

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

3
4 Case No. ADJ2972057 (LAO 0838464)

5 **DONNA NEWTON,**

6 *Applicant,*

7 vs.

8 **JACK-IN-THE-BOX; REPUBLIC
INDEMNITY COMPANY OF CALIFORNIA,**

9 *Defendants.*

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION;
NOTICE OF INTENTION TO AWARD
MEDICAL TREATMENT**

10
11 Defendant seeks reconsideration of the April 28, 2014 Findings and Award issued by the
12 workers' compensation administrative law judge (WCJ). Therein, the WCJ found that defendant's
13 utilization review (UR) was defective and that further medical treatment, in the form of aquatic therapy at
14 the rate of two times per week for four weeks, is required to cure or relieve applicant from the effects of
15 her injury. Based on these findings, the WCJ made an award of the aquatic therapy. Previously,
16 applicant sustained admitted industrial injury to her right knee and low back while employed as a
17 shift leader on November 1, 2003. An Award for future medical treatment for applicant's right knee and
18 low back was entered on February 28, 2012.

19 Defendant contends that the WCJ violated its right to due process in awarding aquatic therapy.
20 Defendant argues that applicant's only argument at the April 2, 2014 trial was the timeliness of the UR
21 and that she did not raise lack of service. Defendant further argues that, absent applicant's testimony or
22 other evidence that she did not receive the UR, the WCJ's decision is not based on substantial evidence.

23 Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for
24 Reconsideration (Report) recommending that we deny reconsideration.

25 Based on our review of the record and for the reasons discussed below, we will grant
26 reconsideration and issue a ten (10) day notice of intention to find that applicant is entitled to
27 aquatic therapy at the rate of two times per week for four weeks, as prescribed by Daniel A. Capen, M.D.

1 We take this action because we find defendant's UR decision defective for a reason other than
2 that given by the WCJ.

3 In his Opinion on Decision, the WCJ stated that he awarded the aquatic therapy because the UR
4 decision was not served on applicant herself. However in his Report, the WCJ acknowledged that,
5 because the first page of the August 11, 2013 UR decision has applicant's name and address on it and
6 because applicant did not testify that she did not receive it, that "it should probably be accepted that
7 Exhibit A was served on [] applicant." Yet, despite this acknowledgement, the WCJ found a different
8 reason to find the UR defective. In this regard, he noted that the UR decision relied, in part, on the
9 review of "24 pages of additional medical report" that were not described or identified. The WCJ found
10 this a violation of Administrative Director Rule 9792.9(1)(3) which requires that a UR decision include a
11 list of all medical records reviewed. (Cal. Code Regs., tit. 8, § 9792.9(1)(3).) However, in our en banc
12 decision in *Dubon v. World Restoration, Inc.*, (2014) 79 Cal.Comp.Cases 313, 322 (Appeals Board en
13 banc), we held that a UR decision is invalid if it suffers from material procedural defects that undermine
14 its integrity but that it is not invalidated by defects that are minor, technical, or immaterial. (*Dubon*,
15 *supra*, 79 Cal.Comp.Cases a p. 322.) Thus, we are not persuaded to affirm the WCJ on this basis.

16 Nevertheless, we find defendant's UR decision defective pursuant to the provisions of section
17 4610(e) which provides that "[n]o person other than a licensed physician ... may modify, delay, or deny
18 requests for authorization of medical treatment" (Lab. Code, § 4610(e) (emphasis added.) In this
19 case, the August 11, 2013 UR delay notice (defendant's Exhibit A) was signed only "April Ellison, RN,
20 BSN, Utilization Review Nurse" and not by a licensed physician. While we recognize the UR decision
21 not to certify the aquatic therapy was subsequently made by Alan Knopf, M.D., on August 19, 2013
22 (defendant's Exhibit C), the August 11, 2013 UR delay notice issued by Nurse Ellison is a material
23 defect that undermines the integrity of defendant's UR decision.

24 In its Petition for Reconsideration, defendant argues that it is a violation of due process to address
25 a type of UR defect not explicitly raised at trial. However, the parties raised "[t]he issue of UR" which
26 sufficiently provides notice that the validity of the UR is in question. Moreover, when the Appeals Board
27 grants reconsideration, it has the power to address all issues, including those not previously raised. Thus,

1 in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, Fn. 7 [Appeals Board en banc],
2 the Appeals Board explained that under sections 5906 and 5908, once reconsideration has been granted,
3 the Appeals Board has the full power to make new and different findings on issues presented for
4 determination at the trial level, even with respect to issues not raised in the petition for reconsideration
5 before it. (Citing *Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724,
6 729 [8] [10 I.A.C. 322]; *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d
7 201, 203 [19 Cal.Comp.Cases. 98]; *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18
8 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d
9 262, 266–267 [8 Cal.Comp.Cases 79].)

10 At the same time, due process requires that when the Appeals Board makes a decision based on
11 different legal theories or on different issues than those presented by the parties, they must be afforded a
12 meaningful opportunity to be heard or present evidence. (*Gangwish v. Workers' Comp. Appeals Bd.*
13 (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker v. Workers' Comp. Appeals Bd.*
14 (2000) 82 Cal.App.4th 151, 157 [65 Cal.Comp.Cases 805].) Therefore, we issue an NIT before awarding
15 medical treatment based on the invalidity of defendant's UR decision thereby giving defendant notice
16 and opportunity to be heard.

17 Accordingly, for the reasons stated herein, we will grant reconsideration and issue a ten (10) day
18 notice of intention to find that applicant is entitled to aquatic therapy at the rate of two times per week for
19 four weeks, as prescribed by Daniel A. Capen, M.D.

20 For the foregoing reasons,

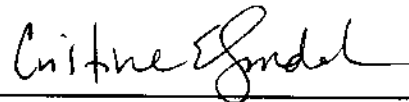
21 **IT IS ORDERED** that defendant's Petition for Reconsideration of the April 28, 2014 Findings
22 and Award is **GRANTED**.

23 **IT IS FURTHER ORDERED** that Notice of Intention is hereby given that absent written
24 objection filed with this Board within ten (10) days of the date of this Order, the Appeals Board will
25 issue a Decision After Reconsideration in which applicant is awarded medical treatment consisting of
26 aquatic therapy at the rate of two times per week for four weeks, as prescribed by Daniel A. Capen, M.D.

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1 **IT IS FURTHER ORDERED**, that pending further action by this Board or the issuance of a
2 Decision After Reconsideration in the above case, all further correspondence, objections, motions,
3 requests and communications shall be filed in writing only with the Office of the Commissioners of the
4 Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th floor,
5 San Francisco, CA 94102) or its Post Office Box address (PO Box 429459, San Francisco, CA 94142-
6 9459), and shall not be submitted to the Los Angeles District Office or any other district office of the
7 WCAB and shall not be e-filed in the Electronic Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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DEPUTY

11 **CRISTINE E. GONDAK**

I CONCUR,

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13
14 
15 **MARGUERITE SWEENEY**

16
17 
18 **RONNIE G. CAPLANE**



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

20 **JUL 07 2014**

21
22 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
23 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

24 **DONNA NEWTON**
25 **LAW OFFICES OF MOORE AND ASSOCIATES**
26 **LAW OFFICES OF JACK DAVIDSON**



27 **PAG/sye**

NEWTON, Donna