

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

Alejandro Ramirez Nunez,
Applicant,

vs.

Dan Fix Landscape, insured by Amtrust North
America,

Defendants.

Case Nos. ADJ9006331

**FINDINGS and
OPINION ON DECISION**

The above-entitled matter having been regularly heard and submitted to Terri Ellen Gordon, Workers' Compensation Law Judge, said Judge now makes her decision as follows:

FINDINGS OF FACT

1. The stipulations as set forth in the minutes of hearing on 04/25/2016 are adopted and incorporated herein as findings of fact.
2. Applicant, Alejandro Ramirez Nunez, born 02/09/1969, while employed as a landscaper by Dan Fix Landscape, insured by Amtrust North America on 02/04/2013, in San Rafael, California, sustained injury to his neck and left shoulder arising out of and in the course of his employment.
3. Defendant's Utilization Review denial of Dr. Shortz's request for an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon is untimely and therefore, the WCAB has jurisdiction to determine whether Dr. Shortz's request for medical treatment is medically necessary.
4. Applicant is not entitled to an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft,

autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon pursuant to the request of Dr. Shortz in that there is not substantial medical evidence that Dr. Shortz's recommended treatment is medically necessary.

5. The issue of attorney's fees is deferred with WCAB jurisdiction reserved.

Date: 05/20/2016



TERRI ELLEN GORDON
WORKERS' COMPENSATION JUDGE

Filed and Served:
On all Parties Shown on
Official Address Record
On: 05/20/2016 By: R. Oosterbaan

Alejandro Ramirez Nunez vs. **Dan Fix Landscape, insured by Amtrust North America**

Judge: Terri Ellen Gordon Case Nos. **ADJ9006331**

OPINION ON DECISION

This matter came on for expedited hearing on 04/25/2016 before Terri Ellen Gordon, Workers' Compensation Judge. The issues at trial were (1) Applicant Alejandro Ramirez Nunez's (hereinafter referred to as "applicant") assertion he is entitled to medical treatment in the form of an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 pursuant to the recommendations of his primary treating physician, Roger Shortz, M.D. and (2) Defendant Dan Fix Landscape, insured by Amtrust North America's (hereinafter referred to as "defendant") claim it conducted a timely Utilization Review (hereinafter referred to as "UR") denying the requests of Dr. Shortz and that there is no substantial medical evidence supporting the requested treatment. Documentary evidence was received and the matter was submitted for decision on 04/25/2016. A decision has now issued and the following is the basis of for that decision.

MEDICAL TREATMENT

Applicant contends he is entitled to medical treatment in the form of an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon, pursuant to the recommendations of his primary treating physician, Roger Shortz, M.D. Defendant submits it conducted a timely UR denial of the requested treatment of Dr. Shortz and that there is no substantial medical evidence supporting the treatment requested.

The Evidence

Applicant's Exhibit 2 is defendant's authorization of Roger Shortz, M.D. as applicant's primary treating physician dated 05/08/2015. Dr. Shortz examined applicant on 12/09/2015 for the purposes of a neurosurgical consultation and authored a report dated 12/09/2015 in which he recommended an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity. Attached to his 12/09/2015 narrative report is a Request for Authorization dated 12/21/2015 requesting fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon (Applicant's Exhibit 1)

Joint Exhibit AA is defendant's UR decision in which it denied Dr. Shortz's requested treatment. Defendant's UR denial is dated 03/09/2016 and reflects the date of receipt as 02/23/2016, the date of 03/02/2016 as the date additional information received, and a decision date of 03/09/2016. (Joint Exhibit AA at page 1 and 2) The 03/09/2016 UR denial also states that defendant attempted a per-to-peer call with Dr. Shortz on 03/07/2016 at 03:05 AM PST and a message was left providing case details, report due times, and a call back number. Defendant attempted another peer-to-peer call with Dr. Shortz on 03/09/2016 at 12:45 PM PST but was unable to leave a message as the office was closed and there was no option to leave a message. Defendant's UR denial is addressed to Dr. Shortz, copied to Frank Cervantes (via email), Dr. Shortz (via fax) and applicant (via mail). The only enclosure is the application for IMR.

The Analysis

Labor Code section 4610 (g) (1) provides, in pertinent part:

“(g) In determining whether to approve, modify, delay, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees all of the following requirements shall 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.”

California Code of Regulations, title 8, section 9792.9.1 provides, in relevant part:

“Utilization Review Standards--Timeframe, Procedures and Notice -- On or After
January 1, 2013

...

(a)(1) For purposes of this section, the DWC Form RFA shall be deemed to have been received by the claims administrator or its utilization review organization by facsimile or by electronic mail on the date the form was received if the receiving facsimile or electronic mail address electronically date stamps the transmission when received. If there is no electronically stamped date recorded, then the date the form was transmitted shall be deemed to be the date the form was received by the claims administrator or the claims administrator's utilization review organization. A DWC Form RFA transmitted by facsimile after 5:30 PM Pacific time shall be deemed to have been received by the claims administrator on the following business day, except in the case of an expedited or concurrent review.

...

(c) The utilization review process shall meet the following timeframe requirements:

(1) The first day in counting any timeframe requirement is the day after the receipt of the DWC Form RFA, except when the timeline is measured in hours. Whenever the timeframe requirement is stated in hours, the time for compliance is counted in hours from the time of receipt of the DWC Form RFA.

...

(3) Prospective or concurrent decisions to approve, modify, delay, or deny a request for authorization shall be made in a timely fashion that is appropriate for the nature of the injured worker's condition, not to exceed five (5) business days from the date of receipt of the completed DWC Form RFA, but in no event more than 14 calendar days from initial receipt of the complete DWC Form RFA.

...

(e) Decisions to modify, delay, or deny a request for authorization.

...

(3) For prospective, concurrent, or expedited review, a decision to modify, delay, or deny shall be communicated to the requesting physician within 24 hours of the decision, and shall be communicated to the requesting physician initially by telephone, facsimile, or electronic mail. The communication by telephone shall be followed by written notice to the requesting physician, the injured worker, and if the injured worker is represented by counsel, the injured worker's attorney within 24 hours of the decision for concurrent review and within two (2) business days for prospective review and for expedited review within 72 hours of receipt of the request.

...

(5) The written decision modifying, delaying or denying treatment authorization shall be provided to the requesting physician, the injured worker, the injured worker's representative, and if the injured worker is represented by counsel, the injured worker's attorney and shall only contain the following information

specific to the request:

- (A) The date on which the DWC Form RFA was first received.
 - (B) The date on which the decision is made.
 - (C) A description of the specific course of proposed medical treatment for which authorization was requested.
 - (D) A list of all medical records reviewed.
 - (E) A specific description of the medical treatment service approved, if any.
 - (F) A clear, concise, and appropriate explanation of the reasons for the reviewing physician's decision, including the clinical reasons regarding medical necessity and a description of the relevant medical criteria or guidelines used to reach the decision pursuant to section 9792.8. If a utilization review decision to modify, deny or delay a medical service is due to incomplete or insufficient information, the decision shall specify the reason for the decision and specify the information that is needed.
 - (G) The Application for Independent Medical Review, DWC Form IMR, with all fields, except for the signature of the employee, to be completed by the claims administrator. The application, set forth at section 9792.10.1, shall include an addressed envelope, which may be postage-paid for mailing to the Administrative Director or his or her designee.
- ...
- (f) (1) The time frame for decisions specified in subdivision (c) may only be extended under one or more of the following circumstances:
 - (A) The claims administrator or reviewer is not in receipt of all of the information reasonably necessary to make a determination.
 - (B) The reviewer has asked that an additional examination or test be performed upon the injured worker that is reasonable and consistent with professionally recognized standards of medical practice.
 - (C) The reviewer needs a specialized consultation and review of medical information by an expert reviewer.
 - (2) (A) If the circumstances under subdivision (f)(1)(A) applies, a reviewer or non-physician reviewer shall request the information from the treating physician within five (5) business days from the date of the receipt of the request for authorization.

In *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298, 2014 Cal. Wrk. Comp. P.D. LEXIS 131 (*Dubon II*), (Appeals board en banc decision), the Appeals Board held

that a utilization review decision is invalid and not subject to independent medical review only if it is untimely, that legal issues regarding the untimeliness of a utilization review decision must be resolved by the WCAB, and that if the utilization review decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5. *In Timothy Bodam v. San Bernardino County/Department of Social Services*, 2014 Cal. Wrk. Comp. LEXIS P.D. 156, the Appeals Board issued a significant panel decision holding, in part, that a defendant is required to comply with all time requirements in conducting utilization review, including the timeframes for communicating the utilization review decision.

Defendant authorized Dr. Shortz as a primary treating doctor on 05/08/2015. (Applicant's Exhibit 2) Dr. Shortz's 12/09/2015 report and RFA dated 12/21/2015 do not reflect an electronic stamp showing either document was sent to defendant claims examiner by e-mail or fax. The only information reflected at the top of each page of Dr. Shortz's 12/09/2015 report and RFA dated 12/21/2015 is "Dec 22 2015 11:48 AM", the name "Bayspine", and what appears to be bate-stamped numbers and page numbers. (Applicant's Exhibit 1) There is no proof of service, cover letter, or transmittal letter accompanying Dr. Shortz's 12/09/2015 report and RFA dated 12/21/2015. Although Dr. Shortz's 12/09/2015 report identifies Am Trust North America as the insurance carrier, and the report is addressed to "Claims Adjuster", there is no evidence establishing the 12/09/2015 report, or Dr. Shortz's 12/29/2015 RFA was actually sent to defendant carrier in December 2015 or January 2016. Accordingly, as there was no evidence establishing Dr. Shortz's 12/09/2015 report and RFA dated 12/21/2015 were sent to defendant claims, at least in December 2015 or January 2016, defendant's failure to conduct a timely utilization review denial relative to the dates of Dr. Shortz's 12/09/2015 report and 12/21/2015 RFA is not dispositive of the issues identified at trial.

At trial, the parties stipulated that Dr. Shortz's 12/09/2015 report and 12/21/2015 RFA were provided to defendant on 02/16/2016 by personal delivery. (M.O.H., dated 04/25/2016, at page 2) Defendant's UR denial is dated 03/09/2016, reflects a date of receipt of request of 02/23/2016, a date of 03/02/2016 as when additional information was received, and a decision date of 03/09/2016. I conclude Dr. Shortz's 12/09/2015 report and 12/21/2015 RFA were

provided to defendant on 02/16/2016 based on the parties stipulation at trial. California Code of Regulations, title 8, section 9792.9.1 (f)(2)(A) requires that defendant have requested additional information reasonably necessary to make a decision within five business days from the date it received Dr. 12/09/2015 report and 12/21/2015 RFA on 02/16/2016, or by 02/23/2016.

Defendant's UR denial dated 03/09/2016 reflects the reviewer attempted a peer-to-peer call with Dr. Shortz on 03/07/2016 and again on 03/09/2016 although the denial does not specify that that additional information was requested. Even assuming the reviewer attempted to request additional information on 03/07/2016 and 03/09/2016, both of those dates are beyond the requisite five business days. Defendant's UR denial also states, on page four, that "Records reviewed included Utilization Review Request for Additional Information dated 03/01/2016". While that "Utilization Review Request for Additional Information dated 03/01/2016" was not offered as evidence at trial, the date of 03/01/2016 is beyond the five business days requirement of California Code of Regulations, title 8, section 9792.9.1 (f)(2)(A). As defendant has not established it timely requested additional information, defendant's UR denial, dated 03/09/2016 and reflecting a decision date of 03/09/2016, is untimely in that it was not made within five working days from its receipt of Dr. Shortz's 12/09/2015 report and 12/21/2015 RFA on 02/16/2016. Furthermore, defendant's UR denial does not reflect defendant communicated by telephone, fax or e-mail its decision to applicant's counsel within two business days following the initial communication. Based on the evidence at trial, the relevant law, and the above analysis, I find defendant's Utilization Review denial of Dr. Shortz's 12/09/2015 request for medical treatment in the form of an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and, as set forth in the Request for Authority dated 12/21/2015, untimely.

In light of my finding defendant's Utilization Review denial is untimely, I further find the WCAB has jurisdiction to determine whether Dr. Shortz's 12/09/2015 request for medical treatment in the form of an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and, as set forth in the Request for Authority dated 12/21/2015 is medically necessary.

Applicant has an accepted industrial injury to his neck and left shoulder with a date of injury of 02/04/2013. (M.O.H., dated 04/25/2016 at page 2) After evaluating applicant on 12/09/2015, Dr. Shortz noted in his 12/09/2015 report, applicant's complaints of constant and moderate pain in his neck, upper, mid and low back, bilateral shoulders and arms, and left leg, and headaches; applicant rated his pain as a 5 out of 10, states it radiates to both arms and legs, and is associated with numbness in the arms and legs, tingling in the arms, legs and feet, and weakness in the arms and legs. Applicant further reported bladder and bowel problems and that the pain is aggravated with bending, prolonged standing, sitting, walking, reaching and kneeling. After reviewing extensive medical reports from 02/06/2013 to 07/23/2014, including emergency department records, chiropractic and physical therapy notes, a neurology report by Arnold Greenberg M.D. dated 02/28/2013, various treatment reports, MRIs of the brain, cervical spine and left shoulder, a medical-legal evaluation by Timothy Lo, M.D. dated 11/17/2014, and some certifications and non-certifications for requested chiropractic treatment, Dr. Shortz diagnosed degenerative disc disease/HNP at C4-5, C5-6 and C6-7 with kyphotic deformity and cervical radiculopathy and recommended an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity. In that same report, Dr. Shortz stated that his request for authorization is based on medically reasonable treatment requirements and in accordance with ACOEM Guidelines and pursuant to Labor Code section 4600, California Code of Regulations, title 8, section 9792.6, and Rule 9785(b). Attached to his narrative report is a Request for Authorization dated 21/21/2015 requesting fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon (Applicant's Exhibit 1)

Timothy Lo M.D. is the panel qualified medical evaluator in this matter. Dr. Lo evaluated applicant on 11/17/2014 and submitted reports dated 11/17/2014, 03/30/2015 and 06/24/2015. In his 11/17/2014 report, Dr. Lo diagnosed, in part, traumatic cervical spondylosis/left facet arthropathy, left facial numbness and swelling of unclear etiology, and suspected left cervical radiculopathy and stated applicant needs a primary treating physician to manage his symptoms or to coordinate conservative treatment. Dr. Lo further notes applicant received temporary benefit

from physical therapy, chiropractic care, and acupuncture treatment and that these should be provided for flare-ups of left-sided pain. Dr. Lo also stated that if applicant failed to improve with conservative treatment, consideration of future cervical facet diagnostic blocks by way of medial branch block and possible left cervical facet rhizotomy might be reasonable treatment options. (Defendant's Exhibit C at pages 11-13) In his 03/30/2015 report, Dr. Lo notes the 02/13/2015 MRI of applicant's brain revealed no evidence of brain parenchymal abnormalities, mass or significant brain injury and that applicant's headache symptoms are most likely related to traumatic cervical facet arthropathy. (Defendant's Exhibit at pages 1-2) In his 06/24/2015 report, Dr. Lo reviewed the 02/25/2015 EMG and nerve conduction study and noted an abnormal EMG and nerve conduction study of the left upper extremity with a moderate carpal tunnel syndrome (unrelated to the 02/04/2013 injury) and no evidence of ulnar neuropathy, radial neuropathy or cervical radiculopathy. He also noted the 07/11/2013 MRI of applicant's cervical spine did reveal reversal of the normal cervical lordosis as well as early degenerative changes, neural foraminal narrowing from C3 through C6, moderate on the left at the C3-4 level, and that while he did have paresthesias in the left upper extremity, they were not verifiable by electrodiagnostic studies and the MRI of the cervical spine revealed no evidence of significant disc herniation. Dr. Lo found applicant permanent and stationary, provided impairment factors, and opined as follows for future medical care:

“Provision of conservative treatment, including physical therapy, chiropractic care, and acupuncture treatment, should be provided for flare-ups of left-sided neck pain. Occasional usage of anti-inflammatory medications and judicious usage of opioid therapy for flare-ups of neck pain would be appropriate. I do not anticipate need for a left shoulder surgery in the future, but consideration of left shoulder injections may be reasonable for flare-ups of left shoulder pain.” (Defendant's Exhibit A at pages 2– 5)

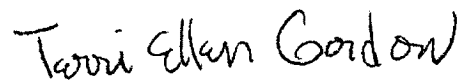
Defendant's Exhibits D and E are the 02/25/2015 EMG and nerve conduction study and 07/11/2013 MRI of the cervical spine, both of which were reviewed by Dr. Lo.

Defendant's UR denial dated 03/09/2016 states that the medical records reviewed by the reviewer included Dr. Shortz's Managed Care Services Referral Form, the 07/11/2013 MRI cervical spine without contrast report of Courtney Bloom, M.D., Dr. Shortz's 12/09/2015 neurosurgical consultation report and RFA dated 12/21/2015, and a 03/01/2016 Utilization Review Request for Additional Information of Mitchell. Defendant's 03/09/2016

UR denial generally refers to “ACOEM Guidelines Neck and Upper Back Complaints, as referenced by CA MTUS Guidelines Surgical Considerations”, notes possible complications of decompression, acknowledges Dr. Shortz’s diagnosis of degenerative disc disease and herniated nucleus pulposus (HNP) at C4-5, C5-6, and C6-7 with kyphotic deformity and cervical radiculopathy, describes prior treatments as including work modifications, medications, chiropractic treatment, acupuncture, and physical therapy, and after concluding “there is no notation of any motor deficits, nor is there any evidence of failure a conservative treatment including injections and physical therapy, denied Dr. Shortz’s recommended medical treatment as not medically necessary.

Based on my review of the evidence, the relevant law, and the foregoing analysis, I find that applicant has not established with substantial medical evidence that Dr. Shortz’s recommendations for an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon are medically necessary. In his 12/09/2015 report, Dr. Shortz describes applicant’s complaints and rating of pain in his neck, upper, mid and low back, bilateral shoulders and arms, and left leg, that radiate to both arms and legs, and are associated with numbness in the arms and legs, tingling in the arms, legs and feet, and weakness in the arms and legs. Dr. Shortz further notes applicant also complains of headaches bladder and bowel problems and that the pain he experiences is aggravated with bending, prolonged standing, sitting, walking, reaching and kneeling. Dr. Shortz reviewed extensive medical reports from 02/06/2013 to 07/23/2014, including emergency department records, chiropractic and physical therapy notes, a neurology report by Arnold Greenberg M.D. dated 02/28/2013, various treatment reports, MRIs of the brain, cervical spine and left shoulder, a medical-legal evaluation by Timothy Lo, M.D. dated 11/17/2014, and some certifications and non-certifications for requested chiropractic treatment and diagnosed degenerative disc disease/HNP at C4-5, C5-6 and C6-7 with kyphotic deformity and cervical radiculopathy. However, after recommending an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction

of deformity he states that his request for authorization is based on medically reasonable treatment requirements and in accordance with ACOEM Guidelines and pursuant to Labor Code section 4600, California Code of Regulations, title 8, section 9792.6, and Rule 9785(b). Dr. Shortz does not provide any additional basis for his additional recommendations in his 12/29/2015 RFA. Dr. Lo does not discuss the medical treatment requested by Dr. Shortz in any of his three reports dated 11/17/2014, 03/30/2015 and 06/24/2015. Therefore, based on my review of the evidence, the relevant law, and the foregoing analysis, I find that applicant has not established with substantial medical evidence that Dr. Shortz's recommendations for an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon are medically necessary. Accordingly, I find applicant is not entitled to medical care in the form of an anterior cervical discectomy fusion at C4-5, C5-6 and C6-7 with cages and plate compression of spinal canal and nerve routes, and correction of deformity and as set forth in the Request for Authority dated 12/21/2015 for fluoroscopy, micro surgery tech, allograft, autograph, inpatient stay of two days, pre-op lab work, EKG and plain cervical x-ray, history and physical to clear applicant for surgery, and an assistant surgeon pursuant to the recommendations of Dr. Shortz.



Terri Ellen Gordon
Workers' Compensation Judge
Workers' Compensation Appeals Board

Dated: 05/20/2016

Filed and Served: On all Parties Shown on the Official Address Record
Date: 05/20/2016 By: R. Oosterbaan

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
PROOF OF SERVICE**

**For
FINDINGS and OPINION ON DECISION**

On: 5/20/2016 By: R. Oosterbaan

Case Number: ADJ9006331

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