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

DONNA NEWTON,

Applicant,

vs.

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

Defendants.

Case No. ADJ2972057 (LAO 0838464)

**OPINION AND DECISION
AFTER RECONSIDERATION**

On July 7, 2014, we granted reconsideration in this matter and issued a notice of intention to award medical treatment in the form of aquatic therapy. We took this action because we found that defendant's utilization review (UR) decision dated August 11, 2013 and signed by "April Ellison, RN, BSN, Utilization Review Nurse" was materially defective pursuant to Labor Code¹ section 4610(e), which provides that "[n]o person other than a licensed physician ... may modify, delay, or deny requests for authorization of medical treatment...." (Lab. Code, § 4610(e).)

We received defendant's timely Objection to Notice of Intention to Award Medical Treatment. Therein, defendant argues that August 11, 2013 letter did not constitute a determination to delay the request for authorization but rather it was a request for additional information necessary in order to determine whether to approve, modify, delay, or deny the request for authorization, as authorized by section 4610(d).

Based on our review of the record and for the reasons discussed below, we will rescind the April 28, 2014 decision awarding aquatic therapy.

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¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 Section 4610(d) states, in pertinent part, that:

2 If an employer, insurer, or other entity subject to this section requests medical
3 information from a physician *in order to determine whether to approve, modify,*
4 *delay, or deny requests for authorization*, the employer shall request only the
5 information reasonably necessary to make the determination....
(Lab. Code, § 4610(d).)

6 In addition, Administrative Director Rule 9792.9.1(f) provides that if a claims administrator or
7 reviewer is not in receipt of all of the information reasonably necessary to make a determination, then "a
8 reviewer *or non-physician reviewer* shall request the information from the treating physician within five
9 (5) business days from the date of receipt of the request for authorization." (Cal. Code Regs., tit. 8,
10 § 9792.9.1(f)(1)(A) & (2)(A).)

11 Therefore, we accept defendant's explanation that August 11, 2013 letter did not constitute a
12 determination to delay the request for authorization but rather that it was a request for additional
13 information, made by a non-physician reviewer, necessary in order to determine whether to approve,
14 modify, delay, or deny requests for authorization, as authorized by section 4610(d). Accordingly, we
15 will rescind the April 28, 2014 decision awarding the aquatic therapy.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board, that the April 28, 2014 Findings and Award is **RESCINDED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **CRISTINE E. GONDAK**

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10 I CONCUR,

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12 **RONNIE G. CAPLANE**

13 

14 **MARGUERITE SWEENEY**

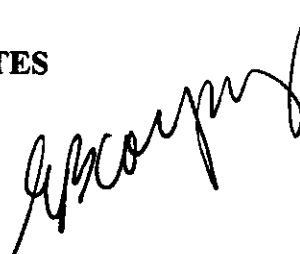


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16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17
18 **AUG 21 2014**

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

21 **DONNA NEWTON**
22 **LAW OFFICES OF MOORE AND ASSOCIATES**
23 **LAW OFFICES OF JACK DAVIDSON**

24 

25
26 **PAG/sye**

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NEWTON, Donna

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

CASE NUMBERS: ADJ2972057

DONNA NEWTON

vs.

**JACK IN THE BOX;
Republic Insurance Company**

DATE OF INJURY:

November 1, 2003

**WORKERS' COMPENSATION
JUDGE:**

KACEY JOSEPH KEATING

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

1.

INTRODUCTION

The applicant, Donna Newton, did sustain injury on November 1, 2003, to her lumber spine and right knee, while employed as a fast food shift leader. The applicant was injured at work as a result of twisting, turning, stooping, lifting, and pulling.

On April 28, 2014, the court issued a Findings and Award which at Finding 1 found that the utilization review was defective. The utilization review was defective because the written

notice of the utilization review was not served on the injured worker and the injured worker's attorney, but only on the injured worker's attorney.

On May 8, 2014, the defendant Republic Indemnity Company of California filed a timely petition for reconsideration. The petition for reconsideration states at page 2 that a medical recommendation was made that the applicant undergo aquatic therapy two times a week for four weeks, and the utilization review determination was to not certify the treatment.

The petition for reconsideration at page 3 states that in the Opinion Decision, the WCJ concluded the determination of Bunch Care Solutions was not served on the applicant. According to the petition for reconsideration, the applicant did not present any evidence to establish that she did not receive the decision. According to the petition, the applicant's sole argument was her assertion that the determination was not made on a timely basis. The petitioner asks that the court's decision be rescinded.

The petitioner contends that the applicant did not contend that the utilization review was not served on her, and that court's finding amounts to a denial of due process.

The petition for reconsideration also states that the WCJ did not state the basis for concluding that the Utilization Review decision was not served on the applicant.

2.

DISCUSSION

Exhibit A is a report from Bunch Care Solutions, dated 8/11/13. The first page of Exhibit A states that it was sent by Fax to Daniel Capen, M.D. The second page of Exhibit A shows that it was copied to Ilaleye Moore, who is the applicant's attorney. The first page of Exhibit A has the applicant's name and address on it. Exhibit A doesn't specify whether or not it was served on

the applicant, but since it has her name and address on it, and the applicant did not testify at trial that she did not receive a copy of the report, it should probably be accepted that Exhibit A was served on the applicant.

Exhibit C is a report from Bunch Care Solutions, with a date of service of 8/19/13. Exhibit C at page 5 stated as the principle reason for not certifying aqua therapy to the applicant, "Regarding the requested aqua therapy 2x4, there is no documentation of an indication for which reduced weight bearing is needed (extreme obesity)."

Page 1 of Exhibit C lists the "Reviewed Data." The first listed reviewed data was the ~~7/25/13 medical report of Dr. Capen.~~ Apparently, that medical report was admitted into evidence as Exhibit 1. The second listed reviewed data was "24 pages of additional medical reports."

The court did not find anything in the exhibits which would identify what the 24 pages of additional medical reports were.

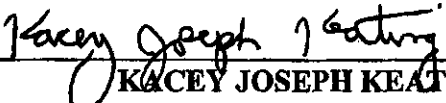
Cal. Code Regs. Title 8, sections 9792.9 (l) (3) provides that a utilization review physician's written decision ~~shall contain a list of all medical records reviewed.~~

~~Recently the court noticed that the utilization review did not comply with the regulation cited in the preceding paragraph.~~ Not providing a more specific description of the 24 pages of additional medical reports is a problem because no one can check the accuracy of the utilization review physician's statement at page 5 of Exhibit C that there is no documentation of an indication for which reduced weight bearing is needed (extreme obesity).

The utilization review was defective, and invalid for not identifying the 24 pages of additional medical reports which the utilization physician reviewed.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration, filed on May 8, 2014
(and dated May 7, 2014), be denied.


KACEY JOSEPH KEATING
WORKERS' COMPENSATION JUDGE
WORKERS' COMPENSATION APPEALS BOARD

Served by mail
On all parties on the
Official Address Record.

By: *Maria Walcher*

Date: *5/20/14*

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DONNA NEWTON,

Applicant,

vs.

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

Defendants.

Case No. ADJ2972057 (LAO 0838464)

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

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

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

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

Based on our review of the record and for the reasons discussed below, we will grant reconsideration and issue a ten (10) day notice of intention to find that applicant is entitled to 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**

9 *Cristine Gondak*

10 **DEPUTY**

11 **I CONCUR,**

12 **CRISTINE E. GONDAK**

13 *Marguerite Sweeney*
14 **MARGUERITE SWEENEY**

15 *Ronnie G. Caplane*
16 **RONNIE G. CAPLANE**



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

18 **JUL 07 2014**

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

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23 **LAW OFFICES OF JACK DAVIDSON**

24 **PAG/sye**

25 **NEWTON, Donna**