WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARK ARCIUCH, *Applicant*

vs.

NORTHRUP GRUMMAN SYSTEMS CORPORATION; AMERICAN HOME ASSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11584131
Marina Del Rey District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Preliminarily, we note that defendant does not challenge the WCJ's finding that the utilization review (UR) denial letter dated October 2, 2023 of the September 19, 2023 Request for Authorization (RFA) was untimely. In *Dubon v. World Restoration, Inc*. (2014) 79 Cal.Comp.Cases 1298, 1299 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that if a UR decision is untimely, the UR decision is invalid and not subject to independent medical review (IMR). If a UR decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board based on substantial evidence. (*Id*. at pp. 1300; 1312.) In this case, the WCJ correctly determined that the September 19, 2023 Request for Authorization is reasonable and necessary.

A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and

opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

For the reasons stated by the WCJ in the Report, we agree that the opinions of Bradley Thomas, M.D., and Peter Gleiberman, M.D., are substantial medical evidence upon which the WCJ properly relied. Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 28, 2024

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

MARK ARCIUCH
WORK INJURY GROUP
BLACK ROSE LAW FIRM

PAG/pm

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.	Applicant's Occupation:	Aircraft Mechanic
2.	Applicant's Age:	60
3.	Date of injury:	11/06/2017
4.	Parts of Body Alleged:	Lumbar Spine, right shoulder, elbows, Neck, lower extremities, hips
5.	Manner in which injuries alleged to have occurred:	Repetitive duties
6.	Identity of Petitioners:	Defendant, Northrup Grumman Systems Corp., American Home Assurance Co.
7.	Timeliness:	The petition was timely filed
8.	Verification:	A verification is attached.
9.	Date of Findings and Award:	4/22/2024
10.	Petitioner's contentions:	That evidence does not support Award of Lumbar Spine surgery

II. FACTS

Applicant, Mark Arciuch, sustained injury arising out of and in the course of employment to the lumbar spine, right shoulder and elbows (MOH/SOE, p. 2, lines 3-5). Dr. Pranay Patel performed a lumbar decompression procedure on Applicant on 08/18/2021 (Exhibit 20, pp. 6-7). Subsequent to this surgery, beginning in approximately October 2021, applicant complained to his primary treating physician, Dr. Bradley Thomas, that the temporary relief of symptoms from this surgery had dissipated and additional non-invasive treatments were initiated.

Going into and throughout 2022 applicant's lumbar spine complaints continued and non-surgical treatments provided. On 10/26/2021 (Exhibit 18, p. 86), Dr. Thomas noted that applicant was "W/O RELIEF" from the spinal decompression with continued tingling in the bilateral lower extremities. In Dr. Thomas' PR-2 report dated 12/22/2021 (Exhibit 18, p. 80) the doctor states that applicant had continued improvement for the lumbar spine with physical therapy. Progress was

again noted with physical therapy for the lumbar spine in the 01/24/2022 report as well (Exhibit 18, p. 77). In the 02/22/2022 PR-2 Report (Exhibit 18, p. 74) it was noted that applicant should continue physical therapy for the lumbar spine. The 03/09/2022 PR-2 report (Exhibit 18, p. 71) reviewed a 03/03/2022 Lumbar MRI report noting a persistent 6 mm disc protrusion accentuated centrally and to the left with left S1 nerve root impingement and that applicant reported lowerback pain and right leg tingling that started in November 2021. Referral for lumbar spine epidural was denied as of 3-14-22 (Exhibit 18, p. 65, 4-4-22 report). In the 4-25-22 PR-2 report (Exhibit 18, p. 64) it was noted that Dr. Thomas was awaiting a decision on a new epidural lumbar injection recommendation. This status remained unchanged on the 5-25-22 Dr. Thomas PR-2 report (Exhibit 18, p. 61). The 6-30-22 PR-2 report (Exhibit 18, p. 58) by Dr. Thomas noted that he personally reviewed the MRI scan of the lumbar spine done March 2022 commenting that there was a disc protrusion at "L4-5 BILATERAL (LEFT>RIGHT), CENTRAL/LEFT/RIGHT SEVERE NEUROFORAMINAL NARROWING." Dr. Thomas further stated that he would consider a right-sided lumbar epidural injection if there was no improvement with left-sided epidural. The 8-22-22 PR-2 report (Exhibit 18, p. 50) noted as follows: "PATIENT HAD ESI INJECTION 7/22/22 L5-S1 ESI WITH DR VALDEZ STATES VERY MIN RELIEF WITH INJECTION. SYMPTOMS HAVE WORSEN, INCREASE/MORE FREQUENT RADIC IN RT LEG W/NUMBNESS/TINGLING." The PR-2 report dated 10-20-22 (Exhibit 18, p. 44) notes that applicant was status-post cortisone injection to left lumbar "perispinal" area and status-post L5-S1 ESI on 07/22/2022 with "MINIMAL RELIEF".

Applicant's worsening complaints and non-invasive treatment efforts continued into 2023. The 01/12/23 PR-2 report (Exhibit 18, p. 38) notes that applicant was status-post L4-5, L5-S1 TFESI with Dr. Valdez on 12/23/2022 with minimal relief. In the PR-2 report dated 05/09/2023 (Exhibit 18, p. 30) Dr. Thomas recommends referral to Dr. Larsen to perform a spinal consult for both the lumbar and cervical spines. In the 06/12/2023 PR-2 report (Exhibit 18, p. 22) Dr. Thomas recommends acupuncture for the lumbar spine for 12 visits as an alternative to physical therapy. In the PR-2 report dated 07/10/2023 (Exhibit 18, p. 14) Dr. Thomas recommends a new lumbar MRI per Dr. Larsen as applicant has recurrent herniation at L5-S1 with bilateral lower extremity radiculopathy and that a new scan is required prior to planned surgery. In the PR-2 report dated 09/18/2023 (Exhibit 18, p. 4) Dr. Thomas notes that Dr. Larsen recommended lumbar spine surgery as applicant had no relief from the acupuncture. On 09/19/2023 Dr. Thomas issued an RFA (Exhibit 3) for this lumbar spine surgery (left L5-S1 revision laminectomy/discectomy and right L5-S1 laminectomy/discectomy) which did not include a request for an updated lumbar MRI scan.

As noted in the untimely UR denial dated 10/02/2023 (Joint Exhibit 101) the RFA issued by Dr. Bradley Thomas was received on 9-19-23. Thereafter, applicant requested IMR which issued a 11/14/2023 determination (Exhibit D) denying the surgery as well.

The deposition of the orthopedic QME, Dr. Gleiberman occurred on 03/08/2024 (Exhibit E). In that deposition transcript the QME opined that if it were up to him, he would do additional hip testing before doing back surgery again (Exhibit E, p. 42, line 10). However, the QME also concedes that he is a hip specialist (Exhibit E, p. 37, line 6). The QME also mentions a study of 500 patients who all had hip replacements in which 80% noted resolved back pain one year post hip replacement surgery (Exhibit E, pp. 36, lines 12-20) to apparently support his opinion that hip issues should be addressed before doing low back surgeries. However, there was no specific citation for the study and no mention of whether any of these study subjects had a lumbar disc protrusion of at least 6 mm nor whether applicant had ever had a hip replaced. Overall, the QME expresses a preference that applicant undergo an injection procedure to the hip which may or may not indicate whether the hip or the low back is the "prime" pain generator (Exhibit E, p. 41, line 6-7).

Pursuant to applicant's Declaration of Readiness (DOR) this matter was set for Expedited Hearing in which the record was opened on 03/25/2024. Applicant testified that he still had ongoing symptoms of low back pain on a daily basis that radiated down his left leg along with tingling and numbness (MOH/SOE p.4, line7 and p.6, line 1). He testified that if he is permitted to undergo a second lumbar spine surgery, he would do it, even if it provided only a little relief (MOH/SOE, p.6, lines 2-3). Applicant also testified that he did travel to London in May 2023 for seven days (MOH/SOE, p.6, line4). On the flight over, applicant got out of his seat to walk around the plane and stretch every one and a half hours (MOH/SOE, p. 6, lines 6-7). When he landed in London his back pain was the same as when the plane left Los Angeles (MOH/SOE, p.6, line 7). He testified that while walking around London he would sit down and take breaks (MOH/SOE, p. 6, lines 8-9). By the time applicant returned to Los Angeles from London his low back pain was the same as when he left for London (MOH/SOE, p. 6, lines 10-11).

After completing applicant's testimony, the matter was submitted for decision. A Findings of Fact and Award and Opinion on Decision were served on the parties on 04/22/2024 awarding the applicant lumbar surgery as described in the 09/19/2023 RFA from Dr. Bradley Thomas. Defendant, thereafter, filed a timely and verified Petition for Reconsideration on 04/29/2024. No Answer to defendant's Petition for Reconsideration has yet been filed. Defendant contends that the surgery Applicant seeks is not medically reasonable or necessary. For the following reasons, the Petition for Reconsideration is without merit and should be denied.

III. DISCUSSION

Defendant contends that the Award of surgery in this matter is not supported by the evidence. Additionally, it appears that defendant also argues (1) that Applicant's testimony is not credible, (2) that this WCJ "misstated the evidence when he concluded Applicant had physical therapy" and

(3) the WCJ "deviated from the medical evidence when he concluded that surgeries were reasonable and necessary." As will be demonstrated below these arguments are fallacious.

First, defendant asserts at p. 2, lines 22-23 of their petition that the lumbar MRI report dated 03/02/2022 (Exhibit 5) states that applicant complained of right leg tingling along with low back pain as opposed to the left to undermine applicant's credibility. However, every other report in evidence clearly indicates that applicant has consistently complained of left lower extremity symptomatology. Some reports even noted bilateral radicular complaints into the legs. Here, defendant seizes upon an apparent typographical error in a misguided effort to impugn Applicant's veracity. Relying on a single erroneous reference to right leg symptoms to attempt to undermine applicant's credibility in the face of an avalanche of medical reports that, like applicant's testimony, overwhelmingly note left leg, if not bilateral, symptoms does not undermine Applicant's credibility. Instead, it undermines Defendant's.

Next, defendant asserts that a 07/07/2023 report from Dr. John Larsen (Exhibit 8) stated that applicant told Dr. Larsen that he has been treating conservatively the past several months with "rest" (p. 2, line 27, Petition for Reconsideration) and then points out that applicant traveled to London in May 2023. Once again, defendant attempts to undermine applicant's credibility by selectively presenting information from the medical record and comparing it to applicant's Trial testimony. And once again the effort fails for multiple reasons. First, defendant does not quote the entire sentence on page 1 of Exhibit 8. That sentence states as follows: "He has been treating conservatively over the past several months with rest therapy medication and epidural steroid injections." Without proper punctuation the sentence could be referring to either an unknown treatment known as "rest therapy medication" or, more likely with the use of commas, the sentence is indicating that multiple modalities, including therapy (most likely physical), medications and injections, were provided to applicant along with rest. Second, this gambit by defendant was apparently designed to argue that applicant was not resting around this time because he traveled to London in May 2023. But applicant never testified at trial about rest. Aside from the word "rest" having many different meanings for many different people, this court presumes that a trip to London would generally be considered a vacation that indeed could be described as restful. Unlike employment where a person has less control over their physical environment, people on a vacation trip can exert themselves whenever and however they see fit. As applicant testified, he was careful to not sit too long and took breaks on the London trip. Defendant's attempt to argue that the London trip somehow was something above and beyond their own subjective concept of "rest" is also undermined by applicant's testimony that his low back symptoms upon his arrival back in Los Angeles were the same as they were when he left to go to London. This court finds nothing inconsistent or incredible about applicant telling Dr. Larsen he was generally resting during the summer months of 2023 as juxtaposed against his London trip.

For the record, this WCJ found applicant's testimony honest and credible throughout the Trial proceedings.

Next, defendant refers to a medical report not in evidence, a supposed 07/26/2023 report from Bradley Thomas, M.D. (Petition for Reconsideration p. 3, line 6), in an apparent effort to substitute its opinion in place of those of the medical experts in this case. Allegedly this medical report shows normal reflexes, no radiculopathy on the left and no motor or sensory deficits. This court is unable to ascertain the truth of such assertions since the report is not in evidence. It is not listed as a separate exhibit and is not included in Exhibit 18, which contains approximately 40 PR-2 or Status Reports from Dr. Bradley Thomas.

Next, defendant attempts again to undermine applicant's testimony by asserting that applicant testified that he did not complete physical therapy for his lower extremities (Petition for Reconsideration, p. 3, line 8). This assertion along with an entire argument heading asserting that this WCJ "MISSTATED THE EVIDENCE WHEN HE CONCLUDED APPLICANT HAD PHYSICAL THERAPY" (p. 5 of the petition), is curious. First, the only testimony from applicant about physical therapy was that he obtained physical therapy after the first epidural in 2021 (MOH/SOE, p. 5, line 10) and that after the London trip in May 2023 he received physical therapy for his arms but not his foot or leg. Applicant never testified that he did not complete physical therapy. Second, it appears that defendant's point here is that a noninvasive treatment regimen was not completed. This is a Red Herring argument as the real question is whether applicant tried physical therapy at all. And the answer is in the affirmative. As outlined above, the medical reports from the PTP, Bradley Thomas, M.D., clearly indicate that applicant underwent physical therapy on multiple occasions after the failed back surgery of 08/18/2021. To the extent defendant's argument is that a second surgery should not be contemplated whenever physical therapy is incomplete for radicular symptoms from a bulging spinal disc, such an argument must fail if the physical therapy, as demonstrated by the medical record in this case, fails to relieve the symptoms.

Finally, we come to the main thrust of defendant's petition – that the surgery recommended by PTP Bradley Thomas, M.D. is not medically reasonable or necessary. For this proposition defendant relies on the opinions of three physicians: Dr. Steven Sheskier, who issued the untimely UR denial decision, the Independent Medical reviewer who denied the applicant's IMR appeal, and the QME, Dr. Peter Gleiberman. As will be shown below, the opinions of the UR and IMR doctors are not only specious but also do not constitute substantial medical evidence. The opinions of the QME, while apparently helpful regarding the Applicant's hip issues, do not provide any basis to deny the requested surgery.

First, the opinion of the UR doctor, Dr. Sheskier, is based on an extraordinarily narrow criteria that does not appear to be tied to any evidence-based criteria. Dr. Sheskier's 10/02/2023 UR denial states that it is based on the flowing: (1) it was unclear whether physical therapy has failed; and (2) that there was no documentation of abnormal reflexes or sensations. This standard seems arbitrary particularly when compared to the rational and straightforward MTUS guidelines noted in the IMR Determination (Exhibit D) which require the following to be present:

(1) Radicular pain syndrome with current dermatomal pain and/or numbness, or myotomal muscle weakness all consistent with a herniated disc;

(2) Imaging findings by MRI, or CT with or without myelography that confirm persisting nerve root compression at the level and on the side predicted by the history and clinical examination; and

(3) Continued significant pain and functional limitation after 4 to 6 weeks of time and appropriate non-operative therapy that usually includes NSAID(s).

As can be readily appreciated, the standard used by Dr. Sheskier is not reasonable and does not even come close to emulating the MTUS guidelines. But even assuming the UR standard was reasonable, application of it to the facts of this case (leaving aside the unexplained requirement for "abnormal reflexes") still leads to the conclusion that the surgery requested by applicant is reasonable and necessary. Regarding Dr. Sheskier's standard that physical therapy must have clearly failed is met here. Multiple reports from Dr. Bradley Thomas in the months after the 08/18/2021 back surgery show that physical therapy was tried and yet Applicant's symptoms were not relieved at all. This is the very definition of failure of physical therapy and there is nothing "unclear" about it.

Regarding the alleged lack of abnormal sensations required by Dr. Sheskier, the 09/18/2023 PR-2 report of Dr. Bradley Thomas (Exhibit 18, p. 4) noted continued loss of sensation/coordination in the left lower extremity. Also, the IMR determination itself (Exhibit D) refers to a 08/18/2023 report from Dr. Bradley Thomas noting sensory deficits at the S1 dermatomes bilaterally. Although this 08/18/2023 report from Dr. Bradley Thomas is not in evidence, the point here is that we clearly have loss of sensation that is abnormal since deficits and loss of sensation cannot reasonably be described as normal. Thus, even under the strained and limited standard used by Dr. Sheskier, the lumbar surgery requested herein is reasonable and necessary.

Unlike the UR doctor, this court applied the MTUS guidelines noted above rationally and reasonably to this case. The first guideline prong is met because the applicant has radiating numbness and tingling. The second prong is met because we have MRI findings (Exhibit 6) that show applicant with a disc protrusion prominent on the left at L5-S1 with associated compression of the left S1 nerve root. Since applicant testified to consistent symptoms radiating down his left leg this second prong is satisfied. Finally, we come to the third prong regarding conservative treatment/pain and functional limitation. As evinced by the medical record subsequent to the 08/18/2021 lumbar surgery, applicant has tried physical therapy, medication, injections, and even acupuncture, all to no avail in alleviating his lumbar symptoms. The reports from Dr. Thomas after the first lumbar surgery consistently note that applicant tried various treatments without relief for

his symptoms. These reports also indicate ongoing pain. PQME Gleiberman's 04/26/2022 report (Exhibit 12) noted that a few months after the 08/18/2021 surgery the low back pains recurred. This QME report also noted at p. 10 that Applicant's low back pain was present "100% of his wakeful day" and varied from 3 out of 10 to 7 out of 10. Also, lower back pain "frequently" awoke applicant while sleeping. This report also noted that low back pain worsened on activities such as bending, twisting, sitting longer than 15 minutes, lying in bed, going up and down stairs and other daily activities.

In his 12/14/2022 report (Exhibit 11, p. 8) Dr. Gleiberman noted the same frequencies and intensities of low back pain as were found during the 04/26/2022 examination along with radiating pain down both legs that was worse on the left than the right. Dr. Gleiberman also noted that applicant's increased pain on activity was the same as the prior exam and that standing, walking more than 15 minutes and prolonged sitting worsened his low back pain. Dr. Gleiberman's 04/24/2023 report (Exhibit 10, pp. 8-9) noted continued low back pain "100%" daily with radiation and "jolt, shooting pain" down both legs and that applicant wanted to see a spine surgeon "because of his persistent and significant low back and leg pain." Clearly, the medical reports from Drs. Thomas and Gleiberman evidence significant pain and functional limitations that satisfy the third prong of the MTUS guidelines.

And yet, despite this plethora of medical information overwhelmingly justifying surgical intervention for the applicant's lumbar spine, the Independent Medical reviewer saw fit to affirm the UR denial of Dr. Sheskier relying on nothing more than speculation and questionable rationalizations. First, the reviewer noted that the most recent lumbar MRI (from July 2023) did not reveal significant right sided pathology at L5-S1 consistent with symptoms. This is curious. Why talk about the right? Although the medical record notes the L5-S1 protrusion is central and does seem to effect the right side, and although applicant did at times complain of bilateral lower extremity symptoms, the medical record clearly documents applicant consistently stating to his evaluators that the radicular symptoms were much worse on the left.

Next, the IMR reviewer notes that prior epidural injections at this level in question had been ineffective "which brings into question the likelihood that surgery would provide significant symptom improvement". This is a curious assertion as well. This WCJ is not surprised that epidural injections here had little to no effect on a significant spinal structural abnormality such as a protruding 6mm disc compressing a nerve root. However, this WCJ can discern no reasonable or logical basis for asserting that failed spine injections necessarily mean a lower likelihood that subsequent surgical intervention will not provide symptom improvement.

Next, the IMR reviewer implies that since applicant's prior lumbar spine surgery failed to provide relief further surgical intervention should be denied. This argument is circular reasoning and, if applied generally, would result in no second surgeries ever occurring if the first one failed. Such an argument cannot serve as a legitimate basis to deny further surgical intervention where,

as here, all other non-invasive treatment modalities have failed to provide relief. Although a second surgery should not automatically occur before trying less invasive treatments, nor should the potential efficacy of a second surgery ever be evaluated on the basis that the first one provided no relief.

Finally, the IMR reviewer notes that the documentation reviewed "did not support that the benefit of the proposed surgery outweighed the risk." This general argument introduces the most slippery of slopes. Every surgery has risks, some quite extreme, and the evaluation of those risks in conjunction with hoped for benefits are quite subjective. The whole point of UR and IMR is to rely on objective evaluation criteria to the greatest extent possible. It is this WCJ's opinion that this last criterion relied upon by the reviewer was completely subjective and simply not relevant to the issue of whether a proposed surgery does or does not amount to reasonable and necessary treatment in a litigated context.

IV. RECOMMENDATION

As the lay and medical evidence produced at Trial clearly show, the defendant's petition for reconsideration has no merit. The applicant testified in a credible manner which was consistent with the medical record. The UR Denial and the IMR Determination are not probative medical evidence regarding reasonableness and necessity of treatment. In fact, they are just the opposite. They state evaluative criteria and then ignore them completely thus rendering their opinions and findings useless. To the contrary, the many reports from PTP Dr. Bradley Thomas and QME Dr. Peter Gleiberman fully support the proposition that applicant's request for lumbar surgery is reasonable and necessary and fully meet the MTUS criteria for lumbar surgery. The reporting from these treating and evaluating physicians constitutes substantial medical evidence. For the foregoing reasons, it is recommended that the Petition for Reconsideration be denied.

May 9, 2024

DANIEL TER VEER
Workers' Compensation Judge