Filed 7/7/17 Baker v. WCAB, Sierra Pacific Fleet Services CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

JACK BAKER, Petitioner, v. WORKER'S COMPENSATION APPEALS BOARD, SIERRA PACIFIC FLEET SERVICES et al., Respondents.	C080895 (WCAB No. ADJ8111772)

Petitioner Jack Baker, a diesel mechanic employed by respondent Sierra Pacific Fleet Services (Sierra Pacific) and insured by respondent State Compensation Insurance Fund (State Compensation), injured his knee, neck, and shoulder in the course of his employment in February 2010. In March 2014 Baker's treating physician recommended

certain prescription drugs, which a utilization review (UR) recommended be denied. Baker appealed the denial by requesting an independent medical review (IMR) on March 19, 2014. The Administrative Director (director) issued an IMR determination upholding the denial on July 21, 2014.

Baker appealed the IMR determination pursuant to Labor Code section 4610.6 with the Workers' Compensation Appeals Board (WCAB).[1] A Workers' Compensation Judge (WCJ) ordered the director to conduct a new IMR. A second IMR upheld the UR denial of the medication authorization in February 2015. Baker appealed the second IMR determination and the WCJ found that although the IMR determination was untimely the determination was legally valid.

Baker filed a petition for reconsideration and the WCAB denied the petition finding the timeframe in section 4610.6, subdivision (d), is directory rather than mandatory. The WCAB held an IMR determination is not legally invalid because it does not issue within the time frame set forth in section 4610.6, subdivision (d).

Baker brought a petition for writ of review, arguing the WCAB incorrectly interpreted section 4610.6, subdivision (d), on the issue of whether an IMR must be conducted in a timely manner.[2] We agree with the WCAB and conclude the 30-day time limit in section 4610.6, subdivision (d), is directory and, accordingly, an untimely IMR determination is valid and binding on the parties.

---

[1] All further statutory references are to the Labor Code unless otherwise designated.

[2] We previously granted the California Applicants' Attorneys Association's and California Workers' Compensation Institute's requests to file amicus briefs. We hereby grant Sierra Pacific and State Compensation's request for judicial notice.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2010 Baker slipped on some tools in a walkway while working as a diesel mechanic for Sierra Pacific and insured by State Compensation. He injured his right knee, neck, left shoulder, and psyche, and received medical treatment. Sierra Pacific furnished treatment, including medical services by Baker's treating physician, Dr. Peggy Portwood.

Dr. Portwood prescribed the drugs Pennsaid and Norco for Baker in February 2014. Baker submitted the prescriptions to the UR organization and the UR denied authorization for the prescriptions on March 12, 2014.

Baker appealed the UR denial through an IMR by filing an application on March 19, 2014. The director of the WCAB designated MAXIMUS Federal Services, Inc. (Maximus) to rule on all IMR appeals but Maximus did not assign the matter to IMR until June 23, 2014.

After the matter was assigned to IMR, both Baker and Sierra Pacific promptly submitted medical information to Maximus. Maximus issued its final decision on July 21, 2014, finding the prescriptions for Norco and Pennsaid not medically necessary or appropriate.

Baker filed a petition appealing the director's IMR on August 19, 2014. A hearing followed on November 5, 2014. The WCJ in its findings determined: "In this case the delay of 96 days to assign this matter is unreasonable. As the designee of the [director], Maximus' delay resulted in an act in excess of her powers." The WCJ continued, "Applicant's appeal from IMR is granted. He is entitled to a new IMR." The WCJ ordered the matter remanded to the director for the conduct of a new IMR. The WCAB granted the appeal on November 26, 2014, finding Baker's remedy was a new IMR pursuant to section 4610.6, subdivision (i): "Although this seems like a somewhat futile act, in that the substantive decision by IMR was not plainly errant to a lay person, that is the remedy provided by the applicable law."

Maximus issued a final determination after the second IMR on February 4, 2015, and upheld the UR denial for the authorization of the medications. Baker again appealed the IMR decision.

Following a hearing, the WCJ issued a findings and order dated June 19, 2015. The WCJ found "The need for applicant's medications or lack of such need as reasonably necessary is a matter of conflicting medical opinions. [¶] 10. The standard of proof in IMR appeals is one of a plainly erroneous finding by the IMR physician that does not require medical expertise. [¶] 11. Since this is a matter of conflicting medical opinions applicant has not met his standard of proof for his appeal." The WCJ did not discuss the timeliness of the decision.

Baker filed a petition for reconsideration which the WCAB granted. In its decision after reconsideration, the WCAB determined the time periods set forth in section 4610.6, subdivision (d), are directory not mandatory. The WCAB found: "The Legislature requires that every medical treatment dispute that remains after a UR decision be addressed through IMR in order to assure that medical necessity is objectively and uniformly determined by medical professionals based upon the MTUS [medical treatment utilization schedule] and other recognized standards of care. IMR is governmental action performed under the auspices and control of the [director] and an IMR determination is a determination of the [director]. The Legislature provides guidelines in section 4610.6(d) on whether an IMR determination should issue, but it enacted no provision that invalidates an IMR determination if it is not made within those section 4610.6(d) timeframes, and it made no allowance for the WCAB to determine treatment disputes after they are submitted to IMR. In light of the expressed legislative intent and statutory design of IMR, the section 4610.6(d) timeframes are properly considered to be directory

and the IMR determination in this case is valid even if it did not issue within those timeframes. The decision of the WCJ is affirmed."[3]

Baker filed a petition for writ of review.

DISCUSSION

I

Standard of Review

The proper interpretation of a workers' compensation statute presents a question of law we review independently. (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277.) Generally we afford the WCAB's interpretation of a statute "great weight," as it was "rendered in an official adjudicatory proceeding by an administrative body with considerable expertise interpreting and implementing a particular statutory scheme." (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 158.)

However, we do not defer to the WCAB's statutory interpretation in this case because it has rendered conflicting decisions on whether section 4610.6, subdivision (d), is mandatory or directory. In *Arredondo v. Workers' Comp. Appeals Bd.* (2015) 80 Cal.Comp.Cases 1050, the WCAB concluded section 4610.6, subdivision (d), is directory.

In interpreting the statute we begin with its text as the best and most reliable indicator of the Legislature's purpose in passing the statute. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818.) We consider the ordinary meaning of the language, the text of related provisions, terms used in other parts of the statute, and the overall structure of the statutory scheme. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 209.) If we find the language of the statute ambiguous, we may look to other extrinsic sources

---

[3] One chairperson dissented.

such as the legislative history to assist us in establishing the legislative purpose behind the statute. (*Holland v. Assessment Appeals Bd. No. 1* (2014) 58 Cal.4th 482, 490.) Our ultimate goal is to construe the statute in such a manner that comports with the legislative intent and promotes the general purpose of the statute. We seek to avoid an interpretation that would lead to absurd consequences. (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.)

II

Statutory Background

Utilization Review

Prior to the passage of section 4610, employers relied on the worker's physician to establish appropriate medical treatment. No uniform medical treatment guidelines existed and the physician's determinations were presumed correct. Employers challenging a physician's recommendation had to engage in a lengthy, costly dispute resolution process. If the dispute remained after comprehensive medical evaluations were completed, either party could request an administrative hearing, followed by the option of seeking reconsideration by the WCAB and ultimately the appellate court. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 238-239 (*Sandhagen*).)

In 2004 the Legislature passed comprehensive workers' compensation reform, including changes to the standards and process employers utilize to evaluate an employee's request for medical treatment. (*Sandhagen, supra,* 44 Cal.4th at pp. 239-242.) The Legislature required the director of the Division of Worker's Compensation to establish uniform guidelines for evaluating requests for treatment which incorporate evidence-based, peer-reviewed and recognized standards of care. The reforms also eliminated the presumption of correctness of the treating physician, replacing it with a rebuttable presumption of correctness in favor of the treatment schedule. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2016) 248 Cal.App.4th 349, 359 (*Margaris*).)

The Legislature also required employers to adopt an evaluation procedure to resolve an injured worker's request for medical treatment called a utilization review. Under this process a claims administrator may approve a worker's request for treatment, but only a physician who is competent to evaluate the specific issues involved in medical treatment may modify, delay or deny requests for authorization. (*Margaris, supra,* 248 Cal.App.4th at pp. 359-360.) Requiring an employer to engage in a medical review prior to denying or modifying a worker's request for treatment represented a departure from the previous practice which permitted an employer, without review by a physician, to object to a treatment request. (*Sandhagen, supra*, 44 Cal.4th at p. 240.) In addition, the reforms mandated relatively short time frames for the employer to complete its UR process. (§ 4610, subd. (g).)

In sum, "the Legislature intended utilization review to ensure quality, standardized medical care for workers in a prompt and expeditious manner. To that end, the Legislature enacted a comprehensive process that balances the dual interests of speed and accuracy, emphasizing the quick resolution of treatment requests, which allowing employers to seek more time if more information is needed to make a decision." (*Sandhagen, supra*, 44 Cal.4th at p. 241.)

Independent Medical Review

The Legislature, in 2012, passed additional workers' compensation reform, including statutes governing dispute resolution on the heels of a UR determination. If proposed treatment is approved during a UR, the determination becomes final and immune from challenge by the employer. However, if the reviewing physician modifies, delays, or denies the worker's treatment request, the worker may seek review through independent medical review. (§ 4610.5, subds. (f)(1) and (d).)

"The IMR is performed by an independent review organization, which assigns medical professionals to review pertinent medical records, provider reports, and other information submitted to the organization or requested from the parties. (§ 4610.6,

subd. (b).) The physician reviewer must approve the requested treatment if it is 'medically necessary based on the specific medical needs of the employee and the standards of medical necessity as defined in subdivision (c) of Section 4610.5.' (§ 4610.6, subd. (c).) The IMR determination must state whether the disputed service is medically necessary, identify the employee's medical condition and the relevant medical records, and set forth the relevant findings associated with the standards of medical necessity. (§ 4610.6, subd. (e).) These standards include . . . (1) the [treatment schedule]; (2) peer reviewed scientific and medical evidence regarding the effectiveness of the disputed treatment; (3) nationally recognized professional standards; (4) expert opinion; and (5) generally accepted standards of medical practice. (§ 4610.5 subd. (c)(2).)" (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1090 (*Stevens*).)

The IMR determination constitutes the final determination of the director and is binding on all parties. A worker may appeal the IMR determination to the Administrative Law Judge (ALJ) on limited grounds. These grounds include the director acted without authority, the determination was the result of fraud or bias, the physician reviewer had a material conflict of interest, or the determination was based on an erroneous fact that is not subject to expert opinion. A party may seek review of the ALJ decision by the WCAB. However, if the WCAB reverses the IMR it cannot, as it could before, reweigh the evidence and make a contrary factual determination as to the medical necessity of the treatment requested. The WCAB may only remand the case for a new IMR. (*Margaris, supra,* 248 Cal.App.4th at pp. 361-362; *Stevens, supra,* 241 Cal.App.4th at p. 1091.)

III

The Issue Before Us: Timeliness[4]

Section 4610.6, subdivision (d), provides that the entity performing the IMR "shall complete its review and make its determination in writing, and in layperson's terms to the maximum extent practicable" and the determination shall issue "within 30 days of receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director. [¶] . . . [¶] Subject to the approval of the administrative director, the deadlines for analyses and determinations involving both regular and expedited reviews may be extended for up to three days in extraordinary circumstances or for good cause."

The WCAB found section 4610.6, subdivision (d), to be directory. Baker disagrees with the WCAB and argues the IMR timelines set forth in section 4610.6 are mandatory.

Recently, in *Margaris*, the appellate court explored this very issue. In that case, the WCAB also concluded "shall" as used in section 4610.6, subdivision (d), is mandatory, such that an untimely IMR determination is invalid. The WCAB found this

---

4 While the briefing of the parties focused almost exclusively on the timeliness issue, at oral argument Baker's counsel sought to raise a "secondary" issue, viz: whether "an IMR determination can be issued without the proper benefit and use of the application of the MTUS [Medical Treatment Utilization Schedule] guidelines." Counsel argued the review process was fatally flawed because of the IMR's failure to properly consider the MTUS guidelines. Acknowledging the issue was not briefed by either side, he invited the court to seek supplemental briefing if necessary. We decline his invitation. To the extent Baker argues the IMR misapplied the guidelines and reached an incorrect conclusion, that is not one of the limited grounds upon which a worker may appeal an IMR determination. If he asserts the IMR decision is rendered a nullity by the failure or refusal to even consider the guidelines, his assertion is not supported by citation to evidence in the record. We decline to consider the issue.

reading of the statute comports with both the ordinary meaning and statutory definition of "shall." However, the *Margaris* court concluded "the issue is more nuanced than the appeals board recognized." (*Margaris, supra*, 248 Cal.App.4th at p. 362.)

Margaris noted that in a statute directing governmental action "shall" may be used in two different contexts: the mandatory-directory context, or the mandatory-permissive context. *Margaris* cited *People v. McGee* (1977) 19 Cal.3d 948, in which the Supreme Court explained that a literal construction of "shall" may sometimes "improperly equate[ ] the mandatory-directory duality with the linguistically similar, but analytically distinct, 'mandatory-permissive' dichotomy." (*Id.* at p. 958; *Margaris, supra*, 248 Cal.App.4th at p. 363.) After reviewing the analysis in *McGee*, the court in *Margaris* observed: "In other words, where a government action is mandatory in the obligatory-permissive sense and the government fails to act, the government can be compelled (i.e., mandated) to act in accordance with the statute. But where a government action is mandatory in the mandatory-directory sense and the government fails to act, it effectively loses jurisdiction to act in accordance with the statute." (*Margaris, supra*, 248 Cal.App.4th at p. 363.)

Margaris provided further elaboration based on *McGee*: " '[A]lthough the mandatory-directory and obligatory-permissive dichotomies are thus analytically distinct, in some instances there is an obvious relationship between the two. If, for example, a statute simply embodies a permissive procedure with which a governmental entity may or may not comply as it chooses, the entity's failure to comply will generally not invalidate the entity's subsequent action. The converse of this proposition is not always true, however, for as we observed in *Morris* [*v. County of Marin* (1977) 18 Cal.3d 901] "[m]any statutory provisions which are 'mandatory' in the obligatory sense are accorded only 'directory' effect." [Citation.]' (*McGee, supra*, 19 Cal.3d at p. 959; [citations].) Stated slightly differently, 'seemingly mandatory language need not be construed as jurisdictional where to do so might well defeat the very purpose of the enactment or

destroy the rights of innocent aggrieved parties. [Citations.] In other words, the provision at issue may be considered mandatory only in the sense that the board "could be mandated to act if it took more time than the short period allotted." ' " (*Margaris, supra,* 248 Cal.App.4th at p. 363.)

The court in *Margaris* noted that section 15 provides "shall" is mandatory and "may" is permissive. However, the court determined: "[G]iven the difference in meaning given to 'shall' in the statutory context, we conclude section 4610.6, subdivision (d), is ambiguous. Accordingly, we move beyond the plain language of that section and consider its meaning with reference to the rest of the statutory scheme and the intent of the Legislature." (*Margaris, supra,* 248 Cal.App.4th at pp. 363-364.)

The court noted time limits applicable to government actions are generally deemed to be directory, unless the Legislature clearly expresses a contrary intent. In ascertaining such intent, courts employ various tests. In one, courts focus on the consequences of holding a time limit mandatory, to determine whether those consequences would defeat or promote the purpose of the statute. In another, a time limitation is considered directory unless a consequence or penalty is provided for failure to act within the time limit. After applying both of these tests to section 4610.6, subdivision (d), the *Margaris* court concluded the Legislature intended the 30-day provision to have a directory, rather than a mandatory effect. (*Margaris, supra,* 248 Cal.App.4th at p. 364)

We agree with the *Margaris* court's assessment. After carefully considering applicable case law, the court concluded: "Neither section 4610.5, which relates to the initiation of IMR, nor section 4610.6, which relates to the execution of IMR, provides any consequence or penalty in the event the IMR organization, under the auspices of the director, fails to issue an IMR determination within the 30-day period. Moreover, the Legislature provided that the *exclusive* means to challenge an IMR determination is by appeal, and expressly limited the grounds upon which an appeal may proceed. (§ 4610.6, subd. (h).) Notably, untimeliness of the IMR determination is not one of the statutory

grounds for appeal. The absence of a penalty or consequence for the failure to comply with the 30-day time limit, coupled with the limited grounds for appeal, indicate that the Legislature did not intend to divest the director of jurisdiction to issue an IMR determination after the 30-day window expires." (*Margaris, supra*, 248 Cal.App.4th at pp. 365-366.)

In addition, the *Margaris* court reviewed the legislative history surrounding section 4610.6, subdivision (b), and concluded: "[T]he Legislature intended to remove the authority to make decisions about the medical necessity of proposed treatment for injured workers from the appeals board and place it in the hands of independent, unbiased medical professionals. Construing section 4610.6, subdivision (d), as directory best furthers the Legislature's intent in this regard. The appeals board's conclusion in this case—that an untimely IMR determination terminates the IMR process and vests jurisdiction in the appeals board to determine medical necessity—is wholly inconsistent with the Legislature's stated goals and their evident intent." (*Margaris, supra*, 248 Cal.App.4th at p. 367.) In so finding, the court noted, "Providing timely medical care to injured workers is a paramount concern of the Legislature, as evidenced by the short time frames provided for decision-making during utilization review and IMR. [Citations.] But we see no evidence in the statute or in the legislative history to indicate the Legislature intended to divest the director of jurisdiction to conduct IMR simply because the IMR determination is untimely." (*Id.* at pp. 368-369.)

We also agree with the *Margaris* court's determination that interpreting section 4610.6, subdivision (d), as mandatory would yield absurd results. When an applicant successfully challenges an IMR determination on appeal, the remedy is a second IMR determination by a different IMR organization, or by a different reviewer of the same organization. (§ 4610.6, subd. (i); Cal. Code Regs., tit. 8, § 9792.10.7, subd. (d).) As *Margaris* notes: "Thus, even if an IMR is procured by fraud or infected by a conflict of interest on the part of the reviewer, the applicant is only entitled to a new IMR and cannot

litigate the issue of medical necessity before the appeals board. Meanwhile, under the appeals board's construction of the statute, an injured worker who receives an untimely IMR determination would be required in every case to engage in costly and time-consuming litigation before the appeals board, even if the IMR determination is only one day late and it *authorizes* the requested medical treatment. We do not believe the Legislature would sanction such an absurd outcome." (*Margaris, supra*, 248 Cal.App.4th at p. 369.)

In the present case, Baker asserts "[t]reatment delayed is treatment denied." *Magaris* also addressed the concern that interpreting section 4610.6, subdivision (d), as directory would leave injured workers who do not receive a timely IMR determination in limbo. The court concluded: "We therefore hold that to the extent the director fails to render an IMR determination within the time frame provided by section 4610.6, subdivision (d)—e.g., fails to ensure the IMR organization complies with the applicable statutes and regulations—a writ of mandamus under Code of Civil Procedure section 1085 will lie, in appropriate circumstances, to compel the director to issue an IMR determination." (*Magaris, supra*, 248 Cal.App.4th at p. 371.)

The interpretation of section 4610.6, subdivision (d), as directory rather than mandatory is consistent with case law and implements the Legislature's stated policy that decisions regarding the necessity and appropriateness of medical treatment should be made by doctors, not judges.

DISPOSITION

The WCAB decision is affirmed.

RAYE, P.J.

We concur:

ROBBIE, J.

MURRAY, J.