

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **KIMBERLY RIVERA,**

5 *Applicant,*

6 *vs.*

7 **VALLEY RADIOLOGY; SEABRIGHT**
8 **INSURANCE,**

9 *Defendants.*

Case No. ADJ7697986
(San Jose District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

10 We previously granted reconsideration in order to allow us time to further study the factual and
11 legal issues in this case. We now issue our Opinion and Decision After Reconsideration. Defendant
12 seeks reconsideration of the September 26, 2013 Findings and Award issued by the workers'
13 compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained
14 admitted industrial injury to her low back while employed as a receptionist on August 27, 2010. The
15 WCJ also found that defendant's July 16, 2013 utilization review (UR) is untimely, that independent
16 medical review (IMR) is not appropriate because defendant did not comply with Labor Code¹ section
17 4610, and that applicant is in need of further medical treatment in the form of acupuncture and
18 medications as prescribed by Norman Kahan, M.D., on June 13, 2013.

19 Defendant contends that the WCJ erred in finding the UR untimely. Defendant argues that
20 section 4610(g)(3)(a) allows its UR provider to communicate its decision to deny to the treating
21 physician within 24 hours of a decision.

22 Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for
23 Reconsideration (Report) recommending that we deny reconsideration.

24 Based on our review of the record and for the reasons discussed below, we affirm the WCJ's
25 decision.

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27 ¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 The WCJ gives the following summary of facts in her Report:

2 Applicant has an industrial injury for which she is receiving medical care.
3 Dr. Norman Kahan is the primary treating physician.

4 On [June 13, 2013], Dr. Kahan issued a request for authorization (RFA) requesting
5 acupuncture and medications (Flexeril, Norco, Neurontin, Terocin and a Theramine
6 medical supplement).

7 The RFA was sent to Defendant via facsimile on [July 5, 2013].

8 Defendant's UR indicates that the RFA was received on [July 8, 2013].

9 The UR non-certification is dated on [July 16, 2013], indicates a determination date
10 of [July 15, 2013], and has a proof of service date of [July 15, 2013].

(Report, 10/17/13, at p. 2.)

11 The parties dispute the date that defendant received the RFA. Applicant claims July 5, 2013 and
12 defendant claims July 8, 2013. However, based on our review of the record, even assuming that
13 defendant received the RFA on July 8, 2013, we find the UR untimely.

14 Section 4610 states that:

15 (g)(1) Prospective or concurrent decisions shall be made in a timely fashion that is
16 appropriate for the nature of the employee's condition, not to exceed five working
17 days from the receipt of the information reasonably necessary to make the
18 determination, but in no event more than 14 days from the date of the medical
19 treatment recommendation by the physician.

....

20 (3)(A) Decisions to approve, modify, delay, or deny requests by physicians for
21 authorization prior to, or concurrent with, the provision of medical treatment services
22 to employees shall be communicated to the requesting physician within 24 hours of
23 the decision. Decisions resulting in modification, delay, or denial of all or part of the
24 requested health care service shall be communicated to physicians initially by
25 telephone or facsimile, and to the physician and employee in writing within 24 hours
26 for concurrent review, or within two business days of the decision for prospective
27 review, as prescribed by the administrative director. If the request is not approved in
full, disputes shall be resolved in accordance with Section 4610.5, if applicable, or
otherwise in accordance with Section 4062.

(Lab. Code, § 4610(g)(1), (3)(A).)

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1 In addition, Administrative Director Rule 9792.9.1 states that:

2 For prospective, concurrent, or expedited review, a decision to modify, delay, or deny
3 shall be communicated to the requesting physician within 24 hours of the decision,
4 and shall be communicated to the requesting physician *initially by telephone,*
5 *facsimile, or electronic mail.* The communication by telephone shall be followed by
6 written notice to the requesting physician, the injured worker, and if the injured
7 worker is represented by counsel, the injured worker's attorney within 24 hours of the
8 decision for concurrent review and within two (2) business days for prospective
9 review and for expedited review within 72 hours of receipt of the request.

7 (Cal. Code Regs., tit. 8, § 9792.9.1(e)(3), emphasis added.)

8 There is no evidence in this case that defendant communicated their decision "initially by
9 telephone, facsimile, or electronic mail" before it served written notice on July 15, 2013. Therefore, we
10 find defendant's UR untimely.

11 Accordingly, for the reasons stated herein, we affirm the September 26, 2013 Findings and
12 Award.

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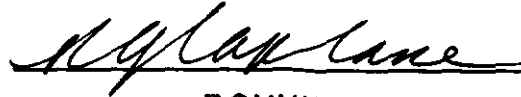
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1 For the foregoing reasons,

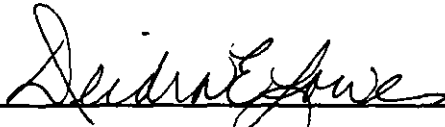
2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board, that the September 26, 2013 Findings and Award is **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 **RONNIE G. CAPLANE**

8 **I CONCUR,**

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12 **DEIDRA E. LOWE**

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15 **MARGUERITE SWEENEY**



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

18 **OCT 28 2014**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **KIMBERLY RIVERA**
23 **BORAH & SHAFFER**
24 **WAI & CONOR LLP**



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26
27 **PAG/sye**

RIVERA, Kimberly

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **KIMBERLY RIVERA,**

5 *Applicant,*

6 **vs.**

7 **VALLEY RADIOLOGY; SEABRIGHT**
8 **INSURANCE COMPANY,**

9 *Defendants.*

Case No. ADJ7697986
(San Jose District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION

10
11 Reconsideration has been sought by defendant, with regard to a decision filed on September 26,
12 2013.

13 Taking into account the statutory time constraints for acting on the petition, and based upon our
14 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
15 opportunity to further study the factual and legal issues in this case. We believe that this action is
16 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
17 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
18 hereinafter determine to be appropriate.

19 For the foregoing reasons,

20 **IT IS ORDERED** that the Petition for Reconsideration is **GRANTED**.

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1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
2 the above case, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 San Jose District Office or any other district office of the WCAB and shall not be e-filed in the Electronic
7 Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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11 **I CONCUR,**

R. G. Caplane

12 **RONNIE G. CAPLANE**

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14 *Deidra E. Lowe*

15 **DEIDRA E. LOWE**



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17 *Marguerite Sweeney*

18 **MARGUERITE SWEENEY**

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

20 **DEC 09 2013**

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

22 **BORAH & SHAFFER**
23 **KIMBERLY RIVERA**
24 **WAI & CONNOR**

apd

25 **ebc**

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ7697986

KIMBERLY RIVERA,

Applicant,

vs.

VALLEY RADIOLOGY; SEABRIGHT;

Defendants.

**REPORT & RECOMMENDATION
ON PETITION FOR
RECONSIDERATION**

I.

INTRODUCTION

Applicant, KIMBERLY RIVERA, born _____, while employed on 08/27/2010, as a receptionist, occupational group number 111, in San Jose, California, by Valley Radiology, sustained an injury arising out of and in the course of employment to the low back. The parties presented to Expedited Hearing on 09/17/2013 and submitted a medical treatment issue for determination.

The Findings and Award in this case issued on 09/26/2013. The Petitioner is Defendant, who has timely filed the verified Petition for Reconsideration on 10/10/2013. The Petition for Reconsideration is not legally defective. Applicant has not filed an Answer.

Petitioner contends that this Judge misapplied the time frames under Labor Code Section 4610 when finding the Utilization Review (UR) denial to be untimely.

II.

FACTS

Applicant has an industrial injury for which she is receiving medical care. Dr. Norman Kahan is the primary treating physician.

On 06/13/2013, Dr. Kahan issued a request for authorization (RFA) requesting acupuncture and medications (Flexeril, Norco, Neurontin, Terocin and a Theramine medical supplement).

The RFA was sent to Defendant via facsimile on 07/05/2013.

Defendant's UR indicates that the RFA was received on 07/08/2013.

The UR non-certification is dated on 07/16/2013, indicates a determination date of 07/15/2013, and has a proof of service date of 07/15/2013.

This Judge determined that UR was untimely, and therefore the underlying medical treatment issue was not subject to Independent Medical Review (IMR).

Defendant disputes the determination that UR was untimely.

III.

DISCUSSION

1. **DEFENDANT ALLEGES THAT THE UR PROVIDER WAS TO HAVE RECEIVED AN ADDITIONAL 24 HOURS TO COMMUNICATE THEIR DECISION TO THE MEDICAL PROVIDER AND BY NOT ALLOWING THE ADDITIONAL TIME THE WCJ MISAPPLIED LABOR CODE SECTION 4610(g)(3(A))**

Labor Code Section 4610(g)(1) mandates that prospective or concurrent UR decisions shall be made in a timely fashion, not to exceed 5 working days from 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.

Here, the RFA was received by Defendant either on 07/05/2013 when faxed by Dr. Kahan or on 07/08/2013 when marked received by Defendant. Pursuant to 8 CCR Section 9792.9(a)(1) the RFA shall be deemed to have been received by Defendant by facsimile on the date the request was received if the receiving facsimile electronically date stamps the transmission. If there is no electronically stamped date recorded, then the date the request was transmitted is deemed the date upon which the RFA was received. Here, Defendant offered no evidence of what the receiving facsimile recorded or when. As such, the Regulations are clear that the received date is deemed to be 07/05/2013.

Based on the Regulations as applied to the evidence offered, the UR determination was due by 07/12/2013.

Defendant's evidence [Defendant's Exhibit S] is unclear and internally inconsistent. The UR letter indicates that the determination was made on 07/15/2013. The UR letter has a proof of service dated 07/15/2013. However, there is no dispute that **the UR letter is dated 07/16/2013**. Is the date of the letter correct/incorrect? Is the date on the proof of service correct/incorrect? Is the date of the determination correct/incorrect? Since there are internally inconsistent dates with respect to Defendant's key exhibit, without any testimony from Defendant as to which is accurate, thus Judge utilized the date of the letter. Utilizing either the 07/15/2013 date or the 07/16/2013 date really makes no difference as the UR determination was due by 07/12/2013 and therefore in either case Defendant's UR is untimely.

Defendant now alleges that it has an additional 24 hours pursuant to Section 4610(g)(1)(A) in which to communicate the decision, and therefore the 07/15/2013 determination was timely communicated on 07/16/2013. This argument was not raised at trial. Considering it for the first time on Reconsideration, it is critical to note that Defendant's argument is only valid assuming the RFA was actually received by Defendant on 07/08/2013. There is no evidence of this, and as indicated herein the Regulations mandate that the 07/05/2013 be utilized given the facts of this case.

In summary, the application of Regulation 9792.9(a)(1) results in 07/05/2013 being deemed the receipt date for the RFA, meaning that UR was due by 07/12/2013. Here, the determination was allegedly made on 07/15/2013 and communicated either on 07/15/2013 or 07/16/2013 (depending on what date you accept as correct in Defendant's Exhibit S); in either case, UR is untimely.

As UR is untimely, it is not proper to submit the RFA to IMR.

IV.

RECOMMENDATION

The Petition for Reconsideration should be denied. Respectfully submitted,

DATE: 10/17/2013



ADORALIDA PADILLA
WORKERS' COMPENSATION JUDGE