WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VALERIE MORALES, ***Applicant,*** **vs.** **GENERAL DESIGN CONCEPTS; BERKSHIRE HATHAWAY HOMESTATE COMPANIES,** ***Defendants.***	**Case No. ADJ3402228 (VNO 0541408)** **OPINION AND ORDER GRANTING PETITION FOR REMOVAL AND DECISION AFTER REMOVAL**

Defendant has filed a timely, verified Petition for Removal, requesting that the Appeals Board rescind the Order dated September 22, 2011, wherein the workers' compensation administrative law judge (WCJ) ordered this case continued to trial on December 6, 2011. Defendant contends that applicant failed to object to a utilization review (UR) decision that she did not require wrist surgery and that applicant failed to obtain a comprehensive medical-legal evaluation as required by Labor Code sections 4610.2 and 4062.[1] Applicant has filed an Answer.

Applicant, while employed as a shipping clerk from October 31, 2006, through February 6, 2007, sustained an industrial injury to her bilateral wrists, hands, shoulders, elbow and neck. She was examined by Chester Hasday, M.D., as agreed medical evaluator (AME).[2] She received a stipulated Award of 18% permanent disability and need for further medical treatment. Defendant claims that applicant filed a petition to reopen on July 14, 2011, but the petition is not in EAMS or in the paper file.

Applicant has been treated by Edwin Haronian, M.D., who has recommended surgery. Surgery was apparently denied by UR.[3] Applicant did not object to the UR determination. Instead, she filed a

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[1] Unless otherwise specified, all statutory references are to the Labor Code.

[2] In the Stipulation, Dr. Hasday is identified as a "State Panel QME [qualified medical evaluator], but both applicant and defendant refer to him as an AME.

[3] The UR documents are specified in the pretrial conference statement dated September 22, 2011, but they have not been scanned into EAMS.

Declaration of Readiness to Proceed (DOR) to Expedited Hearing. At a Mandatory Settlement Conference on September 22, 2011, the WCJ continued the case to trial.

Turning to the procedural issue presented by this case, we first consider the decision of the Supreme Court in *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*), which addressed the statutory scheme for making determinations regarding the appropriateness of requested medical treatment through the UR process described in section 4610 and its relationship to the process described in section 4062. In concluding that the Legislature intended to require employers to conduct a UR when considering requests for medical treatment, and to only allow employees to use section 4062 to dispute UR denials of treatment requests, the Court summarized the process in *Sandhagen* as follows:

> "In summary, section 4062 simultaneously *precludes* employers from using its provisions to object to employees' treatment requests but *permits* employees to use its provisions to object to employers' decisions regarding treatment requests. The Legislature's intent regarding employers' use of section 4062 to dispute treatment requests could not be more clear...
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> "Taken together, the language of sections 4610 and 4062 demonstrates that (1) the Legislature intended for *employers* to use the utilization review process in section 4610 to review and resolve any and all requests for treatment, and (2) if dissatisfied with an employer's decision, an *employee* (and only an employee) may use section 4062's provisions to resolve the dispute over the treatment request...the plain language of section 4062 establishes that only employees may use section 4062 to resolve disputes over requests for treatment." (Emphasis in original.)

As can be seen, the Supreme Court in *Sandhagen* characterized the obligation of an employer to follow the UR process as mandatory. In doing this, the employee's right to address a UR denial pursuant to section 4062 was described with the word "may," which suggests that the process is optional for an employee. However, the actual holding in *Sandhagen* is that an employer must follow the UR process. *Sandhagen* did *not* hold that an employee could challenge a UR denial by proceeding directly to a hearing without first following the section 4062 process.

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In her concurring opinion in *Sandhagen*, Justice Kennard clarifies the majority opinion by explaining how the statutory scheme for resolving medical treatment disputes should be construed, as follows:

> "Certain language in the majority's opinion, however, might be misread to suggest that utilization review is a dispute-resolution process that *replaces* the 'cumbersome, lengthy, and potentially costly' dispute-resolution process that previously applied under former section 4062. As I understand the statutory scheme, utilization review process adds a *new step* that the employer must take *before* section 4062 comes into play, but it *does not replace the section 4062 process.* Section 4062 remains the means for resolving any dispute between the parties regarding medical treatment ...
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> "[S]ection 4610's utilization review is not to be conflated with the process of dispute resolution. Section 4062 continues to govern medical treatment disputes, as it did before the reforms. The statutory scheme does not create two separate dispute-resolution tracks for employers and for employees. Instead, it sets forth two successive stages of a single-track process: The employer first proceeds with utilization review under section 4610, and then the employee may dispute the employer's conclusion under section 4062. The fact that the '*employee* (and only the employee)' initiates the dispute-resolution process set forth in section 4062 is not intended to exclude employers from that process; rather, it merely reflects the circumstance that utilization review has been interposed as a threshold step. The employer who seeks to object to a proposed medical treatment must follow the utilization review process. If that process results in a modification, delay, or denial of the requested treatment, then naturally the employee is the party that invokes the section 4062 dispute-resolution mechanism, because the employee is the aggrieved party" (Emphasis in original.)

As explained by Justice Kennard, the first step in the medical treatment dispute resolution process is the obtaining of a UR determination by the employer. If the employee disagrees with the UR determination, he or she may object *and seek further medical opinion through the section 4062 process.* It is appropriate that the section 4062 process applies at that stage because medical treatment disputes should be addressed and resolved based upon substantial medical opinion, and section 4062 provides for development of the medical record by obtaining such an opinion from a panel or agreed medical

evaluator. Of course, if the employee does not object to the UR determination, he or she is not obligated to pursue the section 4062 process.

Requiring the employee to initiate the section 4062 process to challenge a UR denial of authorization is consistent with the plain language of sections 4610 and 4062. Section 4610(g)(3)(A) provides in pertinent part that if a request for a medical procedure "is not approved in full" as part of the UR, "disputes *shall* be resolved in accordance with Section 4062." (Emphasis added.) In turn, section 4062(a) provides in pertinent part, as follows:

> "If either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610, the objecting party *shall* notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney...
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> "If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained." (Emphasis added.)

Requiring the employee to initiate the section 4062 process is also consistent with the earlier en banc decision of the Appeals Board in *Willette v. Au Electric Corporation* (2004) 69 Cal.Comp.Cases 1298 (*Willette*), wherein the Appeals Board wrote as follows:

> "[B]ecause section 4610 states that disputes under that section 'shall' be resolved in accordance with section 4062, and because section 4062 states that, if *the employee* objects to a decision made pursuant to section 4610 not to fully approve a treatment recommendation, *the employee* 'shall' notify the employer of the objection within specified time frames, then it is incumbent on the employee to make a timely objection under 4062 to a utilization review physician's determination to disapprove, in whole or in part, the treating physician's prescribed treatment. Also, because section 4062(a) provides that a panel QME evaluation 'shall' be obtained, because sections 4062.1(c) and 4062.1(d) provide that the employee 'shall' select a panel QME, schedule the appointment, inform the employer of the selection, and participate in the evaluation, and because section 4062.3(i) provides that the panel QME 'shall' serve a report that determines the disputed medical issue, then a panel QME report must be obtained whenever an

> unrepresented employee timely disputes a utilization review determination regarding treatment." (Emphasis in original, footnote omitted.)

As can be seen, the Appeals Board in *Willette* put great emphasis on the Legislature's use of the mandatory word "shall" in section 4062 to describe the obligation of an unrepresented employee to make timely objection if he or she disputes a UR determination. As the Appeals Board stated in *Willette*, "an unrepresented employee (if he or she desires to dispute the utilization review physician's determination) *must* timely object, and then a panel qualified medical examiner ('QME') *must* be obtained to resolve the disputed treatment issue(s)." (Emphasis added.)

We find no factual, logical or legal reason to read the mandatory language of sections 4610 and 4062 differently for an employee represented by an attorney, as in this case, than for an unrepresented employee. In either case, the first step in dealing with a medical treatment request is the obtaining of a UR determination by the employer, as discussed in *Sandhagen*. If the employee objects to the UR determination, the next step as discussed by Justice Kennard in her concurring opinion in *Sandhagen* is the dispute resolution procedure mandated by section 4062 and established in sections 4062.1 and 4062.2 et. seq. If that process does not lead to a resolution of the dispute, it may then be presented to a WCJ for determination. By following the section 4062 process, the WCJ will, at the time of hearing, have the benefit of expert medical opinion from a third-party evaluator who is independent of both the treating and UR physicians. This helps assure that a final decision is justly made by a WCJ based upon substantial medical evidence.

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In this case, it is apparent that applicant objects to the UR determination. But instead of objecting and seeking further evaluation by Dr. Hasday pursuant to section 4067, applicant filed a DOR, apparently relying on the medical reports of Dr. Haronian, the treating physician. As we have seen, this is not allowed by sections 4610 and 4062. We also note that defendant has scheduled an examination by Dr. Hasday on January 11, 2012. Therefore, we grant removal and take this case off calendar pending evaluation by Dr. Hasday. After receipt of Dr. Hasday's report, either party may request further hearing if the pending issues are not resolved.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Removal is **GRANTED**.

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IT IS FURTHER ORDERED, as the Decision After Removal of the Workers' Compensation Appeals Board, the Order dated September 22, 2011, is **RESCINDED** and that this matter is **TAKEN OFF CALENDAR** pending further evaluation by Chester Hasday, M.D.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

DEPUTY
RICK DIETRICH

ALFONSO J. MORESI

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOV 22 2011

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

GOLDMAN, MAGDALIN & KRIKES
KOSZDIN, FIELDS, SHERRY & KATZ
VALERIE MORALES
WAYNE SINGER

MR/ara