

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

3
4 **RODOLFO ARROYO,**

5 *Applicant,*

6 vs.

7 **INLAND CONCRETE ENTERPRISES, INC.;**
8 **CALIFORNIA INSURANCE GUARANTEE**
9 **ASSOCIATION for FREMONT**
10 **COMPENSATION INSURANCE COMPANY,**
11 **in liquidation,**

12 *Defendants.*

Case No. ADJ2701561 (VNO 0432386)
(Van Nuys District Office)

OPINION AND ORDER
GRANTING APPLICANT'S
PETITION FOR REMOVAL
AND DECISION
AFTER REMOVAL

13 Applicant petitions for removal of this case to the Appeals Board to challenge the October 28,
14 2015 Findings Of Fact & Orders of the workers' compensation administrative law judge (WCJ) who
15 found that defendant's February 12, 2015 utilization review (UR) decision "was timely" and for that
16 reason the WCAB does not have "subject matter jurisdiction to opine on the medical necessity of the
17 Applicant's need for medical treatment in the form of a [motorized] scooter."¹

18 It is admitted that applicant sustained industrial injury to his back, knees and right big toe while
19 working for defendant as a concrete worker on July 14, 2000.

20 Applicant contends that there has been no change in his condition or circumstances that supports
21 defendant's refusal to repair or replace the motorized scooter that he authorized and that he has used for
22 five years, and that his need for the motorized scooter is supported by substantial medical evidence.

23 An answer was received from defendant.

24 The WCJ provided a Report And Recommendation Of Workers' Compensation Administrative
25 Law Judge On Petition For Removal (Report) recommending that removal be denied.

26
27 ¹ The October 28, 2015 finding states the date of the challenged UR decision as February 12, 2005, but the copy of the UR decision received as Applicant's Exhibit 17 is dated February 12, 2015.

1 Removal is granted and the WCJ's decision is rescinded as the Decision After Removal. The
2 treating physician's request for authorization involved the repair or replacement of the motorized scooter
3 defendant earlier provided to applicant, but defendant's UR did not address that issue and instead
4 considered whether use of a motorized scooter is medically supported. In that the February 12, 2015 UR
5 decision does not address the issue raised by the treating physician's request for authorization there is no
6 timely UR and the dispute may be determined by the WCJ based upon substantial medical evidence
7 consistent with Labor Code section 4604.5. The case is returned to the trial level for that purpose and for
8 the WCJ to address the admissibility of Exhibit 16.

9 BACKGROUND

10 Applicant sustained industrial injury to his back, knees and right big toe in the course of his
11 employment as a concrete worker for Inland Concrete Enterprises, Inc., on July 14, 2000. Defendant
12 accepted the claim and medical treatment has been provided, including toe surgery, knee surgeries and
13 multiple back surgeries.

14 During his deposition on November 8, 2008, the parties' Agreed Medical Evaluator (AME) Stuart
15 Green, M.D., testified that it was medically reasonable for applicant to use a motorized scooter to relieve
16 the effects of his industrial injury. (Applicant's Exhibit 11, 66:12-67:6.) Dr. Green reiterated that
17 opinion in his comprehensive March 12, 2009 report of examination. (Applicant's Exhibit 12, p. 23.)
18 Defendant accepted the opinion of the AME and provided applicant with a motorized scooter.

19 After approximately five years of use, the scooter began to break down. On February 10, 2015,
20 applicant's primary treating physician, Jalil Rashti, M.D., reported to defendant that applicant's scooter
21 was broken and he requested authorization to replace it with a new scooter in light of the costs of repair.
22 Defendant submitted the request for authorization to UR. However, the UR reviewer did not evaluate
23 whether the scooter should be replaced or repaired. Instead, the February 12, 2015 UR decision
24 addressed whether applicant should use a motorized scooter as a matter of medical necessity, and denied
25 authorization to purchase one on the grounds that it was "not essential to care." (Applicant's Exhibit 17,
26 p. 3.)

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1 Applicant requested a hearing to challenge defendant's action, and the issues of "[n]eed for
2 further medical treatment in the form of a motorized scooter" and "[s]ubject matter jurisdiction over the
3 medical treatment dispute" were tried before the WCJ on October 21, 2015. (October 21, 2015 Minutes
4 of Hearing (MOH), 2:19-22.) As shown by the MOH, medical reports by AME Dr. Green and treating
5 physicians Dr. Rashti and Mark Greenspan, M.D., were received into evidence along with defendant's
6 February 12, 2015 UR decision, invoices regarding the replacement or repair of the scooter, letters from
7 applicant's attorney to defendant, and applicant's testimony. However, applicant's Exhibit 16, a
8 February 2015 report by Dr. Rashti, and his Exhibits 22 and 24 were not received into evidence at the
9 trial, but were instead marked for identification for a later ruling by the WCJ following defendant's
10 objection on the grounds that the exhibits were not listed on the pretrial conference statement. (MOH,
11 4:15-17, 5:6-8, 5:11-13, 5:17-22.)

12 On October 28, 2015, the WCJ issued his decision finding that the WCAB lacked subject matter
13 jurisdiction over the treatment dispute because defendant issued a timely UR decision. As part of his
14 decision, the WCJ found that Exhibits 22 and 24 were "stricken" from evidence along with Exhibit 23,
15 but he made no finding concerning Exhibit 16.²

16 The WCJ addresses applicant's contentions and explains the reasons for his decision in his Report
17 in pertinent part as follows:

18 Pursuant to [*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases
19 1298, 1299-1230 (Appeals Board en banc) (*Dubon II*)], the rules regarding
disputes regarding medical treatment are as follows:

- 20 '1. A utilization review (UR) decision is invalid and not
21 subject to independent medical review (IMR) only if it is
22 untimely.
- 23 2. Legal issues regarding the timeliness of a UR decision
24 must be resolved by the Workers' Compensation Appeals
25 Board (WCAB), not IMR.
- 26 3. All other disputes regarding a UR decision must be
27 resolved by IMR.

² The MOH reflects that Exhibit 23, a June 3, 2015 UR decision, was admitted at the trial without objection. (MOH, 5: 8-10.)
However, applicant's petition does not challenge the WCJ's subsequent decision to strike Exhibits 22, 23 and 24 from
evidence, or the WCJ's decision not to allow Exhibits A, B and C, which were offered by applicant after the trial.

1 4. If a UR decision is untimely, the determination of
2 medical necessity may be made by the WCAB based on
substantial medical evidence consistent with Labor Code
3 [§] 4604.5.'

4 For a UR decision to be timely pursuant to Labor Code § 4610(g)(1):

5 'Prospective . . . decisions shall be made in a timely fashion
6 that is appropriate for the nature of the employee's
7 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.'

8 In this case, as set forth by the undersigned WCJ in his Opinion on
9 Decision dated October 28, 2015, on page two:

10 'In this case, pursuant to Applicant's Exhibit '17', on
11 February 10, 2015, the Applicant's primary treating
12 physician, Jalil Rashti, M.D., prospectively requested the
13 purchase of a home scooter between February 2, 2015 to
14 April 11, 2015. The request was timely denied on February
15 12, 2015. Given that the request was timely denied, the
16 WCAB is without jurisdiction to determine the medical
17 necessity of the Applicant's need for medical treatment in
18 the form of a scooter.'

19 While the Applicant does not dispute the timeliness of the Defendant's
20 utilization review denial of the requested treatment, he claims that it should
21 nonetheless be ordered by the WCAB because the Defendant previously
22 authorized a motorized scooter and therefore should be considered
23 continuing medical treatment protected under [*Patterson v. The Oaks Farm*
24 (2014) 79 Cal.Comp.Cases 910 (significant panel decision) (*Patterson*)]....

25 In [*Patterson*], there was no utilization review decision that justified
26 terminating the requested medical treatment. Instead, as written by the
27 WCAB, the Defendant '[u]nilaterally terminat[ed] medical treatment that
was earlier authorized as reasonably required to cure or relieve the injured
worker from the effects of the industrial injury . . . contrary to [Labor Code
section] 4600(a) [and in the absence of] substantial medical evidence.'
[*Patterson, supra* 79 Cal.Comp.Cases at p. 917.] In such instances, it is
not necessary for an applicant's physician to initiate a request for
authorization for submission to utilization review before challenging the
termination of the medical treatment...

Therefore, 'when seeking to terminate approved medical treatment, it is a
defendant's burden to show that the injured worker's circumstance or
condition has changed, not the worker's obligation to continually prove the
necessity of the desired treatment.' [*Warner Bros. v. Workers' Comp.*
Appeals Bd. (Ferrone) (2015) 80 Cal. Comp. Cases 831, 835 (writ
denied).] This requires that the Defendant obtain a timely and valid
utilization review denial of the requested treatment and not unilaterally
terminate it merely due to the absence of continuing requests for
authorization.

1 In this case, however, the Applicant was seeking to replace (not repair) his
2 motorized scooter which was no longer functional. Dr. Rashti forwarded a
3 request for authorization for a replacement scooter which was timely
4 denied by the Defendant's utilization review. Given that there was a
5 utilization review denial issued that provided adequate medical justification
6 for its decision, the Defendant did not unilaterally terminate the
7 Applicant's medical treatment in contravention of [Patterson].

8 DISCUSSION

9 The WCJ correctly notes in his Report that defendant's February 12, 2015 UR decision issued
10 within the time allowed by Labor Code section 4610(g)(1), but he then incorrectly concludes from that
11 fact that the WCAB has no jurisdiction over the treatment dispute. Contrary to the WCJ's conclusion,
12 the WCAB does have jurisdiction over this dispute. Dr. Rashti requested authorization to replace the
13 broken scooter that defendant previously provided, but the UR conducted by defendant did not address
14 whether the broken scooter should be repaired or replaced. Instead, the UR considered whether provision
15 of a scooter is medically supported, but that is not the issue raised by the request for authorization

16 When a defendant authorizes a particular kind medical treatment it does not become obligated to
17 provide that treatment forever. For example, the conduct of URs at reasonable intervals to address the
18 ongoing use of a medication may appropriate to determine if the medication continues to be effective and
19 medically necessary. Similarly, the ongoing provision of physical therapy and chiropractic treatment
20 may properly be evaluated through UR to determine if it is reasonable to continue to authorize those
21 treatments. UR of other forms of medical treatment may also be supported when there is a change in the
22 employee's circumstances or condition that raises a question about the necessity for continued provision
23 of the treatment. But in all of these situations, the UR that is conducted must address the treatment for
24 which authorization is requested or the medical treatment issue in dispute. That did not occur in this
25 case.

26 As held in *Dubon II*, a UR decision that does not issue within the allowed time period is invalid.
27 (Cf. *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon I*); *Bodam v. San Bernardino County Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519 (significant panel decision).) Here, defendant did not conduct a timely UR of the treating physician's request for authorization to replace or repair the broken motor scooter. Thus, there is no valid UR concerning the

1 request for authorization submitted by Dr. Rashti, and as held in *Dubon II*, the determination of whether
2 the treatment should be authorized may be made by the WCAB based on substantial medical evidence
3 consistent with Labor Code section 4604.5.

4 Accordingly, the WCJ's October 28, 2015 decision is rescinded and the case is returned to the
5 trial level for consideration of the reasonableness and necessity of repairing or replacing the broken
6 scooter, or in the alternative, whether defendant may do one or the other. As part of the new decision,
7 the WCJ should also address whether Applicant's Exhibit 16 is received into evidence.

8 For the foregoing reasons,

9 **IT IS ORDERED** that applicant's petition for removal is **GRANTED**.

10 **IT IS FURTHER ORDERED** as the Decision After Removal of the Workers' Compensation
11 Appeals Board that the October 28, 2015 Findings Of Fact & Orders of the workers' compensation
12 administrative law judge are **RESCINDED**, and the following is **SUBSTITUTED** in their place:

13 **FINDINGS OF FACT**

14 1. The Applicant, Rodolfo Arroyo, born _____, while employed on July 14, 2000,
15 as a concrete worker (occupational group number: 480) at Riverside, California, by Inland Concrete
16 Enterprises, Inc., sustained injury arising out of and in the course of employment to his back, knees and
17 right big toe.

18 2. On February 10, 2015, applicant's primary treating physician, Jalil Rashti, M.D., reported to
19 defendant that the motorized scooter defendant had earlier provided applicant was broken and the
20 physician requested authorization to replace it with a new scooter.

21 3. Defendant's utilization review decision dated February 12, 2005 did not address the question
22 of whether the earlier provided motorized scooter should be repaired or replaced and no utilization
23 review decision has issued concerning Dr. Rashti's February 10, 2015 request for authorization.

24 4. In the absence of a valid utilization review decision concerning the February 10, 2015 request
25 for authorization by Dr. Rashti, the Workers' Compensation Appeals Board has jurisdiction to determine
26 if the request for authorization is supported by substantial medical evidence and is consistent with Labor
27 Code section 4604.5.

**STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD**

WCAB Case No(s). ADJ 2701561 (VNO 0432386)

**RODOLFO ARROYO, VS. INLAND CONCRETE ENTERPRISES,
INC.; CIGA, by its servicing facility
Sedgwick Claims Management
Services, Inc., for
Fremont Compensation Insurance
Company, in liquidation,
DEFENDANT(S).**

APPLICANT,

**WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK NOVEMBER 18, 2015**

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE ON PETITION FOR REMOVAL**

INTRODUCTION:

On November 17, 2015, the Applicant filed a timely and verified Petition for Removal¹ dated November 17, 2015 alleging that the undersigned WCJ erred in his Findings of Fact & Orders dated October 28, 2015. The Applicant contends that the Defendant's prior authorization of a previous motorized scooter waived its right to deny authorization, by way of utilization review, for a new scooter and that substantial medical evidence supported the Applicant's need for a motorized scooter.

STATEMENT OF FACTS:

The Applicant sustained an industrial injury while employed on July 14, 2000 to his back, knees and right big toe, while employed as a concrete worker for Inland Concrete Enterprises, Inc.

On February 10, 2015, the Applicant's primary treating physician, Jalil Rashti, M.D., requested the purchase of a home scooter. On February 12, 2015, Joy Hamilton, M.D. issued his utilization review denial of the request. [Applicant's Exhibit "17"] In his denial, Dr. Hamilton wrote the following on pages two to three:

"His current mechanical scooter is over 5 years old, and is beginning to break down. It can no longer be fixed. The provider notes that the patient therefore requires a new home scooter for daily use.

* * *

The California Medical Treatment Utilization Schedule does not provide recommendations regarding scooters for chronic pain;

¹ Since the undersigned WCJ denied the Applicant his requested medical treatment, it is not an interim order subject to removal and will instead be treated as a Petition for Reconsideration.

therefore alternative guidelines are sought. The consulted evidence based guidelines state that power mobility devices are not recommended in the following patient scenarios; if the functional mobility can be sufficiently resolved by the prescription of a cane or walker; or the patient has sufficient upper extremity function and/or available caregiver can propel a manual wheelchair. The guidelines also state mobilization and independence should be encouraged and a motorized scooter is not considered to be essential to care if there is any mobility with canes or other assistive devices.

Reportedly, the patient previously owed a mechanical scooter. The guidelines do not recommend the use of a motorized assistive device unless patient's mobility deficit can not [sic] be solved with the use of a cane, a walker, or due to lack of sufficient upper body strength a manual wheelchair can not [sic] be used. Reportedly, the patient uses his cane occasionally for ambulation. Due to lack of criteria outlined by the guidelines, the continued use of a scooter does not appear to be necessary. The prospective request for one home scooter (purchase) is recommended non-certified."

* * *

A search of the California MTUS, including ACOEM Guidelines, does not reveal guidelines appropriate to the request for a mechanical scooter; therefore, alternative guidelines were consulted.

Power mobility devices (PMDs):

Not recommended if the functional mobility deficit can be sufficiently resolved by the prescription of a cane or walker, or the patient has sufficient upper extremity function to propel a manual wheelchair, or there is a caregiver who is available, willing, and able to provide assistance with a manual wheelchair. Early exercise, mobilization and independence should be encouraged at all steps of the injury recovery process, and if there is any mobility with canes or other assistance devices, a motorized scooter is not essential to care.

Official Disability Guidelines, Knee & Leg (Acute & Chronic)"

On October 21, 2015, the parties submitted the disputed issue of the Applicant's need for a replacement motorized scooter to the undersigned WCJ. On October 28, 2015, the undersigned WCJ issued his Findings of Fact & Orders holding that the WCAB was without jurisdiction to determine the medical necessity of the issue.

It is from this decision that the Applicant claims to be aggrieved.

DISCUSSION:

Pursuant to Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 1298, 1299-1230 (Appeals Board en banc), the rules regarding disputes regarding medical treatment are as follows:

- “1. A utilization review (UR) decision is invalid and not subject to independent medical review (IMR) only if it is untimely.
2. Legal issues regarding the timeliness of a UR decision must be resolved by the Workers' Compensation Appeals Board (WCAB), not IMR.
3. All other disputes regarding a UR decision must be resolved by IMR.
4. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code [§] 4604.5.”

For a UR decision to be timely pursuant to Labor Code § 4610(g)(1):

“Prospective . . . 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 this case, as set forth by the undersigned WCJ in his Opinion on Decision dated October 28, 2015, on page two:

“In this case, pursuant to Applicant's Exhibit “17”, on February 10, 2015, the Applicant's primary treating physician, Jalil Rashti, M.D., prospectively requested the purchase of a home scooter between February 2, 2015 to April 11, 2015,. The request was timely denied on February 12, 2015. Given that the request was timely denied, the WCAB is without jurisdiction to determine the medical necessity of the Applicant's need for medical treatment in the form of a scooter.”

While the Applicant does not dispute the timeliness of the Defendant's utilization review denial of the requested treatment, he claims that it should nonetheless be ordered by the WCAB because the Defendant previously authorized a motorized scooter and therefore should be considered continuing medical treatment protected under Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 910 (Appeals Board significant panel decision). However, as explained by the WCAB:

“The defendant in *Patterson* terminated agreed-upon, authorized, ongoing nurse case manager services for no reason

other than that Ms. Patterson was 'difficult to deal with,' and offered no evidence at all that the nurse case manager services were no longer reasonably required. The Appeals Board panel in *Patterson* repeatedly noted that, under those circumstances, defendant had the burden of showing that applicant's condition or circumstances had changed such that nurse case manager services were no longer reasonably required pursuant to [Labor Code §] 4600." [*McCool v. Monterey Bay Medicar* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 578, 9-10 (Appeals Board noteworthy panel decision)]

In *Patterson*, there was no utilization review decision that justified terminating the requested medical treatment. Instead, as written by the WCAB, the Defendant "[u]nilaterally terminat[ed] medical treatment that was earlier authorized as reasonably required to cure or relieve the injured worker from the effects of the industrial injury . . . contrary to [Labor Code §] 4600(a) [and in the absence of] substantial medical evidence." [*Patterson v. The Oaks Farm, supra* at p. 917] In such instances, it is not necessary for an applicant's physician to initiate a request for authorization for submission to utilization review before challenging the termination of the medical treatment. [*Oliveira v. King Ventures* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 362, 13 (Appeals Board noteworthy panel decision)]

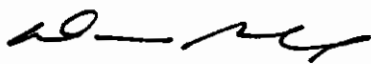
Therefore, "when seeking to terminate approved medical treatment, it is a defendant's burden to show that the injured worker's circumstance or condition has changed, not the worker's obligation to continually prove the necessity of the desired treatment." [*Warner Bros. v. Workers' Comp. Appeals Bd. (Ferrone)* (2015) 80 Cal. Comp. Cases 831, 835 (writ denied)] This requires that the Defendant obtain a timely and valid utilization review denial of the requested treatment and not unilaterally terminate it merely due to the absence of continuing requests for authorization.

In this case, however, the Applicant was seeking to replace (not repair) his motorized scooter which was no longer functional. Dr. Rashti forwarded a request for authorization for a replacement scooter which was timely denied by the Defendant's utilization review. Given that there was a utilization review denial issued that provided adequate medical justification for its decision, the Defendant did not unilaterally terminate the Applicant's medical treatment in contravention of *Patterson*.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Applicant's Petition for Removal dated November 17, 2015 be denied.

Date: November 18, 2015



DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE