

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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5 **JESUS RODRIGUEZ,**

6 *Applicant,*

7 **vs.**

8 **AIR EAGLE, INC., CALIFORNIA**  
9 **INSURANCE GUARANTEE ASSOCIATION;**  
10 **SEDGWICK CMS FOR LEGION**  
11 **INSURANCE IN LIQUIDATION,**

12 *Defendants.*

**Case Nos. ADJ3415116 (LAO 0794342)**  
**ADJ581399 (LAO 0794343)**

**OPINION AND DECISION**  
**AFTER**  
**RECONSIDERATION**

12 We granted the Petition for Reconsideration by defendant on November 7, 2014 to further study  
13 the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

14 Defendant sought reconsideration of the Findings of Fact and Order (F&O) issued by a workers'  
15 compensation administrative law judge (WCJ) on August 19, 2014. In that F&O, the WCJ found that  
16 applicant sustained an industrial injury to his right elbow, right shoulder, psyche, right hand grip loss,  
17 and neck on December 29, 2000; that defendant's Utilization Review (UR) decision was issued timely;  
18 that defendant's UR decision denying home health care services of 24 hours per day, 7 days per week on  
19 a psychiatric basis was invalid; that applicant met his burden to prove that the requested treatment was  
20 reasonable and necessary to cure and relieve the effects of his industrial injury; that applicant was  
21 entitled to home health care services of 24 hours per day, 7 days per week on a psychiatric basis to be  
22 provided by a Licensed Vocational Nurse (LVN) or a psychiatric technician; and that applicant's  
23 Exhibits 10 and 11 were admitted into evidence.

24 Defendant contended that applicant did not have a valid prescription for home health care  
25 services within the meaning of Labor Code section 4600(h); that the UR decision did not contain a  
26 material defect that undermined the integrity of the UR decision as defined in *Dubon v. World*  
27 *Restoration, Inc.*, (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon I*); and that applicant

1 did not meet his burden to show that the requested home health care services were reasonable and  
2 necessary.

3 We did not receive an answer from applicant. We received a Report and Recommendation  
4 (Report) from the WCJ in response to the Petition for Reconsideration, which recommended denial of the  
5 Petition. On October 6, 2014, defendant requested permission to file and filed a Supplemental Petition  
6 for Reconsideration. We grant defendant's request and accept the Supplemental Petition. (Cal. Code  
7 Regs., tit. 8, § 10848.)

8 Here, the F&O issued on August 19, 2014. On October 6, 2014, we issued our en banc decision  
9 in *Dubon v. World Restoration, Inc.*, (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon*  
10 *II*). In *Dubon II*, we rescinded our previous en banc decision of February 27, 2014 in *Dubon I*, and we  
11 held that a UR decision is invalid only if it is untimely. *Dubon II* is binding on all Appeals Board panels  
12 and WCJs. (Cal. Code Regs., tit. 8, § 10341.) On November 7, 2014, we granted defendant's Petition  
13 and requested that applicant and defendant file concurrent supplemental responses which addressed  
14 *Dubon II* and the timeliness of defendant's UR decision. On December 1, 2014, both parties timely filed  
15 Responses. We accept both Responses for filing.

16 We have reviewed the record and have considered the allegations in the Petition for  
17 Reconsideration, the Supplemental Petition and the Responses and the contents of the Report. Based on  
18 our review of the record and for the reasons discussed below, we affirm the F&O, except that we amend  
19 it to find that defendant's UR decision was not issued timely (Finding of Fact, 2), that defendant received  
20 a prescription for home health care services (Finding of Fact, 4), and that applicant is entitled to home  
21 health care services from October 22, 2013 and continuing (Finding of Fact, 5). Otherwise, we make no  
22 other substantive changes.

### 23 BACKGROUND

24 On September 5, 2008 and September 15, 2008, defendant's Qualified Medical Evaluator (QME)  
25 in psychiatry, Sherry Mendelson, M.D., issued supplemental reports to address applicant's need for 24  
26 hours per day, 7 days per week of home health care services. (Exhibit C, Sherry Mendelson, M.D.,  
27 September 5, 2008; Exhibit B, Sherry Mendelson, M.D., September 15, 2008.) She reviewed and

1 summarized transcripts of depositions of applicant's spouse Aleida Rodriguez and sister Raquel Couse,  
2 both of whom were providing home health care services to applicant, and medical records from  
3 applicant's treating psychologist Elena Konstat, Ph.D. (Exhibit C, pp. 3-7; Exhibit B, pp. 2-3.) Dr.  
4 Mendelson noted that while applicant had severe depression and had three psychiatric hospitalizations for  
5 suicide attempts in 2004 and 2005, he had not made any subsequent suicide attempts and was not  
6 actively suicidal at time of her evaluation in April 2008. (Exhibit C, p. 7; Exhibit B, p 3.) She concluded  
7 that she did not believe that he needed 24 hours per day, 7 days per week in home health care services on  
8 a psychiatric basis. (*Ibid.*) She opined that if applicant's condition changed and "and he becomes  
9 actively suicidal with an actual plan, he should be hospitalized and the need for in-home health care  
10 should be revisited . . . if there is a period of time when Mr. Rodriguez is actively suicidal and not in the  
11 hospital, he should have care by a licensed psychiatric technician." (Exhibit B, p. 3; see Exhibit C, p. 7.)

12 On May 17, 2011, Dr. Mendelson reexamined applicant. (Exhibit J, Sherry Mendelson, M.D.,  
13 May 17, 2011.) Applicant reported that:

14 "[A]nywhere from once every two weeks to once every six weeks, he have  
15 (*sic*) the thought of taking his pills when the pain and depression get bad.  
16 He has not made any suicide attempts. His family keeps the pills, and Mr.  
17 Rodriguez doesn't know where they are, so he would not do anything to  
18 harm himself. Mr. Rodriguez says he doesn't know what would happen if  
19 had access to his pills." (Exhibit, p. 4; see p. 6.)

20 Dr. Mendelson further stated that since she last examined applicant "[e]very two to six weeks, he has  
21 some actual suicidal ideation with thoughts of taking his pills. This is new from my last evaluation in  
22 May 2008. . . . (Exhibit J, p. 14.) In pertinent part, she opined that:

23 "Mr. Rodriguez should have someone monitoring his medications. Either  
24 a family member or a licensed vocational nurse should administer his  
25 medications twice a day as he is confused, has concentration problems, and  
26 also has occasional suicidal thoughts of taking the medication. Thus, it is  
27 my opinion that Mr. Rodriguez' medication should be monitored by  
someone other than Mr. Rodriguez." (Exhibit J, p. 18.)

28 However, she concluded that applicant was not in need of 24 hours per day, 7 days per week of home  
29 health care services because "[h]e does have the suicidal thoughts, but they are occasional, and he does  
30 not have access to his medications." (*Ibid.*)

1 On November 9, 2012, Dr. Konstat issued a report following her review of a June 20, 2012 report  
2 by nurse case manager Katherine Perez-Silva, R.N., (Exhibit X). (Exhibit 1, Elena Konstat, Ph.D.,  
3 November 9, 2012.) In pertinent part, Dr. Konstat noted that applicant was “a dependent adult due to his  
4 psychological illness.” She stated that she agreed with Ms. Perez-Silva that the issue was whether  
5 applicant’s psychiatric team deemed him to be actively suicidal. She opined that:

6 “We both agree that if he is actively suicidal, he will need 24-hour awake  
7 staff. We both agree that if he is not deemed to be actively suicidal, he  
8 will not need 24-hour awake staff and can be handled by a caregiver  
during awake hours, but I believe this caregiver should be cognizant of the  
patient’s past suicidal attempts.” (Exhibit 1, p. 5.)

9 Dr. Konstat also agreed with Ms. Perez-Silva’s recommendations for various safety measures, including  
10 alarms, in applicant’s home. (Exhibit 1, pp. 5-6.)

11 On May 13, 2013, Farshid Hekmat, M.D., issued a report on his letterhead following his  
12 examination of applicant on May 8, 2013. (Exhibit 7, Farshid Hekmat, M.D., May 13, 2013.) In  
13 pertinent part, Dr. Hekmat reviewed Ms. Perez-Silva’s report of June 26, 2012, records from Brotman  
14 Medical Center from March 8 to March 20, 2013, and reports from Dr. Konstat of March 7, 2013 and  
15 March 21, 2013. (Exhibit 7, pp. 14-16, 17-18.) Dr. Hekmat reported that applicant had been hospitalized  
16 from March 7 to March 21, 2013 at Brotman Medical Center under the care of Jonathan Hulkower, M.D.,  
17 “after disclosing his plans of jumping out of a moving vehicle to end his life.” (*Ibid.*) He further reported  
18 that upon applicant’s discharge Dr. Konstat recommended that applicant have 24 hours per day, 7 days  
19 per week of home health care services “preferably by a psyche technician or LVN level” but that  
20 applicant’s wife and daughter were “currently” providing home health care services. (Exhibit 7, p. 17.)  
21 Dr. Hekmat incorporated the findings from Ms. Perez-Silva’s report, Dr. Konstat’s reports and the  
22 reports of Dr. Hulkower. (Exhibit 7, p. 18.) He concluded that “24/7 home care assistance by a psyche  
23 technician or an LVN is reasonable and necessary to cure and relieve Mr. Rodriguez [from] the effects of  
24 his orthopedic injury” and requested authority for that care. (Exhibit 7, p. 19.) The report is signed by  
25 Dr. Hekmat on May 17, 2013. (Exhibit 7, p. 20.)

26 On September 26, 2013, Dr. Hekmat issued a supplemental report on his letterhead. (Exhibit 6,  
27 Farshid Hekmat, M.D., September 26, 2013.) He stated in pertinent part that:

1 "Due to the seriousness of the applicant's condition, I requested  
2 authorization of 24/7 Home Health Care Assistance by a psyche technician  
3 or LVN, since is reasonable and necessary to cure and relieve Mr.  
4 Rodriguez from the effects of his orthopedic injury, including the  
5 consequences of it. Also, I incorporate the requests and recommendations  
6 made by Konstat in the past regarding the issue of 24/7 Home Health Care,  
7 since Mr. Rodriguez' condition has been abundantly documented."  
8 (Exhibit 6, pp. 1-2.)

9 Dr. Hekmat signed the report under penalty of perjury on September 26, 2013. (Exhibit 6, p. 2.)

10 On October 7, 2013, defendant's adjuster wrote to Dr. Hekmat. In pertinent part, she advised that  
11 she had reviewed his September 26, 2013 report. (Exhibit K, Sedgwick CMS Letter, October 7, 2013.)

12 On October 28, 2013, Dr. Hekmat submitted a Request for Authorization for Medical Treatment  
13 (RFA) to defendant. (Exhibit E, Request for Authorization, October 28, 2013.) The form is  
14 electronically date-stamped "10/28/2013 2:53:13 PM." The box which states: "Check box if the patient  
15 faces an imminent and serious threat to his or her health" is checked. The requested procedure is "24/7  
16 home health care by psyche tech or LVN." The RFA is signed by Dr. Hekmat. A copy of the medical  
17 report by Dr. Hekmat of September 26, 2013 was attached to the RFA.

18 On October 29, 2013, defendant's adjuster wrote to Dr. Hekmat. In pertinent part, she advised  
19 that she had reviewed his May 17, 2013 report. (Exhibit I, Sedgwick CMS Letter, October 29, 2013.)

20 On November 1, 2013, a Request for Medical Documentation was sent to Dr. Hekmat by a UR  
21 reviewer for defendant. (Exhibit G, Correspondence by Defendant, November 1, 2013.) The letter asked  
22 for additional information with respect to the duration of the requested home health care services and  
23 stated that if the information was not received, the request would be sent to a physician for review.

24 On November 6, 2013, a UR decision issued denying the requested home health care services.  
25 (Exhibit H, UR Decision, November 6, 2013.) On November 7, 2013, defendant's adjuster wrote to Dr.  
26 Hekmat and advised of four UR decisions, including the request for home health care services. (Exhibit  
27 F, Sedgwick CMS Letter, November 7, 2013.)

On November 22, 2013, Dr. Konstat issued a supplemental report. (Exhibit 11, Elena Konstat,  
Ph.D., November 22, 2013.) She again requested a psyche technician or LVN to provide 24 hours per  
day, 7 days per week of home health care services to applicant. She explained that applicant's physical

1 and psychological condition had deteriorated to the extent that his need for home health care services was  
2 an alternative to inpatient psychiatric hospitalization. (Exhibit 11, pp. 1-3.) She opined that:

3 "The patient needs a psych[e] technician or LVN level provider on a 24/7  
4 basis [] in accordance with the aforementioned medical literature, to  
5 observe, monitor and detect behavior patterns. Also, a psyche technician  
6 or LVN can provide intervention to restrain the patient of [sic] any  
7 potential violent or suicidal patterns. Mr. Rodriguez will benefit from a  
8 psyche technician or LVN to keep track of a safe environment and/or  
9 stressors in and out of the home. At any rate, it is quite evident that this  
10 patient is in dire need of psychiatric/psychological treatment to prevent a  
11 fatality." (Exhibit 11, pp. 3-4.)

12 On December 23, 2013, Dr. Hekmat issued a supplemental report after his review of Dr.  
13 Konstat's November 22, 2013 report. (Exhibit 12, Farshid Hekmat, M.D., December 23, 2013.) He  
14 agreed with Dr. Konstat's assessment of applicant's condition and her recommendation for 24 hours per  
15 day, 7 days per week of home health care services by a psyche technician or LVN. (Exhibit 12, p. 2.)

16 On December 30, 2013, the parties proceeded to trial on the issues of applicant's need for home  
17 health care services beginning October 22, 2013 and continuing; whether defendant failed to comply with  
18 Rule 9792.9.1 (Cal. Code Regs., tit. 8, § 9792.9.1); and whether there was substantial medical evidence  
19 to support a need for home health care services.

20 Defendant's claims adjuster Lori Valencia-Friend testified in pertinent part as follows.

21 "[T]he first complete RFA she received was on October 28, 2013" (Exhibit E) and that it was "the  
22 first correctly filled out request for authorization" that she received, and she sent it to UR. (Minutes of  
23 Hearing, Summary of Evidence, December 30, 2013 (MOH), p. 5, lines 8-10; p. 6, lines 16-18, p. 7, lines  
24 5-6.) She identified the request for additional information that was sent to Dr. Hekmat (Exhibit I).  
25 (MOH, p. 5, lines 14-16.) She confirmed that UR denied the request for 24 hours per day, 7 days per  
26 week of home health care services on November 6, 2013. (MOH, p. 5, lines 15-16.) She testified that:

27 "As a claims examiner she is familiar with the RFA process. She is  
familiar with a general requirement that when a request is made with the  
indication that there is an [imminent] and serious threat to a patient's  
health that there is a 72-hour requirement for utilization review to be  
completed. In the instant case the utilization review was not completed in  
72 hours." (MOH, p. 6, lines 11-14.)

1 Defendant's UR supervisor Linda Laubach, R.N., testified as follows:

2 "The first complete request with the correctly completed RFA was dated  
3 October 28, 2013. . . . She was aware that the RFA indicated that there  
4 was an '[imminent] threat' to the patient's health. (MOH, p. 8, lines 8-10.)

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6 "For reports marked with a check box regarding '[imminent] threats,' the  
7 72-hour period was not complied with." (MOH, p. 8, lines 23-24.)

8 On August 19, 2014, the WCJ issued the F&O, finding that defendant's UR decision issued  
9 timely. However, he then found that the UR decision suffered from material procedural defects pursuant  
10 to *Dubon I*. Consequently, he considered whether applicant had met his burden by way of substantial  
11 medical evidence to show that the requested home health care services were reasonable and necessary.  
12 (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230, 242 [73  
13 Cal.Comp.Cases 981] [injured worker bears the burden of proof to show that medical treatment is  
14 reasonably required].)

#### 15 DISCUSSION

16 We first address whether the UR decision of November 6, 2013 was invalid. In *Dubon II*, we  
17 held that a UR decision is invalid only if it is untimely. (*Id.* at p. 1299.) Accordingly, we consider former  
18 Rule 9792.9.1 which set forth the timeframes for UR decisions at the time that the subject RFA was  
19 submitted and the UR decision issued. (See Cal. Code Regs., tit. 8, § 9792.9.1, operative October 1,  
20 2013.)<sup>1</sup> According to then Rule 9792.9.1(a)(1), the RFA is deemed to have been received "on the date  
21 the form was received if the receiving facsimile or electronic mail address electronically date stamps the  
22 transmission when received. If there is no electronically stamped date recorded, then the date the form  
23 was transmitted shall be deemed to be the date the form was received by the claims administrator or the  
24 claims administrator's utilization review organization." (Cal. Code Regs., tit. 8, § 9792.9.1(a)(1).) Here,  
25 the October 28, 2013 RFA was electronically date-stamped "10/28/2013 2:53:13 PM" (Exhibit E), and  
26 defendant's adjuster testified that she received the RFA on October 28, 2013. Thus, the operative date is

27 <sup>1</sup> Rule 9792.9.1 was amended effective February 12, 2014, but all references herein are to Rule 9792.9.1,  
operative as of October 1, 2013.

1 October 28, 2013 at 2:53 p.m. The UR decision issued nine days later on November 6, 2013, and the  
2 WCJ concluded that defendant's UR decision was timely because it issued within the time requirements  
3 for a regular UR decision.

4 However, Dr. Hekmat checked the box for imminent and serious threat on the RFA, thereby  
5 raising the issue of whether the October 28, 2013 RFA was subject to the timelines for expedited review.  
6 According to then Rule 9792.9.1(c)(3)(A), "Prospective or concurrent decisions to approve, modify,  
7 delay, or deny a request for authorization related to an expedited review shall be made in a timely fashion  
8 appropriate to the injured worker's condition, not to exceed 72 hours after the receipt of the written  
9 information reasonably necessary to make the determination. The requesting physician must certify the  
10 need for an expedited review upon submission of the request." (Cal. Code Regs., tit. 8, §  
11 9792.9.1(c)(3)(A).) Here, both defendant's adjuster Ms. Valencia-Friend and defendant's UR reviewer  
12 Ms. Laubach testified that the RFA of October 23, 2013 was correctly filled out and that the RFA was  
13 complete when it was received on October 28, 2013. As part of the RFA, Dr. Hekmat attached his  
14 September 26, 2013 report which was signed under penalty of perjury. The purpose of the box check is  
15 to alert the reviewer that a separate timeframe for the decision applies, and there is nothing in Rule  
16 9792.9.1 as it existed in 2013 which allows a defendant to override a requesting physician's designation  
17 of a request as imminent and serious. Thus, the October 28, 2013 RFA should have been treated as an  
18 expedited request.

19 "For . . . expedited review, a decision to modify, delay, or deny shall be communicated to the  
20 requesting physician within 24 hours of the decision, and shall be communicated to the requesting  
21 physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be  
22 followed by written notice to the requesting physician . . . within 72 hours of receipt of the request [for  
23 expedited review]. (Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).) "The first day in counting any timeframe  
24 requirement is the day after the receipt . . . except when the timeline is measured in hours. . . [then] the  
25 time for compliance is counted in hours from the time of receipt of the DWC Form RFA." (Cal. Code  
26 Regs., tit. 8, § 9792.9.1(c)(1).) Here, 72 hours after October 28, 2013 at 2:53:13 p.m. is October 31,  
27 2013 at 2:53:13 p.m. The request for further information was sent on November 1, 2013, and both Ms.

1 Valencia-Friend and Ms. Laubach admitted that defendant did not meet the 72 hour timeframe.  
2 Accordingly, the UR decision of November 6, 2013 was untimely.

3 We now turn to defendant's contentions that it was only liable for home health care services if it  
4 received a prescription and that the RFA was not a valid prescription. Labor Code<sup>2</sup> sections 4600(h),  
5 4603.2(b)(1), and 5307.8 were enacted as of January 1, 2013. On June 12, 2014, we issued *Neri*  
6 *Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682  
7 (Appeals Board en banc) (*Neri Hernandez*) concerning home health care services. In *Neri Hernandez*,  
8 we concluded that sections 4600(h), 4603.2(b)(1), and 5307.8 "apply to all requests for home health care  
9 services and for payment thereof where no final decision on the request had issued by January 1, 2013."  
10 (*Id.* at p. 688.) Consequently, sections 4600(h), 4603.2(b)(1), and 5307.8 and *Neri Hernandez* apply to  
11 applicant's claim for home health care services. In *Neri Hernandez*, we held that:

12 "[T]he prescription required by section 4600(h) is either an oral referral,  
13 recommendation or order for home health care services for an injured  
14 worker communicated directly by a physician to an employer and/or its  
15 agent; or, a signed and dated written referral, recommendation or order by  
16 a physician for home health care services for an injured worker."  
17 (*Id.* at p. 693.)

18 Here, Dr. Hekmat recommended home health care services for applicant in his May 17, 2013  
19 report. (Exhibit 7.) Then, Dr. Hekmat recommended home health care services for applicant in his  
20 September 26, 2013 report. (Exhibit 6.) Dr. Hekmat's reports are on his letterhead, they identify  
21 applicant, they are dated, and they are signed. We conclude that Exhibits 6 and 7 are prescriptions for  
22 home health care services within the meaning of section 4600(h).

23 Furthermore, the RFA of October 28, 2013 (Exhibit E) is also a prescription within the meaning  
24 of section 4600(h). It identifies applicant, it requests home health care services, it lists Dr. Hekmat's  
25 name and address, and it is signed and dated by Dr. Hekmat. (See *Neri Hernandez, supra*, at p. 693.)

26 Section 4600(h) provides that an employer's liability is limited to 14 days before the date that the  
27 prescription was received. Here, defendant's adjuster wrote to Dr. Hekmat on October 7, 2013 and

<sup>2</sup> All further statutory references are to the Labor Code.

1 advised him that she had reviewed his September 26, 2013 report. She testified that she received the  
2 completed RFA on October 28, 2013. Then, she wrote to Dr. Hekmat on October 29, 2013 and advised  
3 him that she had reviewed his May 17, 2013 report. Fourteen days before October 7, 2013 is September  
4 23, 2013, fourteen days before October 28, 2013 is October 14, 2013, and fourteen days before October  
5 29, 2013 is October 15, 2013. The parties stipulated that the issue was whether applicant was entitled to  
6 home health care services beginning on October 22, 2013. We conclude that defendant received a  
7 prescription more than 14 days before October 22, 2013, so that it was potentially liable on the first day  
8 of the stipulated period of October 22, 2013.

9 Finally, we consider whether applicant met his burden to show that he reasonably required home  
10 health care services of 24 hours per day, 7 days per week by a psyche technician or LVN. To be  
11 substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability,  
12 be based on an accurate history and an examination, and must set forth reasoning to support the expert  
13 conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922,  
14 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board  
15 en banc).) “[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on  
16 inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation,  
17 conjecture, or guess. [Citations.] Further, a medical report is not substantial evidence unless it sets forth  
18 the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]” (*Gatten*,  
19 *supra*, at p. 928.)

20 In his Report, the WCJ stated that:

21 “Based on the medical reports of Elena Konstat, Ph.D., (Exhibits 1-5, 9  
22 and 11), Scott Miller, M.D., (Exhibit 9) and Farshid Hekmat, M.D.  
23 (Exhibits 6, 7, and 10) which are better reasoned and more persuasive than  
24 the medical reports of Sherry Mendelson, M.D., it is found that 24 hour,  
seven days per week, Home Health Care for applicant’s psychiatric  
condition is required to deal with his psychiatric issues which include  
suicidal tendencies.” (Report, p. 8.)

25 We note that Dr. Mendelson did not review Ms. Perez-Silva’s report of June 20, 2012 and that Dr.  
26 Mendelson’s reports issued before applicant’s suicide attempt and inpatient hospitalization in March  
27 2013. Even so, Dr. Mendelson’s opinion is in accord with the recommendations of Ms. Perez-Silva and

1 Dr. Konstat, as incorporated by Dr. Hekmat. All agreed that applicant could not be unsupervised in the  
2 administration of his medications, and all agreed that when applicant was actively suicidal, he required  
3 24 hours per day, 7 days per week of supervision by a psychiatric technician or LVN. Dr. Konstat has  
4 consistently treated applicant for many years for his psychiatric industrial injury and throughout his  
5 multiple suicide attempts. When Dr. Hekmat issued the RFA and his report of September 26, 2013, he  
6 concluded that applicant required the recommended services based on his own observation and the  
7 reports of Dr. Konstat and the other mental health professionals. Finally, Dr. Konstat's report of  
8 November 22, 2013 and Dr. Hekmat's report of December 23, 2013 recommending the services as an  
9 alternative to inpatient hospitalization support the WCJ's conclusion that applicant required home health  
10 care services by a psyche technician or LVN 24 hours per day, 7 days per week on a continuing basis.  
11 (See *Gregory v. Cott* (2014) 59 Cal.4th 996 [79 Cal.Comp.Cases 985] [reiterating California's strong  
12 public policy favoring provision of home health care services and disfavoring institutionalization of the  
13 elderly and disabled].) Thus, we are satisfied that applicant met his burden to show that he was entitled  
14 to home health care services of 24 hours per day, 7 days per week by a psyche technician or LVN. In  
15 keeping with the parties' stipulation, we find that the period of liability commenced on October 22, 2013.

16 Accordingly, we affirm the F&O, except that we amend it to find that defendant's UR decision  
17 was not issued timely (Finding of Fact, 2), that defendant received a prescription for home health care  
18 services (Finding of Fact, 4), and that applicant is entitled to home health care services from October 22,  
19 2013 and continuing (Finding of Fact, 5). Otherwise, we make no other substantive changes.

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2 For the foregoing reasons,

3 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals  
4 Board that the Findings of Fact and Order issued on August 19, 2014 by the WCJ is **AFFIRMED** except  
5 that it is **AMENDED** as follows:

6 Findings of Fact 2, 4 and 5 are amended as follows:

7 **Findings of Fact**

- 8 2. Defendant's UR decision of November 6, 2013 was untimely.
- 9 4. Applicant met his burden to prove that Dr. Hekmat's letter of September  
10 26, 2013 is a prescription under Labor Code section 4600(h) and that  
11 defendant received Dr. Hekmat's prescription on October 7, 2013.  
Applicant also met his burden to prove that the requested treatment is  
reasonable and necessary to cure and relieve the effects of the industrial  
injury.

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2 5. Applicant is entitled to home health care services on a psychiatric basis of  
3 24 hours per day, 7 days per week beginning on October 22, 2013 and  
4 continuing to be provided by a Licensed Vocational Nurse or a Psychiatric  
5 Technician.

6 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **I CONCUR,**

**FRANK M. BRASS**

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**MARGUERITE SWEENEY**

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15 **I DISSENT (See attached Dissenting Opinion),**



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**KATHERINE ZALEWSKI**

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

22 **JAN 09 2015**

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

25 **JESUS RODRIGUEZ**  
26 **LAW OFFICES OF MANUEL E. AGUIRRE, ATTN: MANUEL E AGUIRRE**  
27 **LAUGHLIN, FALBO, LEVY & MORESI, ATTN: JASON SANDERS**

*AS/jp*



1 **DISSENTING OPINION OF COMMISSIONER ZALESKI**

2 I agree with the majority that the UR decision was untimely and therefore invalid. I also agree  
3 that defendant received a prescription before the beginning of the stipulated liability period.

4 However, I disagree that applicant met his burden to show that he was entitled to home health  
5 care services by a psyche technician or an LVN from October 22, 2013 and continuing indefinitely.

6 Dr. Mendelson recommended home health care services by a psyche technician or an LVN *if*  
7 applicant was actively suicidal. In his May 17, 2013 report following his examination of applicant on  
8 May 8, 2013, Dr. Hekmat summarized all of the reports describing applicant's March 2013 suicide  
9 attempt and inpatient hospitalization. However, the record does not contain any subsequent medical  
10 reports by any medical provider after an examination of applicant. Presumably, a report prepared after  
11 an examination would document applicant's current medical condition and evaluate his ongoing needs.  
12 Instead, Dr. Konstat's reports are conclusory and based on generalities about suicidal individuals with no  
13 findings supporting her conclusions. Moreover, because the record lacks a report of a current  
14 examination, there is no evidence of the expected duration of applicant's need for services. Hence, I do  
15 not believe that the evidence is sufficient to support a conclusion that applicant was in need of the  
16 requested home health care services.

17 Thus, I respectfully dissent.



**WORKERS' COMPENSATION APPEALS BOARD**

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**KATHERINE A. ZALEWSKI, Commissioner**

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

**JAN 09 2015**

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

**JESUS RODRIGUEZ**

**LAW OFFICES OF MANUEL E. AGUIRRE, ATTN: MANUEL E AGUIRRE**  
**LAUGHLIN, FALBO, LEVY & MORESI, ATTN: JASON SANDERS**

*AS/jp*

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

5 **JESUS RODRIGUEZ,**

6 *Applicant,*

7  
8 *vs.*

9 **AIR EAGLE, INC., CALIFORNIA**  
10 **INSURANCE GUARANTEE ASSOCIATION;**  
11 **SEDGWICK CMS FOR LEGION**  
12 **INSURANCE IN LIQUIDATION,**

*Defendants.*

**Case Nos. ADJ3415116 (LAO 0794342)**  
**ADJ581399 (LAO 0794343)**

**OPINION AND ORDER**  
**GRANTING PETITION FOR**  
**RECONSIDERATION**  
**AND NOTICE TO FILE**  
**SUPPLEMENTAL RESPONSES**

13 Defendant seeks reconsideration with regard to a decision issued on August 19, 2014. Taking  
14 into account the statutory time constraints for acting on the petition, and based upon our initial review of  
15 the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further  
16 study the factual and legal issues in this case. We believe that this action is necessary to give us a  
17 complete understanding of the record and to enable us to issue a just and reasoned decision.  
18 Reconsideration will be granted for this purpose and to allow the parties to file supplemental pleadings  
19 and for such further proceedings as we may hereinafter determine to be appropriate.

20 In the Findings of Fact and Order (F&O), the workers' compensation administrative law judge  
21 (WCJ) found that applicant sustained an industrial injury to his right elbow, right shoulder, psyche, right  
22 hand grip loss, and neck on December 29, 2000; that defendant's Utilization Review (UR) decision was  
23 issued timely; that defendant's UR decision denying home healthcare services of 24 hours per day, 7  
24 days per week on a psychiatric basis was invalid; that applicant met his burden to prove that the  
25 requested treatment was reasonable and necessary to cure and relieve the effects of his industrial injury;  
26 that applicant was entitled to home health care services of 24 hours per day, 7 days per week on a  
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1 psychiatric basis to be provided by a Licensed Vocational Nurse or a Psychiatric Technician; and that  
2 applicant's Exhibits 10 and 11 were admitted into evidence.

3 Defendant contends that applicant did not have a valid prescription for home health care services  
4 within the meaning of Labor Code section 4600(h); that the Utilization Review (UR) decision did not  
5 contain a material defect that undermined the integrity of the UR decision as defined in *Dubon v. World*  
6 *Restoration, Inc.*, (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon I*); and that applicant  
7 did not meet his burden to show that the requested home health care services were reasonable and  
8 necessary.

9 We did not receive an Answer from applicant. We received a Report and Recommendation  
10 (Report) from the WCJ in response to the Petition for Reconsideration, which recommends denial of the  
11 Petition.

12 We have reviewed the record and have considered the allegations in the Petition for  
13 Reconsideration and the contents of the Report. Here, the F&O issued on August 19, 2014. On October  
14 6, 2014, we issued our en banc decision in *Dubon v. World Restoration, Inc.*, (2014) 79 Cal.Comp.Cases  
15 1298 (Appeals Board en banc) (*Dubon II*). In *Dubon II*, we rescinded our previous en banc decision of  
16 February 27, 2014 in *Dubon I*. Based on our review of the record and for the reasons discussed below,  
17 we will grant defendant's Petition and we will request that applicant and defendant each file concurrent  
18 supplemental responses which address *Dubon II* and the timeliness of defendant's UR decision.

19 I.

20 On October 28, 2013, Farshid Hekmat, M.D., submitted a Request for Authorization for Medical  
21 Treatment (RFA) to defendant. (Exhibit E, Request for Authorization, October 28, 2013.) The form is  
22 electronically date-stamped "10/28/2013 2:53:13 PM." The box which states: "Check box if the patient  
23 faces an imminent and serious threat to his or her health" is checked. The requested procedure is "24/7  
24 home health care by psyche tech or LVN." The RFA is signed by Dr. Hekmat. A copy of a medical  
25 report by Dr. Hekmat dated September 26, 2013 was attached to the RFA.

26 On November 1, 2013, a Request for Medical Documentation was sent to Dr. Hekmat by  
27 defendant Sedgwick. (Exhibit I, Correspondence by Defendant, November 1, 2013.) It asked for

1 additional information with respect to the duration of the requested home health care services and stated  
2 that if the information was not received, the request would be sent to a physician for review.

3 On December 30, 2013, the parties proceeded to trial on the issues of applicant's need for home  
4 health care services beginning October 22, 2013 and continuing; whether defendant failed to comply with  
5 Rules 9792.9.1 (Cal. Code Regs., tit. 8, § 9792.9.1); and whether there was substantial medical evidence  
6 to support a need for home health care services.

7 Defendant's claims adjuster Lori Valencia Friend testified in pertinent part as follows.

8 She received the first complete RFA on October 28, 2013 (Exhibit E) and sent it to UR. (Minutes  
9 of Hearing, Summary of Evidence (MOH), December 30, 2013, p. 5, lines 8-10.) She identified the  
10 request for additional information that was sent to Dr. Hekmat. (Exhibit I.) (MOH, p. 5, lines 14-16.) She  
11 confirmed that UR denied the request for 24/7 home health care services on November 6, 2013. (MOH,  
12 p. 5, lines 15-16.) She testified that:

13 "As a claims examiner she is familiar with the RFA process. She is  
14 familiar with a general requirement that when a request is made with the  
15 indication that there is an [imminent] and serious threat to a patient's  
16 health that there is a 72-hour requirement for utilization review to be  
17 completed. In the instant case the utilization review was not completed in  
18 72 hours." (MOH, p. 6, lines 11-14.)

17 Defendant's UR supervisor Linda Laubach, a registered nurse, testified as follows:

18 "The first complete request with the correctly completed RFA was dated  
19 October 28, 2013. . . . She was aware that the RFA indicated that there  
20 was an '[imminent] threat' to the patient's health." (MOH, p. 8, lines 8-  
21 10.)

21 \*\*\*

22 "For reports marked with a check box regarding '[imminent] threats,' the  
23 72-hour period was not complied with." (MOH, p. 8, lines 23-24.)

23 On August 19, 2014, the WCJ issued the F&O, finding that defendant's UR decision issued  
24 timely. However, he then found that the UR decision suffered from material procedural defects pursuant  
25 to *Dubon I*. Consequently, he considered whether applicant had met his burden by way of substantial  
26 medical evidence to show that the requested home health care services were reasonable and necessary.

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II.

Under Rule 9792.9.1., a UR decision in response to an expedited request for authorization must issue within 72 hours; otherwise other timelines apply. Here, in his Opinion on Decision, the WCJ concluded that defendant's UR decision was timely because it issued within the time requirements for a regular decision, but he did not consider the issue of whether the October 28, 2013 RFA was subject to the timelines for expedited review. Preliminarily, it appears that the October 28, 2013 RFA should have been treated as an expedited request, and if it was properly an expedited request, it would have been untimely. Moreover, the WCJ considered the issue of whether applicant met his burden to show that home health care services were reasonable and necessary after he concluded that the UR decision suffered from material procedural defects pursuant to *Dubon I*.

Under WCAB Rule 10848, the Appeals Board may request supplemental pleadings. (Cal. Code Regs., tit. 8, § 10848.) In order to give the parties an opportunity to adequately address the issues raised by *Dubon II* and their application to the provision of home health care services in this matter, the issue of timeliness of defendant's UR decision in response to the October 28, 2013 RFA, and to develop a full and complete record for reconsideration (see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753 [22 Cal.Comp.Cases 350]), we request that applicant and defendant each file concurrent supplemental responses.

The supplemental responses shall only address the issues raised by *Dubon II* and their application to the provision of home health care services in this matter, particularly the issue of timeliness of defendant's UR decision in response to the October 28, 2013 RFA, and shall not address any other issues. The supplemental responses must be filed within twenty (20) days of the service of this order. As applicable, this twenty-day period is extended under Rule 10507 (Cal. Code Regs., tit. 8, § 10507 [service by mail]) and Rule 10508 (Cal. Code Regs., tit. 8, § 10508 [last day to file falls on a weekend or holiday]). The supplemental responses must be filed with the Office of the Commissioners of the Appeals Board at the address below and not with any district office or through EAMS.

Accordingly, we grant defendant's Petition for Reconsideration and request supplemental responses.

1 For the foregoing reasons,

2 **IT IS HEREBY ORDERED** that defendant's Petition for Reconsideration of the Findings of  
3 Fact and Order issued on August 19, 2014 by the WCJ is **GRANTED**.

4 **NOTICE IS HEREBY GIVEN** that, pursuant to WCAB Rule 10848 (Cal. Code Regs., tit. 8, §  
5 10848), applicant and defendant are each requested by the Workers' Compensation Appeals Board to file  
6 **SUPPLEMENTAL RESPONSES**. The **SUPPLEMENTAL RESPONSES** shall only address the  
7 issues raised by *Dubon v. World Restoration, Inc.*, (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en  
8 banc) (*Dubon II*) and their application to the provision of home health care services in this matter,  
9 particularly the issue of timeliness of defendant's UR decision in response to the October 28, 2013 RFA,  
10 and shall not address any other issues. The **SUPPLEMENTAL RESPONSES** must be filed within  
11 twenty (20) days of the service of this order, plus five (5) days under Rule 10507 (Cal. Code Regs., tit. 8,  
12 § 10507 [service by mail]) and as applicable under Rule 10508 (Cal. Code Regs., tit. 8, § 10508 [last day  
13 to file falls on a weekend or holiday]), and must be filed at the Office of the Commissioners of the  
14 Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor,  
15 San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-  
16 9459), and shall not be filed at the Los Angeles district office or any other district office of the Workers'  
17 Compensation Appeals Board and shall not be e-filed in EAMS.

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

CASE NUMBERS: ADJ3415116-MF, ADJ581399

JESUS RODRIGUEZ

-vs.-

AIR EAGLE INC; CALIFORNIA  
INSURANCE GUARANTEE  
ASSOCIATION; SEDGWICK CMS  
FOR LEGION INSURANCE IN  
LIQUIDATION

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE:

Hon. JOHN HERNANDEZ

DATES OF INJURY:

12/29/2000;  
CT 12/29/2000 – 04/25/2001

**JOINT REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

I  
**INTRODUCTION**

The applicant sustained one specific injury (ADJ3415116-MF) and one continuous trauma injury (ADJ581399). The applicant was employed by Air Eagle, Inc. at the time of both injuries. At the time of both injuries, the applicant was 55 years old and employed by Air Eagle, Inc. It is stipulated by the parties that as a result of both injuries, the applicant sustained injuries arising out of and occurring in the course of her employment to his right elbow, right shoulder, psyche, right hand grip loss, and neck as a result of the specific injury. As to the injuries, there are no disputes.

Defendant has filed a timely and verified Petition for Reconsideration of this Judge's Findings of Facts and Orders dated 08/19/2014 whereby it was found that that defendant did complete a timely Utilization review for a request of "24/7" psychiatric Home Health Care but that the UR decision denying 24/7 Home Healthcare on a

psychiatric basis was invalid. The court further found that based on substantial medical evidence, that the applicant was entitled to "24/7" psychiatric Home Health Care to cure and relieve the effects of the industrial injuries.

Petitioner contends that this judge acted in excess of his powers, that the evidence does not justify the Findings of Fact, and that the Findings of Fact do not support the Order. There has been no response from defendant.

## **II** **FACTS**

The facts of this case are mostly undisputed. The parties admit that the applicant's injuries are AOE/COE to his right elbow, right shoulder, psyche, right hand grip loss and neck. There is no dispute that an Award on Stipulations for 90% PD was issued by WCJ Tolman on 02/22/2006. A DOR was filed by applicant and an MSC was set for 03/20/2012 before WCJ Watkins. Thereafter, the matter was continued to a trial before WCJ Tolman on 05/08/2012 on the limited issue of Home Health Care Services for the period of 04/03/2006 through 08/03/2007. (EAMS Doc ID No. 36810939 ).

WCJ Tolman was out that day and the parties presented before the instant WCJ who ordered the parties to obtain an independent Home Health Care evaluation to be performed by Katherine Perez-Silva, R.N.. The matter was taken off-calendar. A new DOR was filed by applicant on 08/06/2012, again raising the Home Care issue. In the interim, the issue related to the Home Care Services for the period of 04/03/2006 through 08/03/2007 resolved by way of a Joint Stipulation and Award and Order dated 08/29/2012. (EAMS Doc ID No. 42157675). On that same date the matter went off-calendar.

On 10/03/2012 a new DOR was filed by applicant, again on the Home Care issue, specifically the need for "24/7" psychiatric home care services. (EAMS Doc ID No. 43414659). The matter proceeded to an MSC before WCJ Horelly who continued the case to 01/3/2013 before the instant WCJ. The matter was eventually continued for trial on 01/28/2013. At that time the matter was submitted. (EAMS Doc ID No. 46814785). On 02/19/2013 an Order Vacating Submission and Order to Develop the Record issued specifically on the issue of Labor Code § 4600(h) and the matter was set for conference on 5/01/2013. (EAMS Doc ID No. 47031650). A conference was held and discovery continued on the matter and in the interim, applicant secured a report from the PTP incorporating the recommendations of the non-physician psychiatric secondary treater.

On 08/29/2013 a DOR for an Expedited Hearing was filed by applicant. (EAMS Doc ID No. 49681767). On 10/22/2013, at the Expedited Hearing applicant as Ordered to comply with the UR/IMR process with respect to the PTP's request for 24/7 Home Health Care utilizing the required RFA forms per Tit.8, Cal. Code of Regs. § 9785.5. The matter was taken off-calendar. . (EAMS Doc ID No. 50218530).

On 10/31/2013 applicant filed a new DOR for Expedited Hearing. (EAMS Doc ID No. 50345350). At the hearing the parties entered into a series of stipulations including continuing the Expedited to a regular trial off the expedited track on 12/30/2013. (EAMS Doc ID No. 50636056). On 12/30/2013 the matter proceeded to trial on the need for "24/7" Home Health Care on a psychiatric basis commencing 10/22/2013 through present and continuing. The main point of contention at trial was whether the UR denial

was timely. Applicant asserted that the Request for Authorization (RFA) was submitted to defendant on 10/22/2013 via fax by the PTP. Defendant asserted that they did not actually receive the complete and valid RFA until 10/28/2013 and completed a UR denial timely. Alternatively, applicant contended that due to the "expedited nature" of the request pursuant to Tit.8, Cal. Code of Regs. § 9792.9.1(c) (4), defendant only had up to 72 hours to make a determination; therefore, according to applicant, any determination past 10/31/2013 was untimely. Both the claims examiner and a representative from defendant's UR department testified.

After reviewing the evidence and considering the testimony of the witnesses, this Court, on 02/03/2014, issued a decision whereby it was found that the defendant timely completed Utilization Review for the request of 24/7 Home Health Care pursuant to Labor Code § 4610 and Tit. 8, Cal. Codes of Regs § 9792.10.1. It was also found that Tit. 8 Cal.Code Regs §§ 9792.9 and 9792.9.1 were inapplicable to the instant case. The parties were ordered to comply with Labor Code § 4610.5, as applicable, for any further dispute resolution.

Applicant sought timely reconsideration (EAMS DOC ID. No. 51593116) and after considering the merits of applicant's arguments, on 03/12/2014 this WCJ issued a Joint Order Rescinding the Findings of Facts and Orders having issued on 02/03/2014 and the matter was set for status conference on 04/16/2014. At the status conference of 4/16/2014, the defendant requested a continuance as a new attorney (within the same firm) had been assigned and he needed time to study the issues. (EAMS DOC ID. No. 52162532). The matter was set for further status conference on 5/5/2014. On

that day, the parties stipulated to resubmit the matters for decision with additional exhibits. The matter was resubmitted on 5/5/2014.

Due to some confusion over the exhibit numbering, on 5/5/2014, applicant's exhibits were renumbered to clarify the record. After submission, and upon reviewing the evidence, this WCJ noted that there was also an error with the lettering of defendant's exhibits and thereafter issued a redesignation of defendant's exhibits. (EAMS DOC ID. No. 53020294).

On 07/09/2014 Findings of Facts and Orders along with a Joint Opinion on Decision issued in these cases. This court found that defendant did not timely complete a valid UR determination. Additionally, it was found that applicant met his burden to show that 24/7 Psychiatric Home Health Care was reasonable and medically necessary.<sup>1</sup>

Defendant filed a timely and verified Petition for reconsideration of the 07/09/2014 decision. In preparing the Report and Recommendation it was determined that the decision needed to be rescinded and changed to reflect the Court's opinion that the UR determination was in fact timely, just invalid. On 08/14/2014 a Joint Order Rescinded was issued and on 08/19/2014 a new Findings of Facts and Orders along with a Joint Opinion on Decision were issued.

In this decision, the Court found that the UR determination dated 11/06/2013 was timely, but that it was defective because the incorrect "reviewer" was utilized pursuant to

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<sup>1</sup> The Original Opinion on Decision contains a typographical error stating "234/7" rather than "24/7".

Tit.8, Cal. Codes of Regs. § 9792.6.1(v). It was further found that the applicant met his burden to show that 24/7 Psychiatric Home Health Care to be provided by a Licensed Vocational Nurse or Psychiatric Technician was reasonable and necessary based on substantial medical evidence.

### **III DISCUSSION**

#### **ISSUE REGARDING WHETHER THE RFA IS A VALID PRESCRIPTION UNDER LABOR CODE SECTION 4600(h)**

In their Petition for Reconsideration Defendant raises the issue of whether the request for authorization is a valid prescription under Labor Code section 4600(h). This is a new issue that was not raised at the time of trial. In fact, as far as the court is concerned this issue was resolved when the applicant obtained a new report from the PTP, Dr. Hekmat, which is the basis of the RFA and subsequent UR issue.

New issues are not appropriate for a petition for reconsideration and will therefore not be addressed by this WCJ.

#### **THE UR DETERMINATION WAS TIMELY BUT INVALID**

In this Court's original Joint Opinion on decision and Findings of Fact, it was found that defendant did not complete UR timely. That was incorrect. UR was completed timely and the record should reflect that defendant completed a timely UR determination. There was no further request for reconsideration by either party as to the timeliness issue and the determination that the UR was completed timely.

The "rub" however is that the court found that the UR Denial prepared by David

H. Trotter, M.D., a Board Certified **Orthopedic Surgeon**, was evaluated "exclusively from a musculoskeletal standpoint." Dr. Trotter finds that the treatment request for 24-7 Home Health Care by Psych Technician or LVN is not considered medically necessary for this Injured Worker" from an orthopedic standpoint.

Labor Code § 4610(e) states:

"No person other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services, and where these services are within the scope of the physician's practice, requested by the physician may modify, delay, or deny requests for authorization of medical treatment for reasons of medical necessity to cure and relieve."

In the instant case, the UR physician makes it clear that he is not competent to evaluate specific mental health related clinical issues and that those issues are not "within the scope of his practice." This is clear to the court because Dr. Trotter specifically states that "[a]ny psych-associated issues should be addressed by a mental health reviewer", which he is not. Accordingly, it can be inferred that whether the applicant requires 24-7 Home Health Care by Psych Technician or LVN on a psychiatric basis is outside his area of expertise.

However, even if it were found that labor Code § 4610(e) was not violated, the UR is invalid because the UR doctor failed to review the plethora of psychiatric medical reports available. According to the UR report, the only psychiatric related reports reviewed (other than the report of Dr. Hekmat incorporating the findings of the secondary treating physicians) were the 08/06/2013 PR2 from Dr. Elena Konstat and an MES Review Report by Apama Dixit, Psy.D. Dated 09/09/2013. There were at least

seven reports from Dr. Konstat (Applicant Exhibits 1-5 and 9 and Defense Exhibit J) all dated before the UR date of 11/06/2013 which were apparently not sent to the reviewer. By failing to review these reports, the UR physician failed to address a significant portion of the applicant's medical history for treatment that is directly related to the requested treatment.

Accordingly, based on the self-professed statements by Dr. Trotter's confirming his lack of expertise in dealing with mental health issues, and his deference to a mental health reviewer on a mental health issue, this court found that the UR, while timely, was not valid. This court did not consider this to be a "minor technical or immaterial defect."

This court further finds that the failure by defendants to have the request reviewed by the appropriate medical specialist is a material defect that undermined the integrity of the UR decision rendering it invalid pursuant to the findings in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon*).

**THE NEED FOR 24/7 PSYCHIATRIC HOME HEALTH CARE IS NECESSARY BASED ON SUBSTANTIAL MEDICAL EVIDENCE**

Based on the medical reports of Elena Konstat, Ph.D., (Exhibits 1-5, 9 and 11), Scott Miller, M.D., (Exhibit 9) and Farshid Hekmat, M.D. (Exhibits 6, 7, and 10) which are better reasoned and more persuasive than the medical reports of Sherry Mendelson, M.D., it is found that 24 hour, seven days per week, Home Health Care for applicant's psychiatric condition is required to deal with his psychiatric issues which include suicidal tendencies.

Petitioner is correct that this WCJ previously found that the reports of Dr. Konstat did not constitute substantial medical evidence when this court vacated the submission on 2/19/2013. (*Defendant's Petition for Reconsideration*, 7/31/2014, p. 10, lines 22-25). That original determination was based on noncompliance with the provisions of Labor Code § 4600(h) in that "[h]ome health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician." In the interim from that day, additional medical evidence has been submitted to cure the original defect and as a whole now considered, the reports of Dr. Konstat are substantial medical evidence.

It is further noted that Dr. Trotter, the UR physician, did not review any of the reports issued by the mental health evaluators. Accordingly, the medical necessity issue is based on substantial medical evidence.

### **RECOMMENDATION**

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

Respectfully submitted,



JOHN HERNANDEZ  
Workers' Compensation Judge

Date: September 15, 2014