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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SCOTT SMITH,

Applicant,

vs.

**PLANT CONSTRUCTION; ARCH
INSURANCE COMPANY,**

Defendants.

Case No. ADJ8310247
(Oakland District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Defendant seeks reconsideration of the May 12, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) who entered an award of medical treatment based upon his findings that defendant's utilization review (UR) dated January 29, 2014, "suffers from material procedural defects," and that substantial medical evidence supports the need for left shoulder surgery and other modalities of treatment contained in the treating physician's Request for Authorization dated January 22, 2014.

It is admitted that applicant sustained industrial injury to his left shoulder, lumbar spine and left knee while working for defendant Plant Construction as a carpenter on June 2, 2007.

Defendant contends that the WCAB lacks jurisdiction to determine the validity of utilization reviews, that Defendant's Exhibits A and D should have been received into evidence or in the alternative, that the WCJ's finding that the UR suffers from material procedural defects is not supported by the evidence.

An answer was received from applicant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that his May 12, 2014 Findings And Award be affirmed, but that reconsideration be granted to strike certain paragraphs from his accompanying Opinion on Decision (Opinion).

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1 Reconsideration is granted and the May 12, 2014 Findings And Award is rescinded as our
2 Decision After Reconsideration. The utilization review in this case requires development. For that
3 reason, the case is returned to the trial level with an interim order allowing applicant's treating physician
4 to submit an amended Request For Authorization (RFA) to defendant for further utilization review
5 pursuant to the applicable statutes and regulations.

6 **BACKGROUND**

7 As set forth in the September 16, 2013 report of the parties' Agreed Medical Examiner
8 Joel Renbaum, M.D., applicant sustained industrial injury to his left knee on June 2, 2007. (WCAB
9 Exhibit X.) Notwithstanding two arthroscopic surgeries applicant continued to have symptoms of
10 instability and pain in his knee. In April 2012, the left knee gave way and applicant fell, injuring his left
11 shoulder. An August 2012 request to perform an MRI of the left shoulder was denied by defendant and
12 liability for that body part was not initially accepted.

13 In his September 16, 2013 report, Dr. Renbaum declared applicant's knee condition to be
14 permanent and stationary. On page 21 of the report Dr. Renbaum described applicant's shoulder
15 condition based upon his examination as "Left shoulder pain, with impingement syndrome." On page 23
16 Dr. Renbaum opined that applicant's left shoulder condition is "reasonably related as a compensable
17 consequence to the June 4, 2007 work injury," and he further wrote that an MRI of that body part should
18 be provided. It appears defendant thereafter accepted liability to provide reasonable medical treatment
19 for the left shoulder based upon Dr. Renbaum's report.

20 An MRI study of applicant's left shoulder was performed by Eric Smith M.D., on December 16,
21 2013. (Joint Exhibit 101.) The report of that study describes an "area of tearing of the anterior inferior
22 labrum with cartilage fissuring along the anterior glenoid rim," along with tendinosis and hypertrophy of
23 the long biceps tendon, which was said to "suggest tearing of medial limb coracohumeral superior
24 glenohumeral ligament sling."

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1 On January 22, 2014, applicant's treating physician Stephan Viess, M.D., submitted a RFA to
2 defendant. (Defendant's Exhibit B.) The procedures for which authorization was requested were
3 described as follows:

4 "Surgery – left shoulder arthroscopy with labral repair and biceps tenodeis

5 Synvisc one left knee

6 Cardiac clearance for surgery with Robert Santos – ValleyCare

7 Post op physical therapy for shoulder 2 x week for 4 weeks." (Quotation
8 converted from upper case to lower case.)

9 A second RFA with essentially the same request was submitted by Dr. Viess on or about and
10 February 13, 2014. (Defendant's Exhibit B.) It appears that no reports, studies or other additional
11 information were submitted by Dr. Viess with either of the RFAs.

12 The January 29, 2014 UR Notification of Non Certification (Defendant's Exhibit C) prepared by
13 defendant's UR physician Gregory Mallo, M.D., identifies the medical records he reviewed in connection
14 with the RFA as an MRI study of the lumbar spine performed on May 9, 2013, and a January 7, 2014
15 PR-2 Progress Report by Dr. Viess that describes the December 16, 2013 MRI of the left shoulder by
16 Dr. Smith (Applicant's Exhibit 1). The UR denial does not identify either the September 16, 2013 report
17 by Dr. Renbaum or the actual December 16, 2013 MRI study by Dr. Smith as documents that were
18 reviewed in connection with the UR denial.

19 In the January 29, 2014 UR denial, Dr. Mallo wrote that he telephoned Dr. Viess on January 29,
20 2014, but was placed on hold for greater than 10 minutes and did not make contact. The reason for not
21 certifying the requested surgery is described in the UR denial as follows:

22 "Per guidelines, surgery is medically necessary when there are subjective
23 clinical findings to include pain, weakness, and deformity. In addition,
24 there must be significant pain which limits function and a specific physical
25 exam such as + Obrien's test or impingement signs. In addition, the
26 appropriate therapy and NSAID use must be documented.

27 "The submitted notes do not include physical exam or prior treatments
therefore the requested surgery is not recommended at this time."

1 Applicant challenged the UR denial by requesting an expedited hearing, and it appears he also
2 requested Independent Medical Review (IMR).¹ An expedited hearing was conducted before the WCJ
3 on April 28, 2014. The issue for determination is described in the Minutes of Hearing from that date as
4 "medical treatment," with applicant claiming entitlement to the requested left shoulder surgery, and with
5 defendant asserting that the WCAB lacks jurisdiction "because either the UR was properly done or
6 because independent medical review has been done and any problem with the Utilization Review has
7 been rectified by the IMR process." Along with the documents described above, the WCJ received into
8 evidence additional progress reports by Dr. Viess. No testimony was presented at the hearing.

9 On May 12, 2014, the WCJ issued his decision as described above. In his Report, the WCJ
10 responds to defendant's contentions in pertinent part, as follows:

11 "Defendant disputes the jurisdiction of the Workers' Compensation
12 Appeals Board to determine this issue. In the recently decided en banc
13 decision of the Workers' Compensation Appeals Board, *Dubon v. Workers' Compensation Appeals Board* (2014) 79 Cal.Comp.Cases 313, it was expressly held that:

14 A UR decision is invalid if it is untimely or suffers from
15 material procedural defects that undermine the integrity of
16 the UR decision. Minor technical or immaterial defects are
17 insufficient to invalidate a defendant's UR determination. If
18 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.

19 "Thus, Board jurisdiction is predicated upon an untimely or procedurally
20 defective Utilization Review determination...

21 "[D]r. Mallo had only two documents to review in connection with his
22 determination, a PR-2 from the treating physician, and a lumbar MRI (an
23 obviously irrelevant document), although there were many medical reports,
24 as well as a shoulder MRI available to the carrier to provide to Dr. Mallo.
25 Where the carrier consciously refuses to provide its utilization review
26 vendor with a complete medical file, a non-certification determination
27 becomes a relative certainty, and this non-feasance, in the words of *Dubon*
'undermine[s] the integrity of the UR decision.' To put it more bluntly,
'garbage in, garbage out...'

¹ Because we rescind the WCJ's May 12, 2014 decision, we do not reach defendant's contention that two documents it offered concerning the IMR process, Defendant's Exhibit A (April 3, 2014 IMR determination) and Defendant's Exhibit D (February 24, 2014 IMR request), should have been received into evidence at the expedited hearing.

1 "Defendant attempts (page 6) to shift the burden of providing a medical
2 record to the utilization review physician to the treating physician.
3 Defendant contends that pursuant to Title 8, Calif. Code of Reg., Sec.
4 9792.91(c)(2) the Request for Authorization ('RFA') must conform to Title
5 8, Calif. Code of Reg., Sec. 9792.6.1(t)(1) and (2). Subsection (t)(2)
6 specifically provides, among other things that the RFA must 'identify with
7 specificity a recommended treatment or treatments, and be accompanied by
8 documentation substantiating the need for the requested treatment.'
9 Defendant argues that this regulation places the burden on the treating
10 physician to provide not only the RFA and a treatment report justifying the
11 treatment but also all relevant medical records...

7 "In this case, Defendant was in possession of all of the treatment reports
8 cited by the undersigned in the Opinion on Decision and elected to not
9 provide them to its utilization review vendor. While Defendant had the
10 shoulder MRI, it elected to send the utilization reviewer instead a copy of
11 the lumbar spine MRI. The Labor Code provides the employer with
12 specific means to obtain additional information and documentation, and it
13 failed to do so..."

11 The WCJ notes in his Report that Rule 9792.6.1(t)(2) "was not made effective until February 12,
12 2014 – in other words, it was not the law at the time that Dr. Viess submitted the RFA which is at issue."
13 The WCJ further writes that he "inadvertently addressed what might be termed 'substantive' rather than
14 'procedural' defects in the utilization review," which is the reason he recommends in his Report that
15 reconsideration be granted "to strike the second, third, fourth, fifth and sixth paragraphs of the discussion
16 of 'Material Procedural Defects' " in his Opinion.²

17 DISCUSSION

18 Labor Code section 4610 provides that if a UR physician concludes that an RFA contains
19 "incomplete or insufficient information," he or she may "deny or delay" the requested treatment, but in
20 either case, "the (UR) decision shall specify the reason for the decision and specify the information that
21 is needed." (Lab. Code, § 4610(g)(4).) Before making a decision to deny or delay authorization, the
22 defendant may request "medical information from [the treating] physician," but "shall request only the
23

24
25 ² The WCJ's recommendation is moot in light of our decision to rescind his May 12, 2014 decision. Moreover, statements in
26 an Opinion On Decision are not findings of fact, but are intended to explain the basis for the decision and make the
27 reconsideration process meaningful. (See, Lab. Code, 5813; *Evans v Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [33
Cal.Comp.Cases 350]; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528 [45
Cal.Comp.Cases 410].)

1 information reasonably necessary to make the determination.” (Lab. Code, §§ 4610(g)(4) and (d).) Such
2 a request allows a limited extension of time for rendering the UR decision. (Lab. Code, §§ 4610(g)(1),
3 (g)(2) and (g)(5); see also, Cal. Code Regs., tit. 8, §§ 9792.7(b)(3), 9792.9(h)(1)(A), (h)(3) and (h)(4) and
4 9792.9.1, 9792.9.1(f)(1)(A).)

5 When additional information has been requested, but the defendant “is not in receipt of all of the
6 necessary medical information reasonably requested,” the “claims administrator shall immediately
7 notify” the requesting physician, the injured worker and his or her attorney in writing that, “the claims
8 administrator cannot make a decision within the required timeframe” and shall “specify the information
9 requested but not received.” (Cal. Code Regs., tit. 8, §§ 9792.9(h)(1)(A) and (h)(2).) Upon receipt of
10 the information, the defendant must make a decision within five working days of receipt for prospective
11 or concurrent review or 30 days for retrospective review (Cal. Code Regs., tit. 8, §§ 9792.7(b)(3),
12 9792.9(h)(3) and (h)(4).)

13 If, however, the additional information requested by the defendant is not timely received, the UR
14 may deny the treatment request based on incomplete or insufficient information, but must do so “with the
15 stated condition that the request will be reconsidered upon receipt of the information requested.” (Cal.
16 Code Regs., tit. 8, §§ 9792.9(c)(2)(A) and 9792.9.1(f)(3)(A) and (f)(3)(B).)

17 It is apparent from the statutes and regulations that the UR process requires a good faith effort by
18 both the treating physician and the UR physician to assure that necessary and appropriate information is
19 available in a timely fashion to allow a proper UR determination based upon medical evidence. In this
20 case, Dr. Viess did not include information with his RFAs that could have addressed the documentation
21 concern expressed in the UR denial, and it appears that Dr. Mallo did not sufficiently endeavor to assure
22 that such information was properly identified and obtained before issuing the UR denial.³

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26 ³ Defendant only raises procedural issues in its petition, and does not contend that the evidence presented at the expedited
27 hearing does not support provision of the requested shoulder surgery as reasonable medical treatment.

1 Labor Code section 133 vests the Workers' Compensation Appeals Board with "jurisdiction to do
2 all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under
3 this code." With regard to this case, we conclude that the appropriate course of action to address the
4 insufficient UR documentation is to rescind the WCJ's May 12, 2014 decision and allow the UR process
5 to be properly completed in accordance with the applicable statutes and regulations. Development of the
6 record in this way is consistent with Labor Code section 4610 and Rule 9792.9, as well as due process
7 and our constitutional mandate "to accomplish substantial justice in all cases expeditiously,
8 inexpensively, and without incumbrance of any character." (Cal. Const., Article XIV, § 4; *Tyler v.*
9 *Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].)

10 Accordingly, the May 12, 2014 Findings And Award is rescinded and the case is returned to the
11 trial level with an interim order allowing applicant's treating physician to submit an amended RFA with
12 appropriate documentation to defendant within 20 days of the date of this decision. Thereafter,
13 utilization review should proceed in accordance with the applicable statutes and regulations and within
14 their timeframes. In the event that applicant disputes the resulting UR decision, he may take further
15 action as appropriate at that time.

16 For the foregoing reasons,

17 **IT IS ORDERED** that defendant's petition for reconsideration of the May 12, 2014 Findings
18 And Award of the workers' compensation administrative law judge is **GRANTED**.

19 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
20 Compensation Appeals Board that the May 12, 2014 Findings And Award of the workers' compensation
21 administrative law judge is **RESCINDED**.

22 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
23 Compensation Appeals Board that applicant's treating physician may **within twenty (20) days** of the
24 service of this decision submit an amended Request for Authorization to perform left shoulder surgery
25 and other treatment modalities related to the proposed surgery.

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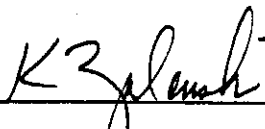
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1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board that defendant shall conduct a utilization review of any Request for
3 Authorization submitted by applicant's treating physician pursuant to the above Order in accordance with
4 applicable statutes and regulations.

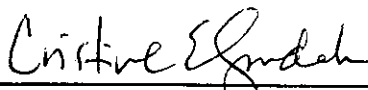
5 WORKERS' COMPENSATION APPEALS BOARD

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MARGUERITE SWEENEY

9 I CONCUR,

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12 KATHERINE ZALEWSKI

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14 DEPUTY

15 CRISTINE E. GONDAK



16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 AUG 04 2014

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

20 SCOTT SMITH
21 BOXER & GERSON
22 HANNA BROPHY ET. AL.
23 STEPHEN VIESS, M.D.

24 JFS/abs
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**WORKERS' COMPENSATION APPEALS BOARD
DIVISION OF WORKERS' COMPENSATION
STATE OF CALIFORNIA**

**SCOTT SMITH v. PLANT CONSTRUCTION
and ARCH INSURANCE COMPANY
WCAB CASE NO.: ADJ8310247**

JUDGE STANLEY E. SHIELDS

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

ISSUES PRESENTED

- a. Whether the Judge's finding that the Utilization Review in this matter suffered from material procedural defects and the Judge's corollary finding that the WCAB has jurisdiction over the medical dispute presented is error because (1) it is contrary to specific regulation and statute, (2) the reason for the denial was not based on the lack of review of a shoulder MRI report, (3) the WCJ relied on medical records not referenced in the utilization review "or otherwise provided to UR by the PTP" to determine that the utilization review physician had insufficient medical records, (4) the WCJ usurped the role of the utilization reviewer by finding that the reviewer made an incorrect diagnosis, (5) the WCJ relied, in part on ACOEM Guidelines published in 2004, rather than revisions made in 2008.
- b. Whether the Judge's failure to accept into evidence two of Defendant's exhibits is error because "medical issues are solely the jurisdiction of IMR."

INTRODUCTION

Defendant filed a timely, verified Petition for Reconsideration of the undersigned's Findings and Award, filed and served on May 12, 2014. Applicant has filed a timely, verified Answer.

In the Findings and Award complained of, the undersigned found that Applicant Scott Smith, while employed as a carpenter on June 2, 2007, by Plant Construction, sustained injury to his left knee, left shoulder, and spine, and claims to have sustained injury to other body parts not presently at issue. Of material importance to Defendant's appeal, the undersigned found that the Utilization Review dated January 29, 2014 suffered from material procedural defects and that the Workers' Compensation Appeals Board therefore had jurisdiction over the medical issue. As a corollary, the undersigned found that Defendant's Exhibit A, the IMR Final Determination letter, and Defendant's Exhibit D, the Application letter for IMR, were inadmissible—Exhibit A because the Utilization Review was void *ab initio*, and Exhibit D was irrelevant. Finally, the undersigned found that substantial medical evidence supported the need for a left shoulder surgery and other modalities of treatment, as set forth in the treating physician's Request for Authorization, dated January 22, 2014. This last finding, Finding No. 6, is not contested by Defendant.

As the entire Opinion on Decision (except the section relating to the evidence supporting the proposed treatment) is relevant to the issues raised by Defendant, the full Opinion is set forth below, less only the discussion of substantial evidence supporting the treating physician's request for surgery.

OPINION ON DECISION

INTRODUCTION

Applicant Scott Smith, while employed as a carpenter by Plant Construction on June 2, 2007, sustained injury arising out of and in the course of his employment to his left knee, left shoulder and lumbar spine, and claims to have sustained injury arising out of and in the course of his employment to other parts of his body not presently at issue. The left shoulder injury is considered a “compensable consequence” of the original injury, and resulted from a fall when his knee gave out in July or August, 2012.

Applicant is presently treating with orthopedic surgeon Stephen Viess, M.D. Joel Renbaum, M.D., is the Agreed Medical Evaluator (“AME”).

On January 22, 2014, Dr. Weiss issued a Request for Authorization (“RFA”) for (1) a left shoulder arthroscopy with labral repair and biceps tenodesis (sic), (2) Synvisc one left knee, (3) Cardiac Clearance for Surgery, and (4) Post Op Physical Therapy for Shoulder twice a week for four weeks. On January 29, 2014, a Utilization Review denial was issued, the request having been reviewed by Gregory Mallo, M.D.

The parties submitted for decision the issue of need for the various modalities of treatment on a designated record, without testimony.

DISCUSSION

A. ADMISSIBILITY OF EVIDENCE.

At Hearing, Applicant objected to two of Defendant’s exhibits, being Defendant’s Exhibit A, the IMR Final Determination letter, and Exhibit D, the Application letter for IMR, dated February 24, 2014. A ruling on the admissibility of these exhibits was deferred until now.

In this case, Applicant pursued alternative remedies to the Utilization Review denial of treatment. Applicant filed the necessary paperwork to begin the Independent Medical Review process and also filed for a hearing at the Workers' Compensation Appeals Board, claiming that IMR was not the proper remedy because of material procedural defects in the Utilization Review process. Since I find, below, that there were material procedural defects in the Utilization Review process, the referral to IMR was *void ab initio*, and evidence of the Application and the IMR decision itself is irrelevant. Those exhibits will not be admitted.

B. BOARD JURISDICTION.

Defendant disputes the jurisdiction of the Workers' Compensation Appeals Board to determine this issue. In the recently decided *en banc* decision of the Workers' Compensation Appeals Board, *Dubon v. Workers' Compensation Appeals Board* (2014) 79 Cal.Comp.Cases 313, it was expressly held that:

A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination. 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.

Thus, Board jurisdiction is predicated upon an untimely or procedurally defective Utilization Review determination.

C. UTILIZATION REVIEW DETERMINATION.

1. Timeliness.

I find the Utilization Review ("U.R.") in this matter to have been timely. Labor Code Section 4610(g) provides that a decision must be

made within five working days of the RFA. In this case, Defendant issued its decision on the fifth working day.

2. Material Procedural Defects.

In his decision to deny authorization for surgery, the U.R. physician, Dr. Mallo, reviewed two documents, the January 7, 2014 report of Dr. Viess, and the May 9, 2013 MRI of the **lumbar spine**. Although an MRI of the left shoulder had been obtained in December, 2013, this MRI was not provided to Dr. Mallo.

In commenting on the advisability of shoulder surgery, Dr. Mallo consulted various medical guidelines.

He first indicates that he consulted the Official Disability Guidelines (“ODG”) regarding “Surgery of SLAP lesions.” A “SLAP tear” or “SLAP lesion” is an injury to the Glenoid labrum. SLAP is an acronym for “superior labral tear from anterior to posterior.” As the medical record reflects, Mr. Smith has been diagnosed with an **anterior** labral tear. (See reports of Dr. Viess [Applicant’s Exhibit 1] and shoulder MRI [Joint Exhibit 101].) A **superior** labral tear is, obviously, located in a different part of the labrum than an **anterior** labral tear. The ODG citation by Dr. Mallo is irrelevant to the injury and the treatment requested here.

Next, Dr. Mallo reviews surgical considerations for a ruptured biceps tendon (the injury here is “instability [of] long biceps tendon [see Joint Exhibit 101] citing “ACOEM Occupational Practice Guidelines, 2nd Edition, 2008[,] pp. 560-561.”

Title 8, Calif. Code of Regs. Sec. 9792.23.2(a) states:

The Administrative Director adopts and incorporates by reference the Shoulder Complaints Chapter (ACOEM Practice Guidelines, 2nd Edition (2004), Chapter 9) into the MTUS from the ACOEM Practice Guidelines.

It is noted that the ACOEM 2nd Edition was published in 2004; a 3rd Edition was published in 2010. If there is such a publication as “ACOEM Occupational Practice Guidelines, 2nd Edition, 2008,” it has not been

adopted as part of the Administrative Director's Medical Treatment Utilization Schedule. It should be further noted that Dr. Mallo refers to pages 560-561 of that possibly fictitious document. The last page of the ACOEM 2nd Edition published in 2004 is page 516.

Finally, Dr. Mallo looks at recommendations for surgery for a ruptured biceps tendon. At the risk of being redundant, I will repeat that there is no allegation or evidence here of a ruptured biceps tendon. The discussion here by Dr. Mallo is entirely irrelevant.

To sum up, Dr. Mallo had only two documents to review in connection with his determination, a PR-2 from the treating physician, and a lumbar MRI (an obviously irrelevant document), although there were many medical reports, as well as a shoulder MRI available to the carrier to provide to Dr. Mallo.

Where the carrier consciously refuses to provide its utilization review vendor with a complete medical file, a non-certification determination becomes a relative certainty, and this non-feasance, in the words of *Dubon* "undermine[s] the integrity of the UR decision." To put it more bluntly, "garbage in, garbage out."

I finally point out that Dr. Mallo bases his determination for non-certification on a lack of documentation. He states, "Per guidelines, surgery is medically necessary when there are subjective clinical findings to include pain, weakness and deformity. In addition, there must be significant pain which limits function and a specific physical exam such as + O'Brien's test or impingement signs. In addition, appropriate therapy and NSAID use must be documented. The submitted notes do not include physical exam or prior treatments[,] therefore the requested surgery is not recommended at this time."

Dr. Mallo—if he had been provided with an adequate medical file—would have seen clinical findings of pain in the reports of Dr. Viess dated March 24, 2014, March 20, 2014, and February 13, 2014. He also would have seen evidence of pain in the AME's report of September 9, 2013

(page 5), as well as in the doctor's record review, especially entries of August 2, 2012, May 23, 2013, and June 23, 2013.

Dr. Mallo would also have found evidence of weakness and limitation of function by reviewing Dr. Viess's reports, as well as the AME report, which noted that Mr. Smith has difficulty with forceful activity and over shoulder reaching (p. 5) and significant loss of motion (p. 6). Impingement signs were noted by John Frazier, M.D., on August 12, 2012 (see Renbaum report, p. 18) and by Dr. Renbaum himself (p. 6). Conservative treatment was attempted, in the form of a cortisone injection by Dr. Frazier on August 2, 2012, but treatment was delayed by the Defendant's refusal to accept the shoulder as a compensable claim.¹ [It is not clear when this part of the claim was accepted, but Dr. Viess was under the impression as of May 23, 2013, that Defendant had still not accepted liability.]

I find that the utilization review here suffers from material procedural defects, including but not limited to an entirely insufficient record upon which to make a decision, and the U.R. doctor's reliance on guidelines which are not authorized by law and/or irrelevant and/or fictitious.

DISCUSSION

It should be noted, first, that all of Defendant's contentions—and the issues in this case—are inextricably intertwined. Pursuant to *Dubon*, if the utilization review is either late or suffers from a material procedural defect, then it is invalid, and the Workers' Compensation Appeals Board has jurisdiction over the medical dispute at issue. The admissibility of a utilization review decision is dependent upon its validity. This principle goes back to *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th

¹ It required more than a year for Defendant to authorize an MRI of the left shoulder. (Footnote in original.)

230 [73 Cal.Comp.Cases 981] (*Sandhagen II*). Defendant's argument 1 (page 3 of Petition) that "Defendants exhibits A and D should have been admitted into evidence," is directly contrary to *Sandhagen*. Defendant's second argument (page 3 of Petition) that "Jurisdiction re medical necessity and entitlement to medical treatment, absent a denied body part, resides solely with the IMR process," is directly contrary to *Dubon*.

Defendant's third argument (page 5 of Petition) that, "Utilization review in this case, did not suffer from a material procedurally (sic) defect, so as to warrant investing jurisdiction with the board," is not substantiated by the evidence. First, Defendant contends (page 5) that "material procedural defects should not encompass more than what is specifically enumerated by statute and regulation including, but not limited to, timeliness, signature by UR reviewer, list of medical records reviewed, appropriate specialty[,] etc." This contention is clearly inconsistent with *Dubon*. In *Dubon*, the principal defect found by the Board was that Defendant had failed to provide pertinent and relevant reports to the utilization review doctor—specifically including some reports by the treating physician and the Agreed Medical Evaluator. This was the primary basis on which I found a material defect in this case. As set out in the Opinion on Decision, the utilization review doctor here was provided with precisely two documents, a single report from the treating physician and a copy of an MRI of a body part (lumbar spine) not at issue. It is notable that there was available to the carrier to provide to its utilization review vendor a recent (December, 2013) MRI of the left shoulder, for which surgery was being requested. The carrier chose not to provide this document to the utilization review physician.

Defendant attempts (page 6) to shift the burden of providing a medical record to the utilization review physician to the treating physician. Defendant contends that pursuant to

Title 8, Calif. Code of Reg., Sec. 9792.9.1(c)(2) the Request for Authorization (“RFA”) must conform to Title 8, Calif. Code of Reg., Sec. 9792.6.1(t)(1) and (2). Subsection (t)(2)² specifically provides, among other things, that the RFA must “identify with specificity a recommended treatment or treatments, and be accompanied by documentation substantiating the need for the requested treatment.” Defendant argues that this regulation places the burden on the treating physician to provide not only the RFA and a treatment report justifying the treatment but also all relevant medical records.

Without addressing the validity or invalidity of the regulation cited by Defendant, it is perhaps enough to say that the Defendant’s interpretation of the regulation flies in the face of both statutory and case law. I cite from *Dubon*:

[Labor Code] Section 4610 expressly indicates that UR decisions should be based on the “information” that is “reasonably necessary” to make the determination and that, if a decision to delay or deny is based on “incomplete or insufficient information,” the UR decision shall specify the additional information needed. (Lab. Code Secs. 4610(d), (g)(1), (g)(2), (g)(4), (g)(5).) Furthermore, section 4610 and the statutory scheme of which it is a part also contemplate compliance with the AD’s Rules on UR procedures. (Lab. Code Secs. 4610(c), (g)(3)(a), (i), 4603.5 (“The administrative director shall adopt rules . . . necessary to make effective the requirements of this article.”).)

Dubon v. Workers’ Compensation Appeals Board (2014) 79 Cal.Comp.Cases 313, 321.

In this case, Defendant was in possession of all of the treatment reports cited by the undersigned in the Opinion on Decision and elected to not provide them to its utilization review vendor. While Defendant had the shoulder MRI, it elected to send the utilization reviewer instead a copy of the lumbar spine MRI. The Labor Code provides the employer with


² It is notable that this subsection was not made effective until February 12, 2014—in other words, it was not the law at the time that Dr. Viess submitted the RFA which is at issue.

specific means to obtain additional information and documentation, and it failed to do so (perhaps because it had all of the documentation all along).

Defendant goes on to suggest that I usurped the physician's function by stating that the utilization review physician utilized the wrong guidelines and appeared to have misunderstood the diagnosis. Upon review of this criticism, it appears that I inadvertently addressed what might be termed "substantive," rather than "procedural" defects in the utilization review. However that may be, I believe that the Defendant's failure to provide its vendor with a medical record which included the very medical findings which he said were needed in order to justify the requested surgery is a *very material* procedural error within the meaning of *Dubon*.

RECOMMENDATION

In light of Defendant's Petition, I recommend that Reconsideration be granted to strike the second, third, fourth, fifth, and sixth paragraphs of the discussion of "Material Procedural Defects," (C. 2. in the Opinion) and otherwise affirm the decision.



Dated: June 19, 2014

Stanley E. Shields
Workers' Compensation Judge

Served by mail on all parties listed on the
Official Address record on the above date.

BY: Ben Aguilar  Date: 06/19/2014

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