WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE VARGAS, *Applicant*

vs.

ADORNO CONSTRUCTION, INC.,
administrative functions performed by BBSI;
ACE AMERICAN INSURANCE COMPANY,
administered by CORVEL, *Defendants*

Adjudication Number: ADJ16099603
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 6, 2024

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

JOSE VARGAS
WELTIN, STREB & WELTIN
HERMANSON, GUZMAN & WANG

PAG/abs

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

By timely, verified petition filed on June 7, 2024, defendant seeks reconsideration of the decision filed herein on February 1, 2024, but not evidently served until May 17, 2024, in this case, which arises out of an admitted injury, on February 23, 2022, to the left shoulder of a construction foreman. Petitioner, hereinafter defendant, contends that I erred in drawing an inference that a certain request for authorization of medical treatment was communicated to its claims administrator, and in concluding that the procedure in question was reasonable and necessary. Applicant has filed a perfunctory answer. I will recommend that reconsideration be denied.

FACTS

The factual background is summarized in the opinion on decision, as follows:

> This case arises out of an admitted injury, on February 23, 2022, to the left shoulder of a construction foreman who had, at that point, worked for this employer for approximately 30 years. Applicant Jose Vargas underwent shoulder surgery on July 5, 2022, performed by Dr. J. Theodore Schwartz and described as an arthroscopic repair of the rotator cuff, with other procedures, with ongoing symptoms. When those symptoms failed to abate, Ds. Schwartz obtained a repeat MRI, on February 17, 2023, and, on August 2, 2023, a CT scan of the shoulder, showing persistent pathology. Dr. Schwartz examined Mr. Vargas on August 7, 2023 and reported that they had reviewed his treatment options and the doctor would be requesting authorization for a further surgical procedure, consisting of an arthroscopic evaluation, with debridement and possible subacromial decompression. He completed a request for authorization (RFA) for that surgery the following day, August 8, 2023. That is the procedure that forms the current controversy.

Defendant did not direct that RFA to its utilization reviewer for a decision approving or denying authorization until approximately December 13, 2023, and the utilization review (UR) decision denying authorization for surgery is dated December 20, 2023. Applicant contends that that decision was untimely based on the RFA having been submitted by facsimile on August 8, 2023. Defendant contends that it did not receive the request until December 13, 2023, and the decision was therefore timely.

As defendant points out, the fax transmittal log showing that a facsimile from the treating surgeon to the claims administrator on August 8, 2023, does not prove what documents were actually transmitted on that date, but on December 13, 2023, the August RFA was definitely sent. As stated in the decision, however,

> There is in fact no question that the RFA and report were received on that December date, as both parties point to the fax transmittal from Golden State Orthopedics and Spine dated December 13, 2023. Applicant, however, points to more than its date: There, Dorothy Demartini indicates that the fax was being sent to both Laura

(Pittenger), the claims adjuster, and the UR department and, in all capital letters, states: "I FAXED THIS OVER BACK ON 8/25/2023 – AS OF TODAY IT'S GOING ON 4MONTHS, I HAVE CALLED THE ADJUSTER 10 TIMES, SHE HAS NOT RETURN MY CALL, I HAVE CALLED UR-DEPT, AGAIN, NO ANSWER, CAN SOME ONE PLEASE GET BACK WITH ME RE: THIS SURGERY REQUEST" (sic) (Exh. A) That document includes multiple telephone numbers and fax numbers and gives no indication that any of that information is new. Moreover, Dr. Schwartz had by that point been applicant's treating physician for over a year; no evidence suggests that prior communications (such as the request to authorize the 2022 surgery) had caused problems or multiple-month delays.

Moreover:

> I note the presence of a report dated November 17, 2023, by Rex Lockwood, D.C., serving in the capacity of qualified medical evaluator (QME), and concluding that Mr. Vargas remains temporarily, totally disabled (TTD) pending the surgery that had been requested: "One of the key issues in this case appears to be the MMI/P&S [maximum medical improvement/permanent and stationary] status, with there having been a recommendation for further arthroscopic surgery to determine the source of the patient's continuing complaints, these resulting in a continuing TTD status…[The primary treating physician] has asserted what appears to be viable reasoning for further arthroscopic search for the source of his ongoing rather pronounced functional impairment…" The QME, while aware of the mandatory UR process, weighs in in favor of proceeding with surgery. More significant, legally, is the QME's awareness of the request for it. Dr. Lockwood cites the August 7, 2023, report and paraphrases from it. From this, it appears clear that the parties had that report; defendant claimed at trial that it was not accompanied with the actual RFA form. Even if that is accurate, however, it certainly gives rise to an inquiry about the surgery, yet there is no indication that defendant ever initiated such an investigation.

Defendant acknowledges that the RFA was dated August 8, 2023. It also cites applicant's correspondence to the QME, on October 16, 2023, indicating that a surgical request by Dr. Schwartz was then pending. Then came Dr. Lockwood's report, dated November 17, 2023, and quoted above. It would appear that, even if defendant was not, during that period, in possession of the actual RFA, by all of those indications, defendant was on notice that the treating physician was recommending further surgery. Its general duty to "conduct a reasonable and timely investigation" with respect to applicant's entitlement to that medical treatment is rooted in California Code of Regulations, Title 8, section 10109. It does not appear that this defendant undertook such an investigation. My conclusion after trial: "In sum, I find it reasonable to infer that December 13, 2023, was not the first date on which the request for authorization was conveyed to this defendant, and therefore that the UR decision was untimely."

Defendant's second contention is that the surgery itself is not reasonable or necessary. Limited evidence is available on that question, as pointed out in the opinion:

This leaves the question of the reasonableness of the surgery. An untimely UR decision is inadmissible in evidence, *Sandhagen, supra.* Without considering the QME report, that leaves the reporting by Dr. Schwartz and an orthopedic consultant Dr. Daniel Haber, who does not recommend surgery, but whose report of May 8, 2023, was not offered in evidence. On balance, having reviewed the entirety of the actual evidentiary record, I believe Dr. Schwartz has adequately justified the procedure he has requested.

RECOMMENDATION

I recommend that reconsideration be denied.

Respectfully submitted,

Date: July 1, 2024

Christopher Miller
Workers' Compensation Judge

OPINION ON DECISION

This case arises out of an admitted injury, on February 23, 2022, to the left shoulder of a construction foreman who had, at that point, worked for this employer for approximately 30 years. Applicant Jose Vargas underwent shoulder surgery on July 5, 2022, performed by Dr. J. Theodore Schwartz and described as an arthroscopic repair of the rotator cuff, with other procedures, with ongoing symptoms. When those symptoms failed to abate, Ds. Schwartz obtained a repeat MRI, on February 17, 2023, and, on August 2, 2023, a CT scan of the shoulder, showing persistent pathology. Dr. Schwartz examined Mr. Vargas on August 7, 2023 and reported that they had reviewed his treatment options and the doctor would be requesting authorization for a further surgical procedure, consisting of an arthroscopic evaluation, with debridement and possible subacromial decompression. He completed a request for authorization (RFA) for that surgery the following day, August 8, 2023. That is the procedure that forms the current controversy.

The first issue submitted for decision is the timeliness of the utilization review (UR) decision denying surgery. The decision is dated December 20, 2023. Applicant claims that the RFA was sent by facsimile on August 8, 2023, defendant that it was not received until December 13, 2023. Should applicant prevail on the timeliness question, we would reach the second issue, which is the reasonableness of the disputed treatment.

Utilization review (UR) is mandated by section 4610.[1] Subdivision (g) of that section provides, in pertinent part, as follows:

> (1) Prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician. In cases where the review is retrospective, the decision shall be communicated to the individual who received services, or to the individual's designee, within 30 days of receipt of the information that is reasonably necessary to make this determination.
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> (2) If the employee's condition is one in which the employee faces an imminent and serious threat to his or her health, including, but not limited to, the potential loss of life, limb, or other major bodily function, or the normal timeframe for the decision making process, as described in paragraph (1), would be detrimental to the employee's life or health or could jeopardize the employee's ability to regain maximum function, decisions to approve, modify, or deny requests by physicians prior to, or concurrent with, the provision of medical treatment services to employees shall be made in a timely fashion that is appropriate for the nature of the employee's condition, but not to exceed 72 hours after the receipt of the information reasonably necessary to make the determination.

[1] All statutory references not otherwise identified are to the California Labor Code.

> (3) Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review, as prescribed by the administrative director.
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> (6) A utilization review decision to modify or deny a treatment recommendation shall remain effective for 12 months from the date of the decision without further action by the employer with regard to a further recommendation by the same physician for the same treatment unless the further recommendation is supported by a documented change in the facts material to the basis of the utilization review decision.

See, Sandhagen v. Cox & Cox Construction (2004) 69 Cal.Comp.Cases 1452 (Appeals Board en banc) and *Sandhagen v. Cox & Cox Construction* (2005) 70 Cal.Comp.Cases 208 (Appeals Board en banc) (overruled in other respects by *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]).

The remedy for an employee aggrieved by a contrary UR decision is the independent medical review (IMR) process, governed by sections 4610.5 and 4610.6. The IMR decision itself is binding on the parties, and may be appealed on only limited grounds. In the event of a successful appeal, the matter is remanded to the administrative director for another IMR by a different reviewer. Section 4610.6(j).

Invalidating a regulation that "independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely *and otherwise procedurally proper* utilization review (UR),"[2] the appeals board held, in *Dubon v. World Restoration, Inc*. (2014) 79 Cal.Comp.Cases 1298 (appeals board en banc),[3] that only untimeliness subjects a medical issue to judicial review, and other procedural improprieties are solely within the purview of IMR. Thus, the appeals board has the power to determine timeliness of UR, and, in the event that that process is found not to have been timely completed, to adjudicate the underlying medical issue. *Id.* A UR decision to modify, deny or delay a request for medical treatment must be communicated to the treating physician within 24 hours of the decision, followed by written notice, within certain timeframes, to the physician, the injured worker and his or her attorney if any. 8

[2] 8 Cal. Code Regs., § 10451.2, emphasis added.

[3] The appeals board's en banc decisions are binding precedent on all appeals board panels and workers' compensation administrative law judges. (8 Cal. Code Regs., § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also, Govt. Code § 11425.60(b).) Moreover, the filing of a petition for, or the pendency of, a writ of review does not, of itself, suspend the operation of a decision by the appeals board, in the absence of a stay issued by the appellate court. Lab. Code § 5956. However, if an appellate court either explicitly or implicitly overrules an en banc decision, that en banc decision is of no precedential value. *Diggle v. Sierra Sands U.S.D.* (2005) 70 Cal.Comp.Cases 1480.

Cal. Code Regs. section 9792.9.1(e)(3). A UR decision that is not timely communicated, consistent with the statute and applicable regulations, is not timely made. *Bodam v. San Bernardino County* (2014) 2014 Cal.Wrk.Comp.LEXIS 156 [ADJ8120989] (significant panel decision).

With respect to expedited review, the relevant regulation, Cal. Code Regs., title 8, section 9792.9.1, provides, at subdivision (c)(4):

> (4) Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization related to an expedited review shall be made in a timely fashion appropriate to the injured worker's condition, not to exceed 72 hours after the receipt of the written information reasonably necessary to make the determination. The requesting physician must certify in writing and document the need for an expedited review upon submission of the request. A request for expedited review that is not reasonably supported by evidence establishing that the injured worker faces an imminent and serious threat to his or her health, or that the timeframe for utilization review under subdivision (c)(3) would be detrimental to the injured worker's condition, shall be reviewed by the claims administrator under the timeframe set forth in subdivision (c)(3) [Lab. Code § 4610(g)(1), above].

In this matter, defendant's compliance with those timeframes depends on a simple question of when it received the RFA. Neither party presented a witness to the exchange(s) between Dr. Schwartz's office and defendant's claims adjuster and UR department, which might or might not have been probative. I am therefore left to make inferences, from the documents evincing the request, on August 8, 2023, and thereafter, that the surgery be authorized, and from those indicating its receipt on December 13, 2023. There is in fact no question that the RFA and report were received on that December date, as both parties point to the fax transmittal from Golden State Orthopedics and Spine dated December 13, 2023. Applicant, however, points to more than its date: There, Dorothy Demartini indicates that the fax was being sent to both Laura (Pittenger), the claims adjuster, and the UR department and, in all capital letters, states: "I FAXED THIS OVER BACK ON 8/25/2023 – AS OF TODAY IT'S GOING ON 4MONTHS, I HAVE CALLED THE ADJUSTER 10 TIMES, SHE HAS NOT RETURN MY CALL, I HAVE CALLED UR-DEPT, AGAIN, NO ANSWER, CAN SOME ONE PLEASE GET BACK WITH ME RE: THIS SURGERY REQUEST" (sic) (Exh. A) That document includes multiple telephone numbers and fax numbers and gives no indication that any of that information is new. Moreover, Dr. Schwartz had by that point been applicant's treating physician for over a year; no evidence suggests that prior communications (such as the request to authorize the 2022 surgery) had caused problems or multiple-month delays.

I note the presence of a report dated November 17, 2023, by Rex Lockwood, D.C., serving in the capacity of qualified medical evaluator (QME), and concluding that Mr. Vargas remains temporarily, totally disabled (TTD) pending the surgery that had been requested: "One of the key issues in this case appears to be the MMI/P&S [maximum medical improvement/permanent and stationary] status, with there having been a recommendation for further arthroscopic surgery to determine the source of the patient's continuing complaints, these resulting in a continuing TTD status…[The primary treating physician] has asserted what appears to be viable reasoning for further arthroscopic search for the source of his ongoing rather pronounced functional

impairment…" The QME, while aware of the mandatory UR process, weighs in in favor of proceeding with surgery. More significant, legally, is the QME's awareness of the request for it. Dr. Lockwood cites the August 7, 2023, report and paraphrases from it. From this, it appears clear that the parties had that report; defendant claimed at trial that it was not accompanied with the actual RFA form. Even if that is accurate, however, it certainly gives rise to an inquiry about the surgery, yet there is no indication that defendant ever initiated such an investigation.

In sum, I find it reasonable to infer that December 13, 2023, was not the first date on which the request for authorization was conveyed to this defendant, and therefore that the UR decision was untimely.

This leaves the question of the reasonableness of the surgery. An untimely UR decision is inadmissible in evidence, *Sandhagen, supra.* Without considering the QME report, that leaves the reporting by Dr. Schwartz and an orthopedic consultant Dr. Daniel Haber, who does not recommend surgery, but whose report of May 8, 2023, was not offered in evidence. On balance, having reviewed the entirety of the actual evidentiary record, I believe Dr. Schwartz has adequately justified the procedure he has requested. I have ordered that it be authorized.

Date: February 1, 2024

Christopher Miller
Workers' Compensation Judge