WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTHA REYES, ***Applicant,*** **vs.** **TARGET, INC., Permissibly Self-Insured, Administered by SEDGWICK CMS,** ***Defendant.***	**Case No. ADJ7410410** **(Van Nuys District Office)** **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, we will deny reconsideration.

Applicant is correct that a written utilization review (UR) decision "shall be signed by either the claims administrator or the reviewer." (Cal. Code Regs., tit. 8, § 9792.9.1(e)(5).) However, under the Appeals Board's recent en banc decision in *Dubon II*, which is binding on all WCAB panels (Cal. Code Regs., tit. 8, § 10341), a failure to sign is not a basis for invalidating UR decision; instead, applicant's remedy was to timely request independent medical review (IMR), which she did. (*Dubon v. World Restoration, Inc.* (Oct. 6, 2014) __ Cal.Comp.Cases __ [2014 Cal. Wrk. Comp. LEXIS 131] (Appeals Board en banc).)

Because the March 28, 2014 UR decision was not invalid, then in the absence of changed circumstances (not alleged here), that UR decision "shall remain effective for 12 months from the date of the decision without further action by the employer with regard to any further recommendation by the same physician for the same treatment." (Lab. Code, § 4610(g)(6).) Accordingly, it is immaterial that applicant's physician's May 22, 2014 request for authorization (RFA) was not denied by defendant until June 17, 2014, even though that denial otherwise might have been deemed untimely had it been an initial

RFA. (Lab. Code, § 4610(g)(3).) Under section 4610(g)(6), defendant could properly have disregarded the new RFA and not issued a UR decision at all.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 29 2014

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

MARTHA REYES
DENNIS HERSHEWE
DIETZ GILMOR

jp

CASE NUMBER: ADJ7410410

MARTHA REYES	**-vs.-**	**TARGET, INC., PSI; ADMINISTERED BY SEDGWICK CMS,**
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE:		**HON. SHILOH A. RASMUSSON**
DATE:		**SEPTEMBER 30, 2014**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant Martha Reyes, born , while employed as a soft line team leader by Target, Inc., sustained admitted injury to her thoracic spine, right third finger, right wrist, right shoulder, cervical spine, right upper extremity, lumbar spine, right elbow and psyche, and claims injury to her internal system in the form of diabetes, hypertension and sleep disorder, during the cumulative trauma period of 09/04/1985-03/30/2010.

Applicant has filed a timely, verified Petition for Reconsideration from a 09/04/2014 Findings of Fact, wherein it was determined that Labor Code §4610(g)(6) bars applicant from litigating the 06/17/2014 utilization review ("UR") determination, where the 06/17/2014 UR determination was duplicative of a previously submitted Request for Authorization ("RFA") denied by UR on 03/28/2014, and where the adverse determination was made within the preceding 12 months. The matter is not currently on calendar.

Applicant contends on Petition for Reconsideration that:

(a) the undersigned could not rely on the prior 03/28/2014 utilization review determination as it was unsigned;
(b) the 03/28/2014 utilization review determination is the subject of currently pending appeal to Independent Medical Review ("IMR");

(c) any appeal of a UR determination "stays and suspends" the 12 month bar for resubmission of an RFA per § 4610(g)(6);
(d) the undersigned violated applicant's due process rights by failing to address the validity of the 06/17/2014 utilization review determination; and
(e) the undersigned substituted his own medical judgment for that of the primary treating physician in determining that the 05/22/2014 request for authorization was a duplicate of a prior 02/25/2014 RFA, rather than a resubmission based on a change in facts.

II.
FACTS

With respect to the history of the multiple RFAs and concomitant UR determinations, the following history was described in the 09/04/2014 Opinion on Decision.

Applicant's primary treating physician Dr. Sobol submitted an RFA on 02/25/2014 (Exhibit I), wherein it is noted at p.3 that authority is being requested for "home care assistance 4 hrs/day x 3 days/wk x 6 wks for cooking/cleaning/laundry/med [illegible]." UR evaluated the request and denied it on 03/28/2014 (Exhibit L). The denial was served on Dr. Paveloff at Dr. Sobol's offices. The record reflects no allegation by the Applicant of material defect in the UR decision, or request for expedited hearing. Applicant claims to have sought IMR of the UR decision (Petition for Reconsideration, p.6:13-15).

The Sobol Orthopedic Medical Group then submitted a 05/22/2014 RFA, requesting "Home Care Assistance, 4 hours/day, 3 days/week for 6 weeks," (Exhibit 8). The form indicates it to be a "New Request" rather than a "Resubmission - Change in Material Facts." The request was denied by Utilization Review on 06/17/2014 (Exhibit 15).

This 06/17/2014 UR denial forms the basis of the present controversy.

Applicant filed a 07/10/2014 Declaration of Readiness to proceed to Expedited Hearing, noting therein an objection to a 06/17/2014 Utilization Review Determination as untimely, and not based on substantial medical evidence. Defendant filed a timely objection to the DOR, arguing that the applicant failed to establish grounds for overturning an IMR decision (Defendant's Objection to DOR, 07/17/2014).

The matter proceeded to Expedited Hearing on 08/21/2014. Submitted for decision was the applicant's need for further medical treatment generally (in the context of the 06/17/2014 utilization review decision). Additional issues raised were:

(1) whether the utilization review determination of 06/17/2014 was invalid as untimely or suffering from material defect;
(2) whether the utilization review complied with 8 Cal. Code Regs. §9792.9.1(g) and 9792.9.1(e)(5)(A) regarding documenting attempts to contact the prescribing physician and documenting the date the request for authorization was received, respectively;
(3) whether Labor Code §4610(g)(6) obviates the need for utilization review of a request for authorization that had previously been denied within 12 months; and,
(4) whether the 12 month timeframe set§4610(g)(6) would apply to a UR determination that had been appealed to Independent Medical Review, which had affirmed the UR determinations, and was now the subject of pending IMR appeal.

The applicant testified under direct and cross-examination and the matter submitted for decision.

On 09/04/2014, Findings of Fact issued, wherein it was determined that Labor Code § 4610(g)(6) bars applicant from litigating the 06/17/2014 Utilization Review denial, as the same requested treatment was previously denied by Utilization Review on 03/28/2014, and there had been no showing of material change in circumstance necessitating another utilization review.

Applicant filed the instant Petition for Reconsideration on 09/16/2014. As of the date of this writing, there has been no response from defendant.

III.
DISCUSSION

Applicant first alleges that the 03/28/2014 UR determination may not be relied upon for purposes of determining applicability of § 4610(g)(6), as the 03/28/2014 UR determination was not signed, and is therefore defective. However, applicant failed to raise the issue of alleged material defect of the 03/28/2014 UR decision at the time, or to file a Declaration of Readiness to Proceed to Expedited Hearing.

Applicant's PTP submitted a duplicate treatment request, and Utilization Review denied the request on 06/17/2014. Applicant did object to the 06/17/2014 adverse UR determination. However, when the applicant's objection to the 06/17/2014 UR decision

was heard at expedited hearing, and defendant asserted that 03/28/2014 UR determination controlled, obviating the duplicate 06/17/2014 UR determination, applicant again failed to raise the issue of the 03/28/2014 UR being defective. Applicant is raising the issue of alleged defect in the 03/28/2014 UR determination for the first time upon Petition for Reconsideration. As was noted by the Appeals Board in *Dubon*, "[j]udicial scrutiny of the procedural validity of a UR decision is of particular importance since SB 863 amended the Labor Code to bar an injured worker from renewing a treatment request for 12 months absent a documented material change in circumstances. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 313). Applicant has declined to appeal the 03/28/2014 UR determination, choosing instead to litigate a subsequent 06/17/2014 UR determination. Applicant now claims the prior 03/28/2014 UR determination was invalid, and in raising this argument for the first time on Petition for Reconsideration, effectively denies the defendant the opportunity to submit responsive evidence in the record. Applicant's decision to raise this issue for the first time on Petition for Reconsideration amounts to a waiver of the argument.

Applicant also argues that the 03/28/2014 UR determination is subject to pending IMR, not yet decided,[1] and that a pending IMR or appeal from an IMR determination stays and suspends the 12 month bar of § 4610(g)(6). (Petition for Reconsideration, p.7:12-15). Applicant argues that "implementation" of § 4610(g)(6) is stayed until there has been a final determination of the disputed medical treatment request, either from the WCAB or the appellate courts. "If and when the utilization review has been upheld, following all appellate review, the 12 months period begins on the date of the utilization review denial." (Ibid.). Applicant offers no caselaw or other authority for this proposition.

As is noted in the opinion on decision, applicant's reading of the statute would effectively render the statute meaningless. The process of appealing a UR determination to IMR, and thereafter appealing an IMR determination, will often take several months at minimum. To subscribe to applicant's interpretation of Labor Code § 4610(g)(6) would be to allow a doctor to resubmit identical treatment requests repeatedly to UR while the first treatment request, denied by UR, is being appealed, in the hopes that one of the many duplicate requests will find a receptive UR physician. This would also create a significant administrative burden on defendant, who would be required to refer multiple and repeated RFAs through UR, while at the same time participating in the appeal of the original RFA through the IMR and IMR appeals process. Moreover, applicant's interpretation of the statute would increase the likelihood for conflicting

[1] The record does not contain a copy of the alleged IMR application. Inexplicably, IMR determinations for requests submitted both *before* and *after* the 03/28/2014 UR decision have been received and appealed by applicant. (Petition for Reconsideration, p.6:15-18).

IMR and subsequent UR determinations, made during the pendency of the IMR process.

The record in the instant matter is illustrative of the perils of such an interpretation. Primary treating physician Dr. Sobol's office has submitted a request for "home care assistance" on eight different occasions, from 10/22/2013 (Exhibit 12) through 08/15/2014 (Exhibit 13). Following the original request of 02/25/2014, and subsequent UR denial, the treatment was requested and denied an additional three times, all while the IMR appeal has remained pending.[2]

Applicant's interpretation of the statute finds no support in caselaw or other authority, and is incongruent with the plain legislative intent of Labor Code § 4610(g)(6). Multiple filings of repeated, duplicative Requests for Authorization encourages doctor shopping, inconsistent outcomes between IMR and UR, and places a significant administrative burden on defendant. Labor Code § 4610(g)(6) serves to bar this type of repeated and cumulative request. Moreover, this section is only applicable where the underlying UR determination is valid, or the UR determination is upheld via IMR, and does not interfere with applicant's due process rights to challenge the validity of the UR determination.

Finally, applicant asserts that the WCJ improperly substituted his own medical judgment for that of the treating physician. This assertion appears to be in the context of whether there had been a material change in applicant's condition giving rise to the repeat 05/22/2014 RFA (Exhibit 8). Applicant alleges that the material change in the applicant's condition was the "three surgeries to three different parts of the body." (Petition for Reconsideration, p.10:3-4). These surgeries are not alleged to have occurred after the 03/28/2014 adverse UR determination.[3] The applicant appears to misunderstand § 4610(g)(6), which notes the 12 month bar to resubmission of an RFA applies unless "the further recommendation is supported by documented change in the facts material for the basis of the utilization review decision." This would appear to apply to interval changes occurring after the prior adverse UR determination, which

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[2] The 02/25/2014 RFA, which was denied on 03/28/2014, was repeated three times, on 04/11/2014 (Exhibit H), 07/02/2014 (Exhibit 14), and 08/15/2014 (Exhibit 13). It appears that Utilization Review has again denied the requested treatment on 06/17/2014 (Exhibit 8) and 07/22/2014 (Exhibit K). The UR response, if any, to the 08/15/2014 RFA is not contained in the record.

[3] AME Dr. Angerman notes as of 04/30/2014 that applicant's last surgery was a 06/06/2013 surgery consisting of flexor tenosynovectomy and carpal tunnel release on the right with limited internal neurolysis and third digit tenosynovectomy, tenolysis and release. (Exhibit M, p.17).

would materially alter the medical basis for the request for authorization. Moreover, the RFA itself allows the requesting physician to indicate whether the request is a "New Request" or "Resubmission – Change in Material Facts." Dr. Sobol's offices indicated the request to be a new submission, not a change in facts. (Exhibit 8). Thus, Dr. Sobol's own RFA contradicts applicant's assertion that there was a change in material fact warranting yet another UR review of a repeat RFA.

IV.
RECOMMENDATION

Based on the foregoing, it is the respectful recommendation of the undersigned that the Petition for Reconsideration be DENIED.

Dated: 09/29/2014

SHILOH A. RASMUSSON
Workers' Compensation Administrative Law Judge