

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

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5 **KRISSY KORN,**

6 *Applicant,*

7 **vs.**

8 **ENTERTAINMENT PARTNERS;
9 INSURANCE COMPANY OF THE STATE
10 OF PENNSYLVANIA, administered by AIG
11 CLAIMS,**

12 *Defendant.*

**Case No. ADJ7329727
(Marina del Rey District Office)**

**ORDER DENYING
PETITION FOR
RECONSIDERATION**

13 We have considered the allegations of the Petition for Reconsideration and the contents of the
14 report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our
15 review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we
16 will deny reconsideration, except with regard to the WCJ's comment on Page 6 of the report to the effect
17 that defendant failed to meet its burden of proof that the treatment requested is consistent with the
18 medical treatment utilization schedule. We observe that it is applicant, not defendant, who has the burden
19 of proving the requested treatment is reasonably required. (See *Dubon v. World Restoration, Inc.* (2014)
20 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon I.*)

21 Further, we observe that this decision comports with our holding in *Dubon v. World Restoration,*
22 *Inc.* (October 6, 2014) 79 Cal.Comp.Cases __ (Appeals Board en banc) (*Dubon II.*)

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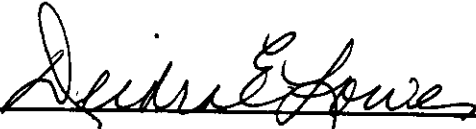
1 For the foregoing reasons,

2 **IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **MARGUERITE SWEENEY**

8 **I CONCUR,**

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12 **DEIDRA E. LOWE**

13 **CONCURRING, BUT NOT SIGNING**
14 **RONNIE G. CAPLANE**



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

20 **OCT 10 2014**

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

23 **KRISSY KORN**
24 **ASSOCIATED LIEN**
25 **IMPERIAL LIEN**
26 **KEGEL TOBIN**
27 **LEVY FORD**
LISTER MARTIN

jp

CASE NO.: ADJ7329727

KRISSY KORN

vs.

**ENTERTAINMENT PARTNERS;
INSURANCE COMPANY OF
THE STATE OF
PENNSYLVANIA**

WORKERS' COMPENSATION JUDGE:

CIRINA A. ROSE

DATE OF INJURY:

5/4/2010

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

1. Applicant's Occupation: Craft Services Person
2. Applicant's Age: 43
3. Date of injury: 5/4/2010
4. Parts of Body Injured: low back and right shoulder
5. Identity of Petitioner: Defendant, Entertainment Partners;
Insurance Company of the State of
Pennsylvania
6. Timeliness: The petition was timely filed.
7. Verification: A verification is attached.
8. Date of Findings and Award: 7/28/2014
9. Petitioner's contention:
 1. There is no substantial medical Evidence supporting the Award of L4-L5 and L5-S1 Anterior Lumbar Interbody Fusion with Cage and Allograft and L4-

L5 and L5-S1 Posterolateral Fusion with
Screws and Allograft.

II
FACTS

The Applicant, Krissy Korn, while employed on 5/4/2010, as a Craft Services Person by Entertainment Partners, sustained injuries to her low back and right shoulder.

Dr. John Larsen has served as Applicant's primary treating physician since July 2010. He has treated her for her right shoulder and low back. She had right shoulder surgery performed by Dr. Larsen on 10/31/2011. Dr. Larsen recommended a L4-L5 and L5-S1 anterior lumbar interbody fusion with AXIALIF, and posterolateral fusion at L4-L5 and L5-S1 with screws and allograft on 6/1/2012. Dr. William Dillin was selected as a second opinion consult in accord with California Regulation Section 9788.1 then applicable. Applicant was examined by Dr. Dillin on 7/26/2012 and he recommended that Applicant be detoxified off of all opioid medications and be reconditioned and pursue rehabilitation as opposed to surgical intervention. (See Exhibit D)

At trial, Applicant testified that she had tried everything that Dr. Larsen had asked her to do including epidurals, medications, morphine shots and physical therapy. The Applicant also participated in a Functional Restoration program in 2013 for 5 to 6 months which included pool therapy, physical therapy, mental therapy and art therapy.

She further testified that in the last 30 days before trial she experienced burning in her back when she walks too far or sits too long. The pain goes to her head. She has trouble sleeping. Her low back pain affects everything she does including activities of daily living. She is aware that Dr. Larsen has recommended back surgery for a long time and if it is authorized she is ready and in favor of having that surgery.

The Applicant recalled being examined by Dr. Dillin in 2012 and that Dr. Dillin wanted her to get off medications before considering surgery. He also wanted her to attend a functional restoration program which she did subsequent to her exam with Dr. Dillin.

This matter was set for expedited hearing on 7/8/2014, the Applicant was the only witness to testify and all documentary evidence was admitted or marked for identification. The issues that were set forth by the parties were as follows:

1. Need for further medical treatment, specifically L4-L5 and L5-S1 and anterior interbody fusion with cage and allograft and L4-L5 and L5-S1 posterolateral fusion with screws and allograft per Dr. Larsen.
2. Applicant is claiming defendant's UR denial is untimely.
3. The Requesting Physician is not in the MPN and the Medical Treatment Utilization Schedule is presumed controlling.
4. Applicant contends MPN issue not timely raised.
5. No Notice of the MPN and no Notices were sent regarding the MPN.

A Findings and Award issued on 7/28/2014. Defendant filed a timely and verified Petition for Reconsideration on 8/22/2014 contending that there is no substantial medical evidence supporting the Award of L4-L5 and L5-S1 Anterior Lumbar Interbody Fusion with Cage and Allograft and L4-L5 and L5-S1 Posterolateral Fusion with Screws and Allograft. Applicant filed an Answer to the Petition for Reconsideration on 9/4/2014.

III **DISCUSSION**

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to *Smales v. WCAB* (1980) 45 CCC 1026, this Report and Recommendation cures that defect.

The Findings and Award determined the Utilization Review untimely which Petitioner does not challenge. Petitioner has chosen to appeal only the Award of back surgery based on lack of substantial evidence to support said surgery.

Under *Dubon v. World Restoration Inc.* " If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR, but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required." Defendant contends that Applicant has failed to demonstrate that the requested back surgery is medically necessary. This contention is not supported by the evidence or un rebutted testimony admitted.

As there is no dispute that the UR denial dated 5/27/2014 is untimely and therefore invalid, no portion of that UR determination may be relied upon including the opinions of the Utilization Reviewer, Dr. Waltrip. Applicant points out in her Answer to Petition for Reconsideration dated 9/4/2014 that the unchallenged determination that the UR determination was untimely and therefore invalid and renders the U.R. Reviewer's opinion/report in support thereof also "without force or effect". This WCJ concurs.

The only other medical report offered by Defendant is that of Dr. William Dillin dated 7/26/2012. With regard to this report, Applicant points out that the determination of Dr. Dillin on 7/26/2012 may no longer be germane in part because it arose out of the no longer valid Labor Code Section 4062(b), but further because it failed to account for the subsequent conservative treatment Applicant testified she underwent including the functional restoration program she participated in 2013. In light of these two reasons the WCJ did not find that Dr. Dillin's report was substantial medical evidence on the issue of whether Applicant was entitled to the specific back surgery at issue.

On the other hand, the medical report of the Applicant's primary treating physician, John Larsen dated 4/18/2014 discusses the recent MRI scan of Applicant's lumbar spine dated 4/15/2014, the fact that she has failed a long course of non-surgical treatment and includes a well-reasoned discussion as to why the specific back surgery requested is for her improvement and notes her agreement to proceed. (See Exhibit 4 pages 4 to 5)

The medical reports of Dr. John Larsen, Applicant's primary treating physician since July 2010, along with the credible and unrebutted testimony of the Applicant regarding the constant pain she suffers and the significant effect it has on her daily living are the support necessary to establish Applicant's entitlement to the specific back surgery awarded on 7/28/2014 and recommended by Dr. John Larsen on 4/18/2014.

Finally, Petitioner contends that medical treatment must be consistent with the Medical Treatment Utilization Schedule. Neither case cited by Petitioner *Dubon* or *State Compensation Insurance Fund v. W.C.A.B (Sandhagen) (2008) 72 CCC 981* provides support for this position. Further there is no evidence to support this position either. In fact, in *Sandhagen*, Defendant did not seek review of the Court of Appeal's holding that its failure to comply with the Labor Code section 4610 deadlines rendered the utilization medical report inadmissible.

W.C.A.B. requires compliance w/ MTUS

If Defendant had wished to make an argument that the need for the "high risk surgery" requested was not compliant with MTUS they should have presented evidence or legal authority to support it. In light of the fact that they have not, the WCJ finds that they have failed to meet this burden. The court notes that the medical report of Dr. John Larsen date 4/18/2014 does reference several guideline including MTUS and ACOEM. No evidence or authority was presented by Petitioner that these sections were improperly relied upon.

not Δ's burden

With regard to the case at hand, the applicant's unrebutted testimony that she has heeded her treating physician's medical advice with regard to her

medical treatment since July 2010, that she has attempted all conservative measures of treatment short of surgery and that due to the significant back pain that affects her daily activities she is willing to proceed with the specific back surgery her treating physician has recommended. This testimony is supported by the Medical reports of Dr. John Larsen which thoughtfully incorporates the history of Applicant's symptoms and treatment as well as the concurrent diagnostic findings. These reports are deemed substantial medical evidence that the specific back surgery recommended is medically necessary to cure or relieve the Applicant from the effects of her industrial injury.

IV
RECOMMENDATION

As the Petition for Reconsideration fails to demonstrate good cause upon which to set aside the Findings and Award dated 7/28/2014, it is respectfully recommended that the Petition for Reconsideration be denied for lack of good cause as set forth above.

Respectfully submitted,



CIRINA A. ROSE
Workers' Compensation Judge

Date: 9.8.2014

Served on parties as shown on
Official Address Record.

By: 