WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MELODY ALEXANDER, *Applicant*

vs.

MADONNA INN;
CYPRESS INSURANCE COMPANY, administered by
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Number: ADJ14023951
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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 Expedited Opinion on Decision and the WCJ's Report, both of which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the Report, and otherwise affirm the decision of July 17, 2024.

I.

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (*Dubon II*), the Appeals Board held that if a utilization review (UR) decision is untimely, the UR decision is invalid and not subject to IMR. The *Dubon II* decision further held that the Appeals Board has jurisdiction to determine whether a UR decision is timely. (*Id.*) If a UR decision is untimely, the determination of medical necessity for the treatment requested may be made by the Appeals Board. (*Id.* at p. 1300.) Here, while we are sympathetic to applicant's arguments, since the UR decisions were timely, we are without jurisdiction to consider the merits of the UR decisions.

II.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 14, 2024, and 60 days from the date of transmission is Sunday, October 13, 2024. The next business day that is 60 days from the date of transmission is Monday, October 14, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on August 14, 2024, and the case was transmitted to the Appeals Board on August 14, 2024. Service of the Report and transmission

of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 14, 2024.

Accordingly, we affirm the Findings and Award, except that we amend it as recommended by the WCJ to reflect the parties' stipulation at trial that applicant sustained injury to her lumbar spine and left knee.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Award of July 17, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of July 17, 2024 is **AFFIRMED, EXCEPT** that Finding of Fact number 1 is **AMENDED** as follows:

1. Melody Alexander, while employed on September 20, 2018, as a stock clerk, at San Luis Obispo, California by Madonna Inn, sustained injury arising out of and in the course of employment to her lumbar spine and left knee.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2024

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

MELODY ALEXANDER
JOSEPH LOUNSBURY,ESQ.
SAUL ALLWEISS

JMR/mc

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

EXPEDITED OPINION ON DECISION

STIPULATIONS

The stipulations of the parties as set forth in the Minutes of Hearing are accepted as fact.

FACTS

There are forty-four (44) paragraphs recited in the Stipulations of the May 14, 2024, MOH/SOE that reflect the Request for Authorizations (RFA) and Utilization Review (UR) determinations that for the basis for this trial.

Briefly, they are URs dated November 9, 2023, December 1, 2023, December 22, 2023, December 28, 2023, and March 14, 2024. The RFAs included a myriad of different treatment requests.

In summary, applicant is claiming numerous Request for Authorizations (RFA), and Utilization Review (UR) denials are **untimely** for the following reasons:

1. There was a lack of relevant medical reports submitted to the Utilization Review physician;
2. The UR physician was provided an inaccurate history;
3. There was a lack of relevant medical records submitted to the Utilization Review physician;
4. The UR physician cutting and pasting the medical history;
5. Defendant provided nonmedical information to the UR physician.

Lastly, defendant is seeking a protective order for the setting of the UR physicians' depositions.

UNTIMELY UR DENIALS

The case of *Dubon* controls. The only time a WCJ has jurisdiction to act on a UR determination is if it is untimely.

Untimely is not narrowly defined as the 5 – 14 days statutorily mandated for the UR physician to render a determination. It has been found by the WCAB that a timely made determination not timely served renders the UR determination untimely. E.g. when applicant or applicant's counsel is not served with the UR decision.

However, for each of the complaints of an untimely UR determination by applicant attorney hereinabove, none of them are being claimed as untimely based on the date of the UR decision issued nor for the lack of the decision being communicated to applicant or her counsel.

There is no support at this time for the lack of reports or inaccurate history that can be considered as rendering the UR decision untimely. Nor has applicant alleged this was done purposely for the purpose of wrongfully or intentionally misleading the UR physicians to deny applicant medical treatment. Even then, the remedy would perhaps be a Labor Code §5813 petition and/or an IMR appeal.

Lastly, applicant has the statutory remedy of appealing the UR determination by the filing for an Independent Medical Review appeal. This gives applicant the opportunity to make the argument with documents, medical reports and records to show the UR physicians had an inaccurate history. It provides applicant the opportunity to raise and/or provide the reports, records or other materials to the IMR physician.

PROTECTIVE ORDER FOR THE DEPOSITIONS OF THE UR PHSYCIANS

Although the parties made the WCJ aware at the time of trial, that applicant was seeking to depose the UR physicians, no subpoenas or other documentation was submitted into evidence as to the specific date, time and location of the depositions. Generally, the WCJ does not give advisory opinions.

However, this WCJ is unaware of any decision that categorically precludes the taking of a UR physician's deposition. As of the date of this hearing, no good cause has been shown for the taking of the UR physicians' depositions.

DATE: July 17, 2024

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND/OR ALTERNATIVELY PETITION FOR REMOVAL

I.

INTRODUCTION

1.	Applicant's Occupation:	Stock clerk
	Age of Applicant:	XX-XX-XXXX (69)
	Date(s) of Injury:	September 20, 2018
	Parts of Body Injured:	Lumbar spine and left
	knee Manner in Which Injury Occurred:	Not in dispute
2.	Identity of Petitioner:	Applicant
3.	Timeliness:	The petition is timely
	Verification:	The petition is verified
	Services:	The petition was served on all parties
4.	Date of Issuance of Order:	July 17, 2024
5.	Petitioner's Contention:	The WCJ erred in not making a specific finding of AOE/COE. The WCJ erred in not acting on UR denials as untimely.

II.

FACTS

The trial and Petition for Reconsideration and/or alternatively Petition for Removal involve approximately (44) forty-four requests for authorization for medical treatment (RFA) and utilization review (UR) denials.

These RFAs involve an adjustable bed, a motorized scooter and lumbar injections.

III.

DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects.

First applicant complains the WCJ did not make a specific finding of injury AOE/COE. Injury AOE/COE was stipulated to by the parties at trial and is reflected in the record. This was merely a clerical error, and the Findings of Fact and Order should be amended to reflect that it is an admitted industrial injury.

Much of applicant's Petition for Reconsideration and/or alternatively Petition for Removal is requesting relief this WCJ does not have jurisdiction to give.

Once there is a timely (UR) determination, the WCJ loses jurisdiction to act. UR determinations may be untimely if not completed within the proscribed time limits or if it is not served on all parties. However, I know of no case that provides that defendant's failure to provide medical records is grounds to render the determination untimely so as to give the Court jurisdiction to act.

Further, an IMR appeal is an avenue that was created to remedy deficiencies, e.g. lack of medical record, history, etc. in the UR process. If applicant believes in good faith and can ultimately prove defendant's actions were inappropriate and done for the purpose of denying care or delaying treatment so as to violate Labor Code §5813, applicant can file a petition.

In the instant case, applicant does not complain the UR determinations are untimely based on calendar dates or service, but rather because the UR physician did not have a complete or accurate medical record. None of applicant's complaints will constitute an untimely UR denial so as to confer jurisdiction on the Court.

Applicant complains about the procedures and methodology, ownership and alleged interference by the workers' compensation insurance carrier of the UR reviews and reviewers. It is alleged but little in the way of direct evidence presented. Again, none of those will render the decisions untimely.

Applicant's public policy arguments are not ones this WCJ can address.

Applicant has made known to defendant and the Court of his desire to depose the UR physicians. However, no such motion or petition was filed before the Court. No deposition subpoena was presented. Based on the lack of a subpoena or petition, the WCJ determined this became an advisory opinion and there was no triable issue presented at this time.

IV.

RECOMMENDATION

For the reasons stated, it is respectfully recommended that applicant's Petition for Reconsideration and/or alternatively Petition for Removal be granted as to the finding of AOE/COE and be denied based on the arguments and merits addressed herein.

DATE: August 14, 2024

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE