJ further found that the "IMR process does not violate Applicant's due process rights," although he wrote in his Opinion on Decision that "it's obvious on it's [*sic*] face that the IMR process violates both Applicant's and Defendant's due process rights." The WCJ ordered the matter remanded to the Administrative Director (AD) for the conduct a new IMR as set forth in Labor Code section 4610.6(i) and AD Rule 9792.10.7(d).[2] (Cal. Code Regs., tit. 8, § 9792.10.7(d).)

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[1] Commissioner Brass was unavailable to participate further in the decision and Commissioner Sweeney was appointed to take his place on the current panel.

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

Section 4610.6(i) provides in full as follows: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. 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."

AD Rule 9792.10.7(d) provides in full as follows: "If the final determination of the Administrative Director is reversed by the Workers' Compensation Appeals Board, the dispute shall be remanded to the Administrative Director. The Administrative Director shall: (1) Submit the dispute to independent medical review by a different independent review organization, if available; (2) If a different independent medical review organization is not available after remand, the Administrative Director shall submit the dispute to the original independent review organization for review by a different reviewer in the organization."

It is admitted that applicant sustained industrial injury to her low back while working for defendant as a retail merchandiser on November 15, 1997, causing 57% permanent disability and need for future medical treatment.

Applicant contends that the IMR statutes deny her due process and that the AD should be sanctioned for issuing an untimely IMR determination.[3]

An answer was received.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be granted and that the Appeals Board address applicant's contentions.

The WCJ's decision is rescinded and the case is returned to the WCJ for development of the record as appropriate and for a new decision with proper findings on whether the IMR determination issued within the time allowed by section 4610.6(d) following applicant's request for IMR, and if not, whether the proposed treatments are supported by substantial medical evidence and the Medical Treatment Utilization Schedule (MTUS) or otherwise and should be awarded. The issues of penalties and sanctions are deferred

The time periods described in section 4610.6(d) are intended to protect injured workers from delay in obtaining reasonable medical treatment and are mandatory. If an IMR determination does not issue within the time periods mandated by section 4610.6(d), the medical treatment dispute is no longer covered by section 4610.5, and it may be heard and decided pursuant to the WCAB's authority to resolve controversies under section 4604.

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[3] Applicant's contention that the IMR statutes deny her due process is in essence a challenge to the constitutionality of the IMR process implemented by the Legislature. As noted by the WCJ in the Report, the WCAB has no authority to determine the constitutionality of a statute. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028 [58 Cal.Comp.Cases 793]; *Niedle v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 283 [66 Cal.Comp.Cases 223]; cf. Cal. Const., Article III, § 3.5.) For that reason, applicant's contention that the IMR process and statutes are unconstitutional is not further addressed herein.

BACKGROUND

Applicant sustained an industrial injury to her low back while employed by defendant Hallmark Greeting Cards on November 15, 1997. Her claim was addressed by entry of a stipulated award of 57% permanent disability and future medical treatment.

It appears that applicant's treating physician submitted requests to defendant for authorization to provide certain medications, but they were not approved by defendant following its utilization review (UR).[4] It further appears that applicant thereafter submitted requests for IMR of the proposed treatments. An IMR determination issued on or about March 26, 2014. Applicant filed a petition appealing the IMR determination pursuant to section 4610.6(h), asserting the following as reasons for the appeal:

> (1) The administrative director acted without or in excess of the administrative director's powers...
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> (2) The independent medical reviewer was subject to a material conflict of interest that is in violation of section 139.5. The injured worker, by not being informed on the name of the reviewer is deprived a due process right to determine if there is a conflict of interest.
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> (3) The determination was the result of a plainly erroneous express or implied finding of fact;
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> (4) That the Independent Medical Review process is unconstitutional, denying the applicant rights of due process; the right to cross examination of the individual conducting the evaluation and the right to review medical reports;
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> (5) Inability of the applicant to cross examine the reviewer on the medical reports that he reviewed;
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> (6) The clinical case summary was not a summary of the issue but only a minor issue in 2013 without review of the treating physicians medical reports which were never submitted to the reviewer;
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> (7) The decision violates the regulations 9792.10.6(g)(1) in that the decision was not issued within 30 days of receipt of the application, the application being received November 20, 2013 and the decision dated March 26, 2014;
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> (8) The decision is not supported by the MTUS guidelines or ODG guidelines.

[4] Several different treatment requests are identified in the record, but there are no findings as to when authorization for a specific treatment was requested, when the UR decision issued on that specific treatment request, and when applicant applied for IMR of that UR determination. These kind of specific findings are necessary to properly evaluate the treatment issues and should be included as part of any future decision.

In his Report, the WCJ quotes from his Opinion on Decision to explain the reasons for his decision, writing as follows:

> Applicant challenges the 3/26/14 IMR determination upon a number of different grounds. This WCJ interprets those varying grounds to fall into 3 basic areas-
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> 1- due process,
> 2- timeliness of the IMR determination, and
> 3- internal alleged flaws in the IMR analysis and reporting.
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> As to area #1, it is obvious upon it's [*sic*] face that the IMR process violates both Applicant's and Defendant's due process rights. An unknown physician (and the parties must accept Maximus's claims that a doctor was assigned, that he/she is Board certified, that he/she is licensed to practice medicine in California, etc) is allegedly assigned by Maximus to perform a 'review' of a given U.R. determination. No party knows anything about the actual identity of the IMR doctor and no party has any ability to learn anything about the alleged doctor. The parties must blindly accept Maximus's claim that the IMR doctor 'has no affiliation with the employer, employee, providers or the claims administrator". Josef K. had more procedural rights in *Der Process* than does an injured worker in the IMR process in California.
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> Unfortunately, the California Legislature approved this system and while it, again, obviously violates both party's [*sic*] due process rights, the current state of California workers' compensation law does not grant to WCJ's [*sic*] the power to determine constitutional issues. WCJs are compelled to accept and to apply whatever concoction the Legislature has brewed up. Upon that basis and that basis alone, Applicant's contentions must be rejected.
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> Turning to area #2, [Cal. Code Regs., tit. 8, § 9792.10.6(g)(1)] states clearly that 'the independent review organization shall complete its review and make its final determination within 30 days of the receipt of the Application for Independent Medial Review, DWC Form IMR, and the supporting documentation and information provided under section 9792.10.5' (underlining added by this writer). 'May' or 'should' language generally provides for some flexibility in interpretation and application. 'Shall' seems to mandate that the failure to satisfy whatever 'shall' be performed renders that performance void.
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> Absent some showing of an exception to the '30-day' rule set forth above, the IMR determination dated 3/26/14 must be found void and that therefore, Applicant's appeal of said determination must be granted.
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> Area #3 has been rendered moot by the finding above under area #2.

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DISCUSSION

As shown by the Report, the WCJ concluded that an employee may appeal an IMR determination pursuant to section 4610.6(h)(1) if the IMR determination issued beyond the time frames described in section 4610.6(d). That conclusion is incorrect because an IMR determination *must* issue within the time frames mandated by section 4610.6(d). If an IMR determination does not issue within the time frames 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 pursuant to the WCAB's authority under section 4604 to determine controversies arising under that Chapter of the Labor Code.[5]

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

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[5] 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."

The matter may be heard at an expedited hearing pursuant to section 5502(b)(1), which 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 is not "determined" by IMR when an IMR determination does not issue within the allowed time, section 5502(b)(1) authorizes such a determination by the WCAB.

issue is 45 days or less, not 30 days as concluded by the WCJ in the Report. (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 timely perform. (See, *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]; *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon I*); *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.) (*Dubon II*).)

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

[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.

properly construed to be mandatory as plainly expressed on the face of the statute by the Legislature's 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 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...
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> 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 felony welfare fraud 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 an essential element 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 that is within the jurisdiction of the WCAB. (*Dubon II, supra*, 79 Cal.Comp.Cases at pp. 1307-309; 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, and this may be at a section 5502(b)(1) expedited hearing.

Upon a finding of untimely IMR, the WCJ must determine the propriety of the treatment request based upon substantial medical evidence and whether that proposed treatment is supported by the MTUS or otherwise. (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"].) The WCAB is bound by the same statutory standards as the IMR medical professionals in deciding whether medical treatment should be provided. If the proposed medical treatment is supported by substantial medical evidence it may be awarded.

Accordingly, the WCJ's September 29, 2014 Findings And Order is rescinded, and the case is returned to the WCJ for further proceedings and development of the record as appropriate, and for a new decision on whether the IMR determinations issued within the time allowed by section 4610.6(d) following applicant's requests for IMR, and if not, whether the proposed treatments are 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 September 29, 2014 Findings And Order of the workers' compensation administrative law judge is **RESCINDED.**

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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 for further proceedings and development of the record as appropriate, and for a new 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 25 2015

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

SHAENA SOUTHARD
METZINGER AND ASSOCIATES
DIETZ, GILMORE & CHAZEN
ADMINISTRATIVE DIRECTOR

JFS/abs

DISSENTING OPINION OF COMMISSIONER ZALEWSKI

I dissent. I would rescind the September 29, 2014 Findings And Order of the WCJ and enter a finding that the March 26, 2014 IMR determination is final and binding on applicant. The time period described in section 4610.6(d) is directory and not mandatory and a claim that an IMR determination is untimely does not provide grounds for appeal under section 4610.6(h). It is apparent that the Legislature made 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 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.)

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When the Legislature enacted UR, it provided that medical treatment decisions be determined consistent with the MTUS promulgated by the AD pursuant to section 5307.27.[7] (Lab. Code, § 4610(c).) The use of the MTUS as part of the UR process established a 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.[8] 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.

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[7] 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."

[8] 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."

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.)

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 purpose of the statute is defeated if an IMR determination is declared invalid only because additional time was taken to assure that the process was concluded as intended by the Legislature.

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) time frames 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) time frame 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) time frames, 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) time frames are properly considered to be directory and the IMR determination in this case is valid even if it does not issue within those time frames.

I would enter a finding that the March 26, 2014 IMR determination is final and binding on applicant.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 25 2015

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

SHAENA SOUTHARD
METZINGER AND ASSOCIATES
DIETZ, GILMORE & CHAZEN
ADMINISTRATIVE DIRECTOR

JFS/abs

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAENA SOUTHARD, ***Applicant,*** **vs.** **HALLMARK GREETINGS; ARROWWOOD INDEMNITY,** ***Defendants.***	**Case No. ADJ218782 (STK 0182206)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by applicant with regard to a decision filed on September 29, 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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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above matter, 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 any district office of the WCAB and shall *not* be e-filed in the Electronic Adjudication Management System.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

FRANK M. BRASS

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 10 2014

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

DIETZ, GILMOR & CHAZEN
METZINGER AND ASSOCIATES
SHAENA SOUTHARD

sry