

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

3
4 **DONNA IVES,**

5 *Applicant,*

6 **vs.**

7 **DR MYERS DISTRIBUTING COMPANY;**
8 **PREFERRED EMPLOYERS INSURANCE**
9 **COMPANY,**

10 *Defendant.*

Case No. **ADJ11025609**
(San Jose District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

11
12 We previously granted Applicant's Petition for Reconsideration (Petition) to further study the
13 factual and legal issues in this case. This is our Opinion and Decision After Reconsideration. Applicant
14 sought reconsideration of the Findings of Fact issued by a workers' compensation administrative law
15 judge (WCJ) on February 15, 2018, wherein the WCJ found that applicant, while employed on
16 December 7, 2015, sustained industrial injury to her head, and claims industrial injury to her vision and
17 spine. The WCJ also found that the parties stipulated that there is no chiropractic neurologist in
18 defendant's medical provider network (MPN), and that the November 13, 2017 request for authorization
19 (RFA) did not constitute a valid request for treatment with a chiropractic neurologist. The WCJ found
20 that issues of validity of the utilization review (UR) and the need for treatment with Dr. Rachman Chung
21 are moot.

22 Applicant contended that the WCJ erred in finding that the RFA was invalid, arguing that the
23 treatment with Dr. Rachman Chung, chiropractic neurologist, should be authorized.

24 We have considered the Petition for Reconsideration, and we have reviewed the record in this
25 matter. No answer was received. The WCJ has filed a Report and Recommendation on Petition for
26 Reconsideration (Report), recommending that applicant's petition be denied.

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1 Based on our review of the record, and for the reasons discussed herein, we will rescind the
2 February 15, 2018 Findings of Fact, and return the matter to the trial level for further proceedings to
3 develop the record and a new decision by the WCJ.

4 **FACTS**

5 Applicant filed an application for adjudication of claim alleging that on December 7, 2015, she
6 sustained industrial injury to her head, brain, eye, and nervous system, while working for DR Myers
7 Distributing Company, Inc., as an administrator. Defendant accepted injury to the head.

8 Applicant designated David F. Smolins, M.D., as her primary treating physician.

9 On February 5, 2018, the matter proceeded to an expedited hearing. The parties stipulated that
10 there was no chiropractic neurologist in the MPN. The issues were framed as follows:

- 11 1. Need for medical treatment, specifically whether or not there was a proper Request for
12 Authorization for treatment with a chiropractic neurologist on the 11/3/2017 RFA.
- 13 2. Whether the UR authorization of 11/13/2017 was valid.
- 14 3. Need for determination as to whether or not eight sessions of treatment with Dr. Rachman
15 Chung should be authorized.
- 16 4. All other issues are deferred.

17 The documentary evidence submitted by applicant included a DWC form RFA which included a
18 narrative report from her treating physician, Dr. Smolins, both dated November 3, 2017. (Applicant's
19 Ex. 1). The DWC form RFA states under "outside referrals": "Neurology consultation with Dr. Rutchik.
20 Eight sessions of chiropractic care with Dr. Chung." It also states: "Please see attached report dated
21 Nov 03, 2017." In his report, Dr. Smolins writes: "There is a specialist in San Francisco named
22 Dr. Rachman Chung who is a chiropractor of neurology. He specializes in balance issues, vertigo, and
23 tinnitus and would be optimal for treatment with Ms. Ives. . . . Please authorize eight sessions of
24 chiropractic care with Dr. Chung."

25 Defendant submitted a treatment authorization dated November 13, 2017 (Defendant's Ex. A),
26 and an authorization with attachment dated December 11, 2017 (Defendant's Ex. B.) The November 13,
27 2017, treatment authorization authorizes eight sessions of chiropractic treatment and a neurological

1 consultation. The "neuro consultation" is "with Provider of choice, Jonathan Rutchik, MD." The
2 chiropractic treatment was authorized as follows: "Chiro x8 sessions with a Chiro MPN provider for the
3 upper back. A MPN listing has been faxed separately." The November 13, 2017, treatment authorization
4 advises applicant she is "required to seek treatment with the Preferred Select MPN," in compliance with
5 section 4616.

6 The [December 11, 2017] authorization states: "We are in receipt of your 12/1/17 request for
7 1. Neurology consultation with Dr. Rutchik. 2. 8 sessions of chiropractic with Dr. Chung. Please note this
8 was authorized 11/13/2017. Dr. Michael Chung is in network for Chiro. See attached." (Defendant's
9 Ex. B.)

10 The matter was submitted without testimony. On February 15, 2018, the WCJ issued the disputed
11 decision, finding that the November 3, 2017 RFA did not constitute a proper request for eight sessions
12 with a chiropractic neurologist. Applicant sought reconsideration.

13 DISCUSSION

14 California's workers' compensation system makes the employer of an industrially injured
15 employee responsible for all medical treatment reasonably necessary to cure or relieve the injured
16 employee from the effects of his or her injury. (Lab. Code, § 4600.) Initially upon notification of an
17 industrial injury, the employer directs and controls the injured employee's medical treatment. (Lab.
18 Code, § 4600(c).)

19 As threshold matter, we note that if UR is not timely sought, the WCJ may exercise jurisdiction to
20 consider the merits of the requested treatment at issue. (See *Dubon v. World Restoration, Inc.* (2014) 79
21 Cal.Comp.Cases 313 (Appeals Board en banc).) As discussed below, we are persuaded that defendant did
22 not properly refer this matter to medical UR, and medical UR was not timely sought. Therefore, the
23 Workers' Compensation Appeals Board (WCAB) has jurisdiction to determine the reasonableness and
24 necessity of the requested medical treatment.

25 Senate Bill 228¹, effective January 1, 2004, added statutory provisions intended to make the
26 workers' compensation system more efficient and less costly by requiring every employer to establish a

27 ¹ Senate Bill 228, Statutes of 2003, chapter 639.

1 UR program under which only a licensed physician with competence to evaluate the specific clinical area
2 can modify, delay or deny treatment requests. Under each UR program, a claims administrator must
3 approve an injured employee's medical treatment unless a physician determines that such treatment is
4 medically unnecessary, based on a schedule adopted by the Administrative Director. The MTUS², as the
5 schedule is known, establishes uniform evidence-based standards to be used by physicians in evaluating
6 medical treatment requests. (Lab. Code, §§ 4610, 5307.27; see also, *Stevens v. Workers' Comp. Appeals*
7 *Bd.* (2015) 241 Cal.App.4th 1074, 1081.) The purpose of California's UR requirement, "... is to ensure
8 quality, standardized medical care for workers in a prompt and expeditious manner," since UR "balances
9 the dual interests of speed and accuracy, emphasizing the quick resolution of treatment requests, while
10 allowing employers to seek more time if more information is needed to make a decision." (*State Comp.*
11 *Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 241 [73 Cal.Comp.Cases
12 981].) A recognized advantage of UR is its efficiency, since employers can promptly approve
13 straightforward, non-controversial requests without medical UR. If, however, the request is more
14 complex, the employer can forward it to medical UR for the required physician input. This process
15 "ensures that a physician rather than a claims adjuster with no medical training makes the decision to
16 deny, delay or modified treatment." (*Id.*) Thus, the UR process coupled with the MTUS is intended to
17 achieve the overarching goal that injured employees receive those treatments scientifically proved to cure
18 or relieve their work-related injuries and illnesses in a timely and expeditious manner.

19 Every UR program is required to establish written policies and procedures to ensure that
20 decisions concerning the medical necessity and appropriateness of treatment requests are consistent with
21 the MTUS. (Lab. Code, § 4610 (g)(1).) Treatment that is "medically necessary" in the context of
22 treatment is defined to mean medical treatment that is reasonably required to cure or relieve the injured
23 employee of the effects of his or her injury based on standards as set forth in the MTUS adopted by the
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26 ² MTUS is the acronym for the Division of Workers' Compensation's Medical Treatment Utilization Schedule. The MTUS,
27 which is set forth in the California Code of Regulations, Title 8, section 9792.20 et seq., contains a set of guidelines that
provide details on which treatments are effective for certain injuries, as well as how often the treatment should be given, the
extent of the treatment, and surgical considerations.

Administrative Director. (Lab. Code, §§ 4600(b), 4610.5(c)(2).) Section 4610.5(c)(2) includes the following hierarchy of standards:

(A) The guidelines, including the drug formulary, 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. (Lab. Code, § 4610.5(c)(2).)

For injuries occurring on or after January 1, 2013, Administrative Director Rule 9792.6.1(t) defines an RFA as a "written request for a specific course of proposed medical treatment." (Cal. Code Regs., tit. 8, § 9792.6.1(t).) The request is required to be "set forth on a 'Request for Authorization (DWC Form RFA),' completed by a treating physician." (Cal. Code Regs., tit. 8, § 9792.6.1(t)(1). Emphasis added.) A "completed" RFA "must identify both the employee and the provider, identify with specificity a recommended treatment or treatments, and be accompanied by documentation substantiating the need for the requested treatment." (Cal. Code Regs., tit. 8, § 9792.6.1(t)(2).) Additionally, the RFA "must be signed by the treating physician." (Cal. Code Regs., tit. 8, § 9792.6.1(t)(3).)

Here, the RFA is a proper request because the requested treatment is set forth on a DWC Form RFA identifying both the employee and the provider, completed and signed by a treating physician. The RFA is accompanied by documentation identifying the requested treatment, and substantiating the recommended treatment with sufficient specificity.

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 MTUS when determining the medical necessity of a proposed medical treatment. (Lab. Code, § 4610(f).) Moreover, the MTUS clearly states that a treatment

1 request cannot be denied on the sole basis that the condition or injury is not addressed in the schedule.
2 (Cal.Code Regs., tit. 8, § 9792.21(d).) Applicant's condition is not addressed in the MTUS, so rule
3 9792.21 is relevant because it provides a logical framework within which to evaluate conditions and
4 treatments that are not addressed in the schedule.

5 Here, the applicant's primary treating physician submitted a proper request. Defendant did not
6 authorize treatment. Instead, defendant modified the request for eight sessions with a chiropractic
7 neurologist when it authorized treatment with a chiropractor, not a chiropractic neurologist. Defendant
8 should have conducted medical UR, consistent with the overarching Legislative purpose in enacting the
9 UR process "to ensure quality, standardized medical care for workers in a prompt and expeditious
10 manner" ... so that "a physician rather than a claims adjuster with no medical training, makes the
11 decision to deny, delay or modified treatment." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*
12 (*Sandhagen*), supra, 44 Cal. 4th at p. 241.) However, in this case the claims adjuster failed to consider
13 the RFA and the treating physician's report.

14 Because the attachment substantiating the need for treatment is a requirement, the DWC form
15 RFA and the attached document must be read together as a whole. The purpose of the required
16 documentation, such as a narrative report, is to expand upon and flesh out the RFA. A report may contain
17 the injured worker's treatment history, the justification for the requested treatment, or a description of the
18 requested treatment.

19 The duties of each party are clear. The requesting physician is obligated to provide the DWC
20 form RFA, with accompanying documentation. The claims adjuster must look at the physician's report,
21 not just the RFA, and read the RFA and the report as one package in its entirety. The defendant is
22 obligated to read the entire RFA, not just to skim the first page or to pick and choose portions of the
23 required accompanying documents. There is no legal basis for defendant's claims adjuster to "modify"
24 the RFA by authorizing treatment with a chiropractor instead of a neurological chiropractor.

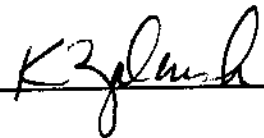
25 Accordingly, we will rescind the February 15, 2018 Findings of Fact, and return this matter to the
26 trial level WCJ to conduct further proceedings as necessary and a new decision.

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1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the February 15, 2018 Findings of Fact is **RESCINDED** and this matter is
4 **RETURNED** to the trial level for further proceedings by the WCJ consistent with this opinion.

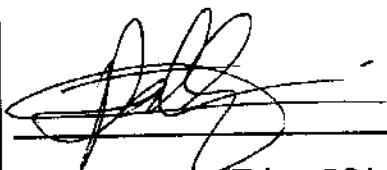
5 **WORKERS' COMPENSATION APPEALS BOARD**

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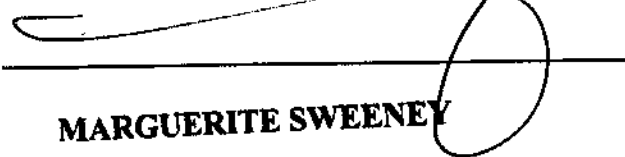
7 **CHAIR**

8 **KATHERINE ZALEWSKI**

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10 **I CONCUR,**

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14 **DEPUTY PATRICIA A GARCIA**

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17 **MARGUERITE SWEENEY**



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

20 **APR 30 2018**

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

23 **DONNA IVES**
24 **LAW OFFICES OF BRIAN ITO**
25 **LAW OFFICES OF MULLEN & FILIPPI**

26 **MG:abs**

27
IVES, Donna

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Applicant,

vs.

**DR MYERS DISTRIBUTING COMPANY,
INC.; PREFERRED EMPLOYERS
INSURANCE COMPANY,**

Defendants.

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Taking into account the statutory time constraints for acting on the petitions, and based upon our initial review of the record, we believe reconsideration must be granted 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 hereafter determine to be appropriate.

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petitions* shall be filed 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 (P.O. Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall not be e-filed in the Electronic Adjudication Management System (EAMS). Any documents relating to the petitions for reconsideration lodged in

1 violation of this order shall neither be accepted for filing nor deemed filed.

2 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
3 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
4 form.¹ If, however, a proposed settlement is being filed, the petitioners for reconsideration should
5 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
6 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

7 **WORKERS' COMPENSATION APPEALS BOARD**

8 **DEPUTY**

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10 **PATRICIA A GARCIA**

11 **I CONCUR,**

12 **CHAIR**

13 

14 **CONCURRING, BUT NOT SIGNING**

15 **MARGUERITE SWEENEY**



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

17 **APR 23 2018**

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

20 **DONNA IVES**
21 **LAW OFFICES OF BRIAN C. ITO**
22 **LAW OFFICES OF MULLEN & FILIPPI**

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24 **abs**

25 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,
26 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,
27 etc.)

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ11025609

DONNA IVES

v. DR MYERS DISTRIBUTING CO
INC; PREFERRED EMPLOYERS

WORKERS COMPENSATION
ADMINISTRATIVE LAW JUDGE: PAULINE H. SUH

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

- | | |
|-------------------------------|--|
| 1. Applicant's Occupation: | Not identified at time of trial |
| Applicant's Age: | 66 at the time of injury |
| Date of Injury: | 12/7/2015 |
| Parts of Body Injured: | head |
| | |
| 2. Identity of Petitioner: | Applicant filed the petition. |
| Timeliness: | The petition was timely filed on 2/22/2018. |
| Verification: | The petition was properly verified. |
| | |
| 3. Date of Issuance of Order: | 2/15/2018 |
| | |
| 4. Petitioners Contents: | Petitioner contends that the evidence does not justify the WCJ's findings of fact and that the findings of fact do not support the WCJ's decision. What petitioner appears to contend is that this WCJ erred in finding that the RFA was not an invalid request for chiropractic neurology and that treatment with Dr. Rachman Chung should be authorized. |

II
FACTS

Applicant, Donna Ives, was employed by DR Myers Distributing, Inc. and sustained an injury on 12/7/2015 to her head and claims to have sustained injury arising out of and in the course of employment to vision and spine. At the time of the injury, the employer's workers' compensation carrier was Preferred Employers Insurance Company.

On 11/3/2017, the primary treating physician, Dr. David Smolins, submitted a Request for Authorization for (1) Neurology Consultation with Dr. Rutchick and (2) Eight sessions of

chiropractic care with Dr. Chung. In support of his RFA, he attached his 11/3/2017 report. On 11/13/2017, defendant's Utilization Review (UR) authorized (1) Neuro consultation with Provider of Choice, Dr. Johnathan Rutchik and (2) 8 chiro sessions with chiro MPN provider.

Applicant contends that defendant should authorize treatment with Dr. Chung as referenced in the 11/3/2017 RFA. Defendant contends that defendants properly authorized treatment as requested within the RFA, but Dr. Rachman Chung is not within their MPN. Defendant contends that the RFA specifically stated 8 chiro sessions, not 8 chiro neuro sessions. Applicant insisted that defendant knew that Dr. Chung was a chiropractic neurologist, defendant does not have such specialist within its MPN, and hence treatment with Dr. Rachman Chung should be authorized.

The sole issue was whether the 11/3/2017 RFA was a valid request for 8 chiropractic neurology sessions, and if so, whether treatment with Dr. Rachman Chung should be authorized.

The matter proceeded to an Expedited Hearing with this WCJ. At the time of trial, parties could not stipulate to the applicant's occupation nor occupational group code. Parties therefore agreed to defer all issues except for whether the 11/13/2017 Request for Authorization (RFA) was valid request for treatment for chiropractic neurology and whether treatment with Dr. Chung should be authorized. Parties stipulated that there were no chiropractic neurologist within the defendant's Medical Provider Network (MPN).

On 2/15/2018, this WCJ issued Findings of Fact that the 11/3/2017 RFA was a valid RFA for neurology consult and 8 chiropractic sessions, but not a valid RFA for 8 chiropractic neurology session. This WCJ also recommended that, as discussed in length at the time of the hearing, a simple solution would be to have Dr. Smolins issue a proper RFA wherein he specify request for 8 chiropractic neurology sessions or 8 chiropractic session with chiropractic neurologist.

On 2/22/2018, applicant filed a timely verified Petition for Reconsideration.

There is no response from the defendant.

III **DISCUSSION**

Pursuant to CCR §9792.6.1(t), Request for Authorization (RFA) means a written request for a specific course of proposed medical treatment wherein such request must be completed, signed by the treater and under CCR §9785(g), the RFA must include, as an attachment, documentation substantiating the need for the requested treatment.

Applicant attorney appears to argue that this WCJ found the RFA to be defective. This is not so. In my decision, I found that the RFA was a complete request as it was identified as Request for Authorization with proposed medical treatment request for neurology consult and 8 chiropractic sessions, signed by Dr. Smolins with his report substantiating the need for the requested treatment. I also noted that there was a timely authorization for neurology consult and 8 chiropractic sessions.

In his petition, applicant attorney erroneously stated in his petition that on 11/3/2017, Dr. Smolins issued an RFA requesting authorization for 8 chiropractic neurology sessions with Dr. Rachman Chung, a chiropractic neurologist. This is not accurate. The RFA was for neurological consult with Dr. Rutchik and "8 chiro sessions with Dr. Chung". There was no mention of any chiropractic neurology sessions with a chiropractic neurologist.

While it is true that Dr. Smolins' report noted that applicant "has not trialed chiropractic care. There is a specialist in San Francisco named Dr. Rachman Chung who is a chiropractor of neurology... please authorize eight sessions of chiropractic care with Dr. Chung," the RFA itself only stated "8 sessions of chiropractic care."

Applicant attorney contends that the RFA has limited space and it is unlikely that a reasoned explanation of the need for any treatment could fit in that space. Reg. 9785 does not require the RFA form to contain such explanation, simply specify the proposed medical treatment. He also contends that if defendant found the RFA to be incomplete, they could have non-certified the request but instead certified the RFA. Neither defendant nor this WCJ found the RFA to be incomplete. Defendant did not have any valid grounds to find the RFA incomplete, defendant authorized both requests as specified in the RFA.

Applicant attorney also contends that this WCJ "charitably assumed that the defendant's URO could not have been alerted to Dr. Smolins' chiropractic neurology recommendation because his RFA did not include the word "neurology" next to the word "chiropractic." This again is inaccurate. Lengthy discussion took place at the time of the Expedited Hearing. There was a clear difference between requesting chiropractic treatment and chiropractic neurology treatment as there is a clear difference between request for psychiatric treatment with psychologist versus psychiatrist. There is a difference in requesting physical therapy vs aqua therapy. This WCJ opined that the treating physician should know what specific treatment authorization he is seeking, not the claims adjuster. Claims adjusters and UR receive numerous RFAs and reports from treaters. The treater is in a better position to specify the exact treatment authorization the treater is seeking.

Applicant contends that because Dr. Smolins specifically stated Dr. Chung within the RFA, defendants knew or should have known that Dr. Chung is a chiropractic neurologist. Applicant appears to argue that therefore, as defendants should have known the specialty of Dr. Chung, they should have known that the 8 chiro sessions meant 8 chiro neuro sessions. Further, since defendant's MPN does not have a chiropractic neurology, treatment with Dr. Chung should be authorized. Nothing in the Regulations note that the RFA is to propose request for authorization for treatment with a specific doctor or specific specialist. Rather, the RFA needs to specify the treatment being requested. As authorizing treatment with a specialist, as pointed out to the applicant attorney at the time of trial, there are a couple of steps missing. There must be a valid RFA for the treatment.

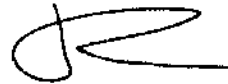
Applicant lastly contends that this WCJ incompletely described the issues for hearing and should have included whether treatment recommended by Dr. Smolins should be authorized. Again, this WCJ did not find the RFA defective. I found that Dr. Smolins' RFA's request was a valid request for neuro consult with Dr. Rachman and 8 chiro sessions. The said RFA did not constitute a valid request for chiro neuro treatments, the issue of whether treatment with Dr. Chung should be authorized was moot.

It continues to be this WCJ's recommendation that Dr. Smolins submit a proper RFA for chiro neuro sessions.

IV **RECOMMENDATION**

It is respectfully recommended that the applicant's Petition for Reconsideration be denied for the reasons stated above.

DATE: March 2, 2018



Pauline H. Suh
Workers' Compensation Judge

Date: 03/05/2018

Served on parties as shown on Official Address Record (attached)

By: O. Martinez