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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RANDALL OTTEN,

Applicant,

vs.

**CARDINAL NEWMAN HIGH SCHOOL;
CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION for SUPERIOR NATIONAL
INSURANCE COMPANY, in liquidation,**

Defendants.

Case Nos. **ADJ3700908 (SRO 0101979)**
ADJ3874442 (SRO 0098853)

**OPINION AND DECISION
AFTER RECONSIDERATION**

We earlier granted defendant's petition for reconsideration of the March 18, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that "defendant's Utilization Review dated October 16, 2013 is invalid," and that there is a need for further medical treatment of applicant's low back injury, including the L4-5 sacral "radio frequency rhizotomy injection" requested by his treating physician.

It was earlier stipulated in ADJ387442 on July 17, 2000, that applicant sustained industrial injury to his low back and psyche while working for defendant as a custodian during the cumulative period through November 7, 1997, causing 46% permanent disability and need for future medical treatment. According to the WCJ's Opinion on Decision, the claim in ADJ3700908 was "previously resolved by a Findings and Order filed July 17, 2000 and should not have been brought to calendar."¹

Defendant contends that the WCAB does not have jurisdiction to determine the necessity of medical treatment, and that the WCJ's finding in this case that the UR is invalid is not supported by the evidence.

An answer to the petition was received from applicant.

¹ Images of the July 17, 2000 stipulated award in ADJ387442, and the July 17, 2000 Findings and Order in ADJ3700908, were not found in EAMS.

1 The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report)
2 recommending that reconsideration be denied, or in the alternative, that defendant's petition be dismissed
3 because it is captioned with the wrong case number (ADJ3700908) and is filed in the wrong case.

4 Defendant's petition is accepted notwithstanding the incorrect case number on its caption.² The
5 March 18, 2014 Findings And Award of the WCJ is reversed as our Decision After Reconsideration. The
6 UR determination is not invalid as found by the WCJ because some reports by applicant's treating
7 physician, Michael Yang, M.D., and the reporting of one of the parties' Agreed Medical Evaluators
8 Steven Isono, M.D., were not provided to the UR physician. The UR physician had sufficient
9 information to make a reasoned UR determination based upon relevant medical guidelines, and the
10 additional reporting of Dr. Yang and Dr. Isono would not change that determination. Instead, the
11 medical treatment dispute in this case may be subject to Independent Medical Review (IMR).

12 BACKGROUND

13 The WCJ describes the procedural background and reasons for his decision in pertinent part in his
14 Report as follows:

15 "On January 21, 2014, ADJ3700908 and ADJ3874442 returned to calendar
16 at the applicant's request for an Expedited Hearing...

17 "At the hearing the parties framed the issue to be decided as applicant's
18 need for a radio frequency rhizotomy. The applicant contended that the
19 Utilization Review was improperly conducted for failure to provide all
20 relevant medical records for Utilization Review which was therefore
21 procedurally deficient. Defendant contended that the applicant's remedy is
22 limited to the IMR process and that Utilization Review has been properly
23 conducted. Defendant further alleges that it was the responsibility of the
24 treating physician to set forth the medical need and basis for the medical
25 treatment being requested pursuant to Regulation 9792.9(c).

26 "At the trial all of the offered medical reports and records were accepted
27 into evidence. At the request of the parties the issue was then submitted for
decision...

² The ADJ3700908 case number is included in the caption of the January 21, 2014 Minutes of Hearing, and the WCJ's March 18, 2014 decision is filed in the ADJ3700908 EAMS file, and not in the ADJ3874442 EAMS file. It is apparent that defendant's use of the incorrect case number on the caption of its petition is a clerical error that should not affect its due process right to seek reconsideration of the March 18, 2014 decision. (See, *Shipley v Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493].)

1 "As noted in the Answer to Petition for Reconsideration, there is no issue
2 as to the timeliness of the defendant's Utilization Review Determination
3 dated October 16, 2013. There is, however, a significant issue as to
4 whether the Utilization Review Determination suffers from a material
5 procedural defect that undermines the integrity of the UR decision. As
6 noted in [*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313
(Appeals Board en banc) (*Dubon*)], if a defendant's Utilization Review is
found invalid the issue of medical necessity is not subject to IMR but is to
be determined by the Appeals Board based upon substantial medical
evidence with the employee having the burden of proving the treatment is
reasonably required.

7 "The Utilization Review determination dated October 16, 2013 (Defendant
8 Exhibit B) noted review of only a four-page fax from Dr. Yang's office
9 including '10/8/13 RFA and Dr. Yang's 10/8/13 SOAP note'. It is,
10 therefore, apparent that the Utilization Review physician, Dr. Riso, did not
11 review the additional reports from the applicant's treating physician as
12 described in Applicant Exhibit 1 and did not review the reports of the
Agreed Medical Examiner Dr. Isono. Defendant's failure to have provided
Dr. Riso with the additional reports from Dr. Yang and the reports from Dr.
Isono is found to have undermined the integrity of the Utilization Review
process and constitutes a material procedural defect.

13 "The reports of Dr. Yang further support the applicant's need for a radio
14 frequency rhizotomy injection to relieve from the symptoms caused by the
15 applicant's industrial back injury. The reports of Dr. Isono further indicate
16 that in the past radio frequency ablation procedures have provided
17 significant relief from the applicant's symptoms and support Dr. Yang's
18 conclusion that the requested treatment is reasonably required to relieve
19 from the effects of the industrial injury."

17 DISCUSSION

18 As can be seen, the WCJ concluded that defendant's UR "suffers from material procedural
19 defects" as described in *Dubon* because the UR physician was not provided some reports by Dr. Yang
20 and he did not see the reporting of Dr. Isono. The WCJ further concluded that the request for medical
21 treatment should be allowed because it is supported by substantial medical evidence. We do not agree
22 with either conclusion.

23 In *Dubon* the Appeals Board held that a "UR decision is invalid if it is untimely or suffers from
24 material procedural defects that undermine the integrity of the UR decision," but that, "technical or
25 immaterial defects are insufficient to invalidate a defendant's UR determination."³ The Appeals Board
26

27 ³ Appeals Board en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].)

1 further concluded in *Dubon* that if a defendant's UR is found to be invalid the issue of medical necessity
2 is to be determined by the WCAB based upon substantial medical evidence; with the employee having
3 the burden of proving the treatment is reasonably required. However, if the UR is both timely and valid,
4 the issue of medical necessity is to be resolved through the IMR process if requested by the employee.
5 (*Ibid.*) On May 22, 2014, the Appeals Board granted reconsideration on *Dubon* but held the prior
6 decision remains in effect and binding pending a new decision after reconsideration. (See 79
7 Cal.Comp.Cases 566.)

8 In this case, applicant contends that the UR process was flawed because the UR physician was not
9 provided all of Dr. Yang's reports and was not given the reporting of Dr. Isono. However, that is not a
10 material procedural defect that undermines the integrity of the UR decision because the additional
11 reporting would not have changed the UR determination, which relies upon evidence based guidelines.

12 The UR physician acknowledged in the UR determination that applicant obtained some relief
13 from an earlier medial branch block. However, he further wrote that the requested radio frequency
14 rhizotomy injection was not supported by evidence based guidelines because the earlier medial branch
15 block did not mitigate applicant's radicular pain, writing as follows in the UR determination:

16 "The claimant is a 54-year-old man with an injury to the lumbar spine
17 dated 11/20/97. An office visit note dated 10/8/13 indicates the claimant
18 with ongoing back pain with radiating pain. The claimant was noted to
19 have '100% pain relief with the medial branch blocks.' Use of multiple
20 medications including opioid medications, steep medications and
21 antineuropathic pain medications are documented. On physical
22 examination, decreased range of motion was noted with positive straight
23 leg raise. A nonantalgic gait is documented.

24 "The request is for right L4-L5 radiofrequency block.

25 "Non-certification is advised.

26 "Currently, California Evidence Based Guidelines do not support the use of
27 radiofrequency lesionings of facet nerves.

"Additionally, the claimant has a degree of unresolved neuropathic
radicular pain. The claimant is receiving antineuropathic pain medications.
Although the diagnostic block would seem to indicate that a portion of the
claimant's pain is facet mediated, the claimant had '100% pain relief' does
not account-for the radicular pain, and it is not accompanied by objective
physical examination findings of changed/increased range of motion, etc.'

1 "Evidence Based Guidelines Used:

2 ACOEM – <https://www.acoempracguides.org/> Low Back; Table 2,
3 Summary of Recommendations, Low Back Disorders.”

4 The additional reports of Dr. Yang would not change the UR determination because they merely
5 repeat information that is included in the reports that were provided to the UR physician. The reporting
6 of Dr. Isono also would not change the UR determination because he does not address the specific
7 circumstances underlying the requested treatment, and he does not identify any applicable medical
8 guidelines or other medical evidence that supports it.

9 In that the UR determination is *not* procedurally defective there was no basis for the WCJ to
10 determine medical necessity as described in *Dubon*, and the issue is subject to IMR if requested by
11 applicant. But even if the UR was defective, the requested treatment is not supported by substantial
12 medical evidence as concluded by the WCJ.

13 As noted above, Dr. Yang essentially repeats the same information about applicant’s condition in
14 his reports. Nowhere does he identify any applicable medical guidelines or other medical evidence that
15 supports the radio frequency ablation and rhizotomy he proposes. Similarly, in his July 16, 2010 and
16 April 22, 2011 reports, Dr. Isono summarily describes radiofrequency ablation and fluoroscopically
17 guided rhizotomy as “medically appropriate” based upon applicant’s diagnosis at that earlier time, but
18 those conclusory reports do not address applicant’s current circumstances and intervening medical
19 history, and they provide no citation to any supporting medical papers, studies, guidelines or other
20 medical evidence.

21 There must be some solid basis in a medical report for the doctor’s ultimate opinion. (*National*
22 *Convenience Stores v. Workers’ Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420 [46
23 Cal.Comp.Cases 783].) The Appeals Board cannot rely upon a conclusory medical opinion that lacks a
24 solid underlying basis and is not substantial evidence. (*Lamb v. Workers’ Comp. Appeals Bd.* (1974) 11
25 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627
26 [35 Cal.Comp.Cases 16].)

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1 In sum, applicant did not meet his burden of proving that the UR suffers from a material
2 procedural defect that undermine the integrity of the UR decision, and he only showed that there are
3 minor technical or immaterial defects that are insufficient to invalidate the UR determination. In
4 addition, applicant did not present substantial medical evidence proving that the provision of the
5 requested rhizotomy is reasonable medical treatment. The contrary decision of the WCJ is reversed.

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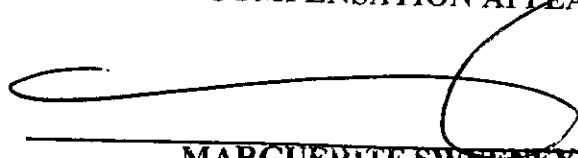
1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the March 18, 2014 Findings And Award of the workers' compensation administrative law
4 judge is **RESCINDED** and the following is substituted in its place:

5 **FINDINGS OF FACT**

6 1. Defendant's Utilization Review dated October 16, 2013 is not invalid.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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11 **MARGUERITE SWEENEY**

12 **I CONCUR,**

13 
14 _____
15 **DEIDRA E. LOWE**

16 
17 _____
18 **FRANK M. BRASS**



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

20 **JUL 18 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 **RANDALL OTTEN**
24 **RICHARD MEECHAN**
25 **LAUGHLIN FALBO**
26 **MULLEN & FILIPPI**

27 **JFS/abs**

