

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

3  
4 **MANUEL GOMEZ,**

5 *Applicant,*

6 vs.

7 **FACILITIES SUPPORT SERVICES;  
8 COMPWEST INSURANCE COMPANY,**

9 *Defendant,*

Case No. ADJ290453  
(Los Angeles District Office)

**OPINION AND  
ORDERS DENYING DEFENDANT'S  
PETITION FOR  
RECONSIDERATION, GRANTING  
APPLICANT'S PETITION FOR  
RECONSIDERATION AND DECISION  
AFTER RECONSIDERATION**

10  
11 Applicant and defendant each seek reconsideration of the January 16, 2014 Findings, Award And  
12 Order of the workers' compensation administrative law judge (WCJ) who found that "applicant is in need  
13 of medical treatment for his right knee consisting of post-surgical physical therapy, provision of a cane,  
14 Diclofenac Flex Plus 10%/10%/10%, Norco 10/325 mg #120, and Restoril 15 mg #30" as requested by  
15 Kevin Pelton, M.D. on March 13, 2013. The WCJ further found that the request for medical treatment of  
16 the left knee, "was communicated to defendant on or after July 2, 2013 and, therefore, must be addressed  
17 through the independent medical review process." The WCJ also found that applicant's claim of new  
18 and further disability is not barred by estoppel, res judicata or the statute of limitations, but that  
19 permanent disability indemnity for injury to the gastrointestinal system is barred by the doctrines of  
20 estoppel and res judicata, and that the record requires development concerning applicant's claim of  
21 gastrointestinal injury.

22 It was earlier stipulated on July 6, 2011, that applicant sustained industrial injury to both knees,  
23 his back and psyche while working for defendant as a driver on May 22, 2007, causing 45% permanent  
24 disability and need for future medical treatment.

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1 Applicant contends that the WCJ erred in finding that the request for medical treatment of the left  
2 knee must be addressed through the independent medical review (IMR) process.<sup>1</sup>

3 Defendant contends that the findings regarding gastrointestinal injury are not justified because a  
4 causal connection was not shown to the original injury and good cause was not shown for new and  
5 further disability based upon gastrointestinal injury. Defendant further contends that there is no need to  
6 develop the medical record regarding the gastrointestinal system.

7 An answer to applicant's petition was received from defendant.

8 The WCJ provided a Joint Report And Recommendation On Petitions For Reconsideration Filed  
9 By Applicant And Defendant (Report) recommending that defendant's petition be denied. For the  
10 reasons set forth in the Report, which are adopted and incorporated herein by this reference, and for the  
11 reasons below, defendant's petition is denied.

12 With regard to applicant's petition, the WCJ recommends in his Report that reconsideration be  
13 granted and that the January 16, 2014 decision be amended to award applicant medical treatment "in the  
14 form of partial left unicompartmental knee replacement with postop therapy" as requested by Dr. Pelton  
15 in his June 26, 2013 report.

16 Applicant's petition is granted. After the WCJ issued his January 16, 2014 decision, the Appeals  
17 Board in its en banc decision *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon*),  
18 addressed the process that now applies to medical treatment disputes following the Legislature's  
19 implementation of the IMR process as part of Senate Bill 863 (SB 863). The case is returned to the trial  
20 level for a determination by the WCJ on whether, as described in *Dubon*, there are "material procedural  
21 defects" that undermine the integrity of defendant's utilization review (UR) decision, or if there are only  
22 "minor technical or immaterial defects" that do not invalidate the UR determination. If it is the former,  
23 the disputed request for left knee replacement surgery should be determined by the WCJ based upon  
24 substantial medical evidence.

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27 <sup>1</sup> Applicant's request to file an amended petition to add a paragraph regarding a regulation that addresses utilization review is granted and the amended petition is allowed. (Cal. Code Regs., tit. 8, § 10848.)

1 **BACKGROUND**

2 The WCJ sets forth the relevant background facts and reasons for his recommendation concerning  
3 applicant's petition in his Report in pertinent part as follows:

4 **"FACTS RELEVANT TO APPLICANT'S PETITION**

5 "Applicant Manuel Gomez, at age 52, while employed on May 22, 2007 as  
6 a driver, sustained industrial injury to his back, both knees, and psyche.

7 "Treating physician Kevin Pelton, MD sent Defendant Compwest  
8 Insurance a Request for Authorization ('RFA') for partial left  
9 unicompartmental knee replacement with post-operative therapy. The  
evidence record does not contain a proof of service for the RFA. The date  
on the first page of the RFA is June 26, 2013. Dr. Pelton signed the report  
on July 2, 2013, four days after the date appearing on the face of the RFA.

10 **"1. TIMELINESS OF UR**

11 "Defendant performed Utilization Review ('UR'). The notice of non-  
12 certification states that the RFA was received on July 17, 2013. The notice  
of non-certification is dated July 24, 2013, five business days later.

13 **"2. FACTUAL DEFECT IN UR**

14 "The UR physician states two reasons for non-certification. First, he states  
15 that the guidelines for partial knee replacement are not met, relying on the  
ODG knee chapter. Second, the UR physician stated that the left knee is  
16 not an accepted body part. The second reason is factually incorrect. The  
S&A provides for future medical care for the left knee.

17 **"3. DEFENDANT OBJECTED TO IMR**

18 "The record does not contain a request for Independent Medical Review  
19 ('IMR'). The record contains indications that IMR was requested.

20 **"4. ISSUES AT TRIAL**

21 "The issue of need for further treatment to the left knee consisting of  
22 surgical repair and physical therapy was tried on December 9, 2013. An  
offer of proof substituted for Applicant's testimony. 'If called as a witness,  
23 the applicant would testify that if authorized, he would undergo left total  
knee replacement and would engage in physical therapy for his right knee.  
24 In addition, the applicant would testify that he takes oral pain medication  
for orthopedic pain and Prilosec for gastrointestinal symptoms.'...

25 **"DISCUSSION OF APPLICANT'S PETITION**

26 "As a result of the petitions for reconsideration, the WCJ conducted  
additional research and recommends that reconsideration be granted.

27 **"1. TREATMENT DISPUTES UNDER SENATE BILL 863.**

1 "The facts of this case require determination of what circumstances permit  
2 a WCJ to determine a medical treatment issue after [Senate Bill 863] SB  
3 863. Labor Code § 4610 through 4610.6 contain a two-step procedure for  
4 resolution of treatment disputes. A timely, procedurally correct utilization  
5 review ('UR') decision may be appealed by Applicant to the independent  
6 medical ('IMR') process. This case presents the question of whether  
7 Defendant's actions in this case were procedurally correct, and if not,  
8 whether the WCJ has power to determine the treatment issue.

6 **"2. THE UR PROCESS WAS PROCEDURALLY DEFICIENT."**

7 "The WCJ determined that UR was conducted in a timely manner.  
8 However, the record demonstrates that the UR process was flawed. The  
9 first of the two reasons for denial treatment was medical necessity based on  
10 review of medical reports and the ODG treatment guidelines. However,  
11 the second reason, that 'the left knee is not an accepted body part,' is  
12 factually incorrect.

10 "Labor Code § 4610.5 was added to the Code as part of SB 863.  
11 Subsection (d) states: 'If a utilization review decision denies, modifies, or  
12 delays a treatment recommendation, the employee may request an  
13 independent medical review as provided in this section.' Subsection. (e)  
14 provides: 'A utilization review decision may be reviewed or appealed only  
15 by independent medical review pursuant to this section...'

14 "Subsection (h)(2) provides: 'If at the time of a utilization review decision  
15 the employer is also disputing liability for the treatment for any reason  
16 besides medical necessity, the time for the employee to submit a request for  
17 independent medical review to the administrative director or administrative  
18 director's designee is extended to 30 days after service of a notice to the  
19 employee showing that the other dispute of liability has been resolved.'

17 "The undersigned decided this case based on the extension of the deadline  
18 to request IMR contained in subsection (h)(2). The Findings, Award and  
19 Order states that 'The modalities of treatment for the left knee are subject  
20 to determination through the IMR process ...,' holding in effect that the  
21 time frame for Applicant to request IMR was tolled because of the  
22 erroneous denial of liability for treatment to the left knee. The undersigned  
23 also considered the language of Title 8, California Code of Regulations §  
24 10451.2 (c)(3), which states, 'If a non-IMR/IBR dispute is resolved in  
25 favor of the employee ..., then any applicable IMR and/or IBR procedures  
26 established by the Labor Code and Rules of the Administrative Directory  
27 shall be followed.'

23 "The recommendation to grant reconsideration is based on the language of  
24 Regulation § 10451.2 (c)(1)(C), and the explanation contained in the Final  
25 Statement of Reasons ('FSOR') for Reg. § 10451.2 effective October 23,  
26 2013.

26 "Regulation § 104512 (c)(1)(C) distinguishes between 'procedural'  
27 deficiencies and other types of defect in the UR process. Relevant portions  
of Subsection (c) provide:

1 (c) Medical Treatment Disputes Not Subject to Independent  
2 Medical Review

3 (1) Where applicable, independent medical review (IMR) applies  
4 solely to disputes over the necessity of medical treatment where a  
5 defendant has conducted a timely and otherwise procedurally  
6 proper utilization review... All other medical treatment disputes  
7 are non-IMR ... disputes. Such non IMR ... disputes shall  
8 include, but are not limited to:

9 (A) any threshold issue that would entirely defeat a medical  
10 treatment claim (e.g., injury, injury to the body pan for  
11 which treatment is disputed ...'

12 (B) \*\*\*

13 (C) a dispute over whether UR was timely undertaken or  
14 was otherwise procedurally deficient; however, if the  
15 employee prevails in this assertion, the employee ... still has  
16 the burden of showing entitlement to the recommended  
17 treatment...'

18 "The discussion of § 10451.2 in the FSOR illustrate the kinds of procedural  
19 deficiencies which take a treatment decision outside of IMR:

20 'IMR is limited to determining whether a recommended treatment  
21 is medically necessary; and, therefore, IMR cannot determine  
22 whether a defendant's UR determination was untimely or  
23 procedurally deficient. To the contrary, this question falls within  
24 the exclusive jurisdiction of the WCAB. Of course, if the WCAB  
25 finds that UR was proper and timely, then the issue of medical  
26 necessity must be determined solely by IMR, if applicable. (Lab.  
27 Code, § 4610(g)(3)(A) & (B) [disputes over medical necessity  
'shall be resolved in accordance with Section 4610.5, if  
applicable'], 4610.5 (d) & (e) ['the employee may request an  
independent medical review [of a UR decision] as provided by  
this section' and 'a utilization review decision may be reviewed or  
appealed only by independent medical review pursuant to this  
section'.]) If, however, the WCAB finds that UR was untimely or  
otherwise procedurally deficient, then IMR does not come into  
play, but the employee still has the burden of proof on his or her  
entitlement to the treatment, as more thoroughly discussed in the  
SSOR (at pages 1314).

"Applying these concepts to the case under consideration, the IMR process  
cannot and will not address the flaw in Defendant's UR determination  
which incorrectly states that the left knee is a denied body part. That is an  
issue of interpretation of the Stipulations with Request for Award, not a  
medical determination. IMR addresses medical necessity only, and is not  
designed to resolve the issue raised by Defendant's faulty UR  
determination.

"As the UR determination is procedurally defective in a way that IMR is  
not designed to remedy, the case is not subject to IMR. Under Regulation

1 § 104512, Applicant still has the burden of showing entitlement to the  
2 recommended treatment...

3 **4. UTILIZATION REVIEW WAS TIMELY.**

4 "Applicant argues that Defendant's utilization review was untimely. Labor  
5 Code § 4610(g)(1) provides that prospective or concurrent UR decisions  
6 shall be made in a timely fashion, not to exceed five working days.

7 "The only evidence in the record regarding the date Defendant received the  
8 RFA is the face of the UR Notice of Non-certification. The Non-  
9 certification states, 'RFA RECEIPT DATE: 07/17/2013.' The undersigned  
10 accepts the un rebutted evidence at face value. The notice of non-  
11 certification, dated five business days after the receipt date, is timely.  
12 Defendant has met its burden to show timely compliance with the UR  
13 deadline under [*State Compensation Insurance Fund v. Workers' Comp.*  
14 *Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases  
15 981]].

16 "Applicant argues that based on the date the physician signed the RFA, the  
17 receipt date must have been earlier than July 17, 2013. This argument is  
18 speculative. The record contains no evidence of when the 5-day time  
19 frame began running, apart from the receipt date stated in Exhibit B.  
20 Furthermore, Dr. Pelton signed the RFA on July 2, 2013, shortly before a  
21 national holiday, and it is plausible that several days passed before the RFA  
22 was served.

23 "Applicant on Reconsideration argues that Defendant's Exhibit B should  
24 be excluded from the record as untimely. Exhibit B was properly admitted  
25 into evidence, and should not now be excluded." (Citations deleted and  
26 modified.)

27 **DISCUSSION**

After the WCJ issued his January 16, 2014 decision, the Appeals Board in *Dubon* addressed the process that now applies to medical treatment disputes following the Legislature's implementation of the IMR process as part of SB 863.<sup>2</sup>

In *Dubon*, as in this case, the applicant contended that the defendant's UR concerning requested medical treatment was not procedurally flawed, and the WCJ had authority to determine the treatment dispute. The WCJ concluded in *Dubon* that disputes over alleged procedural defects in a defendant's UR denial must be resolved through the IMR process and that the WCAB has no authority to determine the

<sup>2</sup> En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236].

1 issue of medical treatment even if defendant's UR was procedurally defective. The Appeals Board  
2 disagreed with that determination by the WCJ and based upon its review of the statutes, regulations and  
3 case law held in *Dubon* as follows:

4 "1. IMR solely resolves disputes over the medical necessity of treatment requests.  
5 Issues of timeliness and compliance with statutes and regulations governing UR are  
6 legal disputes within the jurisdiction of the WCAB.

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

10 3. If a defendant's UR is found invalid, the issue of medical necessity is not subject  
11 to IMR but is to be determined by the WCAB based upon substantial medical  
12 evidence, with the employee having the burden of proving the treatment is reasonably  
13 required.

14 4. If there is a timely and valid UR, the issue of medical necessity shall be resolved  
15 through the IMR process if requested by the employee."

16 In *Dubon*, the Appeals Board concluded that the defendant's UR process in that case, "suffers  
17 from material procedural defects that undermine the integrity of the UR decision because the UR  
18 physicians were not provided with adequate medical records." For that reason, the case was returned to  
19 the WCJ for determination on whether the requested medical treatment was reasonably required.

20 In this case, the WCJ initially found that the request for treatment of the left knee was required to  
21 be submitted to IMR because the request for that treatment was communicated to defendant after the  
22 July 2, 2013 implementation of the IMR process by the Legislature. However, the WCJ also wrote in his  
23 Report that the UR process was "flawed" because it incorrectly states that applicant's left knee is a  
24 denied body part. Thus, under *Dubon*, the question is whether there are UR flaws that are "material  
25 procedural defects" that undermine the integrity of the UR decision, or if there are only "minor technical  
26 or immaterial defects" that do not invalidate the UR determination. This issue should be first addressed  
27 by the WCJ at the trial level in light of the Appeals Board decision in *Dubon*.

1 If the WCJ finds that there are material procedural defects that invalidate the UR, he should then  
2 determine, based upon substantial medical evidence, if the requested left knee medical treatment is  
3 reasonably required to cure or relieve the injured worker from the effects of his injury. The WCJ's new  
4 decision should provide a complete explanation of the reasons for his determinations.

5 For the foregoing reasons,

6 **IT IS ORDERED** that defendant's petition for reconsideration of the January 16, 2014 Findings,  
7 Award And Order of the workers' compensation administrative law judge is **DENIED**.

8 **IT IS FURTHER ORDERED** that applicant's petition for reconsideration of the January 16,  
9 2014 Findings, Award And Order of the workers' compensation administrative law judge is **GRANTED**.

10 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
11 Compensation Appeals Board that the January 16, 2014 Findings, Award And Order of the workers'  
12 compensation administrative law judge is **RESCINDED** and the following is **SUBSTITUTED** in its  
13 place:

14 **FINDINGS OF FACT**

15 1. MANUEL GOMEZ born on December 18, 1954 while employed on May 22, 2007 as a driver  
16 at Van Nuys, California, by FACILITIES SUPPORT SERVICES, whose workers' compensation  
17 insurance carrier was COMPWEST INSURANCE, sustained injury arising out of and occurring in the  
18 course of employment to both knees, back, and psyche which were settled by Stipulation and Award on  
19 July 6, 2011.

20 2. Applicant is in need of medical treatment for his right knee consisting of post-surgical physical  
21 therapy, provision of a cane, Diclofenac Flex-Plus 10%/i 0%/5%, Norco 10/325 mg #120, and Restoril  
22 15 mg #30, as requested by Kevin Pelton, MD on March 13, 2013.

23 3. The issue of medical treatment for the left knee is deferred.

24 4. Applicant filed a timely petition to reopen on April 5, 2012 alleging that he suffers new and  
25 farther disability to his knees, back, psyche, gastrointestinal system, and suffers from sleep disorder as a  
26 result of the industrial injury.

27 ///



1 5. Applicant's claim for new and further disability, including the claim of new and further  
2 industrial injury to the gastrointestinal system, is not barred by estoppel.

3 6. Applicant's claim for new and further disability, including the claim of new and further  
4 industrial injury to the gastrointestinal system, is not barred by res judicata.

5 7. Applicant's claim for new and further disability, including the claim of new and further  
6 industrial injury to the gastrointestinal system, is not barred by the statute of limitations.

7 8. Compensation for permanent disability, if any, to the gastrointestinal system which existed on  
8 July 6, 2011 when the parties entered into the Stipulation and Award, is barred by the doctrines of  
9 estoppel and res judicata.

10 9. Further discovery regarding the gastrointestinal system is necessary to determine if any  
11 permanent disability existed before the July 6, 2011 Stipulation and Award, and whether Applicant  
12 suffers from any new and further gastrointestinal disability after the July 6, 2011 Award.

13 10. Stanley Majcher, MD, has been selected as the Panel QME in the area of internal medicine.

14 11. Applicant's attorney has provided a valuable service by securing treatment for the right knee.  
15 The amount of the fee is deferred with WCAB jurisdiction retained.

16 **AWARD**

17 **AWARD IS MADE** in favor of MANUEL GOMEZ against FACILITIES SUPPORT  
18 SERVICES and COMP WEST INSURANCE of:

19 a. Medical treatment to the right knee in accordance with Finding 2;

20 b. Reasonable attorney in an amount deferred to further proceedings in accord with Finding 11.

21 **ORDER**

22 **IT IS HEREBY ORDERED:**

23 a. The issue of treatment for the left knee is deferred in accord with Finding 3;

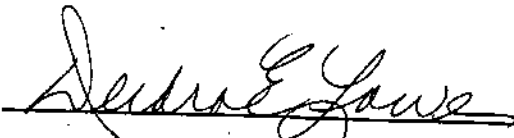
24 b. The claim for new and further disability, including new and further disability to the  
25 gastrointestinal system, is not barred in accord with Findings 4, 5, 6 and 7;

26 c. Compensation for permanent disability to the gastrointestinal system, if any, which existed on  
27 July 6, 2011, is barred in accord with Finding 8;

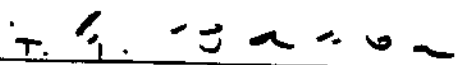
1 d. Stanley Majcher, MD is the Panel QME in the field of internal medicine in accord with  
2 Findings 9 and 10.

3 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
4 Compensation Appeals Board that the case is **RETURNED** to the trial level for further proceedings and  
5 decision by the workers' compensation administrative law judge in accordance with this decision.  
6

7 **WORKERS' COMPENSATION APPEALS BOARD**

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11 DEIDRA E. LOWE

11 I CONCUR,

12  
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14 \_\_\_\_\_  
15 FRANK M. BRASS  
16 **CONCURRING, BUT NOT SIGNING**  
17 RONNIE G. CAPLANE



18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **APR 11 2014**

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

- 22 **MANUEL GOMEZ**  
23 **MOISES VAZQUEZ, ESQ.**  
24 **SAPRA & NAVARRA**  
25 **JACOB EMRANI**  
26 **SAMUELSEN GONZALEZ**



27 **JFS/abs**

**CASE NO.: ADJ290453**

**MANUEL GOMEZ**

**vs.**

**FACILITIES SUPPORT  
SERVICES; COMPWEST  
INSURANCE COMPANY**

**WORKERS' COMPENSATION JUDGE:**

**PETER H. HINK**

**DATE OF INJURY:**

**MAY 22, 2007**

**JOINT REPORT AND RECOMMENDATION  
ON PETITIONS FOR RECONSIDERATION  
FILED BY APPLICANT AND DEFENDANT**

**I**

**INTRODUCTION**

Both Applicant and Defendant seek reconsideration regarding different portions of the Findings, Award and Order dated January 16, 2014.

Applicant Manuel Gomez, through his attorney Moises Vasquez, filed a timely, verified Petition for Reconsideration. Applicant challenges the portion of the January 16, 2014 Findings, Award and Order wherein the undersigned WCJ determined that the specific forms of treatment to be provided for Applicant's left knee are to be submitted to the Independent Medical Review ("IMR") process.

Applicant contends:

- A. The IMR process deprives Applicant of due process and equal protection because Applicant's Award of future medical care pre-dates Senate Bill 863;
- B. The IMR process violates the separation of powers doctrine of the United States and California Constitutions;

- C. The WCJ should have determined what treatment shall occur, without resort to the IMR process, because Defendant's utilization review was untimely and based on false information.

On Reconsideration, the undersigned WCJ has re-assessed the facts and applicable law, and recommends that Applicant's Petition for Reconsideration be granted.

Raising issues entirely unrelated to the Applicant's petition for reconsideration, Defendant Compwest Insurance filed a timely, verified Petition for Reconsideration of the portion of the January 16, 2014 Findings, Award and Order relating to discovery in connection with the Petition to Reopen for New and Further Disability. Defendant contends:

- A. The Findings, Award and Order are defective due to a lack of a causal connection between the original injury and the alleged new and further disability to the gastrointestinal system;
- B. No good cause has been shown to reopen for new and further disability; and
- C. Discovery regarding the gastrointestinal system is not justified because defendant did not agree that a QME panel could be obtained, did not participate in selection of the QME, and objected to the panel.

The undersigned WCJ recommends that Defendant's Petition for Reconsideration be denied. The undersigned WCJ will address Applicant's Petition first, followed by the Defendant's Petition.

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II

**FACTS RELEVANT TO APPLICANT'S PETITION**

Applicant Manuel Gomez, at age 52, while employed on May 22, 2007 as a driver, sustained industrial injury to his back, both knees, and psyche. 12/9/13 *Minutes of Hearing, Stipulation 1, EAMS Doc ID 50734516, see also, Stipulation with Request for Award on July 6, 2011 which provides for future medical care for his right and left knees. EAMS Doc ID 31528379 and 31528048.*

Treating physician Kevin Pelton, MD sent Defendant Compwest Insurance a Request for Authorization ("RFA") for partial left unicompartmental knee replacement with post-operative therapy. *Applicant's Exhibit 4, EAMS Doc ID 50734520.* The evidence record does not contain a proof of service for the RFA. The date on the first page of the RFA is June 26, 2013. Dr. Pelton signed the report on July 2, 2013, four days after the date appearing on the face of the RFA. *App's Ex. 4, EAMS Doc ID 50734520.*

**1. TIMELINESS OF UR**

Defendant performed Utilization Review ("UR"). The notice of non-certification states that the RFA was received on July 17, 2013. *Defendant's Exhibit B, EAMS Doc ID 50734541.* The notice of non-certification is dated July 24, 2013, five business days later.

**2. FACTUAL DEFECT IN UR**

The UR physician states two reasons for non-certification. First, he states that the guidelines for partial knee replacement are not met, relying on the ODG knee chapter. Second, the UR physician stated that the left knee is not an

accepted body part. *Id.* The second reason is factually incorrect. The S&A provides for future medical care for the left knee.

### **3. DEFENDANT OBJECTED TO IMR**

The record does not contain a request for Independent Medical Review ("IMR"). The record contains indications that IMR was requested. See *Applicant's Exhibit 18 ("[Defendants] are in receipt of an Independent Medical Review request for the knee. We object to the request as it is vague and ambiguous.") EAMS Doc ID 50734534.*

### **4. ISSUES AT TRIAL**

The issue of need for further treatment to the left knee consisting of surgical repair and physical therapy was tried on December 9, 2013. An offer of proof substituted for Applicant's testimony. "If called as a witness, the applicant would testify that if authorized, he would undergo left total knee replacement and would engage in physical therapy for his right knee. In addition, the applicant would testify that he takes oral pain medication for orthopedic pain and Prilosec for gastrointestinal symptoms." *Minutes of Hearing, 12/9/13, Stipulation 8, EAMS Doc ID 51083038.*

## **III**

### **DISCUSSION OF APPLICANT'S PETITION**

As a result of the petitions for reconsideration, the WCJ conducted additional research and recommends that reconsideration be granted.

## **1. TREATMENT DISPUTES UNDER SENATE BILL 863.**

The facts of this case require determination of what circumstances permit a WCJ to determine a medical treatment issue after SB 863. Labor Code §§ 4610 through 4610.6 contain a two-step procedure for resolution of treatment disputes. A timely, procedurally correct utilization review ("UR") decision may be appealed by Applicant to the independent medical ("IMR") process. This case presents the question of whether Defendant's actions in this case were procedurally correct, and if not, whether the WCJ has power to determine the treatment issue.

## **2. THE UR PROCESS WAS PROCEDURALLY DEFICIENT.**

The WCJ determined that UR was conducted in a timely manner. See section 4 below. However, the record demonstrates that the UR process was flawed. The first of the two reasons for denial treatment was medical necessity based on review of medical reports and the ODG treatment guidelines. However, the second reason, that "the left knee is not an accepted body part," is factually incorrect.

Labor Code § 4610.5 was added to the Code as part of SB 863. Subsection (d) states: "If a utilization review decision denies, modifies, or delays a treatment recommendation, the employee may request an independent medical review as provided in this section." Subsection (e) provides: "A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section. ..."

Subsection (h)(2) provides: "If at the time of a utilization review decision the employer is also disputing liability for the treatment for any reason besides medical necessity, the time for the employee to submit a request for independent medical review to the administrative director or administrative director's designee is extended to 30 days after service of a notice to the employee showing that the other dispute of liability has been resolved."

The undersigned decided this case based on the extension of the deadline to request IMR contained in subsection (h)(2). The Findings, Award and Order states that "The modalities of treatment for the left knee are subject to determination through the IMR process ....," holding in effect that the time frame for Applicant to request IMR was tolled because of the erroneous denial of liability for treatment to the left knee. The undersigned also considered the language of Title 8, California Code of Regulations § 10451.2 (c)(3), which states, "If a non-IMR/IBR dispute is resolved in favor of the employee ..., then any applicable IMR and /or IBR procedures established by the Labor Code and Rules of the Administrative Directory shall be followed."

The recommendation to grant reconsideration is based on the language of Regulation § 10451.2 (c)(1)(C), and the explanation contained in the Final Statement of Reasons ("FSOR") for Reg. § 10451.2 effective October 23, 2013.

Regulation § 10451.2 (c)(1)(C) distinguishes between "procedural" deficiencies and other types of defect in the UR process. Relevant portions of Subsection (c) provide:

"(c) Medical Treatment Disputes Not Subject to Independent Medical Review ...



"(1) Where applicable, 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 ... All other medical treatment disputes are non-IMR ... disputes. Such non-IMR ... disputes shall include, but are not limited to:

- (A) any threshold issue that would entirely defeat a medical treatment claim (e.g., injury, injury to the body part for which treatment is disputed ..."
- (B) \*\*\*
- (C) a dispute over whether UR was timely undertaken or was otherwise procedurally deficient; however, if the employee prevails in this assertion, the employee ... still has the burden of showing entitlement to the recommended treatment ..."

The discussion of § 10451.2 in the FSOR illustrate the kinds of procedural deficiencies which take a treatment decision outside of IMR:

"IMR is limited to determining whether a recommended treatment is medically necessary (Lab. Code, Code, § 4610.6(a), (c), (e); see also § 4610.5(c)(2), (c)(3), (f)(2) & (3), (h)(2), (k), (l)(4)); and, therefore, IMR cannot determine whether a defendant's UR determination was untimely or procedurally deficient. To the contrary, this question falls within the exclusive jurisdiction of the WCAB. (Lab. Code, § 4604 ["[c]ontroversies between employer and employee *arising under this chapter* shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5*" (italics added)]; see also § 5300.)<sup>7</sup> Of course, if the WCAB finds that UR was proper and timely, then the issue of medical necessity must be determined solely by IMR, if applicable. (Lab. Code, §§ 4610(g)(3)(A) & (B) [disputes over medical necessity "shall be resolved in accordance with Section 4610.5, if applicable"], 4610.5 (d) & (e) ["the employee may request an independent medical review [of a UR decision] as provided by this section" and "a

utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section"].) If, however, the WCAB finds that UR was untimely or otherwise procedurally deficient, then IMR does not come into play, but the employee still has the burden of proof on his or her entitlement to the treatment, as more thoroughly discussed in the SSOR (at pages 13-14).

Applying these concepts to the case under consideration, the IMR process cannot and will not address the flaw in Defendant's UR determination which incorrectly states that the left knee is a denied body part. That is an issue of interpretation of the Stipulations with Request for Award, not a medical determination. IMR addresses medical necessity only, and is not designed to resolve the issue raised by Defendant's faulty UR determination.

As the UR determination is procedurally defective in a way that IMR is not designed to remedy, the case is not subject to IMR. Under Regulation § 10451.2, Applicant still has the burden of showing entitlement to the recommended treatment.

### **3. APPLICANT HAS SHOWN ENTITLEMENT TO THE RECOMMENDED TREATMENT.**

Kevin Pelton, MD, recommended surgical treatment for Applicant's left knee based on the following findings and rationale:

"The patient is doing very well from his right unicompartmental knee replacement. ..."

"His left knee is increasing his symptoms and e-rays today show 1 mm joint space. He has had previous meniscectomy, and this has led to

posttraumatic osteoarthritis in the left knee. At this point, he is eager to proceed with the same surgery he had for his right knee and I do think he is a perfect candidate for it. ... "He has failed conservative care including activity modification, intraarticular steroid injections, bracing, over the counter medications, narcotic medications, and previous meniscectomy and continues to be symptomatic." Applicant was provided with Norco to maintain his functional level. *Applicant's Exhibit 4.*

Dr. Pelton is familiar with the Applicant's condition, having provided treatment from September 2012 to the present. *Applicant's Exhibits 1 to 9.* Dr. Pelton performed right partial knee replacement, the same procedure now requested for the left knee, with good results. *Applicant's Exhibits 4 and 7.*

Dr. Pelton's opinion regarding left knee surgery is sufficient to overcome the opinions expressed in the UR denial, which are based on a review of only two reports and without physical exam or history from the patient.

The record contains the opinion of AME Albert Simpkins, MD, dated October 16, 2013. *Appeals Board Exhibit T.* AME Simpkins states "the patient requires a unicompartmental arthroplasty at this time. Clearly there will be increased impairment over that which was present at the time of my last evaluation ...." The undersigned holds that the reports of Dr. Simpkins may be considered consistent with Labor Code § 4062.2(f) because it has been determined that the defects in the UR process make IMR inapplicable to this case. However, even if the reports of Dr. Simpkins were not considered, the reports of Dr. Pelton alone are sufficient to show Applicant's entitlement to the partial knee replacement.

#### **4. UTILIZATION REVIEW WAS TIMELY.**

Applicant argues that Defendant's utilization review was untimely. Labor Code § 4610(g)(1) provides that prospective or concurrent UR decisions shall be made in a timely fashion, not to exceed five working days.

The only evidence in the record regarding the date Defendant received the RFA is the face of the UR Notice of Non-certification. *Defendant's Exhibit B, EAMS Doc ID 50734541*. The Non-certification states, "RFA RECEIPT DATE: 07/17/2013." The undersigned accepts the un rebutted evidence at face value. The notice of non-certification, dated five business days after the receipt date, is timely. Defendant has met its burden to show timely compliance with the UR deadline under SCIF v. WCAB (Sandhagen) 2008, 73 CCC 981.

Applicant argues that based on the date the physician signed the RFA, the receipt date must have been earlier than July 17, 2013. This argument is speculative. The record contains no evidence of when the 5-day time frame began running, apart from the receipt date stated in Exhibit B. Furthermore, Dr. Pelton signed the RFA on July 2, 2013, shortly before a national holiday, and it is plausible that several days passed before the RFA was served.

Applicant on Reconsideration argues that Defendant's Exhibit B should be excluded from the record as untimely. Exhibit B was properly admitted into evidence, and should not now be excluded. See *Opinion on Decision, page 3, EAMS Doc ID 51117439*.

#### **5. CONSTITUTIONAL ISSUES WERE WAIVED.**

Applicant raised issues regarding the constitutionality of Senate Bill 863 for the first time at trial. The issues were waived as they were not listed on the Pre-Trial Conference Statement.

#### **IV**

#### **RECOMMENDATIONS REGARDING APPLICANT'S PETITION**

It is recommended that the Applicant's Petition for Reconsideration be granted, and that Applicant be awarded medical treatment in the form of partial left unicompartmental knee replacement with postop therapy, as requested by Kevin Pelton, MD, in the report dated June 26, 2013.

#### **V**

#### **FACTS RELEVANT TO DEFENDANT'S PETITION**

Applicant Manuel Gomez, while employed on May 22, 2007 as a driver, sustained industrial injury to his back, both knees, and psyche. *12/9/13 Minutes of Hearing, Stipulation 1, EAMS Doc ID 50734516.* Applicant and Defendant entered into Stipulations with Request for Award which provides in relevant part:

"DEFENDANT AND APPLICANT STIPULATE TO INJURY TO THE BACK (420), Left Knee (513), RIGHT KNEE (513) and PSYCHE (842)"  
"APPLICANT DISMISSES HIS ALLEGED CLAIMS OF INJURY TO THE CLAIMS OF 700 (MULTIPLE PARTS) AND 820-Excretory."  
*S&A, page 5, EAMS Doc ID 31528048.*

On April 5, 2012, Applicant filed a Petition to Reopen for new and further disability, which alleges:

"... APPLICANT'S CONDITION HAS WORSENERED AND HE HAS SUFFERED A NEW AND FURTHER DISABILITY TO HIS BACK BILATERAL

KNEES, PSYCHE, AND COMPENSABLE INTERNAL ORGANS (GASTRO INTERNAL) AND SLEEP DISORDER .... "EAMS Doc ID 37335664.

On July 23, 2013, Applicant filed a DOR regarding treatment and temporary disability, containing the following language:

"INTERNAL MEDICINE PANEL QME APPOINTMENT MADE BY APPLICANT AND THEN CANCELLED BY DEFENSE. CALLED MEDICAL PROVIDER OFFICE TO KEEP EXAM BUT WOULD NOT. NEED ORDER COMPELLING EXAMINATION. APPLICANT NOT RECEIVING TTD." EAMS Doc ID 49195133.

1. **THE DOCTRINES OF RES JUDICATA, ESTOPPEL AND THE STATUTE OF LIMITATIONS DO NOT BAR THE CLAIM FOR NEW AND FURTHER DISABILITY TO THE GASTROINTESTINAL INJURY.**

Defendant raised multiple theories at trial—estoppel, res judicata, and statute of limitations. *Minutes of Hearing, Page 3, lines 3 – 6.* Applicant's Petition to Reopen regarding alleged new and further gastrointestinal injury, and medical discovery relating to the claim, is not barred by any of these doctrines.

The theories turn on the question of what rights were extinguished by the Stipulations with Request for Award, and what rights were preserved under the terms of that document.

An Award may be reopened within 5 years of the date of injury if the applicant suffers new and further disability. *Labor Code 5410.* The disability must be new and greater than that which existed at the time of the award. *Nicky Blair's Restaurant v. WCAB (Court of Appeal, 1980) 45 CCC 876.*

Nothing in the language of the Stipulation with Request for Award suggests that either party intended to bargain away the right to reopen. Instead, the parties expressed intent on page 5 of the Stipulations to define the areas of

the body injured in the industrial injury by agreeing that the back, left knee and right knee are industrial. *EAMS Doc 31528048, page 5*. In the same paragraph, Applicant dismissed claims that he injured "700 (MULTIPLE PARTS) and 820-Excretory." *Id.*

The undersigned holds that the language in the Stipulations with Request for Award does not foreclose Applicant's right to reopen for new and further disability to his gastrointestinal system as a result of consuming oral pain medications (or other theories of causation which may be developed in the discovery process). The words "multiple parts" and "excretory" are ambiguous. The parties are free to negotiate terms in a Stipulation with Request for Award which would forever bar a particular benefit, however, to do so effectively they must choose very precise, unambiguous language. That is not the case here. The elements of estoppel and res judicata are not established.

The Petition to Reopen was filed within 5 years of the date of injury. It is timely.

**2. DEFENDANT CANNOT VETO MEDICAL DISCOVERY REGARDING THE CLAIM FOR GASTROINTESTINAL INJURY.**

Defendant refused to participate in the Panel QME selection process because it believed the claim for gastrointestinal new and further disability was barred. Defendant incorrectly believes that the QME process cannot go forward without its consent. *See Petition, page 10, lines 13-25.*

Labor Code § 4062.2(c) states in part, "If a party fails to exercise the right to strike a name from the panel within 10 days . . . the other party may select any physician who remains on the panel . . . ."

Defendant's citation to *Granados v. Barrett Business Services*, 2012 Cal. Wrk. Comp. P.D. LEXIS 128 is not on point. In *Granados*, Defendant through conduct waived a valid objection to the QME process. Here, Defendant's objection to the appointment of a QME panel was based on the incorrect belief that the claim for gastrointestinal new and further disability was barred.

**3. DEFENDANT IMPROPERLY RAISES NEW ISSUES IN THE PETITION FOR RECONSIDERATION.**

While abandoning the issues of estoppel, res judicata and statute of limitations on reconsideration, Defendant improperly raises new contentions for the first time in the Petition for Reconsideration.

The new contentions are: (1) There is no causal connection between the alleged new and further gastroenterology claim and the original injury, and (2) There is no good cause shown to reopen under Labor Code § 5803. *Defendant's Petition, page 7 to 10.* Both arguments are flawed because the case is now in the discovery phase regarding the Petition to Reopen. The time to establish or defeat a causal connection between Applicant's industrial orthopedic injury and his claim that he suffers gastrointestinal problems as a result thereof comes after the completion of discovery.

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#### **4. DEFENDANT MISCHARACTERIZES THE RECORD.**

Defendant repeatedly asserts that the WCJ made a finding that Applicant suffered new and further disability. See, e.g., *Petition, page 1, line 23-24; page 4, lines 3 and 9; page 10, lines 4-5*. The undersigned made no finding that new and further disability exists. The parties are now in the medical discovery process. At the end of discovery, it will be possible to determine if new and further disability exists.

Defendant asserts that "The judge incorrectly states that the parties stipulated that a panel QME be obtained in internal medicine." *Petition, page 10, lines 18-19*. The language of the Opinion on Decision is vastly different. It states: "The parties stipulated that a QME panel was obtained and Applicant selected Stanley Majcher, MD, as the QME over Defendant's objection." *Opinion on Decision, page 2, 1<sup>st</sup> paragraph, EAMS Doc ID 51117439; see also 12/9/13 Minutes of Hearing and Summary of Evidence, Stipulation 7, EAMS Doc ID 50734516*.

#### **1. DEFENDANT IMPROPERLY RAISES NEW ISSUES AND ARGUMENTS ON RECONSIDERATION.**

Defendant argues "there is no claim for new and further disability as there was no existence of gastrointestinal permanent disability prior to the Stipulation and Award . . . ." *Defendant's Petition, page 2, lines 9 – 13*. This argument is flawed based on a faulty concept of new and further disability. To prevail in a petition to reopen under Labor Code section 5410, a party must show that applicant suffers from new and further disability that did not exist at the time of

the original Award. If gastrointestinal disability did not exist at the time the S&A was approved, but developed later due to medications used to treat the industrial knee injuries, this is exactly what Labor Code section 5410 is intended to address. Defendant asserts, in essence, that a party cannot reopen for organs that were not included in the original Award. That is simply not the case.

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This argument displays a misunderstanding of both the issue that was submitted for decision at trial, and the relief granted in the Findings, Award and Order. The parties did not litigate the issue of whether the applicant has suffered new and further disability to his gastrointestinal system. Instead, the issue litigated was whether medical discovery in the form of a Panel QME exam in the specialty of internal medicine is appropriate.

## VI

### JOINT RECOMMENDATIONS

It is recommended that the Applicant's Petition for Reconsideration be granted, and that Applicant be awarded medical treatment in the form of partial left unicompartmental knee replacement with postop therapy, as requested by Kevin Pelton, MD, in the report dated June 26, 2013.

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It is further recommended that Defendant's Petition for Reconsideration be denied.

Dated: February 26, 2014

Respectfully submitted,

*PHH*

**Peter H. Hink**  
Workers' Compensation Judge

Served on parties as shown on the  
Official Address Record.

By: *Angie Gonzalez* Date: 2/26/14  
Angie Gonzalez