

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3  
4 **ANGELIQUE DIAZ,**

5 *Applicant,*

6 **vs.**

7 **SOUTHERN CALIFORNIA GAS COMPANY,**  
8 **Permissibly Self-Insured,**

9 *Defendants.*

Case No. **ADJ7656854**  
**ADJ7656855**  
(Marina Del Rey District Office)

**OPINION AND ORDER  
GRANTING PETITION  
FOR RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

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11 Applicant and defendant each seek reconsideration of the Findings and Order (F&O) issued on  
12 December 5, 2019, wherein the workers' compensation administrative law judge (WCJ) found that a  
13 Utilization Review (UR) physician does not act as an agent of defendant for purposes of imposing a  
14 Labor Code section 5814<sup>1</sup> penalty, that applicant's treatment involved four instances in which there was  
15 an inaccurate/improper application of the mandatory statutory guidelines by the UR physician, and that  
16 defendant cannot be liable for a section 5814 penalty for unreasonable delay of medical treatment based  
17 on an alleged timely, inaccurate/improper application of the UR's mandatory guidelines. The WCJ  
18 ordered that applicant's petitions for section 5814 penalties be denied.

19 Applicant contends that the WCJ erroneously failed to impose section 5814 penalties because the  
20 UR physicians' failures to address applicant's Primary Treating Physician's (PTP) treatment requests  
21 caused unreasonable delay attributable to defendant.

22 Defendant contends that section 4610.1 bars the imposition of section 5814 penalties in this case  
23 because the alleged delay occurred during the utilization review process. Defendant further contends that  
24 the evidence does not demonstrate any instance in which there was an inaccurate/improper application of  
25 the UR's mandatory statutory guidelines.

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27 <sup>1</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

1 We received an Answer from defendant, but not applicant.

2 The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) as to  
3 applicant's Petition (Report on Applicant's Petition) and defendant's Petition (First Amended Report on  
4 Defendant's Petition). The Reports recommend that the Petitions be denied.

5 We have considered the allegations of the Petitions, the Answer, and the contents of the Reports.  
6 Based on our review of the record, and for the reasons stated below, we will grant reconsideration;  
7 rescind the F&O; substitute findings that applicant is not entitled to section 5814 penalties because the  
8 alleged unreasonable delay occurred during the utilization review process and the WCAB lacks  
9 jurisdiction to determine the allegations of inaccurate/improper applications of the UR's mandatory  
10 statutory guidelines; and substitute an order that applicant's petitions for section 5814 penalties be  
11 denied.

## 12 **FACTUAL BACKGROUND**

13 While employed as a customer service representative from October 26, 2006 through February  
14 20, 2009, applicant sustained injury to her bilateral upper extremities, psyche, and in the form of  
15 hypertension.

16 On December 2, 2019, the matter proceeded to trial as to the following issues: (1) whether the  
17 UR physician acts as an agent on behalf of defendant for purposes of imposing section 5814 penalties; (2)  
18 whether a defendant may be liable for section 5814 penalties based upon alleged timely,  
19 inaccurate/improper applications of the UR's statutory guidelines; and (3) whether applicant's treatment  
20 involved four instances in which there was an inaccurate/improper application of the mandatory statutory  
21 guidelines by the UR physician. (Minutes of Hearing, December 2, 2019, pp. 1, 3:15-24.)

22 At trial, defendant was represented by William G. Carter, of Wai & Connor, LLP. (*Id.*, p. 1.) The  
23 parties stipulated as relevant herein:

24 On July 11, 2017, the UR physician denied a treatment request for an EMG, which was  
25 overturned by a MAXIMUS IMR Final Determination Letter dated September 12,  
2017.

26 On October, 2, 2017, the UR physician denied a treatment request for Norco, which  
27 was overturned by a MAXIMUS IMR Final Determination Letter dated November 8,  
2017.

1 On January 24, 2018, the UR physician denied a treatment request for Norco and  
2 chiropractic treatment, which was overturned by a MAXIMUS IMR Final  
Determination Letter dated March 26, 2018.

3 On March 15, 2018, the UR physician denied a treatment request for bilateral upper  
4 extremity nerve conduction studies, which was overturned by a MAXIMUS IMR Final  
Determination Letter dated April 24, 2018.

5 The workers' compensation judge has jurisdiction over these disputes.  
6 (*Id.*, p. 2:15-25.)

7 The WCJ admitted the four UR letters and the four IMR determination letters referenced in the  
8 stipulations, and the parties submitted the issues for decision without additional documentary evidence or  
9 any witness testimony. (*Id.*, pp. 1-3.)

10 On December 30, 2019, after the WCJ issued the F&O, Hector Benjumea, of the Law Offices of  
11 Singer & Benjumea, filed defendant's Petition. (Petition for Reconsideration, December 30, 2019, p. 1.)

12 In the Report on Applicant's Petition, the WCJ writes:

13 There were four situations where the PTP requested medical treatment through an RFA  
14 and the RFAs were sent to UR physicians who failed to use the appropriate guidelines.  
15 The UR physicians recommended denial of the treatment based on their use of incorrect  
16 guidelines. Based on these UR denials, the Defendant refused to authorize the treatment  
recommended in the Request for Authorization (RFA). These four UR denials were  
submitted to Independent Medical Review (IMR), and IMR overturned all four UR  
denials based on the mistakes the UR doctors made in applying the guidelines.

17 Applicant's attorney filed a petition for LC5814 penalties for the four UR denials that  
18 IMR overturned. The issues went to trial and the WCJ found that the UR doctors had  
19 used inappropriate guidelines. The WCJ found that there was no wrongdoing by the  
20 defendant employer/carrier and that the UR doctors are not agents of the defendant and  
are not parties. Thus, there is no LC5814 penalty.  
(Report on Applicant's Petition, p. 2.)

21 LC4610.1 is captioned "Increase In Compensation Under Section 5814—Inapplicable  
22 For Unreasonable Delay to Complete The Utilization Review Process . . ." LC4610.1  
23 says there is no LC5814 penalty "for periods of time necessary to complete the utilization  
review process in compliance with Section 4610." The IMR appeal would appear to be a  
part of the UR process in this context. . . . There is no evidence of an unreasonable delay  
in the completion of the UR process . . .

24 . . .  
25 In our instant case, we have four UR denials that were technically timely . . .  
(Report on Applicant's Petition, pp. 4-5.)

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1 **DISCUSSION**

2 We first address applicant’s contention that there were four instances in which the UR physician  
3 failed to address the PTP’s treatment requests, resulting in unreasonable delay of applicant’s treatment  
4 for which defendant is subject to section 5814 liability. In this regard, section 4610.1 provides as  
5 relevant herein:

6 An employee shall not be entitled to an increase in compensation under Section 5814 for  
7 unreasonable delay in the provision of medical treatment for periods of time necessary to  
8 complete the utilization review process in compliance with Section 4610.  
(§ 4610.1)

9 Here, as stated by the WCJ in the Report on Applicant’s Petition, section 4610.1 provides that  
10 industrially-injured employees are not entitled to recover section 5814 penalties for delays of medical  
11 treatment that occur while the utilization review is in the process of completion. (Report on Applicant’s  
12 Petition, p. 4.) We thus agree with the WCJ that, since applicant argues that she is entitled to penalties  
13 for delay that occurred while the utilization review was in the process of completion—i.e., while the UR  
14 physicians failed to properly address the requests of her treating physician—applicant is barred by  
15 section 4610.1 from recovering section 5814 penalties. Accordingly, we conclude that the WCJ correctly  
16 determined that defendant is not liable for section 5814 penalties based upon alleged delay occurring  
17 during the UR process, and we will substitute a finding that focuses upon this reasoning.

18 We turn next to defendant’s contention that the evidence fails to show any instance in which the  
19 UR physician performed an inaccurate/improper application of the UR’s mandatory statutory guidelines.  
20 Before addressing this contention, however, we observe that the performance of UR physicians in the  
21 timely application of mandatory guidelines constitutes subject matter outside the WCAB’s jurisdiction.  
22 Specifically, in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en  
23 banc) (writ den.) (*Dubon II*), the Appeals Board held that a timely UR decision must be reviewed through  
24 the IMR process rather than by the WCAB. As a consequence, a party seeking to challenge a UR  
25 decision on grounds other than untimeliness must be made through the IMR process. (Cf. *Dubon v.*  
26 *World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (*Dubon I*.) Here, the four UR denials were  
27 timely and applicant has alleged that these timely denials constitute “inaccurate/improper application[s]

1 of the mandatory statutory guidelines by [the] UR.” (Report on Applicant’s Petition, p. 5; Minutes of  
2 Hearing, December 2, 2019, p. 3:15-24.) Since applicant has thus challenged the UR decision on  
3 grounds other than timeliness, and since the parties’ stipulation purporting to allow the WCJ to exercise  
4 jurisdiction over the challenge cannot confer jurisdiction where the WCAB otherwise has none, the WCJ  
5 erred by exercising jurisdiction over the issue of whether the UR physicians misapplied the UR’s  
6 mandatory guidelines. Accordingly, we will substitute a finding that the WCAB lacks jurisdiction over  
7 the allegations of inaccurate/improper applications of the mandatory guidelines.

8 Lastly, we note that defendant has attempted to substitute its attorney of record through the filing  
9 of its Petition and its purported new attorney’s notice of representation. (Petition for Reconsideration,  
10 December 30, 2019, p. 1; Notice of Representation, December 31, 2019.) To effect substitution of its  
11 attorney, however, defendant must file a formal substitution of attorney and otherwise comply with Code  
12 of Civil Procedure sections 284, 285 and 286. (Cal. Code Regs., tit. 8, former § 10774 now § 10402 (eff.  
13 Jan. 1, 2020).) Therefore, we admonish defendant and its new attorney, Mr. Benjumea, to properly  
14 substitute counsel.

15 Thus, we will grant reconsideration, rescind the F&O, substitute findings that applicant is not  
16 entitled to section 5814 penalties and the WCAB lacks jurisdiction to determine the allegations of  
17 inaccurate/improper applications of the UR’s mandatory statutory guidelines, and substitute an order that  
18 applicant’s petitions for section 5814 penalties be denied.

19 For the foregoing reasons,

20 **IT IS ORDERED** that applicant’s Petition for Reconsideration of the Findings and Order issued  
21 on December 5, 2019, is **GRANTED**.

22 **IT IS FURTHER ORDERED** that defendant’s Petition for Reconsideration of the Findings and  
23 Order issued on December 5, 2019, is **GRANTED**.

24 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers’  
25 Compensation Appeals Board, that the Findings and Order issued on December 5, 2019, is  
26 **RESCINDED**, and the following findings and order are **SUBSTITUTED** in its place:

27 / / /

**FINDINGS OF FACT**

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2           1.       It is found that applicant is not entitled to Labor Code section 5814  
3 penalties because the alleged unreasonable delay occurred while utilization  
4 review was in the process of completion. (Labor Code section 4610.1.)

5           2.       It is found that the Workers' Compensation Appeals Board lacks  
6 jurisdiction to adjudicate a dispute arising from a timely UR decision.  
7 (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298  
8 (Appeals Board en banc) (writ den.) (*Dubon II*.)

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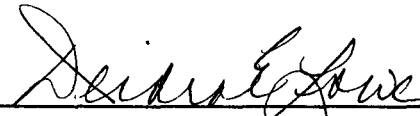
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**ORDER**

It is hereby ordered that applicant's petitions for Labor Code section 5814 penalties are denied.

**WORKERS' COMPENSATION APPEALS BOARD**



**DEIDRA E. LOWE**

**I CONCUR,**



**KATHERINE WILLIAMS DODD**



**CHAIR**

**KATHERINE ZALEWSKI**

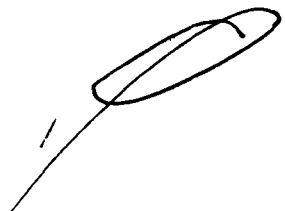


**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**FEB 14 2020**

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

**ANGELIQUE DIAZ  
BERKOWITZ AND COHEN  
WAI & CONNOR**



**SRO/oo**