

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

3
4 **TOMMY GUTIERREZ,**

5 *Applicant,*

6 vs.

7 **BIGGE CRANE & RIGGING COMPANY;
8 ZURICH AMERICAN INSURANCE
COMPANY,**

Defendants.

Case No. ADJ2123966 (SFO 0510193)
(San Francisco District Office)

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

DOCUMENT #1
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11 → Defendant seeks reconsideration of the April 29, 2015 Findings & Award of the workers'
12 compensation administrative law judge (WCJ) who found that defendant's utilization review (UR) of a
13 Request For Authorization (RFA) by applicant's treating physician Douglas Abeles, M.D., to provide the
14 prescription medications Percocet and Norco was "untimely, due to defendant's failure to prove that the
15 decision was communicated to the treating physician by phone, FAX or email within 24 hours of the
16 decision." The WCJ further found that Dr. Abeles' request to provide the medications "is reasonable and
17 necessary," and the medications were awarded along with reimbursement to applicant for self-procuring
18 them.

19 It was previously stipulated that applicant sustained industrial injury to his back while working
20 for defendant Bigge Crane & Rigging Company as a crane operator on August 8, 2008, causing
21 permanent disability and need for future medical treatment.

22 Defendant contends that the evidence shows it timely communicated the UR decision to
23 Dr. Abeles and the award of medical treatment is not justified.

24 An answer was not received from applicant.

25 The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report)
26 recommending that reconsideration be denied.

27 ///

1 We have carefully reviewed the record and considered the allegations of defendant's petition for
2 reconsideration and the WCJ's Report with respect thereto. For the reasons stated by the WCJ in her
3 Report, which is adopted and incorporated by this reference except as discussed below, and for the
4 reasons below, reconsideration is denied and the April 29, 2015 Findings & Award is affirmed.

5 Defendant did not establish at trial that the UR determinations were timely communicated to
6 Dr. Abeles' office within 24 hours after the decisions were made as required by Administrative Director
7 (AD) Rule 9792.9.2(e)(3). (Cal. Code Regs., tit. 8, § 9792.9.2(e)(3).) In accordance with the holding in
8 *Bodam v. San Bernardino County Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519 (significant
9 panel decision) (*Bodam*), a UR decision that is timely made but not timely communicated is invalid.¹
10 For that reason, the WCJ was authorized to award the requested medical treatment based upon her
11 finding that applicant's use of the medications is supported by substantial medical evidence in light of the
12 entire record.

13 The WCJ provides a summary of the background and explains the reasons for her decision in her
14 Report by quoting from her Opinion on Decision, as follows:

15 Applicant is continuing to undergo treatment for his back with his primary
16 treating physician (PTP), Dr. Abeles. Dr. Abeles faxed a Request for
17 Authorization (RFA) to defendant on 01/23/2015 for medications,
18 including Percocet and Norco (Exhibit 'A'). Said request for medications,
19 Percocet and Norco, was denied by Utilization Review (UR) on 01/27/2015
20 (Exhibits 'G' and 'H.')...

21 The issue is whether the Utilization Review decision issued in a timely
22 manner. In the WCAB en banc decision of [*Dubon v. World Restoration,*
23 *Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.)
24 (*Dubon II*)] the WCAB held,

25 1. 'A utilization review (UR) decision is invalid and not
26 subject to independent medical review (IMR) only if it is
27 untimely; and

¹ Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); 25 Cal. Workers' Comp. Rptr. 197 [News Brief, August 1997].)

1 2. If a UR decision is untimely, the determination of
2 medical necessity may be made by the WCAB based on
3 substantial medical evidence consistent with Labor Code
4 section 4604.5'

5 In addition, in the WCAB Significant Panel Decision of [*Bodam*], the
6 WCAB held the following per [Labor Code sections 4610(g)(1) and
7 (g)(3)(A)] and [AD Rule 9792.9.1(e)(3) (Cal. Code Regs., tit. 8, §
8 9792.9.2(e)(3))]:

9 '(1) A defendant is obligated to comply with all time
10 requirements in conducting UR, including the timeframes
11 for communicating the UR decision;

12 '(2) A UR decision that is timely made but is not timely
13 communicated is untimely; and;

14 '(3) When a UR decision is untimely and, therefore, invalid,
15 the necessity of the medical treatment at issue may be
16 determined by the WCAB based upon substantial evidence.

17 [Labor Code Section 4610(g)(3)(a)], as well as [AD Rule 9792.9.1(e)(3)
18 (Cal. Code Regs., tit. 8, § 9792.9.2(e)(3))], cited above in the *Bodam* case
19 provides:

20 'For prospective ... review, a decision to modify, delay, or
21 deny shall be communicated to the requesting physician
22 within 24 hours of the decision, and shall be
23 communicated to the requesting physician initially by
24 telephone, facsimile, or electronic mail.' (Emphasis
25 added.)...

26 Applying the above stated law to the facts in this case, the question is
27 whether defendant timely communicated the UR decision to the requesting
physician within 24 hours of the UR decision. Defendant produced Exhibit
'E' as evidence that they had complied with this requirement.

There is no document entered into evidence from the UR physician, Dr.
Dao claiming that he communicated the UR decision to the PTP Dr. Abeles
within the 24 hour period requirement. Instead, Exhibit 'E' is a letter dated
01/27/2015 from the primary treating physician's **assistant**, Marc Munoz
to Zurich. The **totality** of the body of contents of the letter state:

'At this time we spoke with Dr. Dao for Utilization
Review regarding Mr. Gutierrez's use of his
medications. All information was provided to the best of
my knowledge; however, we will have to await Dr. Dao's
report.' (Emphasis added.)

This paragraph is followed by the standard [Labor Code section 5703]
disclosure statement. The document is signed by Dr. Abeles' physician's
assistant, Marc Munoz. The letter is **not signed by the PTP**, Dr. Abeles,
nor is it signed or acknowledged in any way by the UR reviewing
physician.

1 Unfortunately, although this does appear to be a good faith attempt by
2 defendant to confirm a timely communication of the UR decision to the
3 requesting physician Dr. Abeles, it falls short on several levels:

4 (a) There is **no statement in the letter that the Utilization**
5 **Review decision was, in fact, communicated from the UR**
6 **physician Dr. Dao to the PTP Dr. Abeles, which is what**
7 **the law requires.** The letter merely explains that 'we'
8 discussed the use of the applicant's medications. This could
9 have been a conversation about the PTP's reasoning for his
10 RFA. This interpretation is bolstered by the second line of
11 the 2 sentence note stating, '**All information was provided**
12 **to the best of my knowledge; however, we will have to**
13 **await Dr. Dao's report.'** This could easily be interpreted
14 as that the PTP's staff had provided all information to the
15 UR reviewer so that he could approve the request for
16 medication, but that the PTP's staff would have to wait for
17 Dr. Dao's report to see if indeed Dr. Dao was convinced of
18 the need for the medication and would approve it as
19 recommended by the PTP. This seems a more likely
20 interpretation of these 2 lines, than that the final UR
21 decision had been communicated to the PTP. **If the**
22 **decision had been communicated, as argued by**
23 **defendant, why would the PTP's staff need to await the**
24 **UR Reviewer Dr. Dao's report?**

25 (b) The letter doesn't identify who 'we' are. There is no
26 explanation as to exactly who talked to the UR physician
27 Dr. Dao. Did both Mr. Munoz and Dr. Abeles talk to Dr.
[Dao] together, in a conference call? Did only Mr. Munoz
talk to Dr. Dao? If the latter is true, the mandatory legal
requirement that the UR decision be communicated to Dr.
Abeles has not been met.

(c) Next, the letter is not signed by the primary treating
physician, Dr. Abeles, who is the person required to receive
the UR decision. The letter is signed by the physician's
assistant, Mr. Munoz. Therefore, Mr. Munoz and not Dr.
Abeles, is the one making the assertions. It is not clear, but
from reading this letter, however, it appears that Dr. Dao
talked to Mr. Munoz who communicated the information
about 'use of applicant's medications' to Dr. Abeles. (And
again, the information communicated is not specifically
identified, so we have no way of knowing if the PTP was
told of the UR denial within the 24 hour mandatory period.)

For the above reasons, Exhibit 'E,' the letter from Marc Muno[z] to Zurich,
does not constitute substantial evidence to prove that the UR denial was
communicated to Dr. Abeles within 24 hours of the UR decision.
Therefore, consistent with the *Bodam* case, the defense has failed in their
burden of proof on this issue.

Based on the above, the Utilization Review decision is deemed untimely,
and the WCAB may take jurisdiction over medical treatment dispute. See

1 [Dubon, supra.]” (Bracketed citations and material substituted, emphasis
2 in original.)

3 **DISCUSSION**

4 The record shows that the January 27, 2015 UR determinations timely issued within five days
5 after Dr. Abeles submitted the RFAs in accordance with the applicable AD Rule. However, as discussed
6 by the WCJ in her Report, defendant did not show that notice of the UR determinations was timely
7 communicated to Dr. Abeles’ office within 24 hours after they were made as required by AD Rule
8 9792.9.1(e)(3). In that regard, we do not adopt the WCJ’s view as expressed in her Report that a
9 defendant must show that a UR determination was communicated directly to the treating physician and it
10 was not defendant’s obligation to make that showing in this case. The reason the WCJ was authorized to
11 hear and decide the medical treatment dispute is because defendant did not show that the UR
12 determinations were communicated in any form to Dr. Abeles’ office within 24 hours after they were
13 made as required by AD Rule 9792.9.1(e)(3) and the holding in *Bodam*.

14 Defendant cites the January 27, 2015 letter from Dr. Abeles’ physician assistant, Mark Munoz, to
15 the insurer as evidence that the UR determinations were timely communicated to applicant’s treating
16 physician. (Exhibit E.) However, the letter makes *no* mention of the UR determinations and refers only
17 to a conversation about applicant’s “use of his medications.” We do not agree with the WCJ that the
18 letter evidences “a good faith attempt by defendant to confirm a timely communication of the UR
19 decision to the requesting physician Dr. Abeles.” Instead, the letter and the UR determinations support
20 the conclusion that the conversation referenced in Exhibit E occurred *before* the final UR determinations
21 were made.

22 In the January 27, 2015 letter, Mr. Munoz wrote that “we will have to await” receipt of the
23 written UR determinations by Dr. Dao. As the WCJ wrote in her Report, “If the [UR] decision had been
24 communicated, as argued by defendant, why would the PTP’s staff need to await the UR Reviewer
25 Dr. Dao’s report?” The answer to that question is apparent. There would be no need to “await” the UR
26 report if the UR determination had been communicated by Dr. Dao to Mr. Munoz during the January 27,
27 2015 conversation referenced in Exhibit E.

1 Moreover, on page 2 of each of the January 27, 2015 UR determinations (Exhibits F, G, H and I),
2 Dr. Dao described his conversation with Mr. Munoz on that date, writing as follows:

3 I spoke to PA Mark at 4:35 PM PT today after the AP's office had called
4 back. He stated that he does not know that much about this claimant[']s
5 clinical status. He noted that claimant has taken multiple narcotic
6 medications but that there has not been any documentation of significant
benefit from these medications. My denial for medications will not be
changed after the above discussion.

7 The above-described evidence shows that the January 27, 2015 conversation between Mr. Munoz
8 and Dr. Dao referenced in Exhibit E occurred before the final UR determinations were made by Dr. Dao.
9 In sum, defendant did not meet its burden of showing that the UR determinations were timely
10 communicated to the office of applicant's primary treating physician within 24 hours as required by AD
11 Rule 9792.9.1(e)(3) and the holding in *Bodam*.

12 We also find that the WCJ's award of the medications is supported by substantial medical
13 evidence. A review of the numerous reports by Dr. Abeles and others that are in evidence demonstrates
14 that applicant appropriately used the medications at issue to relieve his chronic pain, consistent with the
15 MTUS guidelines referenced in the UR determinations.

16 By way of example, on page two of one of the February 4, 2013 report by Dr. Abeles
17 (Defendant's Exhibit W), the physician wrote that he discussed the potential toxicity of Norco and
18 Percocet with applicant "in detail" and that "He knows to stay compliant with his medication regimen."
19 Applicant's participation in urinalysis "to insure compliance of medication usage" was also documented
20 in that report. The continuation of that approach is further documented on page two of Dr. Abeles
21 March 6, 2013 report (Defendant's Exhibit W), and in all his other reports from 2013 to 2015.

22 On page two of his August 25, 2014 report (Defendant's Exhibit R), Dr. Abeles explains why
23 applicant "will continue his current pain medication regimen," writing that, "His pain medication
24 provides modest pain relief, allowing him to remain functional. He is not experiencing any intolerable
25 side effects."

26 More recently, in his report of February 6, 2015 (Defendant's Exhibit M), Dr. Abeles discusses
27 applicant's continuing use of Norco and Percocet. With regard to the Norco, Dr. Abeles wrote, "I am

1 keeping close control on his medication use and will periodically checking [sic] his CURES reports and
2 having ongoing discussions with the pharmacy to insure he is maintaining his treatment protocol.”

3 On page two of his April 3, 2015 report (Applicant’s Exhibit 9), Dr. Abeles discusses applicant’s
4 condition and the treatment plan. He explains that applicant “is still suffering from chronic low back
5 pain due to his previous surgery, degenerative disc disease, and the 4.0 mm disc herniation at the L5-S1
6 level causing ongoing back pain and radicular symptoms in his leg.” Dr. Abeles discusses the need for a
7 pain management physician located closer to applicant’s residence, and he notes that he is “attempting to
8 slowly wean [applicant] off of the Norco and Percocet,” although he continued to prescribe them for
9 “breakthrough pain.”

10 The medical reporting in evidence shows that applicant’s use of Norco and Percocet to relieve his
11 pain is not inconsistent with the MTUS guidelines referenced in the UR determinations. As expressed in
12 the MTUS guidelines as quoted in the UR determinations (Defendant’s Exhibits F-I), the use of such
13 medications requires “Ongoing review and documentation of pain relief, functional status, appropriate
14 medication use, and side effects.” Dr. Doa’s statement in the UR determinations that “there has not been
15 any documentation of significant benefit from these medications” is contradicted by the several reports of
16 primary treating physician Dr. Abeles that are in evidence.

17 In light of the substantial medical evidence demonstrating applicant’s appropriate use of the
18 medications to relieve the effects of his industrial injury, the WCJ’s decision that they should continue to
19 be provided as reasonable medical treatment was correct. The April 29, 2015 decision is affirmed.

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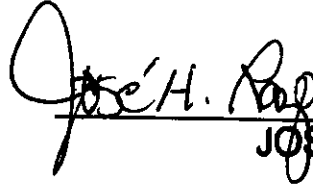
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1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's petition for reconsideration of the April 29, 2015 Findings &
3 Award of the workers' compensation administrative law judge is **DENIED**.

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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **JOSE H. RAZO**

9 **I CONCUR,**

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11 
12 **RONNIE G. CAPLANE**



13
14 
15 **KATHERINE ZALEWSKI**

16
17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **JUL 20 2015**

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

22 **TOMMY GUTIERREZ**
23 **SMITH & BALTAXE**
24 **MULLEN & FILIPPI**



25 **JFS/abs**

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

TOMMY GUTIERREZ

Applicant,

v.

BIGGIE CRANE & RIGGING CO.

Defendant.

CASE NO. ADJ2123966

**REPORT AND RECOMMENDATION
ON PETITION FOR
RECONSIDERATION**

DOCUMENT #2
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→ **I. INTRODUCTION**

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1. **IDENTITY OF PETITIONER:** Defendant
 2. **DATE & TYPE OF INJURY:** Specific injury to low back on 1/8/2008
 3. **TIMELINESS:** Petition was timely filed.
 4. **VERIFICATION:** A verification is attached.
 5. **DEFENDANT'S CONTENTIONS:**
 - The WCJ erred by finding the UR decision untimely as it had not been properly communicated to the primary treating physician.
 - The WCJ erred by finding that a letter from the PTP's physician's *assistant* to the carrier memorializing a conversation he had with the UR physician, Dr. Dao, "regarding Mr. Gutierrez's use of his medications" (Exhibit E) did not constitute communication of the UR decision to the PTP within 24 hours of the decision as mandated by LC 4610(g)(3)(a), as well as 8 CCR 9792.9.1(e)(3), 8 CCR.
 - The WCJ erred by awarding reimbursement of the self-procured medical treatment out-of-pocket costs of Hydrocodone/Norco in the **amount of \$115.**

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2 “(1) A defendant is obligated to comply with all time requirements in conducting
UR, including the timeframes for communicating the UR decision;

3 (2) A UR decision that is timely made but is not timely communicated is
4 untimely; and;

5 (3) When a UR decision is untimely and, therefore, invalid, the necessity of the
6 medical treatment at issue may be determined by the WCAB based upon substantial
evidence.

7 Labor Code Section 4610(g)(3)(a), as well as 8 CCR 9792.9.1(e)(3), cited above in the *Bodam*
case provides:

8 "For prospective ... review, a decision to modify, delay, or deny **shall be**
9 **communicated to the requesting physician within 24 hours of the decision**, and shall
10 be communicated to the requesting physician initially by telephone, facsimile, or
electronic mail." (Emphasis added.)

11 **III. Was the UR Denial Communicated to PTP Dr. Abeles within 24 hours?**

12
13 Applying the above stated law to the facts in this case, the question is whether defendant
14 timely communicated the UR decision to the requesting physician within 24 hours of the UR
15 decision. Defendant produced Exhibit “E” as evidence that they had complied with this
16 requirement.

17 **There is no document** entered into evidence from the UR physician, Dr. Dao claiming
18 that he communicated the UR decision to the PTP Dr. Abeles within the 24 hour period
19 requirement. Instead, Exhibit “E” is a letter dated 01/27/2015 from the primary treating
20 physician's **assistant**, Marc Munoz to Zurich. The **totality** of the body of contents of the letter
21 state:

22 **"At this time we spoke with Dr. Dao for Utilization Review regarding Mr.**
23 **Gutierrez's use of his medications. All information was provided to the best of my**
24 **knowledge; however, we will have to await Dr. Dao's report."** (Emphasis added.)
25

1
2 This paragraph is followed by the standard LC 5703 disclosure statement. The document
3 is signed by Dr. Abeles' physician's **assistant**, Marc Munoz. The letter is **not signed by the**
4 **PTP**, Dr. Abeles, nor is it signed or acknowledged in any way by the UR reviewing physician.

5 Unfortunately, although this does appear to be a good faith attempt by defendant to
6 confirm a timely communication of the UR decision to the requesting physician Dr. Abeles, it
7 falls short on several levels:

8 (a) There is **no statement in the letter that the Utilization Review decision was, in**
9 **fact, communicated from the UR physician Dr. Dao to the PTP Dr. Abeles**, which
10 is what the law requires. The letter merely explains that "we" discussed the use of the
11 applicant's medications. This could have been a conversation about the PTP's
12 reasoning for his RFA. This interpretation is bolstered by the second line of the 2
13 sentence note stating, "**All information was provided to the best of my knowledge;**
14 **however, we will have to await Dr. Dao's report.**" This could easily be interpreted
15 as that the PTP's staff had provided all information to the UR reviewer so that he
16 could approve the request for medication, but that the PTP's staff would have to wait
17 for Dr. Dao's report to see if indeed Dr. Dao was convinced of the need for the
18 medication and would approve it as recommended by the PTP. This seems a more
19 likely interpretation of these 2 lines, than that the final UR decision had been
20 communicated to the PTP. **If the decision had been communicated, as argued by**
21 **defendant, why would the PTP's staff need to await the UR Reviewer Dr. Dao's**
22 **report?**

23 (b) The letter doesn't identify who "we" are. There is no explanation as to exactly who
24 talked to the UR physician Dr. Dao. Did both Mr. Munoz and Dr. Abeles talk to Dr.
25 Doa together, in a conference call? Did only Mr. Munoz talk to Dr. Dao? If the latter

1 is true, the mandatory legal requirement that the UR decision be communicated to Dr.
2 Abeles has not been met.

3 (c) Next, the letter is not signed by the primary treating physician, Dr. Abeles, who is the
4 person required to receive the UR decision. The letter is signed by the physician's
5 assistant, Mr. Munoz. Therefore, Mr. Munoz and not Dr. Abeles, is the one making
6 the assertions. It is not clear, but from reading this letter, however, it appears that Dr.
7 Dao talked to Mr. Munoz who communicated the information about "use of
8 applicant's medications" to Dr. Abeles. (And again, the information communicated is
9 not specifically identified, so we have no way of knowing if the PTP was told of the
10 UR denial within the 24 hour mandatory period.)

11 For the above reasons, Exhibit "E," the letter from Marc Munos to Zurich, does not
12 constitute substantial evidence to prove that the UR denial was communicated to Dr. Abeles
13 within 24 hours of the UR decision. Therefore, consistent with the *Bodam* case, the defense has
14 failed in their burden of proof on this issue.

15 Based on the above, the Utilization Review decision is deemed untimely, and the WCAB
16 may take jurisdiction over medical treatment dispute. See *Dubon v. World Restoration; SCIF*,
17 (2014) 79 Cal Comp Cases 1298.

18
19 **IV. Has Applicant Sustained his Burden of Proving the MT is Reasonable?**

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21 Considering the range of medical evidence in the file, it is reasonable and necessary to
22 award medical treatment in the form of the medications, Percocet and Norco and, specifically, for
23 reimbursement of the self-procured medical treatment out-of-pocket costs of Hydrocodone/Norco
24 in the amount of \$115. (See Exhibit "12")."
25

1 **III. RECOMMENDATION**

2 **IT IS RESPECTFULLY RECOMMENDED** that the petition for reconsideration filed by
3 defendant herein be **DENIED** on the merits.

4 **DATE:** 6/3/15

5 *Colleen S. Casey*

6 **Colleen Casey**
7 **WORKERS' COMPENSATION**
8 **ADMINISTRATIVE LAW JUDGE**