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WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA

SARITA JANE BISSETT-GARCIA,  
*Applicant,*  
vs.  
PEACE AND JOY CENTER; VIRGINIA  
SURETY COMPANY,  
*Defendants.*

Case No. ADJ 1390531 (LBO 0388008)  
(Santa Ana District Office)

OPINION AND ORDER GRANTING  
PETITION FOR RECONSIDERATION AND  
DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of January 20, 2016, wherein it was found that defendant's utilization review process with regard to a request for home care assistance was not completed in a timely manner. Having established WCAB jurisdiction based on the purported untimeliness of utilization review, the WCJ deferred the issue of necessity of medical treatment pending further development of the record. In this matter, in a compromise and release agreement approved on October 20, 2015, applicant settled her claim that while employed as an office administrator on December 22, 2006, she sustained industrial injury to her upper extremities and shoulders. However, under the terms of the compromise and release, defendant was to continue providing medical treatment caused by the industrial injury.

Defendant contends that the WCJ erred in finding that utilization review was not completed in a timely manner. We have received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, the WCJ erred in finding that the utilization review was not timely completed. We will therefore rescind the Findings of January 20, 2016 and issue a new decision reflecting that utilization review was completed in a timely manner, and that the WCAB therefore has no jurisdiction to determine whether the course of treatment requested by applicant's physician is medically necessary.

1 On September 11, 2015, applicant's counsel wrote to defense counsel attaching a PR-2 report  
2 from primary treating physician Vincent J. Valdez, M.D. On the bottom of page 2 of the attached report,  
3 Dr. Valdez wrote, "The patient requires home assistance with [activities of daily living]; 8 hours a day, 7  
4 days a week for cooking, cleaning, self grooming and transportation." On the transmittal letter,  
5 applicant's counsel wrote, "Please see the attached PR-2, treating doctor's report from Dr. Vincent J.  
6 Valdez 9/08/15. Requesting authorization from home assistance 8 hours a day, 7 days a week. We are  
7 asking that this be authorized upon receipt of this letter."

8 Despite the fact that this "request for authorization" did not comply with Administrative Rule  
9 9792.9.1(a) or Administrative Rule 9792.9.1(c)(2)(B) (Cal. Code Regs., tit. 8, § 9792.9.1, subds. (a) &  
10 (c)(2)(B)), defense counsel forwarded the request for treatment to the utilization review process  
11 established by defendant pursuant to Labor Code section 4610. On September 17, 2015, defendant's  
12 utilization review provider denied the requested treatment. According to the utilization review  
13 determination, Dr. Valdez's request for treatment was received by the utilization review provider on  
14 September 14, 2015. Pursuant to Labor Code section 4610(g)(1) and Administrative Director Rule  
15 9792.9.1(c)(3) (Cal. Code Regs., tit. 8, § 9792.9.1, subd. (c)(3)), defendant had five business days to  
16 issue a decision to approve, modify, delay or deny the request. The time runs from the date that a request  
17 for authorization "was received by the claims administrator or the claims administrator's utilization  
18 review organization." (Administrative Director Rule 9792.9.1(a)(1); Cal. Code Regs., tit. 8, § 9792.9.1,  
19 subd. (a)(1).) Thus, defendant's utilization review determination was due September 21, 2015. The  
20 September 17, 2015 utilization review denial was well within the time limits.

21 The September 17, 2015 utilization review denial recited that the utilization review physician left  
22 a message with Dr. Valdez on the afternoon of September 16, 2015 and on the morning of September 17,  
23 2015. The parties stipulated that on October 2, 2015, applicant's counsel called defendant's utilization  
24 review provider. The substance of that telephone conference was never placed into the evidentiary  
25 record. However, the parties appear to agree that this phone call prompted the utilization review provider  
26 to issue a second utilization review denial on October 2, 2015. The only difference between the October  
27 2, 2015 denial and the September 17, 2015 denial, is that the October 2, 2015 denial recites that the

1 utilization review physician successfully spoke with the primary treating physician on the morning of  
2 September 17, 2015. According to the October 2, 2015 denial, during the telephone call with the primary  
3 treating physician, the physician was informed that the requested treatment does not meet applicable  
4 guidelines and was thus deemed not medically necessary.

5 In this matter, the WCJ determined that the September 17, 2015 utilization denial was  
6 "incomplete" because it did not recite the fact that the utilization review physician spoke by telephone to  
7 the primary treating physician. We note that there does not appear to be any requirement that a  
8 utilization review denial recite the contents of a telephone conference between the reviewer and the  
9 treating physician, unless relevant to explaining the rationale behind the utilization review decision.  
10 (Cal. Code Regs., tit. 8, § 9792.9.1(e)(5)(A-I).) However, even generously assuming that failure to  
11 include this information constitutes a substantial material defect, in *Dubon v. World Restoration, Inc.*  
12 (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (commonly known as *Dubon II*), we held that  
13 the WCAB has jurisdiction over a challenge to a utilization review determination only if the  
14 determination was untimely. In so holding, we reversed our earlier determination in *Dubon v. World*  
15 *Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (commonly known as *Dubon*  
16 *I*) in which we held that the WCAB had jurisdiction over challenges to "invalid utilization review  
17 decisions [which were] untimely or suffer[ed] from material procedural defects that undermine the  
18 integrity of the utilization review decision." (*Dubon II*, 79 Cal.Comp.Cases at p. 1303.) The *Dubon II*  
19 decision squarely rejected the proposition that any procedural defect other than timeliness vested the  
20 WCAB with jurisdiction to review the propriety of a utilization review denial.

21 The WCJ's analysis that failure to recite that the utilization review reviewer spoke by telephone  
22 to the treating physician rendered the utilization review invalid, and this invalidity vested the WCAB  
23 with jurisdiction over the issue of medical necessity, attempts to revive the reasoning of *Dubon I*. In this  
24 case, the utilization review determination was timely made and served. The correctness of the  
25 determination may only be resolved through independent medical review, and not by the WCAB.

26 Accordingly, we will grant reconsideration, rescind the Findings of January 20, 2016, and issue a  
27 new decision reflecting that defendant timely completed utilization review, and that the WCAB has no

1 jurisdiction to resolve the issue of medical necessity of the requested treatment.

2 For the foregoing reasons,

3 **IT IS ORDERED** that reconsideration of the Findings of January 20, 2016 is hereby  
4 **GRANTED**.

5 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
6 Compensation Appeals Board that the Findings of January 20, 2016 is hereby **RESCINDED** and that the  
7 following is **SUBSTITUTED** therefor:

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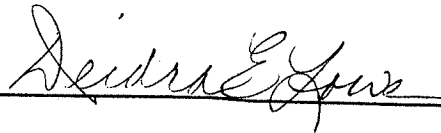
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1 **FINDINGS OF FACT**

2 1. The Utilization Review Determination of September 17,  
3 2015 was timely.

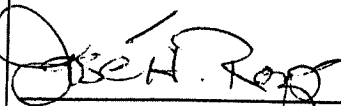
4 2. The Workers' Compensation Appeals Board does not  
5 have jurisdiction to review the utilization review denial in this matter.

6 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **DEIDRA E. LOWE**

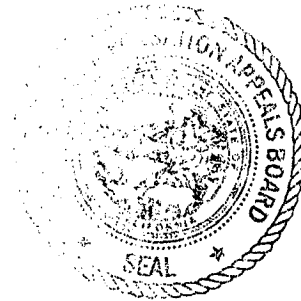
10 **I CONCUR,**

11 

12 **JOSE H. RAZO**

13  
14 **CONCURRING, BUT NOT SIGNING**

15  
16 **KATHERINE ZALEWSKI**



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

18 **APR 11 2016**

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

21 **SARITA JANE BISSETT-GARCIA**  
22 **MARVIN L. MATHIS**  
23 **BRADFORD & BARTHEL**

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26 **DW:00**