**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

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| **MARSHA ROSENBLUM,**<br><br>***Applicant,***<br><br>**vs.**<br><br>**LOMPOC UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured, Administered By WORKERS' COMPENSATION ADMINISTRATORS,**<br><br>***Defendants.*** | **Case No. ADJ11930934**<br>**(Santa Barbara Satellite Office)**<br><br>**OPINION AND ORDERS DENYING DEFENDANT'S PETITION FOR RECONSIDERATION, GRANTING APPLICANT'S PETITION FOR RECONSIDERATION, AND DECISION AFTER RECONSIDERATION** |

Applicant and defendant each seek reconsideration of the May 20, 2019 Expedited Findings of Fact and Order wherein the workers' compensation administrative law judge (WCJ) found that he lacked jurisdiction (1) to determine medical treatment issues already authorized by a timely utilization review (UR), or (2) to determine the causal connection between the authorized treatment and the industrial injury. The WCJ also found that defendant may request a panel qualified medical evaluator (PQME) from the medical unit. At the expedited hearing on May 7, 2019, the parties stipulated that applicant, while employed on September 4, 2008 as an instructional assistant, sustained industrial injury to her right hip and right groin.

Applicant contends that the WCJ erred by not enforcing the medical treatment authorized by UR and awarding the right hip surgery. No answer was received from defendant.

Defendant contends the WCJ erred by finding the court lacked jurisdiction over the timely UR authorization for a right hip total arthroplasty, arguing that Labor Code[1] sections 4061 and 4062 provide an alternate track to dispute an injured worker's treatment request. Defendant argues that it properly objected to and withdrew its UR approval for the hip surgery after the UR authorization issued. Applicant filed an answer.

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

We have considered the petitions for reconsideration and we have reviewed the record in this matter. The WCJ has filed a Report and Recommendation on Petitions for Reconsideration (Report) for the Petitions for Reconsideration, recommending that reconsideration of the Petitions be denied.

Based on our review of the record and for the reasons discussed below, we deny defendant's Petition for Reconsideration. We grant applicant's Petition for Reconsideration, and amend the May 20, 2019 Expedited Findings of Fact and Order to reflect that applicant is entitled to the medical treatment authorized by timely UR.

## RELEVANT FACTS

Applicant, while employed on September 4, 2008 as an instructional assistant by Lompoc Unified School District, sustained an admitted industrial injury to her right hip and right groin. On October 16, 2018, defendant notified applicant that the claim was accepted. (Defendant's Ex. F.)

Applicant initially treated with Central Coast Industrial Care. Multiple reports from Industrial Care noted applicant's ongoing hip strain and pain. (Defendant's Ex. C, D, E, F.) Applicant's primary treating physician, Christopher Birch, M.D., issued a report dated February 5, 2019, stating that he reviewed the medical records and x-rays of the right hip. He concluded that, "having failed all the applicable non-operative measures . . . [applicant] meets the criteria for a right total hip arthroplasty. (Applicant's Ex. 1.) In his report dated April 1, 2019, Dr. Birch confirmed his opinion that applicant failed all the non-operative measures and met all the criteria for a right total hip arthroplasty. (Applicant's Ex. 2.)

On April 2, 2019, Dr. Birch submitted a request for authorization (RFA) to defendant's claims administrator, Workers' Compensation Administrators (WCA) for a right total hip arthroplasty. (Applicant's Ex. 3.) The RFA was submitted to UR.

On April 8, 2019, a timely UR Determination issued, authorizing the right total hip replacement surgery that was the subject of the April 2, 2019 RFA. (Applicant's Ex. 4.)

On April 11, 2019, defendant objected to the medical determination made by Dr. Birch. The claims administrator sent a fax to Dr. Birch, stating that a "decision whether to authorize the RFA or send it to medical utilization review" was deferred pursuant to section 4610(g)(7) and Administrative Director

rule 9792.9.1(b), (Cal. Code Regs., tit. 8, § § 9792.9.1(b).) (Applicant's Ex. 5.) Defendant, through WCA, stated that it was deferring surgical authorization pending a medical-legal opinion on industrial causation of the hip osteoarthritis pursuant to sections 4061 and 4062, and whether the right hip replacement surgery was related to applicant's industrial injury.

On May 7, 2019, the matter proceeded to an expedited hearing on the primary issue of applicant's need for a right hip replacement surgery as authorized by UR. Defendant contended the UR was fatally flawed because there was no connection between the requested surgery and applicant's industrial injury.

On May 20, 2019, the WCJ issued the disputed Expedited Findings of Fact and Order, finding that the court has no jurisdiction to determine medical treatment authorized by a timely UR. Applicant and defendant each seek reconsideration.

**DISCUSSION**

California's workers' compensation system makes the employer of an industrially injured employee responsible for all medical treatment reasonably necessary to cure or relieve the injured employee from the effects of his or her injury. (Lab. Code, § 4600.) Employers are also required to conduct UR of treatment requests received from physicians. (§ 4610; *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 236 [73 Cal.Comp.Cases 981] (*Sandhagen*).)

The purpose of California's UR requirement, "... is to ensure quality, standardized medical care for workers in a prompt and expeditious manner," since UR "balances the dual interests of speed and accuracy, emphasizing the quick resolution of treatment requests, while allowing employers to seek more time if more information is needed to make a decision." (*Sandhagen* 44 Cal.4th at 241.)

The employer must notify the employee of the UR decision and include "[n]otice that the utilization review decision is final unless the employee requests independent medical review." (§ 4610.5(f)(1).) Section 4610 provides mandatory time limits within which a UR decision must be made by the employer. (§ 4610 et seq.) An employee may challenge a UR decision denying medical treatment through the Independent Medical Review (IMR) process. Section 4062(b) provides that "[i]f the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a request for authorization of a medical treatment recommendation made by a treating physician, the objection shall be

resolved only in accordance with the independent medical review process established in Section 4610.5." (§ 4062(b).)

When a treating physician submits an RFA for medical treatment to a claims adjuster, section 4610(e) provides that only a licensed physician "may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve." Thus a reviewing physician, and not a claims adjuster, is required to apply the Medical Treatment Utilization Standards (MTUS) when determining the medical necessity of a proposed medical treatment. (Lab. Code, § 4610(f).) "The legislature has made it abundantly clear that medical decisions are to be made by medical professionals." (*Dubon II, supra*, at p. 1309.) The record here reflects that the claims adjuster attempted to defer surgical authorization, *after* the UR physician reviewed the matter and authorized the surgery.

In *Sandhagen, supra,* 44 Cal.4th 230, 236, the California Supreme Court addressed the meaning and effect of section 4610 in relation to section 4062, and determined that the statutory language of section 4610, "indicates the Legislature intended for employers to use the utilization review process when reviewing and resolving *any and all* requests for medical treatment." (Emphasis in original.) (*Sandhagen, supra,* 44 Cal.4th 230, 236.) The Court held that,

> [S]ection 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. An employer may not bypass the utilization review process and instead invoke section 4062's provisions to dispute an employee's treatment request. (*Id.*, at 237.)

In *Ramirez v. Workers' Comp. Appeals Bd.* (2017) 10 Cal.App.5th 205, the Court of Appeal evaluated the UR and IMR process and summarized as follows:

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> If the utilization review approves the requested treatment, the determination is final and the employer may not challenge it. (§ 4610.5, subd. (f)(1).) If the utilization review modifies, delays, or denies the requested treatment, the employee may seek review through a procedure called "independent medical review." (§ 4610.5, subd. (d).) (*Id.* at pp. 213-214.)

Defendant avers that the Appeals Board has no authority to order treatment addressed by a timely UR decision even if the treatment was approved by UR. This contention misinterprets the holding of *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*). As noted in the *Dubon II* decision, section 4604 provides that "[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.*" (*Dubon II, supra*, at p. 1305 (emphasis in original decision).) If the employee's physician requests treatment and the employer approves that treatment through UR, *there is no dispute as to the medical necessity of the treatment.* (§ 4610.5(c)(1) [disputed medical treatment is explicitly defined as treatment that has been modified or denied by a UR decision on the basis of medical necessity].) There is no provision in section 4610.5 for an employee to challenge a UR decision *approving* treatment through IMR. There is also no provision in section 4610.5 for the employer to challenge a UR decision at all through IMR. (See also, Cal. Code Regs., tit. 8, § 9792.10.1(b)(2) [defines the parties eligible to request IMR, which does not include the employer].)

On April 11, 2019, defendant attempted to override the timely April 8, 2019 UR determination and "withdraw" the authorization. Although section 4610(l) allows for deferral of UR while the employer disputes liability for an injury or treatment, here defendant did not dispute liability until three days after the UR authorized the right hip replacement surgery on April 8, 2019. There is no "alternative track" under section 4062 for an employer to dispute a UR determination. When defendant approved the requested treatment through UR, there was no further dispute as to the necessity of the treatment. (§ 4610.5, subd. (f)(1).) An employer may not bypass the UR process and invoke section 4062 to dispute an employee's treatment request. (*Sandhagen, supra,* 44 Cal.4th 230, 237.)

Turning to applicant's Petition for Reconsideration, applicant asserts that the WCJ should have enforced the UR determination and awarded the right hip surgery. The Labor Code expressly vests the

Appeals Board with the authority for "the enforcement against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee." (Lab. Code, § 5300(b); see also Lab. Code, §§ 5301, 3207 [section 3207 defines "compensation" as "every benefit or payment conferred by this division upon an injured employee"].) The Appeals Board retains the authority to determine medical treatment controversies not subject to IMR. (See Lab. Code, § 5304 [the "appeals board has jurisdiction over any controversy relating or arising out of Sections 4600 to 4605 inclusive"].) This includes the authority to award medical treatment that was specifically approved by the employer either without UR or pursuant to its UR. Moreover, vesting such authority in the Appeals Board furthers the legislative purpose of providing an "expeditious manner of resolving treatment requests." (*Sandhagen, supra*, at p. 244.)

The Appeals Board has jurisdiction to award medical treatment that was specifically approved by the employer pursuant to its UR. On April 8, 2019, defendant's UR approved the right hip total arthroplasty requested by Dr. Birch in the April 2, 2019 RFA. The WCJ is within his authority to order defendant to provide the approved treatment to applicant. We find applicant is entitled to further medical treatment in the form of a right hip total arthroplasty in accordance with the April 8, 2019 UR determination approving the surgery.

Accordingly, as discussed above, we deny reconsideration of defendant's Petition for Reconsideration. We grant reconsideration of applicant's Petition for Reconsideration, and amend the May 20, 2019 Expedited Findings of Fact and Order to reflect that applicant is entitled to medical treatment pursuant to defendant's UR decision.

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For the foregoing reasons,

**IT IS ORDERED** that the defendant's Petition for Reconsideration of the May 20, 2019 Expedited Findings of Fact and Order, is **DENIED.**

**IT IS FURTHER ORDERED** that the applicant's Petition for Reconsideration of the May 20, 2019 Expedited Findings of Fact and Order, is **GRANTED.**

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 20, 2019 Expedited Findings of Fact and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** to read as follows:

**FINDINGS OF FACT**

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5. The Workers' Compensation Appeals Board has authority to enforce a Utilization Review Determination authorizing medical treatment.

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## ORDER

a. Defendant is liable for further medical treatment in the form of a right total hip arthroplasty pursuant to the April 8, 2019 Utilization Review Determination.

**WORKERS' COMPENSATION APPEALS BOARD**

CRAIG SNELLINGS

**I CONCUR,**

JOSÉ H. RAZO
CHAIR

KATHERINE ZALEWSKI

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

AUG 09 2019

**SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD**

**MARSHA ROSENBLUM**
**WOLF WALKER LAW FIRM**
**GOLDMAN MAGDALIN KRIKES, LLP**

**MG/abs**