WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

OSCAR GARCIA-PICEN, ***Applicant,*** **vs.** **TIGHT QUARTERS, INC.; CALIFORNIA INSURANCE COMPANY,** ***Defendant.***	**Case No. ADJ9070770** **(Santa Ana District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

In order to further study the issues, we previously granted defendant's petition for reconsideration of the February 6, 2014 Findings And Order of the workers' compensation administrative law judge (WCJ), who ordered defendant to "authorize the viscosupplementation injections" recommended by applicant's treating physician Ralph Venuto, M.D., based upon the finding that defendant's utilization review (UR) denial dated May 24, 2013 "was defective," and that the injections are "reasonable and necessary to cure or relieve" the effects of the admitted industrial injury to the right knee that was sustained by applicant while he was working for defendant as a foreman on March 16, 2012.

Defendant contends that the WCJ's finding that defendant's UR was defective is in error, and that the February 6, 2014 order to provide viscosupplementation injections is not supported by substantial medical evidence.

An answer was not received from applicant. The WCJ provided a Report And Recommendation Of California Workers' Compensation Administrative Law Judge On Petition For Reconsideration (Report) recommending that defendant's petition be denied.

The WCJ's February 6, 2014 decision is rescinded as our Decision After Reconsideration. The WCJ incorrectly determined that defendant's UR was defective because it was not signed by the UR physician. It appears the UR may be defective for other reasons and this information should be provided to the UR physician for further consideration.

BACKGROUND

Applicant admittedly injured his knee in the course of his employment by defendant on March 16, 2012, and surgery was performed on May 16, 2012. He thereafter received two Synvisc injections on or around October 2012, but they did not provide relief and a third injection was not given at that time. Applicant continued to experience symptoms in the knee and a second surgery was performed on March 1, 2013. Thereafter, Dr. Venuto requested authorization to perform a series of viscosupplementation injections to complete the course of treatment. Defendant conducted a UR in response to the request. On May 24, 2013 defendant denied Dr. Venuto's request for authorization to provide the injections based upon the UR physician's statement on page three of her May 24, 2013 report that "the clinical evidence provided does not establish medical necessity" for the requested injections. (Defendant's Exhibit J.)

On November 25, 2013, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing. Applicant's counsel asserted on the declaration that defendant's "UR denial was done improperly," and a hearing was requested on the issue of entitlement to medical treatment. Defendant did not object to the declaration and participated in the expedited hearing that was conducted on January 29, 2014 to address the medical treatment request. In addition to Dr. Venuto's requests for authorization and his reports, the WCJ also received into evidence defendant's UR report and correspondence, reports from other treating physicians and applicant's testimony. Following the hearing the WCJ issued her February 6, 2014 decision ordering defendant to provide the injections.

The WCJ writes in her Opinion and in her Report that she concluded that defendant's UR denial was defective because the UR report was not signed by the UR physician. The WCJ further writes in her Report that her decision is in accord with the en banc decision of the Workers' Compensation Appeals Board in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon*), which issued after the trial in this case, and which addresses the process that now applies to medical treatment disputes following the Legislature's implementation of the Independent Medical Review (IMR) process as part of Senate Bill 863 (SB 863).

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DISCUSSION

The WCJ's determination that defendant's UR is defective because it is not signed by the UR physician is incorrect. Attached to Defendant's Exhibit J in the EAMS file is the May 24, 2013 Review Determination Notification PreAuthorization report (UR Report) prepared by defendant's UR physician. The third page of that report includes what appears to be the signature of defendant's UR physician, Victoria Knoll, M.D. Thus, the WCJ's stated reason for concluding that the UR was defective is in error and her February 6, 2014 decision based upon that incorrect determination is rescinded.[1]

In addition, the WCJ's reliance upon the decision in *Dubon* in her Report is misplaced. In *Dubon*, the Appeals Board addressed the process that applies to medical treatment disputes as a result of the Legislature's implementation of the IMR process as part of SB 863.[2] However, that process is not applicable in this case because applicant was injured in March 2012, and defendant's UR denial issued prior to the July 1, 2013 implementation date of SB 863. Instead, applicant could have sought an Agreed Medical Evaluator or Panel Qualified Medical Evaluator to address the treatment dispute. However, neither party objected to the process they are following so the issue is not further addressed herein. (*MCA, Inc./Universal Studios, Inc. v. Workers' Comp. Appeals Bd.* (*Ferrell*) (1977) 62 Cal.Comp.Cases 529 (writ den.) [variance from statutory procedure does not support reversal when no party timely objects].)

With regard to defendant's UR, it appears from the current record that the UR physician was not aware of a part of applicant's relevant medical history when she considered Dr. Venuto's request to perform the viscosupplementation injections. In her May 24, 2013 UR Report, Dr. Knoll describes applicant's medical history and notes that he underwent right knee arthroscopy with partial meniscectomy on May 16, 2012. However, nowhere in that UR Report does Dr. Knoll mention

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[1] In that the UR Report was signed by the UR physician, we do not reach defendant's contention that a UR physician's signature is not required and we express no opinion on whether a UR determination is defective if it does not include the signature of the UR physician.

[2] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].

applicant's second surgery that was performed on March 1, 2013, which appears to be a material fact in support of Dr. Venuto's request to perform the viscosupplementation injections.

In order to assure a proper UR determination, the UR physician should be informed of the fact that the injections were requested *after* a second surgery on applicant's knee.[3]

In considering the UR, it is important to recognize that the UR report is *not* "presumed correct on the issue of the extent and scope of medical treatment" as defendant argues in its petition.[4] (5:10.) Instead, Labor Code section 4604.5(a) now provides as follows:

> "The recommended *guidelines set forth in the medical treatment utilization schedule adopted by the administrative director pursuant to Section 5307.27 shall be presumptively correct* on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury. The presumption created is one affecting the burden of proof." (Emphasis added.)

Labor Code section 5307.27, in turn provides for the development of a "medical treatment utilization schedule" by the Administrative Director.[5] Thus, on its face, the presumption created by Labor Code section 4604.5(a) only applies to the "medical treatment utilization schedule" developed by the Administrative Director, and it does not apply to UR as argued by defendant.

The WCJ's February 6, 2014 decision is rescinded and the case is returned to the trial level.

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[3] In that the UR determination was issued more than one year ago on May 24, 2013, the primary treating physician may submit another request for authorization to provide treatment.

[4] Defendant's citation in the petition to Labor Code section 4604.5(a)[1][2] is incorrect. Labor Code section 4604.5 was amended in 2012, and subdivision (a)[1][2] no longer exists.

[5] Labor Code section 5307.27 provides in full as follows: "On or before December 1, 2004, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases."

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 6, 2014 Findings And Order of the workers' compensation administrative law judge is **RESCINDED** and the case is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

RONNIE G. CAPLANE

I CONCUR,

FRANK M. BRASS

I CONCUR AND DISSENT (SEE SEPARATE CONCURRING AND DISSENTING OPINION),

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 10 2014

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

OSCAR GARCIA-PICEN
REAL, HERNANDEZ & LY
HALLETT, EMERICK & WELLS

JFS/abs

SEPARATE CONCURRING AND DISSENTING OPINION OF COMMISSIONER SWEENEY

I concur with the majority that the WCJ incorrectly determined that defendant's UR was defective because it was not signed by the UR physician. I further agree with the majority that the WCJ's reliance upon the holding in *Dubon* is misplaced because applicant was injured in March 2012, and defendant's UR denial issued prior to the July 1, 2013 implementation date of SB 863. I also agree with the majority's statement that a UR report is *not* "presumed correct on the issue of the extent and scope of medical treatment," as defendant argues in its petition.

My dissent is from the decision to rescind the WCJ's February 6, 2014 award with a suggestion that the UR physician be informed of the second surgery and asked to reevaluate the treatment request because more than one year has passed since authorization was denied. In my view, the record shows that defendant's UR is defective on its face and the requested treatment has sufficient evidentiary support. Medical treatment should be expeditiously provided, and I would affirm the WCJ's order allowing the viscosupplementation injections.

The failure of the UR physician to reference applicant's *second* knee surgery that was performed on March 1, 2013 in her May 24, 2013 UR Report is significant because it has long been recognized that an accurate medical history is required in order for a medical report to be given evidentiary weight. A medical opinion is not substantial evidence if it is based on facts no longer germane, or is based upon an incorrect or inadequate medical history. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].)

The UR physician's lack of knowledge of applicant's second knee surgery is also significant because Dr. Venuto's recommendation for the viscosupplementation injections is directly related to the second knee surgery and part of that course of treatment as shown by his May 14, 2013 request for authorization. In that request the Dr. Venuto wrote that applicant was on the "road to recovery" following the second surgery and that viscosupplementation is needed "to finish" the treatment and "get him back to work." It is reasonable to infer that Dr. Venuto considered the cost as well as the benefits and risks of the injections before seeking authorization, and I would rely upon his consideration of those

factors to affirm the WCJ's order.

In contrast to Dr. Knoll and the UR Report, Dr. Venuto treated applicant for an extended period of time and his reason for seeking the viscosupplementation injections are sufficiently, albeit succinctly, stated in his June 18, 2013 request as follows:

> "The pain in his knee has increased a bit after walking, and he still has an effusion and pain with flexion. I see that his viscosupplementation has been denied, and denial was because 'This is a treatment for osteoarthritis of the knee and there is insufficient evidence for other conditions including patellofemoral arthritis, chondromalacia patella, osteachondritis dissecans, and patellofemoral syndrome.' *This patient unfortunately has degenerative arthritis. The most serious involvement as far as his degenerative arthritis is in his medial compartment, and that is exactly what this indication is. He has osteoarthritis medial compartment.* I have no idea why you could deny something based upon the fact that it is for osteoarthritis and he has osteoarthritis!" (Italicized portion changed.)

The WCJ correctly found in Finding of Fact 4 that defendant's UR is "defective" notwithstanding that the reason identified for the finding in the WCJ's Opinion and Report is incorrect. The viscosupplementation injections identified by Dr. Venuto are reasonable medical treatment as shown by his request for authorization. The treatment is supported by section 4604.5, the Medical Treatment Utilization Schedule (MTUS) and the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM).

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The WCJ's February 6, 2014 decision directing defendant to provide the requested treatment should be affirmed.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 10 2014

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

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JFS/abs