WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JESUS CERVANTES,

Applicant,

vs.

EL AGUILA FOOD PRODUCTS, INC.; SAFECO INSURANCE CO. OF ILLINOIS; SUPERIOR NATIONAL INSURANCE CO., In Liquidation; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; and BROADSPIRE (Servicing Facility),

Defendant(s).

Case Nos. ADJ3675309 (SAL 0081669)
ADJ2967795 (SAL 0101259)
ADJ3517685 (SAL 0077391)
ADJ1962561 (SAL 0077392)

OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

We granted the petition for reconsideration of defendant, Safeco Insurance Company of Illinois (Safeco), to allow time to further study the record and applicable law. Thereafter, to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision (Lab. Code, § 115)[1] regarding the proper procedure to be followed when an injured employee's treating physician has recommended spinal surgery.

We hold that the procedures and timelines governing objections to a treating physician's recommendation for spinal surgery are contained in Labor Code sections 4610 and 4062[2] and in

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[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Lab. Code, § 115; Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

[2] All further statutory references are to the Labor Code. Although sections 4610 and 4062 refer to the "employer," we will use the term "defendant" because when an employer is insured for workers' compensation its carrier is normally liable and responsible for handling the claim. (Lab. Code, §§ 3753, 3755-3759.)

Administrative Director (AD) Rules 9788.1, 9788.11, and 9792.6(o)[3] and are as follows: (1) when a treating physician recommends spinal surgery, a defendant must undertake utilization review (UR);[4] (2) if UR approves the requested spinal surgery, or if the defendant fails to timely complete UR, the defendant must authorize the surgery; (3) if UR denies the spinal surgery request, the *defendant* may object under section 4062(b), but any objection must comply with AD Rule 9788.1 and use the form required by AD Rule 9788.11; (4) the defendant must complete its UR process within 10 days of its receipt of the treating physician's report, which must comply with AD Rule 9792.6(o), and, if UR denies the requested surgery, any section 4062(b) objection must be made within that same 10-day period; and (5) if the defendant fails to meet the 10-day timelines or comply with AD Rules 9788.1 and 9788.11, the defendant loses its right to a second opinion report and it must authorize the spinal surgery.

We expressly disapprove of *Brasher v. Nationwide Studio Fund* (2006) 71 Cal.Comp.Cases 1282 (Appeals Board significant panel decision) (*Brasher*) to the extent it holds: (1) a defendant may opt out of UR and instead dispute the requested spinal surgery using only the procedure specified in section 4062(b); and (2) if a defendant's UR denies spinal surgery, it is the *employee* that must object under *section 4062*(*a*).

I. BACKGROUND

Applicant, Jesus Cervantes, sustained several industrial injuries to his low back in 1996, 1997, and 1998, while employed by El Aguila Food Products, Inc. (El Aguila). El Aguila was insured by Safeco for two of these injuries. On September 2, 2003, a stipulated Findings and Award issued which determined, among other things, that applicant is entitled to further medical treatment, administered by Safeco.

[3] Cal. Code Regs., tit. 8, §§ 9788.1, 9788.11, 9792.6(o).

[4] UR is the process by which a defendant, through a licensed physician it employs or with whom it contracts, reviews the treatment recommendations of an injured employee's treating physician and then decides whether to approve, modify, delay, or deny authorization for the treatment based on medical necessity. (Lab. Code, § 4610.)

Applicant began treating with Catalino Dureza, M.D, who sent four narrative reports to Safeco between September 2008 and January 2009. All four reports described applicant's current problems and diagnosed "lumbar discopathy with disc displacement" and "lumbar radiculopathy." The September 30, 2008 report requested authorization for a lumbar MRI; the November 4, 2008 report said that applicant "may be a surgical candidate" pending the results of the MRI; and the December 13, 2008 report set forth the MRI findings, but said Dr. Dureza would continue to provide applicant with medication for symptomatic relief. In the January 16, 2009 report, Dr. Dureza said: "I do feel somewhat confident that the patient would benefit from surgery … Therefore, I am requesting L4-L5 and L5-S1 posterior lumbar interbody fusion with pedicle screw fixation and extensive decompression by a Gill Procedure. … [¶] Authorization should be forthcoming in order to prevent further neurological and musculoskeletal deterioration." However, the January 16, 2009 narrative report did not clearly state at the top that Dr. Dureza was requesting authorization for surgery.

On February 25, 2009, Dr. Dureza sent Safeco a fax captioned "WRITTEN REQUEST FOR SURGERY AUTHORIZATION," which referenced his earlier reports and requested that Safeco authorize an "L4-5 + L5-S1 posterior lumbar interbody fusion with pedicle screw fixation."

On March 4, 2009, Safeco obtained a UR report from Allen Deutsch, M.D., who concluded that the requested surgery "is not recommended as medically necessary" based in part on the ACOEM Guidelines.[5]

An expedited hearing was held before a workers' compensation administrative law judge (WCJ), at which the reports of Dr. Dureza and Dr. Deutsch were admitted in evidence.

At trial, applicant argued that he is entitled to surgery because: (1) Dr. Dureza's January 16, 2009 report clearly requested authorization for surgery and, therefore, Safeco's March 4, 2009 UR denial was untimely under section 4610(g); and (2) Safeco did not object to Dr. Dureza's

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[5] The American College of Occupational and Environmental Medicine's *Occupational Medicine Practice Guidelines* (2nd Ed. 2008 revision).

January 16, 2009 report within 10 days of receipt and, therefore, it could not avail itself of the spinal surgery second opinion dispute resolution procedure of section 4062(b).

Defendant argued that applicant is not entitled to surgery because: (1) AD Rule 9792.6(o) requires that any narrative report requesting authorization for proposed treatment "shall be clearly marked at the top that it is a request for authorization"; (2) Dr. Dureza's February 25, 2009 fax was the first written communication that was clearly marked at the top that he was requesting authorization for spinal surgery and, therefore, Safeco's March 4, 2009 UR denial was timely; and (3) once Safeco issued its timely UR denial, it was applicant's burden to initiate the spinal surgery second opinion process by timely objecting to the UR denial, but he did not do so.

On May 13, 2009, the WCJ issued a Findings and Order determining that applicant is entitled to lumbar spinal fusion surgery, concluding that "Dr. Dureza's recommendation for lumbar spinal fusion surgery appears reasonable and appropriate" and that Dr. Deutsch's UR report is "not persuasive." Accordingly, the WCJ said the legal issues were "moot."

Safeco filed a timely petition for reconsideration that essentially raises the same legal arguments it presented at trial, but also asserts that Dr. Dureza's opinion is not substantial evidence.

Applicant filed an answer that essentially raises the same legal arguments he made at trial, but also contends that Dr. Dureza's reports support the finding of entitlement to spinal surgery.

We granted reconsideration to further study the factual and legal issues presented.

II. DISCUSSION

In this opinion, we interpret certain provisions of section 4610 and section 4062, and we consider the interrelationship of these provisions together with the application of relevant AD Rules, in the context of a treating physician's request for authorization of spinal surgery.

A. Principles of Construction

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286, 289] (*DuBois*).) "When interpreting any statute, it is well-settled that we begin with its words because

they generally provide the most reliable indicator of legislative intent." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575, 578] (*Smith*) [internal quotation marks omitted].) "We are required to give effect to statutes according to the usual, ordinary import of the language employed … ." (*DuBois*, 5 Cal.4th at p. 388 [58 Cal.Comp.Cases at p. 289]).) "If the language is clear and unambiguous, there is ordinarily no need for judicial construction [and, therefore,] we presume the Legislature meant what it said and the plain meaning governs." (*Smith*, 46 Cal.4th at p. 277 [74 Cal. Comp. Cases at p. 578] [internal quotation marks omitted]; see also *DuBois*, 5 Cal.4th at pp. 387-388 [58 Cal.Comp.Cases at p. 289].) Nevertheless: "At the same time, we do not consider ... statutory language in isolation. Instead, we examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts. Moreover, we read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831 [internal quotation marks and citations omitted]; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1, 22] (*Steele*) ("The words of the statute must be construed in context … and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible.").)

Generally, the rules of statutory interpretation also govern the interpretation of regulations (*Cal. Drive-In Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 292.) Therefore, our duty is to effectuate a regulation's intent and, if the words of a regulation are clear and unambiguous, the plain language of the regulation applies. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1695-1696; see also *Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1037; *Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1355.)

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B. When a Treating Physician Recommends Spinal Surgery, a Defendant Must Undertake Utilization Review

Based on sections 4062(a) and 4610 and the Supreme Court's decision in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*), we conclude that a defendant must conduct UR whenever an injured employee's treating physician recommends spinal surgery.

The plain language of section 4062(a) establishes that spinal surgery cases are subject to UR because it provides that "[e]mployer objections to the treating physician's recommendation for spinal surgery shall be subject to subdivision (b), *and after denial of the physician's recommendation in accordance with Section 4610*." (Emphasis added.) Section 4610 itself also indicates that spinal surgery cases are subject to UR because it provides that if UR denies a request for spinal surgery then the dispute shall be resolved under section 4062(b). (Lab. Code, § 4610(g)(3)(A) & (g)(3)(B).)[6]

In *Sandhagen*, the Supreme Court interpreted section 4610(b)'s requirement that "[e]very employer shall establish a utilization review process in compliance with this section" to mean that a defendant must conduct UR when considering an employee's request for medical treatment. (*Sandhagen*, 44 Cal.4th at pp. 237, 243, 245 [73 Cal.Comp.Cases at pp. 985, 991, 992].) *Sandhagen* was not a spinal surgery case, but there is nothing in *Sandhagen* which suggests that a defendant may bypass UR in spinal surgery cases. To the contrary, *Sandhagen* specifically states that UR applies to "*any and all* requests for treatment." (*Sandhagen*, 44 Cal.4th at p. 237 [73 Cal.Comp.Cases at p. 985] (emphasis added).)

Therefore, contrary to *Brasher*, we conclude that when a treating physician requests

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[6] Section 4610(g)(3)(A) states: "If a request to perform spinal surgery is denied, disputes shall be resolved in accordance with subdivision (b) of Section 4062." Section 4610(g)(3)(B) states: "If the insurer or self-insured employer disputes whether or not one or more services … were medically necessary to cure and relieve, the dispute shall be resolved pursuant to Section 4062, except in cases involving recommendations for the performance of spinal surgery, which shall be governed by the provisions of subdivision (b) of Section 4062."

authorization to perform spinal surgery, a defendant must assess that request through UR.[7]

C. If Utilization Review Approves the Requested Surgery, or if the Defendant Fails to Timely Complete Utilization Review, the Defendant Must Authorize the Surgery

We also conclude that if UR approves the spinal surgery request, or if the defendant fails to timely complete UR, the defendant must authorize the surgery.

Section 4610 establishes that the purpose of UR is to assess treatment recommendations by physicians and to approve, modify, delay, or deny those recommendations. Furthermore, section 4610(g) establishes certain time "requirements [for UR that] must be met."

Accordingly, the implicit legislative purpose in establishing UR was to create an expeditious and inexpensive method to assess treating physician's medical treatment recommendations. (See Cal. Const., art. XIV, § 4 ("the administration of [workers' compensation] legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance [sic] of any character").) As *Sandhagen* states:

> "Before the passage of Senate Bill No. 228, [¶] … [i]f an employer wanted to obtain a report from a doctor other than the treating physician regarding the necessity of certain medical treatment, essentially the only option for the employer was to initiate the rather cumbersome, lengthy, and potentially costly process under former section 4062. … [¶¶] … In place of the often lengthy and cumbersome process employers used to dispute treatment requests prior to the passage of Senate Bill No. 228, the Legislature created a utilization review process that combines what are typically quick resolutions (§ 4610, subd. (g)(1)) with accuracy—employers can have their utilization review doctors review treatment requests, employers can seek additional time to obtain additional information or examinations (*id*., subd. (g)(5)), and medical review is required before the utilization review doctor can modify, delay, or deny a treatment request (*id*., subd. (e)). … [¶] … [U]tilization review provides an expeditious manner of resolving treatment requests, being neither time consuming nor expensive, especially when compared to the process previously in place." (*Sandhagen*, 44 Cal.4th at pp. 238, 243-244 [73 Cal.Comp.Cases at pp. 986, 991-992].)

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[7] The only exception to this rule is if the surgery's medical necessity is undisputed and the defendant solely challenges whether the industrial injury caused or contributed to the need for surgery because the *cause* of a need for treatment is not an issue subject to UR. (See *Simmons v. State of California, Dept. of Mental Health* (2005) 70 Cal.Comp.Cases 866, 869, 873-874; see also Cal. Code Regs., tit. 8, § 9792.6 ("Utilization review does not include determinations of the work-relatedness of injury or disease … ").) Nevertheless, if a defendant solely disputes industrial causation, it still must timely object under section 4062(b). (See Sections II-D & II-E, *infra*.)

Given the purpose of section 4610, we conclude that if UR approves the recommended spinal surgery, the defendant must authorize it.

This conclusion comports with the statutory language. The purpose of the spinal surgery second opinion procedure is to obtain a report "*resolving* the *disputed* surgical recommendation." (Lab. Code, § 4062(b) (emphasis added).) Therefore, if UR *approves* spinal surgery, there is no "dispute" to "resolv[e]." Similarly, section 4062(a) states that "[e]mployer objections … shall be subject to [section 4062(b)] … after *denial* of the physician's recommendation, in accordance with Section 4610." (Emphasis added). Thus, if there is no UR "denial" under section 4610, then there is no spinal surgery issue that could be "subject to" section 4062(b). Also, section 4610(g)(3)(A) states that "[i]f a request to perform spinal surgery *is denied*," then "*disputes* shall be *resolved* in accordance with [section 4062(b)]." (Emphasis added.) Once again, if there is no UR "deni[al]" there is no "dispute" to "resolve[]."

Furthermore, given both the purpose and timelines of section 4610, we conclude that if a defendant fails to timely complete UR it must authorize the spinal surgery.

This conclusion is supported by the recent decision of the Court of Appeal in *J.C. Penney Co. v. Workers' Comp. Appeals Bd.* (*Edwards*) (2009) 175 Cal.App.4th 818 [74 Cal.Comp.Cases 826] (*Edwards*). In *Edwards*, the Court addressed a treating physician's determination regarding temporary disability. This determination did not pertain to medical treatment, so UR did not apply. Therefore, objections to the determination were governed by section 4062(a), including its specific deadlines for objections not subject to section 4610.[8] J.C. Penney did not timely object under section 4062(a), but instead argued that the treating physician's determination did not constitute substantial evidence. In rejecting this argument, the Court said:

> "A determination by a treating physician that an injured worker continues to be temporarily totally disabled is a medical determination subject to the

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[8] Section 4062(a) provides in relevant part that "[i]f either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues … not subject to Section 4610, the objecting party shall notify the other party in writing of the objection within 20 days of receipt of the report if the employee is represented by an attorney or within 30 days of receipt of the report if the employee is not represented by an attorney."

> objection requirement of Labor Code section 4062. … The question is: What is the effect of failing to object within the 'time limits' of that statute?
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> "The requirement for an objection under section 4062 is stated in mandatory language: 'the objecting party shall notify the other party in writing.' The ordinary meaning of a mandatory time limit is that once the prescribed time has passed the action subject to the time limit may no longer be taken. When J.C. Penney failed to object to a medical determination of temporary total disability by Edwards's treating physician within the time limit provided in section 4062, it lost the right to object to that determination in the future.
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> "The evident purpose of the time limits in section 4062 is to induce both employer and employee to declare promptly medical determination disputes and expeditiously resolve them through the prescribed mechanisms. This purpose cannot be attained if a party such as J.C. Penney can fail to object in a timely manner and nonetheless thereafter tender a claim that contradicts a medical determination subject to the objection requirement of the statute. If either employer or employee fails to raise a dispute about a medical determination within the ambit of section 4062 within the prescribed time, they may not attack that determination thereafter.
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> "We find the core reasoning of the WCAB correct. '[I]t is contrary to the spirit of [section] 4062 to permit a retrospective determination of a permanent and stationary date' when to do so would be to allow a belated objection to a medical determination by the treating physician."
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> (*Edwards*, 175 Cal.App.4th at pp. 825-827 [74 Cal.Comp.Cases at pp. 831-832].)

Even more so than section 4062(a), section 4610(g) emphatically makes clear that its UR deadlines are mandatory. Section 4610(g) declares: "In determining whether to approve, modify, delay, or deny requests by physicians … all of the following *requirements must be met*: (1) Prospective or concurrent 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." (Emphasis added). All of these italicized words indicate a mandatory and time-limited process. (Lab. Code, § 15 (" '[s]hall' is mandatory and 'may' is permissive"]); *Long Beach Police Officers Assn. v. City of Long Beach* (1988) 46 Cal.3d 736, 743 ("the ordinary meaning of 'shall' or 'must' is of mandatory

effect"); *In re Barfoot* (1998) 61 Cal.App.4th 923, 931 (the word "require" means "to direct, order, demand, instruct, command, ... [and] compel").)

Accordingly, if a defendant fails to complete UR in a timely manner, it must authorize the recommended spinal surgery.[9]

D. A *Defendant* May Object under Section 4062(b) to a Spinal Surgery Request, but any Objection Must Comply with Administrative Director Rule 9788.1 and Use the Form Required by Administrative Director Rule 9788.11

For the reasons that follow, we conclude that in the sole context of a recommendation for spinal surgery, it is only the defendant, and not the injured employee, that may object under section 4062.

The opening sentence of section 4062(b) expressly states: "*The employer may object* to a report of the treating physician recommending that spinal surgery be performed within 10 days of the receipt of the report." (Emphasis added.) Accordingly, the plain language of section 4062(b) clearly and unequivocally provides that it is the *defendant* that may initiate that statute's spinal surgery second opinion procedure. This is confirmed by the unambiguous language of section 4062(a), which provides in relevant part: "*Employer objections* to the treating physician's recommendation for spinal surgery shall be subject to subdivision (b) … ." (Emphasis added.) Thus, the language of both sections 4062(b) and 4062(a) refers only to an "employer" objection to a treating physician's spinal surgery recommendation; neither section makes any reference to an objection by an injured employee.

As will be discussed later, a defendant's objection under section 4062(b) to a treating physician's spinal surgery request may be made only after that request has been denied by UR. (See Section II-E, *infra*.) It may seem redundant to provide for a defendant to object again after its own UR has just denied the spinal surgery request, but in the context of spinal surgery this is

[9] We recognize that, in *Sierra Pacific Industries v. Workers' Comp. Appeals Bd.* (*Chatham*) (2006) 140 Cal.App.4th 1498, 1513 [71 Cal.Comp.Cases 714, 724], the Court of Appeal for the Third Appellate District stated: "The effect of bypassing the new utilization review process was that the [UR report] was not admissible …, but there was no effect on the ability of [the defendant] to challenge the reasonableness of the medical treatment." However, this statement is dicta. Furthermore, this statement was made before the Supreme Court had issued its decision in *Sandhagen* and the statement is inconsistent with the Third Appellate District's subsequent opinion in *Edwards*.

exactly what sections 4062(b) and 4062(a) specify. The legislative framework for spinal surgery cases is simply different than it is for non-spinal surgery cases because, at every step, section 4062(b) places the onus on the defendant. For example, in addition to providing for only "employer" objections to a treating physician's spinal surgery recommendation, section 4062(b) requires that "[i]f the second opinion report does not recommend surgery, *the employer shall file a declaration of readiness to proceed*." (Emphasis added.) Because a declaration of readiness is the document that triggers a hearing before the WCAB (Cal. Code Regs., tit. 8, § 10250), section 4062(b) gives the defendant the primary responsibility for initiating the adjudicatory process, even if the second opinion report *agrees* with the defendant's UR denial. This, of course, is consistent with section 4062(b)'s provision making the defendant responsible for initiating the second opinion process, even though its own UR has denied the spinal surgery.

We recognize that section 4062(a) states: "If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a treatment recommendation, the employee shall notify the employer of the objection in writing within 20 days of receipt of that decision." Yet, the fact that section 4062(a) refers generally to "employee" objections to UR determinations does not by itself establish a legislative intent to allow "employee" objections to UR determinations *relating to spinal surgery*.

"It is well settled … that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*Miller v. Superior Court* (1999) 21 Cal.4th 883, 895 (internal quotation marks omitted); see also Code Civ. Proc., § 1859; Civ. Code, § 3534.) Here, we conclude that the "employee" objection language of section 4062(a) states the general rule for when UR modifies, delays, or denies a treatment recommendation *other than spinal surgery*, but that the "employer" objection language of sections 4062(b) and 4062(a) states the specific rule for spinal surgery cases.

In this regard, the Legislature established a fast track for spinal surgery cases. Specifically, section 4062(b) provides, in pertinent part:

> "The employer may object to a report of the treating physician recommending that spinal surgery be performed within 10 days of the receipt of the report. If the employee is represented by an attorney, the parties shall seek agreement with the other party on a California licensed board-certified or board-eligible orthopedic surgeon or neurosurgeon to prepare a second opinion report resolving the disputed surgical recommendation. If no agreement is reached within 10 days, or if the employee is not represented by an attorney, an orthopedic surgeon or neurosurgeon shall be randomly selected by the administrative director to prepare a second opinion report resolving the disputed surgical recommendation. Examinations shall be scheduled on an expedited basis. The second opinion report shall be served on the parties within 45 days of receipt of the treating physician's report."

Therefore, under section 4062(b), a second opinion physician must be agreed to or selected, the examination must be scheduled and completed, and the second opinion report must issue – all within *45 days* after the defendant has received the treating physician's report recommending spinal surgery.

Yet, the general procedure of section 4062(a) for "employee" objections to UR determinations is utterly inconsistent with this specific and expeditious 45-day procedure of section 4062(b) for spinal surgery cases.

Preliminarily, section 4062(b) requires an employer's spinal surgery objection to be made within *10 days* of the receipt *of the treating physician's report*. Section 4062(a), however, provides that an employee's objection may be made within *20 days* of the employee's receipt of *the defendant's UR decision*. Even with our holding that a defendant must complete UR in a spinal surgery case within 10 days of its receipt of the treating physician's report (see Section II-E, *infra*), section 4062(a) would add an extra 20 days to the dispute resolution process at the very outset.

Moreover, once an employee's UR objection has been made, section 4062(a) steers that objection into section 4062.2 for a represented employee and into section 4062.1 for a

non-represented employee.[10] Under section 4062.2, either the parties timely agree to utilize an agreed medical evaluator (AME) or, failing that, the AD issues a three-member qualified medical evaluator (QME) panel from which the parties may agree to select one as an AME or they may each strike one QME, leaving one. Under section 4062.1, only a three-member QME panel process is allowed. But, as illustrated below (see fn. 12, *infra*), the procedures under sections 4062.2 and 4062.1 each involve multiple steps that, collectively, allow the AME and/or QME process to extend indefinitely, well beyond the 45-day deadline of section 4062(b).[11]

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[10] That is, after stating that "[i]f the employee objects to a decision made pursuant to Section 4610 …," section 4062(a) states: "If the employee is represented by an attorney, a medical evaluation to determine the disputed medical issue shall be obtained as provided in Section 4062.2, and no other medical evaluation shall be obtained. If the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in Section 4062.1, and no other medical evaluation shall be obtained.

[11] In all of the scenarios the treating physician issues a report recommending spinal surgery issues, the defendant has 10 days to complete UR (see Section II-E, *infra*), and the applicant has 20 days to object after receipt of the defendant's UR determination (Lab. Code, § 4062(a)). What happens after the employee's UR objection depends on whether it is a represented case where the parties timely agree to an AME, a represented case where the parties do not timely agree to an AME, or a case where the injured employee is unrepresented.

In a represented case that winds up with a timely AME agreement: (1) one party must first make an AME proposal in writing; however, *there is no established time* after the employee receives the UR determination by which this must be done (Lab. Code, § 4062.2(b)); (2) after the written AME proposal, the parties have 10 days – or 20 days, with mutual consent – to agree on an AME (Lab. Code, § 4062.2(b)); (3) after an AME is selected, an appointment must be made and the AME must examine the injured employee; however, *there is no specified time* by which the appointment must be made or the examination must be conducted; and (4) once the evaluation has taken place, the AME has 30 days to issue a report (Lab. Code, § 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(a)); however, an extension of time up to 45 days may be granted (Lab. Code, § 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(b)).

In a represented case that does not result in a timely AME agreement: (1) one party must make an AME proposal in writing; however, *there is no established time* after the employee's UR objection by which this must be done (Lab. Code, § 4062.2(b)); (2) after the written AME proposal, the parties have 10 days – or 20 days, with mutual consent – to agree on an AME (Lab. Code, § 4062.2(b)); (3) when the parties do not timely agree on an AME, one of the parties must request a three-member QME panel from the AD; however, *there is no specified time* by which a QME panel must be requested; (4) once a QME panel has been requested, the AD has 30 days to designate the panel (Cal. Code Regs., tit. 8, § 31.1(c)); (5) after the parties have received the QME panel, they have 10 days to select an AME from the panel and, failing that, three days thereafter for each party to strike one name from the panel (Lab. Code, § 4062.2(c)); (6) after an AME or QME from the panel has been selected, the employee has 10 business days to schedule an appointment with the AME/QME; however, if the employee fails to act within that time *the clock stops running and either party has an indefinite time to schedule the appointment* (Cal. Code Regs., [continued next page] tit. 8, § 31.3(d)) and, furthermore, *there is no requirement that the appointment itself occur within any particular time,* but if an appointment with the selected QME cannot be obtained *within 60 to 90 days*, the AD *may replace that QME or issue an entirely new QME panel* [continued on next page]

Furthermore, there is another significant difference between the special "employer" spinal surgery second opinion process of section 4062(b) and the general "employee" process of section 4062(a). Regardless of whether the second opinion physician is agreed to by represented parties or is randomly selected by the AD, section 4062(b) requires the second opinion physician to be a "licensed board-certified or board-eligible orthopedic surgeon or neurosurgeon." (See also Cal. Code Regs., tit. 8, § 9788.2.) As just discussed, however, section 4062(a) directs a represented employee into section 4062.2 and an unrepresented employee into section 4062.1; yet, neither of those sections requires any AME or panel QME to be an orthopedic surgeon or a neurosurgeon. To the contrary, both sections allow the party who is requesting a QME panel to designate *any* "specialty" for the physicians on the panel (Lab. Code, §§ 4062.2(b), 4062.1(b)) and section 4062.2 does not even require any AME to have been certified as a QME (Lab. Code, § 4062.2(b); see also § 139.2(b)-(e), (h)(3) [standards for QMEs assigned by the AD].)[12]

(Cal. Code Regs., tit. 8, § 33(e); see also § 31.5(a)(2)); and (7) once the evaluation takes place, the AME/QME has 30 days to issue a report (Lab. Code, §§ 4062.5, 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(a)); however, an extension of time up to 45 days may be granted (Lab. Code, § 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(b)).

In a case where the employee is unrepresented: (1) the employee or the defendant must request a panel of three QMEs from the AD (Lab. Code, § 4062.2(b)); however, *there is no established time* how quickly this must be done after the employee's UR objection and, furthermore, although the employee has 10 days to submit the QME panel request form to the AD *after receiving the form from the defendant* (Lab. Code, § 4062.1(b)), there appears to be no requirement about *when* the defendant must furnish the QME panel request form to the employee (compare Cal. Code Regs., tit. 8, § 9812(a)(2)(A)(2.), (a)(3)(A)(3.), (d)(1)(B), (g)(2)(A)(2.), (g)(3)(A)(3.)); (5) once a QME panel request has been submitted, the AD has five working days after receiving the request to assign a panel; however, if the AD does not assign a QME panel within 15 working days, the injured employee may utilize any QME of his or her choice (Lab. Code, § 139.2(h)(1)); (6) if the AD assigns a QME panel within 15 working days, the employee has 10 days after receipt of the panel to select a QME and schedule an appointment (Lab. Code, § 4062.1(b); Cal. Code Regs., tit. 8, § 31.3(a)); however, if the employee does not act within 10 days *the clock stops running and either party may schedule the appointment at any indefinite point in the future* (Lab. Code, § 4062.1(b); Cal. Code Regs., tit. 8, § 31.3(c)); (7) if an appointment with the selected QME cannot be obtained *within 60 to 90 days*, the AD *may replace that QME or issue an entirely new QME panel* (Cal. Code Regs., tit. 8, § 33(e); see also § 31.5(a)(2)); and (8) after the appointment, the QME has 30 days to issue a report (Lab. Code, §§ 4062.5, 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(a)); however, an extension of time up to 45 days may be granted (Lab. Code, § 139.2(j)(1)(A); Cal. Code Regs., tit. 8, § 38(b)).

[12] When a QME panel is issued, section 139.2 does require the AD to determine whether the specialty requested is "appropriate" (Lab. Code, § 139.2(h)(3)(B) & (h)(4)), but these provisions do not mean that the physicians on the panel must be board-certified or board-eligible orthopedic surgeons or neurosurgeons. Moreover, the AD's Rules suggest that the specialty designated by the requesting party is normally used. (Cal. Code Regs., tit. 8, §§ 30.5, 31(a).)

In sum, section 4062(b) and section 4062(a) refer only to "employer" and not "employee" objections in spinal surgery cases; section 4062(b) establishes a unique 45-day fast-track procedure for resolving spinal surgery disputes; and the generic "employee" objection procedure of sections 4062(a), 4062.2, and 4062.1 takes substantially longer than 45 days and does not require that an orthopedic surgeon or a neurosurgeon be used. Accordingly, we conclude that the Legislature's specific intent as expressed by section 4062(b)'s spinal surgery provisions controls over the Legislature's more general intent as expressed in section 4062(a)'s non-spinal surgery provisions. Thus, it is only the defendant which may initiate the section 4062(b) spinal surgery second opinion process.

In reading section 4062(b) to mean that it is the defendant, and not the injured employee, that may initiate the spinal surgery second opinion procedure, we are aware *Sandhagen* repeatedly said that defendants cannot use section 4062 to dispute treatment requests; instead, section 4062 is available only to employees who are dissatisfied with a defendant's UR decision. (*Sandhagen*, 44 Cal.4th at pp. 234, 237, 244-245 [73 Cal.Comp.Cases at pp. 982, 985, 985-986, 992].) *Sandhagen*, however, was not a spinal surgery case and it did not directly involve the provisions of section 4062(b). "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered." (*Steele*, *supra*, 19 Cal.4th at p. 1195 [64 Cal.Comp.Cases at p. 28].) Therefore, *Sandhagen*'s statements that only an injured employee (and not a defendant) may use section 4062 in a non-spinal surgery case have no bearing on the question of whether it is the defendant (and not the employee) that may initiate the spinal surgery second opinion procedure of section 4062(b).

We recognize *Brasher* held that when a defendant's UR denies spinal surgery it is *the injured employee* who must object within 10 days of the denial. (*Brasher*, *supra*, 71 Cal.Comp.Cases at p. 1287.) However, *Brasher* acknowledged it arrived at this conclusion using a "convoluted" method that had the employee begin on the section 4062(a) track and then switch over to the section 4062(b) track. (*Id.*) Yet, nothing in the statutory language of section 4062 provides for any such track-switching procedure. Moreover, importing an "employee" objection

into section 4062(b) would mean the employee has 10 days to object to the spinal surgery recommendation of the employee's *own physician*, even though there is a possibility that defendant's UR process might *approve* the requested surgery. (Lab. Code, § 4610(a).) Accordingly, based on our analysis above, we now expressly reject the *Brasher* holding that, if a defendant's UR denies spinal surgery, the *applicant* must timely object under section 4062(a), after which the applicant is switched over to the section 4062(b) track.[13]

We observe that, if a defendant objects under section 4062(b), it must comply with AD Rules 9788.1 and 9788.11. Rule 9788.1 is expressly framed in mandatory terms and it provides, in relevant part:

> "(a) An objection to the treating physician's recommendation for spinal surgery *shall* be written on the form prescribed by the Administrative Director in Section 9788.11. The employer *shall* include with the objection a copy of the treating physician's report containing the recommendation to which the employer objects. The objection *shall* include the employer's reasons, specific to the employee, for the objection to the recommended procedure. The form *must* be executed by a principal or employee of the employer, insurance carrier, or administrator." (Cal. Code Regs., tit. 8, § 9788.1 (emphasis added).)

Rule 9788.1 also sets forth certain requirements for: (1) a declaration under penalty of perjury regarding when the defendant received the treating physician's spinal surgery recommendation; (2) a declaration under penalty of perjury regarding when the defendant served its objection; and

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[13] The Court of Appeal, First Appellate District, Division 4, recently issued a writ of review in *Elliot v. Workers' Comp. Appeals Bd*., 1st Civ. No. A125585. In *Elliot*, the Appeals Board panel followed this particular holding of the significant panel decision in *Brasher*. Of course, significant panel decisions are not *binding* precedent in workers' compensation proceedings. (See Cal. Code Regs., tit. 8, § 10341.) Nevertheless, significant panel decisions are specifically intended to augment the body of binding published appellate court opinions and en banc decisions issued by the full Board and, therefore, a panel decision is not deemed "significant" unless it meets certain criteria. (See *Larch v Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); see also, e.g., 25 Cal. Workers' Comp. Rptr. 197.) Accordingly, the panel in *Elliot* reasonably followed *Brasher* on a point that had not been implicitly overruled by *Sandhagen*. Nevertheless, upon more comprehensive analysis, the entire Board, including the *Elliot* panelists, has now reached the conclusion that it is the *defendant* that must timely initiate the spinal surgery second opinion procedure of section 4062(b), even if the defendant's UR timely denied authorization for the surgery.

(3) service of the objection. Rule 9788.11 adopts the form that, under Rule 9788.1, "shall" be used for a defendant's spinal surgery objection.[14]

E. The Defendant Must Complete its Utilization Review Process within 10 days of its Receipt of the Treating Physician's Report, Which Must Comply with Administrative Director Rule 9792.6(o), and, if Utilization Review Denies the Requested Surgery, any Section 4062(b) Objection Must Be Made within the Same 10-day Period

For the reasons that follow, a defendant must both complete its UR and, if there is a UR denial, make its section 4062(b) objection within 10 days of its receipt of the treating physician's report recommending spinal surgery.

Section 4062(b) states, "The employer may object to a report of the treating physician recommending that spinal surgery be performed *within 10 days of the receipt of the report*." (Emphasis added.) Therefore, based on its clear and unambiguous language, the 10-day time limit for a section 4062(b) objection starts running when the defendant receives the treating physician's report recommending spinal surgery.[15]

However, section 4062(a) states that "[e]mployer objections to the treating physician's recommendation for spinal surgery shall be subject to subdivision (b), *and after denial of the physician's recommendation, in accordance with Section 4610*" (emphasis added). Similarly, section 4610(g)(3)(A) states that "[i]f a request to perform spinal surgery *is denied* [by utilization review], disputes shall be resolved in accordance with subdivision (b) of Section 4062." (Emphasis added.) Therefore, sections 4062(a) and 4610(g)(3)(A) both plainly and unequivocally provide

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[14] See http://www.dir.ca.gov/dwc/dwcpropregs/SSSOForm233.pdf.

[15] We interpret the "may" language as indicating that a defendant has discretion whether or not to object to a report recommending spinal surgery, i.e., we conclude the "may object" language relates to the "to a report" language that immediately follows it. We do not construe the "may object" language to mean that the 10-day objection period is discretionary, i.e., we conclude the "may object" language does not relate to the "within 10 days" language at the end of the sentence. (See *White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 ("A longstanding rule of statutory construction--the 'last antecedent rule'--provides that 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' ").) In fact, allowing a defendant to discretionarily and indefinitely exceed the 10 days would be utterly contrary to the purpose of section 4062(b), which is to help expeditiously resolve spinal surgery disputes.

that the spinal surgery second opinion process of section 4062(b) cannot be initiated unless and until the UR process of section 4610 has denied the requested spinal surgery.[16]

We cannot consider these various statutory provisions in isolation. Instead, we must harmonize them in the context of the overall statutory scheme for spinal surgery cases. This is accomplished by interpreting sections 4062(a) and 4610(g)(3)(A) to mean that, in spinal surgery cases only, UR must be completed within 10 days of the defendant's receipt of the treating physician's report, so that if UR denies authorization for the requested surgery the defendant can still make its section 4062(b) objection within the 10-day timeline of that statute.

This interpretation is fully consistent with section 4610(g)(1).

Section 4610(g)(1) requires UR to be completed "*no … more than* 14 days from the date of the medical treatment recommendation by the physician." (Emphasis added) Ordinarily, a UR timeline of 10 days from receipt of the spinal surgery report is "no more than" 14 days from the date of the recommendation (i.e., the date the report issues).

Moreover, section 4610(g)(1) requires that UR decisions "shall be made in a timely fashion *that is appropriate for the nature of the employee's condition*." (Emphasis added.) In spinal surgery cases, a UR decision that is "timely" made within 10 days of the receipt of the treating physician's report is "appropriate for the nature of the employee's condition." This is because, as discussed above, the Legislature put all spinal surgery cases on a fast track. Section 4062(b) allows only *10 days* from the defendant's receipt of the treating physician's report to object to a spinal surgery recommendation and then allows only *45 days* from the defendant's receipt of that report for the entire spinal surgery second opinion process to be completed.

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[16] In the context of spinal surgery, we construe the "denial" language of sections 4062(a) and 4610(g)(3)(A) to include any UR decision that does not fully approve the specific spinal surgery recommended by the treating physician. Therefore, a UR decision that modifies or delays a spinal surgery request would be a "denial."

We are cognizant that section 4610(g)(5) allows the deadlines of section 4610(g)(1) to be exceeded in some circumstances.[17] Nevertheless, for the reasons above, we construe the statutory scheme to mean that, in spinal surgery cases only, the UR determination *always* must be made within 10 days of receipt of the treating physician's report, so that the defendant may still timely object under section 4062(b) if there is a UR denial.[18]

Although we hold that a defendant must both complete its UR and make any section 4062(b) objection within 10 days of receipt of the treating physician's report recommending spinal surgery, we further hold that these 10-day timelines are triggered only by a treating physician's report that complies with AD Rule 9792.6(o).

AD Rule 9792.6(o) provides:

> " 'Request for authorization' means a written confirmation of an oral request for a specific course of proposed medical treatment pursuant to Labor Code section 4610(h) or a written request for a specific course of proposed medical treatment. An oral request for authorization must be followed by a written confirmation of the request within seventy-two (72) hours. Both the written confirmation of an oral request and the written request must be set forth on the 'Doctor's First Report of Occupational Injury or Illness,' Form DLSR 5021, section 14006, or on the Primary Treating Physician Progress Report, DWC Form PR-2, as contained in section 9785.2, or in narrative form containing the same information required in the PR-2 form. If a narrative format is used, the document shall be clearly marked at the top that it is a request for authorization."

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[17] Section 4610(g)(5) provides that "[i]f the employer … cannot make a decision within the timeframes specified in paragraph (1) … because the employer … is not in receipt of all of the information reasonably necessary and requested, because the employer requires consultation by an expert reviewer, or because the employer has asked that an additional examination or test be performed upon the employee that is reasonable and consistent with good medical practice, the employer shall immediately notify the physician and the employee, in writing, that the employer cannot make a decision within the required timeframe, and specify the information requested but not received, the expert reviewer to be consulted, or the additional examinations or tests required. The employer shall also notify the physician and employee of the anticipated date on which a decision may be rendered. Upon receipt of all information reasonably necessary and requested by the employer, the employer shall approve, modify, or deny the request for authorization within the timeframes specified in paragraph (1) … ."

[18] In a spinal surgery case, if a defendant does not have all of the necessary information within the requisite 10-day period (see Lab. Code, § 4610(g)(5)), then this can be the basis for its denial.

Therefore, if a treating physician seeks authorization for spinal surgery through a narrative report, the narrative report must clearly state at the top that authorization for spinal surgery is being requested.[19]

Rule 9792.6(o) is part of the "Utilization Review Standards" adopted by the Administrative Director. It implicitly recognizes that claims adjusters routinely receive numerous medical reports from treating physicians. Therefore, if in a spinal surgery case a particular report might trigger the 10-day deadlines for a defendant to both complete UR and make a section 4062(b) objection, then the defendant should be given clear notice that authorization for spinal surgery is being requested.

Although Rule 9792.6(o) is part of the AD's "utilization review" standards, we conclude that its requirement that a narrative report "shall be clearly marked at the top that it [contains] a request for authorization" applies with equal force to section 4062(b)'s 10-day deadline for objecting to requests to authorize spinal surgery.

Accordingly, a narrative report that requests authorization for spinal surgery will not trigger the 10-day UR and section 4062(b) unless it is "clearly marked at the top" that it requests authorization for spinal surgery.

F. If the Defendant Fails to Meet the 10-Day Timelines or to Comply with Administrative Director Rules 9788.1 and 9788.11, the Defendant Loses its Right to a Second Opinion Report and It Must Authorize the Spinal Surgery

As discussed above, the Court of Appeal held in *Edwards* that if a defendant fails to timely object under section 4062(a) to a treating physician's determination that does not pertain to medical treatment, the defendant loses the right to later object to that determination. (*Edwards*, 175 Cal.App.4th at pp. 825-827 [74 Cal.Comp.Cases at pp. 831-832].) There is no reason why that principle should not also apply where, after a UR denial, a defendant fails to timely object under section 4062(b) to a treating physician's spinal surgery recommendation. That is, if a defendant

[19] In the context of AD Rule 9792.6(o), we interpret a "narrative report" to mean any medical report other than the Doctor's First Report of Occupational Injury or Illness (DLSR Form 5021) or the Primary Treating Physician Progress Report (DWC Form PR-2). We note that the the PR-2 already has various check boxes at the top, including ones for "[n]eed for surgery or hospitalization" and "[r]equest for authorization." (Cal. Code Regs., tit. 8, § 9785.2.)

fails to meet the 10-day objection timelines of section 4062(b), there no longer is any "dispute" to "resolv[e]" within the meaning of that statute.

This conclusion accords with the provision of section 4062(b) which requires that "[i]f the second opinion report recommends surgery, *the employer shall authorize the surgery*." (Emphasis added.) If section 4062(b) requires authorization where the second opinion "resolv[es]" the "dispute[]" by recommending surgery, then section 4062(b) implicitly requires authorization where there is no "dispute[]" to "resolv[e]" because the defendant did not timely initiate the second opinion procedure.

Moreover, a defendant must authorize the spinal surgery if it fails to comply with AD Rule 9788.1 and use the form prescribed by AD Rule 9788.11. A failure to comply with those Rules is the functional equivalent of no timely objection. Rule 9788.1 expressly requires a defendant to include: (1) a copy of the treating physician's report; (2) an employee-specific reason for its objection; and (3) distinct and particularized declarations under penalty of perjury regarding when the treating physician's report was received and when the defendant served its objection. If a defendant breaches either of the first two mandates, then the basis of its objection cannot be determined. This is tantamount to not having made an objection. If a defendant does not declare under penalty of perjury when it received the physician's report and when it made its objection, then the AD cannot determine whether the objection was timely. Furthermore, requiring use of the form adopted by Rule 9788.11 gives clear notice to the AD – and to the employee or the employee's attorney – that an objection to the treating physician's spinal surgery recommendation is being made.

III. CONCLUSION

In this case, it was not until February 25, 2009 that Dr. Dureza first sent Safeco a report that was clearly marked at the top that it was a "WRITTEN REQUEST FOR SURGERY AUTHORIZATION." Dr. Deutsch's UR report denying the requested spinal surgery issued on March 4, 2009, which was well within the 10-day UR deadline set forth above.

However, although Safeco's UR denial issued within 10 days of its receipt of the first report requesting spinal surgery that complied with AD Rule 9792.6(o), defendant did not initiate the spinal surgery second opinion process within that 10-day period as required by section 4062(b). Instead, Safeco took the position that it was applicant's obligation to timely object under section 4062(b).

Nevertheless, we recognize that defendant's position was then fully consistent with the Appeals Board's significant panel decision in *Brasher*. (*Brasher*, 71 Cal.Comp.Cases at p. 1287.) Moreover, at that time, there was no binding opinion – either a published appellate opinion or an en banc decision of the Appeals Board – that expressly or implicitly disapproved of this aspect of *Brasher*. Accordingly, we will rescind the May 13, 2009 Findings and Order determining that applicant is entitled to lumbar spinal fusion surgery and we will give Safeco 10 days from the date of its *receipt* of this opinion within which to object to Dr. Dureza's spinal surgery recommendation (cf. Lab. Code, § 4062(b)) and commence the spinal surgery second opinion process. Safeco's objection shall comply with AD Rule 9788.1 and shall be on the form prescribed by AD Rule 9788.11.

Because of our disposition, we will not address defendant's substantial evidence contention.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc), that the Findings and Order issued by the workers' compensation administrative law judge on May 13, 2009 is **RESCINDED** and that this matter is **REMANDED**

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to the workers' compensation administrative law judge for further proceedings and a new decision, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

11/19/2009

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Jesus Cervantes
Rucka, O'Boyle, Lombardo & McKenna
Bradford & Barthel

NPS/jr