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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JARED CARNES,

Applicant,

vs.

**AUTO ZONE, INC.; NATIONAL UNION FIRE
INSURANCE COMPANY,**

Defendants.

Case No. ADJ7069144
(Santa Rosa District Office)

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

Defendant seeks reconsideration of the December 23, 2014 Findings And Order of the workers' compensation administrative law judge (WCJ) who found that defendant's Utilization Review (UR) of the request of applicant's treating physician, Eldan Eichbaum, M.D., for authorization for applicant to acquire a Sleep Number i8 bed was "not timely," and that the treatment request is supported by substantial evidence. Based upon those findings, the WCJ ordered defendant to authorize the Sleep Number i8 bed as described in Dr. Eichbaum's September 3, 2014 report.

Defendant contends that applicant did not demonstrate that there is reasonable medical necessity for the Sleep Number i8 bed that the WCJ ordered it to provide.

An answer was received.

The WCJ provided a January 20, 2015 Report and Recommendation on Petition for Reconsideration (Report) recommending that reconsideration be denied, and he explained his reasoning as follows:

[T]he parties stipulated that the Utilization Review, done September 12, 2014, was not timely, and on that basis, this judge clearly obtained jurisdiction over the issue of whether or not the requested treatment was reasonable and necessary to cure and/or relieve the applicant from the effects of the industrial injury [pursuant to the holding of the Appeals Board in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*)].

With regard to that issue, defendants allege that the reports of Dr. Eichbaum, the treating surgeon, as set forth in Joint Exhibits '1' and '2,' are not substantial evidence and should not have been followed in ordering defendant to provide the medical treatment. In Joint Exhibit '2,'

1 Dr. Eichbaum writes a July 16, 2014 Request for Authorization and sends
2 it to [third party administrator] Gallagher Bassett, setting forth that
3 applicant is scheduled for a major lumbar surgical procedure. He has
4 difficulty with sleeping, and his bed is over fifteen (15) years old. He has a
5 very poor mattress, Dr. Eichbaum recommends a new mattress better suited
6 for him and his condition to alleviate his pain and allow him to get rest. In
7 his letter of September 3, 2014, Dr. Eichbaum again writes defendant, set
8 forth in Joint Exhibit '1,' again setting forth that applicant is scheduled for
9 a lumbar decompression and fusion later this month. He has significant
10 low back and leg pain, and in order to optimize his recovery, he'll need an
11 appropriate bed to sleep on after the surgery. Dr. Eichbaum states that
12 applicant has an inadequate bed and this would definitely be a problem
13 following his surgery. He recommends that applicant get a new mattress.
14 Dr. Eichbaum specifically indicates that a 'Sleep Number I8' mattress
15 would be ideal after the surgery and would maximize his ability to recover.

16 It was based upon Dr. Eichbaum's opinion that this judge found the need
17 for a new mattress as set forth by Dr. Eichbaum to be reasonable and
18 necessary [and] so ordered it. Having reviewed defendant's Petition for
19 Reconsideration, nothing in it has changed this judge's mind. (Bracketed
20 material added.)

21 We have carefully reviewed the record and considered the allegations of the petition for
22 reconsideration, the answer, and the WCJ's Report.¹ For the reasons stated by the WCJ in his Report,
23 which is adopted and incorporated by this reference, the December 23, 2014 decision is affirmed and
24 defendant's petition for reconsideration is denied.

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¹ This case was previously before the Appeals Board when defendant sought reconsideration of a March 19, 2012 decision of the WCJ. Commissioner Moresi retired following the issuance of the October 2, 2012 Opinion And Decision After Reconsideration, and Commissioner Zalewski was appointed to take his place on the panel.

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the December 23, 2014
3 Findings And Order of the workers' compensation administrative law judge is **DENIED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **FRANK M. BRASS**

9 **I CONCUR,**

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12 **MARGUERITE SWEENEY**

13
14 **I DISSENT (See attached dissenting opinion)**

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16 
17 **KATHERINE ZALEWSKI**



18
19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **MAR 06 2015**

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

23 **JARED CARNES**
24 **JOHN BLOOM, ESQ.**
25 **HANNA, BROPHY ET. AL.**

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27 **JFS/bgr**

CARNES, Jared

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DISSENTING OPINION OF COMMISSIONER ZALEWSKI

I dissent. I would rescind the WCJ's December 23, 2014 order because applicant did not present substantial medical evidence showing that a Sleep Number i8 bed, base and pad, with an anticipated cost of \$5,325.86 (Joint Exhibit 4), is reasonable and necessary medical treatment that defendant is obligated to provide.²

An employer is obligated to provide medical treatment "that is *reasonably required* to cure or relieve the injured worker from the effects of his or her injury..." (Lab. Code, § 4600, emphasis added.) Through its enactment of recent statutes, the Legislature has shown that a dispute over whether a proposed medical treatment is reasonably required is to be determined by the use of evidence-based standards and *medical* opinion. (See Lab. Code, § 5307.27 [which provides for the development of a medical treatment utilization schedule (MTUS) that "shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care"] and § 4610.5(c)(2) [defining "medically necessary" and "medical necessity" based upon a hierarchy of standards as follows: "A) The guidelines 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."]; cf. Lab. Code, §§ 4604.5 [MTUS are presumed to be correct on the issue of extent and scope of medical treatment], 4610 [UR], 4610.5 and 4610.6 [independent medical review].)

The Appeals Board recognized that proposed medical treatment must be shown to be reasonable and necessary by substantial *medical* evidence in its decision in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*). In *Dubon II*, which the WCJ expressly relied upon in issuing the order in this case, the Appeals Board held that any "determination of medical necessity" by the WCAB following an untimely UR, as in this case, is to be "based on substantial

² Permissive judicial notice is taken that "Sleep Number" is a registered trademark of the Select Comfort Corporation, and "i8" is a specific model of Sleep Number bed. (Evid. Code, 542(h); < <http://www.sleepnumber.com/sn/en/Beds/Innovation-Series-Beds/p/i8>> , web site as of March 4, 2015.)

1 medical evidence.”

2 Here, it was not shown by substantial medical evidence that a Sleep Number i8 bed, base and pad,
3 is reasonable and necessary medical treatment for the industrial injury.

4 In his July 16, 2014 report (Joint Exhibit 2), Dr. Eichbaum wrote that he was requesting
5 authorization for a new bed because applicant was scheduled for back surgery and “has had difficulty
6 with sleeping” because his bed is “over 15 years old,” and he “has a very poor mattress.” None of this
7 establishes that a Sleep Number i8 bed is required as reasonable and necessary medical treatment.³

8 The August 8, 2014 Request for Authorization (Joint Exhibit 3) simply identifies a request for an
9 “I8 bed (complete set),” and includes no medical explanation or justification for the request.

10 In his September 3, 2014 letter (Joint Exhibit 1), Dr. Eichbaum reiterates that applicant has an
11 inadequate bed. He then offers the only explanation that is found in his reporting as to why authorization
12 for the Sleep Number i8 bed, base and pad was requested by him, writing in full as follows: “He
13 [applicant] has tried several mattresses, and the specific Sleep Number i8 queen mattress would be ideal
14 for him to have after surgery, and maximize his ability to recover.”

15 The above-described documents constitute all the evidence offered by applicant and relied upon
16 by the WCJ to support the December 23, 2014 order that defendant provide a Sleep Number i8 bed, base
17 and pad, as necessary medical treatment. The only rationale provided in those documents for specifically
18 requesting the Sleep Number i8 bed is that applicant “tried several mattresses,” and from that statement it
19 is reasonable to infer that the Sleep Number i8 bed was specifically requested only because applicant
20 happened to like that particular brand and model. That is far short of a showing by substantial medical
21 evidence that a \$5,325.86 Sleep Number i8 bed, base and pad is reasonably required as necessary
22 medical treatment for the industrial injury.

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24 _____
25 ³ It may be that applicant has an old mattress and he would sleep better with a new mattress, just as other things are
26 undoubtedly important to his recovery, like food, clothing and housing. However, that does not make defendant liable to
27 provide all of those things as reasonable *medical* treatment. Instead, as discussed herein, the record must contain substantial
medical evidence showing that the requested items or services are *reasonably required medical treatment* that is necessary to
cure or relieve the effects of the industrial injury. As discussed herein, applicant did not make such a record with regard to the
Sleep Number i8 bed, base and pad requested by Dr. Eichbaum.

1 It was not proven by substantial medical evidence at the expedited hearing that a Sleep Number i8
2 bed, base and pad is reasonable and necessary medical treatment, and I would rescind the WCJ's
3 December 23, 2014 order for that reason. (*Dubon II, supra.*)



4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **KATHERINE ZALEWSKI, COMMISSIONER**

8
9 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

10 **MAR 06 2015**

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

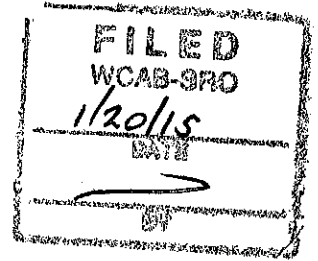
13 **JARED CARNES**

14 **JOHN BLOOM, ESQ.**

15 **HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

16
17 **JFS/bgr**

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



Case Nos. ADJ7069144

JARED CARNES

v. AUTOZONE, INC.; NATIONAL UNION FIRE
INSURANCE COMPANY BY GALLAGHER
BASSETT

Workers' Compensation Judge
MICHAEL J. HURLEY

DATE: JANUARY 20, 2015

**REPORT AND RECOMMENDATION ON PETITION
FOR RECONSIDERATION**

I

INTRODUCTION

This matter originally came before this judge for trial for an Expedited Hearing on October 6, 2014. Five exhibits were admitted into evidence. Defendant was given until October 10, 2014 to submit points and authorities, and the disposition would be that the matter would stand submitted for decision on October 10, 2014. The sole issue at the hearing was whether or not the Utilization Review done September 12, 2014, was timely, and if not timely, whether there was substantial evidence to order the treatment pursuant to *Dubon II*.

As the parties stipulated that the Utilization Review was not timely, this judge did then obtain jurisdiction over whether or not the treatment requested by Dr. Eichbaum was reasonable and necessary to cure and/or relieve from applicant from the effects of the industrial injury. On December 23, 2014, this judge issued a Findings and Order, finding that applicant had presented substantial evidence of need for medical treatment, and this judge ordered defendants to provide said medical treatment consisting of a sleep number

bed as set forth in the report of Dr. Eichbaum. It is from that Findings and Order that defendant has filed a timely Petition for Reconsideration. It is from that Petition for Reconsideration that this Report and Recommendation is made.

II

DISCUSSION

As indicated above, the parties stipulated that the Utilization Review, done September 12, 2014, was not timely, and on that basis, this judge clearly obtained jurisdiction over the issue of whether or not the requested treatment was reasonable and necessary to cure and/or relieve the applicant from the effects of the industrial injury.

With regard to that issue, defendants allege that the reports of Dr. Eichbaum, the treating surgeon, as set forth in Joint Exhibits "1" and "2," are not substantial evidence and should not have been followed in ordering defendant to provide the medical treatment. In Joint Exhibit "2," Dr. Eichbaum writes a July 16, 2014 Request for Authorization and sends it to Gallagher Bassett, setting forth that applicant is scheduled for a major lumbar surgical procedure. He has difficulty with sleeping and his bed is over fifteen (15) years old. He has a very poor mattress. Dr. Eichbaum recommends a new mattress better suited for him and his condition to alleviate his pain and allow him to get rest. In his letter of September 3, 2014, Dr. Eichbaum again writes defendant, set forth in Joint Exhibit "1," again setting forth that applicant is scheduled for a lumbar decompression and fusion later this month. He has significant low back and leg pain, and in order to optimize his recovery, he'll need an appropriate bed to sleep on after the surgery. Dr. Eichbaum states that applicant has an inadequate bed and this would definitely be a problem following his surgery. He recommends that applicant get a new mattress. Dr. Eichbaum specifically indicates that a "Sleep Number I8" mattress would be ideal after the surgery and would maximize his ability to recover.

It was based upon Dr. Eichbaum's opinion that this judge found the need for a new mattress as set forth by Dr. Eichbaum to be reasonable and necessary as so ordered it. Having reviewed defendant's Petition for Reconsideration, nothing in it has changed this judge's mind.

III

RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied.



MICHAEL J. HURLEY
WORKERS' COMPENSATION JUDGE

MJH:kcs

Served by mail on persons shown
on the official address record.

Date 1/20/15 By [Signature]

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION**

01-20-2015

**PROOF OF SERVICE OF REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

Case Number: ADJ7069144

EDD SDI SANTA ROSA Lien Claimant - Other, PO BOX 700 SANTA ROSA CA 95402,
DLEAMS216@EDD.CA.GOV

ELECTRONIC Lien Claimant - Other, 5702 BOLSA AVE HUNTINGTON BEACH CA 92649
WAVEFORM LAB

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4040 SACRAMENTO

HANNA BROPHY Law Firm, PO BOX 12488 OAKLAND CA 94604-2488
SANTA ROSA

JARED CARNES Injured Worker, 847 SAN DOMINGO DRIVE SANTA ROSA CA 95404

JOHN BLOOM SANTA Law Firm, 2101 4TH ST SANTA ROSA CA 95404,
ROSA WORKINJURYLAW@SBCGLOBAL.NET

The Report was served on
the above parties by mail
on 1/20/15 by kcs.