

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4
5 **MICHAEL GREEN,**

6 *Applicant,*

7 **vs.**

8 **ELLE PLACEMENT dba GOLDEN GATE.**
9 **STAFFING; LUMBERMEN'S**
10 **UNDERWRITING ALLIANCE,**

11 *Defendants.*

Case No. ADJ9917212
(Oakland District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

12 We previously granted defendant's petition for reconsideration of the July 31, 2015 Findings And
13 Award of the workers' compensation administrative law judge (WCJ) in order to further study the record
14 and issues. In her decision, the WCJ found that defendant's "Utilization Review [UR] denial of April 27,
15 2015 was untimely," and that the "[d]isc replacement/total disc arthroplasty procedure at L4-L5
16 requested by Dr. Clement Jones under a Request for Authorization [RFA] of April 17, 2015 is reasonable
17 and necessary" medical treatment and it was awarded. It is admitted that applicant sustained industrial
18 injury to his spine, neck, right shoulder and hips while employed by defendant as a driver on November
19 20, 2012.

20 Defendant contends that its UR of the proposed spinal surgery was timely in all respects and for
21 that reason the WCJ had no authority to award the surgery as reasonable medical treatment.

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

23 The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report)
24 recommending that reconsideration be denied.

25 The WCJ's decision is rescinded as the Decision After Reconsideration. Defendant timely made
26 a UR determination and served it within the allowed time. Any further dispute of a valid UR denial is
27 subject to the Independent Medical Review (IMR) process. (Lab. Code, §§ 4610.5 and 4610.6.)

1 **BACKGROUND**

2 The WCJ provides a summary of the background facts and explains the reasons for her decision
3 in pertinent part in her Report as follows:

4 Applicant was injured on November 30, 2012 when he was servicing a
5 vehicle under its hood and the vehicle was struck from behind. Since the
6 injury, applicant has sought treatment for injured body parts including his
7 low back. His treating physician Dr. Talwar recommended a back fusion,
8 however, after evaluating the risks, applicant was not interested in this
9 type of surgery. A second opinion with Dr. Clement Jones was
authorized. By Request for Authorization ('RFA') dated April 17, 2015,
Dr. Jones recommended artificial disc replacement arthroplasty at L4-L5
with a one to two day inpatient stay.

10 At trial, the parties offered two versions of the one page RFA. It was
11 determined that Defendant's Exhibit A with a legible facsimile date stamp
12 across the top of the document indicated that the RFA was received by the
insurance carrier via facsimile at 6:18 p.m. on Friday, April 17, 2015...

13 The procedure was denied by Howard Sturtz, M.D. in his UR letter of
14 April 27, 2015, admitted as defendant's Exhibit B. Petitioner points out
that the UR denial lists a decision date of April 27, 2015...

15 The denial letter was addressed to applicant with copies to applicant, Steve
16 Antunez, Clement Jones, M.D. and applicant's attorney David Weltin...A
facsimile date stamp appears at the top of this page...

17 It was determined that the UR denial was served by facsimile only on
18 April 27, 2015 just after 6:00 p.m. in the evening...

19 It is undisputed that the last business day for UR in this case was April 27,
20 2015. Defendant contends that because the UR denial lists a decision date
21 of April 27, 2015, it had until midnight of the fifth business day to serve
the UR denial. However, as the business day for service of a RFA ends at
22 5:30 p.m., it follows that the end of the business day for service of a UR
denial should also be 5:30 p.m.

23 Labor Code section 4610(g)(1) provides that prospective or current UR
24 decisions cannot exceed 'five working days' from receipt of the RFA...
25 Within this framework, [Rules of the Administrative Director (AD), Rule
9792.9.1(c)(3)] provides that prospective or current decisions shall be
timely, 'not to exceed five (5) business days from the date of receipt of the
completed DWC Form RFA...'

26 A business day is different from a calendar day which is defined as a 24
27 hour period. A business day is commonly used to compute the time for
deadlines for filing papers, making payments, making deliveries,

1 etc...Labor Code section 4600.4(a) specifying availability during the
2 business day provides:

3 '(a) A workers' compensation insurer, third-party or other
4 entity that requires, or pursuant to regulation requires, a
5 treating to obtain either utilization review or prior
6 authorization in order to diagnose or treat injuries or
7 diseases compensable under this article, shall ensure the
8 availability of those services from 9 a.m. to 5:30 p.m.
9 Pacific coast time of each normal business day.

10 '(b) For purposes of this section 'normal business day'
11 means a business day as defined in Section 9 of the Civil
12 Code.' (Lab. C. § 4600.4(a).)

13 Section 9 of the California Civil Code which incorporates Section 7 of the
14 Civil Code provides that Saturdays, Sundays, and certain holidays are not
15 business days. Therefore, for UR purposes, Monday through Friday are
16 business days.

17 Similarly, [AD Rule] 9792.9.1(a)(3) provides:

18 'Every claims administrator shall maintain telephone access
19 and have a representative personally available by telephone
20 from 9:00 AM to 5:30 PM Pacific Time, on business days
21 for health care providers to request authorization for
22 medical services. Every claims administrator shall have a
23 facsimile number available for physicians to request
24 authorization for medical services. Every claims
25 administrator shall maintain a process to receive
26 communications from health care providers requesting
27 authorization for medical services after business hours. For
28 purposes of this section the requirement that the claims
29 administrator maintain a process to receive
30 communications from requesting physicians after business
31 hours shall be satisfied by maintaining a voice mail system
32 or a facsimile number or a designated email address for
33 after business hours requests.['] (Cal. Code Regs., tit. 8, §
34 9792.9.1(a)(3).)

35 As noted above, [AD] rule 9792.9.1(a)(1) requires service of the RFA by
36 the requesting physician no later than 5:30 p.m. in order to be considered
37 received on the same business day. (Cal. Code Regs., tit. 8, §
38 9792.1.9(a)(1).) An RFA received after 5:30 p.m. is deemed received on
39 the next business day. To be timely, UR must issue within five business
40 days, not calendar days, from receipt of the RFA. For all other UR
41 purposes, the business day ends at 5:30 p.m...

42 Defendant contends that because the decision was made on the fifth day
43 for UR, it was allowed 24 additional hours to communicate the decision to
44 the requesting physician...However, no authority is cited to show that a

1 last minute determination operates to extend the requirement that UR
2 decisions shall be timely, not to exceed five (5) business days from the
3 date of receipt of the completed RFA....Here, the UR decision transmitted
4 after business hours by fax after 6:00 p.m. on the fifth and final day for
5 UR is untimely.

6 DISCUSSION

7 The WCJ correctly concludes that the UR decision was timely made within the five "working
8 days" period described in Labor Code section 4610(g)(1).¹ However, the statute provides for issuance of
9 a prospective UR decision like the one in this case within 14 days of receipt of the RFA, not five working
10 days as indicated in the Report. (Lab. Code, § 4610(g)(1).) Instead, the "five working days" time period
11 under section 4610(g)(1) begins to run when the UR reviewer is in "*receipt of the information reasonably
12 necessary to make the determination.*" (*Id.*, italics added.)

13 In this case, there is no evidence of when the UR reviewer received the information reasonably
14 necessary to make the determination. The medical records identified in Dr. Sturtz's April 27, 2015 UR
15 report were not submitted by Dr. Jones as part of the RFA, and there is no evidence of when they were
16 received by Dr. Sturtz as part of the UR process.² But even if it is inferred that Dr. Sturtz was in receipt
17 of that information on the same April 20, 2015 date the RFA is deemed received as determined by the
18 WCJ, the UR decision timely issued "five working days" thereafter on April 27, 2015, in accordance
19 with section 4610(g)(1).

20 As the WCJ notes in her Report, AD Rule 9792.9.1(a)(1) provides that when an RFA is submitted
21 after 5:30 p.m., it is considered to be received on the next business day. (Cal. Code Regs., tit. 8, §
22 9792.1.9(a)(1).) In that the RFA in this case was submitted after 5:30 p.m. on Friday, April 17, 2015, as
23 shown by the fax received date stamped on its face, it is properly deemed under AD Rule 9792.9.1(a)(1)
24 to have been received the next business day on Monday April 20, 2015. AD Rule 9792.9.1(c)(1) states

25 ¹ Further statutory references are to the Labor Code. Section 4610(g)(1) provides in pertinent part as follows: "Prospective or
26 concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to
27 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"

² The UR report shows that Dr. Sturtz attempted telephonic contact with the surgeon submitting the RFA on April 24, 2015,
and it is reasonable to infer that he was in possession of the medical records at that time.

1 that "the first day in counting any timeframe requirement is the *day after* the receipt of the DWC form
2 RFA..." (Cal. Code Regs., tit. 8, § 9792.1.9(c)(1), italics added.) The day after the date the RFA was
3 received was Tuesday, April 21, 2015, and the WCJ was correct in concluding that the Monday, April
4 27, 2015 UR decision timely issued within five working days of that date because Saturday, April 25,
5 2015 and Sunday, April 26, 2015 are not "working days" as described in section 4610(g)(1).

6 The dissent urges that the UR decision is untimely based upon an inference that it was made after
7 5:30 p.m. on April 27, 2015. There is no evidence of the exact time when the UR decision was made and
8 the inference it was made after 5:30 p.m. because the facsimile stamp shows it was sent to the requesting
9 physician at 6:00 p.m. is not reasonable. Instead, the reasonable inference is that the UR decision was
10 regularly made during the business day on the date it is dated, April 27, 2015, and there is no evidence
11 that shows otherwise.

12 The WCJ and the dissent also err in concluding that defendant had less than 24 hours after the UR
13 decision was made within which to communicate the decision to applicant and his treating physician.
14 The 24 hours for providing notice of the UR decision as set forth in the statute and regulations is a
15 separate time period that is not included within the statutory periods for the making of a UR decision.

16 Section 9792.1.9(3)(A) provides in pertinent part that a prospective UR decision like the one in
17 this case "shall be communicated to the requesting physician *within 24 hours of the decision...* initially by
18 telephone or facsimile, and...in writing...within two business days of the decision...as prescribed by the
19 administrative director." (Italics added.) AD Rule 9792.9.1(e) in turn provides that a prospective UR
20 decision "shall be communicated to the requesting physician *within 24 hours of the decision...* initially by
21 telephone, facsimile, or electronic mail...followed by written notice..." (Italics added.)

22 Section 9792.1.9(3)(A) and AD Rule 9792.9.1(e) plainly allow for communication of a UR
23 decision "within 24 hours of the decision," and they do not include that time period within the time for
24 making the decision. In this case, the decision was made on April 27, 2015, and it was communicated by
25 facsimile to the treating physician on the same date, which was within 24 hours of the decision.

26 The record shows that the UR decision was both timely made and timely communicated. As
27 such, the UR is valid and there was no basis for the WCJ to award the disputed medical treatment.

1 (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.)
2 (*Dubon II*); *Bodam v. San Bernardino County Dept. of Social Services* (2014) 79 Cal.Comp.Cases 1519
3 (significant panel decision) (*Bodam*).³ When there is a valid UR decision, any further dispute over the
4 proposed treatment is to be addressed through the IMR process. (*Id.*; Lab. Code, §§ 4610.5 and 4610.6.)

5 For the foregoing reasons,

6 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
7 Board that the July 31, 2015 Findings And Award of the workers' compensation administrative law
8 judge is **RESCINDED**, and the following is **SUBSTITUTED** in its place:

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22 ³ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit.
23 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70
24 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; see also
Govt. Code, § 11425.60(b).)

25 Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to
26 augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant"
27 unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a
new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed
the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn.
3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); 25
Cal. Workers' Comp. Rptr. 197 [News Brief, August 1997].)

FINDINGS OF FACT

- 1. MICHAEL GREEN while employed on November 20, 2012 as a driver at Richmond, California by ELLE PLACEMENT DBA GOLDEN GATE STAFFING, insured by LUMBERMEN'S UNDERWRITING ALLIANCE, sustained injury arising out of and occurring in the course of employment to the lumbar spine, neck, right shoulder and hips.
- 2. The Utilization Review denial of April 27, 2015 was timely made and served, and it is valid.

WORKERS' COMPENSATION APPEALS BOARD

Katherine Zalewski

KATHERINE ZALEWSKI

I CONCUR,

Jose H. Razo

JOSE H. RAZO

I DISSENT. (See Separate Dissenting Opinion.)

Ronnie G. Caplane

RONNIE G. CAPLANE



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 17 2016

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

CUNEO, BLACK, WARD & MISSLER
MICHAEL GREEN
WELTIN, STREB & WELTIN

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JFS/ara

1 **DISSENTING OPINION OF COMMISSIONER CAPLANE**

2 I dissent. I would affirm the decision of the WCJ for the reasons expressed in her Report, which
3 is incorporated by this reference, and for the reasons below.

4 Timely provision of reasonable medical treatment is an essential element of workers'
5 compensation, and the WCAB is mandated by the California constitution to "enforce a complete system
6 of workers' compensation" that includes "full provision for such medical, surgical, hospital and other
7 remedial treatment as is requisite to cure and relieve from the effects of such injury," and "to accomplish
8 substantial justice in all cases *expeditiously*." (Cal. Const., Article XIV, § 4, italics added; see also, Lab.
9 Code, § 4600; *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93]; *Zeeb v.*
10 *Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501 [32 Cal.Comp.Cases 441]; *Braewood*
11 *Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48
12 Cal.Comp.Cases 566].)

13 When a UR determination does not issue within the allotted time, the request for treatment
14 authorization remains unaddressed. (Lab. Code, § 4610(g); *State Compensation Insurance Fund v.*
15 *Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]
16 (*Sandhagen*); *Dubon II, supra.*) As the Supreme Court wrote in *Sandhagen* when it considered the UR
17 process, "the Legislature intended utilization review to ensure quality, standardized medical care for
18 workers *in a prompt and expeditious manner*. To that end [UR] *balances the dual interests of speed and*
19 *accuracy*, emphasizing the *quick resolution of treatment requests...*" (*Sandhagen, supra*, 44 Cal.4th at p.
20 241, italics added.)

21 An injured worker is entitled to an expeditious determination on whether medical treatment
22 proposed by his or her treating physician will be authorized. (*Dubon II, supra.*) This is why the
23 Legislature requires that a UR decision "shall be made in a timely fashion that is appropriate for the
24 nature of the employee's condition" and why it established an absolute time limit in making a UR
25 decision of "five working days from the receipt of the information reasonably necessary to make the
26 determination" and "in no event more than 14 days from the date of the medical treatment
27 recommendation by the physician." (Lab. Code, § 4610(g)(1).) In addition, the regulations promulgated

1 by the AD plainly require that a prospective UR decision, "shall be made in a timely fashion...not to
2 exceed five (5) business days from the date of receipt of the completed DWC Form RFA." (Cal. Code
3 Regs., tit. 8, § 9792.9.1(c)(3).)

4 In this case, the record supports a finding that the UR decision did not issue until after 5:30 p.m.
5 on the fifth business day, as evidenced by the fact that it was not served by facsimile until after 6:00 p.m.
6 For that reason, the UR decision was not timely made within five business days of defendant's receipt of
7 the RFA. (Cal. Code Regs., tit. 8, § 9792.9.1(c)(3); *Dubon II, supra.*)

8 Moreover, a defendant is obligated to comply with all time requirements in conducting UR,
9 including the timeframes for communicating a UR decision, and a UR decision that is not timely
10 communicated is untimely and invalid. (*Bodam, supra.*) Accepting defendant's contention that the time
11 for sending a UR decision does not begin to run until the UR decision is made would expand the time
12 within which UR is to be completed from five working/business days to five working/business days plus
13 24 hours. Such an expansion of the time for completion of UR is contrary to the Legislature's intention
14 in establishing a fixed time frame for completion of UR, and it is contrary to the AD regulations that
15 require completion of UR within five business days of the defendant's receipt of the RFA.

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1 Defendant did not complete a necessary part of the UR process by service of the UR decision
2 within five working/business days as required by section 4610 and AD Rule 9792.9.1. For that reason,
3 the UR in this case is untimely and invalid. (*Sandhagen, supra.*) When there is no valid UR, the WCAB
4 may decide the treatment dispute based upon substantial medical evidence. (*Dubon II, supra; Bodam,*
5 *supra.*) Here, the proposed treatment is supported by substantial medical evidence as found by the WCJ
6 and discussed in her Report, and the award of the treatment should be affirmed.



R. G. Caplane

RONNIE G. CAPLANE, COMMISSIONER

11 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

12 MAR 17 2016

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

15 CUNEO, BLACK, WARD & MISSLER
16 MICHAEL GREEN
17 WELTIN, STREB & WELTIN

18 JFS/ara

RL

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

Case No. ADJ9917212

MICHAEL GREEN,

Applicant,

vs.

**GOLDEN GATE STAFFING;
LUMBERMEN'S UNDERWRITING;**

Defendants.

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I. INTRODUCTION

Date of Injury:	November 20, 2012
Age on DOI:	38
Occupation:	driver
Parts of Body Injured:	lumbar spine, neck, right shoulder, hips
Petitioner:	Defendant Lumberman's Underwriting Alliance
Timeliness:	The petition was timely
Verification:	The petition was verified

Petitioner's Contention: Defendant files for reconsideration of the determination that its Utilization Review ("UR") denial of April 27, 2015 was untimely.

II. FACTS

Applicant was injured on November 30, 2012 when he was servicing a vehicle under its hood and the vehicle was struck from behind. Since the injury, applicant has sought treatment for injured body parts including his low back. His treating physician Dr. Talwar recommended a back fusion, however, after evaluating the risks, applicant was not interested in this type of surgery. A second opinion with Dr. Clement Jones was authorized. By Request for

Authorization ("RFA") dated April 17, 2015, Dr. Jones recommended artificial disc replacement arthroplasty at L4-L5 with a one to two day inpatient stay.

At trial, the parties offered two versions of the one page RFA. It was determined that Defendant's Exhibit A with a legible facsimile date stamp across the top of the document indicated that the RFA was received by the insurance carrier via facsimile at 6:18 p.m. on Friday, April 17, 2015. Pursuant to Regulation 9792.9.1(a)(1), if an RFA is received by facsimile after 5:30 p.m., the date of receipt is considered the next business day. 8 C.C.R. § 9792.9.1(a)(1). Because the RFA was received by defendant at 6:18 p.m. on Friday, April 17, 2015 after the end of the business day, Monday, April 20, 2015 was deemed the date of receipt. This was despite the fact that the UR denial indicated a receipt date of April 17, 2015. (Exhibit B at 1.)

Regulation 9792.9.1(c)(1) states that "the first day in counting any timeframe requirement is the day after the receipt of the DWC form RFA. . ." 8 C.C.R. § 9792.9.1(c)(1). Therefore, day one for completion of the UR decision began on Tuesday, April 21, 2015. Labor Code section 4610(g)(1) provides that prospective or current UR decisions cannot exceed "five working days" from receipt of the RFA. Lab. C. § 4610(g)(1). Likewise, regulation 9792.1.9(c)(3) provides that prospective or current decisions shall be timely, "not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA." 8 C.C.R. § 9792.9.1(a)(1). Therefore, UR in this case was due on April 27, 2015.

The procedure was denied by Howard Sturtz, M.D. in his UR letter of April 27, 2015, admitted as defendant's Exhibit B. Petitioner points out that the UR denial lists a decision date of April 27, 2015. The denial also notes a phone message left by Dr. Sturtz to Dr. Jones on April 24, 2015 at 9:45 a.m. but the substance of the message is not known. Therefore, it is assumed that the decision to deny the disc replacement procedure was made on April 27, 2015.

The denial letter was addressed to applicant with copies to applicant, Steve Antunez, Clement Jones, M.D. and applicant's attorney David Weltin. (Exhibit B at 1-2.) Page 5 of exhibit B is a "Certificate of Service" by "Vasquez, LVN, Estrelita." The certificate stated under penalty of perjury that on April 27, 2015, "a true and exact copy of the attached determination letter was faxed **and/or** placed in an individually addressed envelope(s) and deposited in the United States Mail at Anaheim, CA with postage fully prepaid to the entities listed below." (Id., at 5, emphasis added.) A facsimile date stamp appears at the top of this page as follows:

_15/04/27 18:00:25 5 /11

Similar date stamps on the other pages of Exhibit B appear to show sequential page numbering totaling eleven pages, the Certificate of Service being page five. It was determined that the UR denial was served by facsimile only on April 27, 2015 just after 6:00 p.m. in the evening. Because the proof of service indicates service by fax "*and/or*" U.S. Mail, it cannot be assumed that the UR denial was served by fax *and* U.S. Mail. At trial, defendant did not offer post-marked mailing envelopes nor witness to verify service by U.S. mail.

It is clear that in order for a RFA to be deemed received on a certain day, the physician must submit the RFA before 5:30 p.m. By the same token, Board rule 9792.9.1.(c)(3) requires that prospective or current UR decisions shall be timely, "not to exceed five business days from the day of receipt of the completed DWC Form RFA." At issue is what constitutes the end of a "business day" for service of a UR decision. Here, it was found that service of the UR decision by facsimile after 6:00 p.m. was untimely as occurring after the close of the business day.

On August 17, 2015, applicant filed an answer to the petition for reconsideration.

III. DISCUSSION

It is undisputed that the last business day for UR in this case was April 27, 2015. Defendant contends that because the UR denial lists a decision date of April 27, 2015, it had until midnight of the fifth business day to serve the UR denial. However, as the business day for service of a RFA ends at 5:30 p.m., it follows that the end of the business day for service of a UR denial should also be 5:30 p.m.

Labor Code section 4610(g)(1) provides that prospective or current UR decisions cannot exceed "five working days" from receipt of the RFA. Lab. C. § 4610(g)(1). Within this framework, Board rule 9792.1.9(c)(3) provides that prospective or current decisions shall be timely, "not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA." 8 C.C.R. § 9792.9.1(a)(1).

"Business day" is a term which defines the hours during which most businesses operate. Typically, business days are Monday through Friday. This is the case for insurance companies engaged in workers' compensation business in California. A business day is different from a calendar day which is defined as a 24 hour period. A business day is commonly used to compute the time for deadlines for filing papers, making payments, making deliveries, etc. The precise duration of a business day varies by area and entity. For example, the close of the business day and the daily deadline for filing at the Workers' Compensation Appeals Board is 5:00 p.m. Pacific Standard Time. Filings made with the Board after 5:00 p.m. are deemed received the next business day.

For utilization review purposes, the Labor Code and Board rules define the end of the business day as 5:30 p.m., Pacific Standard Time. Labor Code section 4600.4(a) specifying availability during the business day provides:

“(a) A workers' compensation insurer, third-party or other entity that requires, or pursuant to regulation requires, a treating to obtain either utilization review or prior authorization in order to diagnose or treat injuries or diseases compensable under this article, shall ensure the availability of those services from 9 a.m. to 5:30 p.m. Pacific coast time of each normal business day.

“(b) For purposes of this section "normal business day" means a business day as defined in Section 9 of the Civil Code.”

(Lab. C. § 4600.4(a).)

Section 9 of the California Civil Code which incorporates Section 7 of the Civil Code provides that Saturdays, Sundays, and certain holidays are not business days. Therefore, for UR purposes, Monday through Friday are business days.

Similarly, Board rule 9792.9.1(a)(3) provides:

“Every claims administrator shall maintain telephone access and have a representative personally available by telephone from 9:00 AM to 5:30 PM Pacific Time, on business days for health care providers to request authorization for medical services. Every claims administrator shall have a facsimile number available for physicians to request authorization for

medical services. Every claims administrator shall maintain a process to receive communications from health care providers requesting authorization for medical services after business hours. For purposes of this section the requirement that the claims administrator maintain a process to receive communications from requesting physicians after business hours shall be satisfied by maintaining a voice mail system or a facsimile number or a designated email address for after business hours requests.

(Cal. Code Regs., tit. 8, § 9792.9.1(a)(3).)

As noted above, rule 9792.9.1(a)(1) requires service of the RFA by the requesting physician no later than 5:30 p.m. in order to be considered received on the same business day.

(Cal. Code Regs., tit. 8, § 9792.1.9(a)(1).) An RFA received after 5:30 p.m. is deemed received on the next business day. To be timely, UR must issue within five business days, not calendar days, from receipt of the RFA. For all other UR purposes, the business day ends at 5:30 p.m.

The Board's significant decision in *Bodam v. San Bernardino County/Department of Social Services* (2014) 79 Cal.CompCases 1519, clarifies than Labor Code section 4610(g)(1) and (g)(3)(A) and 8CCR 9792.9.1(e)(3) impose further mandatory requirements for communicating a UR decision to the requesting physician within 24 hours of the decision. Defendant contends that because the decision was made on the fifth day for UR, it was allowed 24 additional hours to communicate the decision to the requesting physician. Defendant suggests that if a decision was made at 4:30 p.m. on the fifth day for UR, it has an additional 24 hours to communicate the decision to the treating physician. However, no authority is cited to show that a last minute determination operates to extend the requirement that UR decisions shall be timely,

MICHAEL GREEN

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not to exceed five (5) business days from the date of receipt of the completed RFA. If this were the case, claims administrators could withhold decisions until the end of the fifth business day in order to gain an additional day to process treatment requests. As applicant notes, it is disingenuous for defendants to claim the business day end at 5:30 p.m. for purposes of receiving an RFA, but they have a 24 hour business day for purposes of actually making UR determinations. As it is, the Board rules turned what should have been a five day review into a ten day process. Here, the UR decision transmitted after business hours by fax after 6:00 p.m. on the fifth and final day for UR is untimely.

Where UR is untimely, the WCAB has authority to determine the issue of medical necessity. Defendant's petition for reconsideration does not contest the medical necessity of the procedure. The medical reports show that applicant has had prolonged conservative treatment for his back since the date of injury on November 20, 2012. Dr. Jones's report of October 27, 2014 documents the failure of conservative treatment; specifically, medication, physical therapy and injections have not helped to relieve applicant's back and leg complaints. (Exhibit 3.) The failed conservative treatment is also summarized in Dr. Jones' appeal letter of April 28, 2015 which further describes lumbar spine MRI and x-ray studies supporting severe L4-L5 disc space narrowing, disc degeneration, and right L4-L5 isolated disc protrusion. (Exhibit 4.) Dr. Jones opines that California MTUS and ACOEM guidelines indicate surgery when there is serious spinal pathology and when the patient is not responsive to conservative treatment, as is the case with applicant. Thus, there is substantial medical evidence to support Dr. Jones' April 17, 2015 request for surgery.

IV. RECOMMENDATION

Based on the foregoing, it is respectfully recommended that the petition for reconsideration filed by defendants be **DENIED**.

DATE: 08/24/2015



Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

CUNEO BLACK SACRAMENTO, US Mail
LUMBERMENS UNDERWRITING BOCA RATON, US Mail
MICHAEL GREEN, US Mail
WELTIN LAW OAKLAND, US Mail

On: parties and lien claimants present
 all parties as shown on Official Address Record

NOTICE TO: Kelly Vallarino WCAB-OAKLAND
Pursuant to Rule 10500, you are designated to serve this/these document(s) forthwith on all parties shown on the Official Address Record.

ON: August 24, 2015

BY: 

MICHAEL GREEN

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