

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION

RAYMOND MONTOYA

Applicant

vs.

NEW GUARD ELECTRIC and ILLINOIS
MIDWEST INSURANCE AGENCY, ON
BEHALF OF VIRGINIA SURETY
COMPANY, INC.,

Defendants.

Case No. ADJ3580886

**FINDINGS,
OPINION ON DECISION**

The above-entitled matter having been heard and regularly submitted, Lilla J. Rados, Workers' Compensation Administrative Law Judge, now makes her decision as follows:

FINDINGS OF FACT

1. There is no jurisdiction to determine whether applicant is entitled to the treatment recommendations made by Dr. Behravan in a report dated November 13, 2013.



LILLA J. RADOS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Applicant filed a request for expedited hearing arguing that the WCAB had jurisdiction to determine whether Dr. Behravan's request for Norco and Prilosec was medically necessary. Defendant argues lack of jurisdiction, relying on newly enacted IMR regulations which requires an applicant to file a request for Independent Medical Review with the Administrative Director if a requested treatment is not authorized by the carrier and utilization review has indicated non-certification for the requested care.

Applicant argued that per *Jose Dubon v. World Restoration, Inc. and State Compensation Insurance Fund* (2/27/2014 en banc), if there is a material defect in utilization review, in accordance with *Sandhagen (State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen))* (2008), the carrier is prohibited from conducting utilization review and a WCJ may determine the reasonableness of the requested medical treatment.

Having reviewed the exhibits offered by the parties along with defendant's extremely well written trial brief, I agree with defendant's contention that utilization review was done timely hence I have no jurisdiction to determine the denial of Norco and Prilosec.

Dr. Behravan never issued a proper request for authorization of treatment to the carrier hence the carrier was not under any obligation to initiate utilization review. The carrier however decided to conduct utilization review upon receipt of Dr. Behravan's report dated November 13, 2013, received by the carrier on December 17, 2013.

The defendant is correct in its argument that when a retrospective review is conducted of requested treatment, the carrier has 30 days to determine the necessity and reasonableness of such care. In this case the carrier issued its utilization review determination within the appropriate timelines.



LILLA J. RADOS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

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On: 6/6/2014

By: nfl

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

06-06-2014

OFFICIAL ADDRESS RECORD

Case Number: ADJ3580886

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8 **WORKERS' COMPENSATION APPEALS BOARD**

9 **STATE OF CALIFORNIA**

10 RAYMOND MONTOYA,

Case No. ADJ3580886

11 Applicant,

12 vs.

TRIAL BRIEF

13 NEW GUARD ELECTYRIC and
ILLINOIS MIDWEST INSURANCE
14 AGENCY on behalf of VIRGINIA
SURETY COMPANY, INC.

15 Defendants.

16 COMES NOW; defendants, Illinois Midwest Insurance Agency on behalf of Virginia
17 Surety Company, Inc.; by and through their counsel of record, Bradford & Barthel, LLP,
18 submit this trial brief as follows:
19

20
21 **STATEMENT OF FACTS**

22 This case involved a cumulative trauma injury to the left shoulder, with the injurious
23 exposure terminating on February 2, 2006. Upon the utilizing Joel Renbaum, MD as an
24 Agreed Medical Examiner, the case-in-chief was settled by way of Stipulations on January 26,
25 2012. The WCAB issued an award of future medical care for the left shoulder on February 29,
26 2012.
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28

1 The injured worker continued to treat under his award of medical care with his primary
2 treating physician, H. Darien Behravan, DO. On November 13, 2013 Dr. Behravan dispensed
3 180 pills of Norco 10/325mg and 60 pills of Prilosec 20 mg to the injured worker (see exhibit
4 "A"- 11/13/13 report of Dr. Behravan). The dispensing of these medications is corroborated by
5 Exhibit B, a Health Insurance claim form submitted by Dr. Behravan on 12/03/2013 with
6 charges identified by National Drug Code (NDC) ID# 00591085305 (NDC List submitted as
7 Exhibit "C").
8

9 On December 17, 2013, Dr. Behravan transmitted his report to Defendant. This
10 transmission is verified by an electronic transmission date stamp (Exhibit "A").

11 Defendant received the report of Dr. Behravan and treated the report as if it were
12 submitted on a DWC Form RFA pursuant to 8 CCR 9791.9.1(c)(2).

13 The November 13, 2013 report of Dr. Behravan, along with numerous other PTP
14 reports of Dr. Behravan (reports dated: 05/10/11, 06/06/11, 07/01/11, 07/29/11, 08/26/11,
15 09/30/11, 10/28/11, 12/12/11, 02/21/12, 04/30/12, 06/29/12, 07/27/12, 09/26/12, 11/21/12,
16 01/22/13, 03/19/13, 05/20/13, 07/19/13, 09/18/13) and the September 15, 2011 AME report of
17 Joel Renbaum, MD (Exhibit "F") were all sent to the reviewer so a competent utilization
18 review and determination could be conducted.
19

20 On January 13, 2014 Dr. Jamie Lewis, MD, a Pain Management and Physical Medicine
21 and Rehabilitation specialist physician reviewed the above identified medical reports and
22 conducted a utilization review.

23 On January 13, 2014 Dr. Lewis attempted to contact Dr. Behravan for a peer-to-peer
24 discussion, leaving his call back number with office staff at Dr. Behravan's office. At the same
25 time, Dr. Behvarian's office faxed a subsequent request for authorization for 180 pills of
26 Norco 10/325, dated January 13, 2014 (Exhibit "G") to the utilization review department. The
27 January 13, 2014 report states that the injured worker "is doing about the same without
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1 complaints of any new pain” and no documented change in material facts was indicated. It is
2 not clear from the report if the 180 pills of Norco 10/325 were dispensed at the January 13,
3 2013 evaluation (page 4 of this report indicates Norco was not dispensed, contradicted by page
4 7 indicating the 180 pills of Norco 10/325 was office dispensed (“OD”))

5 A subsequent attempt for a peer-to-peer call was attempted on January 15, 2014 and
6 Dr. Lewis left his contact information on the general voice mailbox at Dr. Behravan’s office.

7 After reviewing the above listed medical reports, on January 15, 2014 Dr. Lewis
8 denied certification of the prescriptions for 180 pills of Norco 10/325 mg and Prilosec 20 mg
9 that Dr. Behravan had already dispensed (Exhibit “D”).

10 Dr. Lewis notes in the communication section of his report the phone number he
11 attempted to contact Dr. Behravan at, this number is identical to the office number listed for
12 Dr. Behravan on Exhibit A.

13 On January 15, 2014, Rising Medical Solutions communicated utilization review
14 determination of Dr. Lewis to Dr. Behravan in writing (Exhibit “E”). The utilization review
15 determination was copied to the injured worker and his attorney of record.

16 Enclosed with the notice of determination was an Application for IMR (DWC form
17 IMR) with all parts completed by Defendant except for the injured worker’s signature. The
18 injured worker signed and dated the DWC form IMR on January 29, 2014 (Exhibit “E”).
19 Exhibit E is date stamped received by applicant’s counsel’s office January 16, 2014.

20 **POINTS AND AUTHORITIES**

- 21 ***1. The utilization review determination was not materially defective, and the dispute***
22 ***over medical necessity of the treatment requests in the present case is subject to IMR.***

23 The WCAB held in Jose Dubon v. State Compensation Insurance Fund (2014 *en banc*) that
24 IMR solely resolves disputes over the medical necessity of treatment requests while the
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1 WCAB retains jurisdiction to determine whether or not the utilization review decision suffers
2 from material procedural defects. Judicial scrutiny of the procedural validity of a UR decision
3 was opined to be a matter of pervasive and particular importance since SB 863 amended the Labor
4 Code to bar an injured worker from renewing a treatment request for 12 months absent a
5 documented material change in circumstances. (Lab. Code, § 4610(g)(6)) (Dubon at page 9). If the
6 Utilization Review is materially defective (A minor technical or immaterial defect is not
7 sufficient to invalidate a defendant’s utilization review determination: see Dubon at page 2),
8 the issue of medical necessity is to be determined by the WCAB.
9

10 Labor Code § 4610 and 8 CCR 9792.9.1 are the statutes and regulations governing
11 treatment requests made on or after January 1, 2013. In the present case, the request for
12 treatment was communicated to defendant on December 17, 2013 and these statutes and
13 regulations govern the utilization review process subject to adjudication in this case.
14

15 **A. This case involves a “retrospective review” and Defendant had 30 days to conduct**
16 **their utilization review.**

17 Labor Code § 4610 and 8 CCR 9792.9.1 provide the time limits to conduct utilization
18 review of treatment requests. Prospective or concurrent decisions shall be made in a timely
19 fashion within five (5) working days from the receipt of the information reasonably necessary
20 to make the determination, in no event more than 14 days from the date of the medical
21 treatment recommendation by the physician, and in some cases a period shorter than five days
22 if there are exigencies present justifying a more expedient determination.
23

24 When the review is retrospective, a decision resulting in denial of all or part of the
25 medical treatment service shall be communicated to the injured worker or their designee
26 within 30 days of receipt of information that is reasonably necessary to make this
27 determination. (LC § 4610(g)(1)). “Retrospective Review” means utilization review conducted
28

1 after medical services have been provided and for which approval has not already been given
2 (8 CCR 9792.6 (p)).

3 The present dispute involves a retrospective review because Dr. Behravan's request for
4 the Norco and Prilosec medication was preceded by Dr. Behravan dispensing the medications
5 to the injured worker at the November 13, 2013 office visit (Exhibits A-C). Approval for the
6 dispensing of another 60 day supply of prescription medications had not been given to Dr.
7 Behravan by the defendant prior to his dispensing of the 60 day supply of medication on
8 November 13, 2013.
9

10
11 **B. Defendant's Notice of Determination was communicated to the necessary parties**
12 **within 30 days of receiving the information necessary to conduct their utilization**
13 **review.**

14 A retrospective review requires transmission of the determination to be made within 30
15 days of receipt of the information necessary to conduct the utilization review in order to be
16 timely. While Dr. Behravan provided the treatment that is the subject of the injured worker's
17 DOR to the injured worker on November 13, 2013 his report was not received by Defendant
18 until December 17, 2013 (verified by the electronic stamp on Exhibit A).
19

20 A request for treatment shall be deemed to have been received by the claims administrator
21 or its utilization review organization on the date the form was received if the receiving
22 facsimile or electronic mail address electronically date stamps the transmission when received
23 (8 CCR 9792.9.1(a)(1)) At the top of each page of exhibit A is an electronic date stamp
24 showing the 11/13/13 report was received, from the number listed on the report as Dr.
25 Behravan's fax number, on December 17, 2013.
26
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1 Defendant communicated their Notice of Determination on January 15, 2014, 29 days after
2 receiving the request for treatment from Dr. Behravan. Defendant's utilization review
3 determination was timely.

4
5 **C. Defendant's utilization review was conducted by a competent reviewer.**

6 Timeliness is not the only material statutory and regulatory requirement of utilization
7 review. For a utilization review determination to be valid, the reviewer must be competent to
8 evaluate the specific clinical issues involved in the medical treatment services, and the services
9 reviewed must be within the scope of the individual's practice.

10
11 The reviewer in this case is Jamie Lewis, MD (CA# 83972). A search of Dr. Lewis on the
12 California Medical Board website shows Dr. Lewis is a physician specializing in Physical
13 Medicine and Rehabilitation and Pain Management. He is licensed in California, and in good
14 standing with the California Medical Board. There is no evidence Dr. Lewis is not
15 professionally competent to evaluate the clinical issues or services involved with the
16 dispensing of medications related to chronic pain conditions. Dr. Lewis specializes in the same
17 area of medicine as Dr. Behravan, pain management. He currently practices medicine out of

18
19 A second inquiry also must be answered in the affirmative for the reviewer's determination
20 to be competent; section 4610 contemplates a reviewer's determination to be based on review
21 of all information that is reasonably necessary to make the determination. The present case is
22 not analogous to Dubon, because Dr. Lewis reviewed and relied on 20 treatment reports of Dr.
23 Behravan and the AME report of Dr. Renbaum in reaching his determination.

1 **D. The utilization review and Notice of Determination otherwise comply with 8 CCR**
2 **9792.9.1 and void of material defect.**

3 8 CCR 9792.9.1 ©(5) provides: A written decision modifying, delaying, or denying
4 treatment authorization shall only contain the following information specific to the request
5 followed by a list of information that can be include in a written determination. This
6 subsection may or may not be material with regard to the integrity of the utilization review, but
7 that question does not need to be broached by the WCAB in the present case because the UR
8 determination and Notice of Determination (Exhibits D and E) are not defective in this regard
9 either.
10

11 In reviewing Exhibits D and E, the WCAB will note that the written decision sent to Dr.
12 Behravan, applicant's counsel, and the injured worker contains the following information: 1.
13 The date the [treatment request] was first received, 2. The date the decision was made, 3. A
14 description of the specific course of proposed medical treatment requested, 4. A list of all
15 medical records reviewed, 5. A clear, concise, and appropriate explanation of the reasons for
16 the reviewing physician's decision, 6. A DWC Form IMR with all fields, except for the
17 signature of the injured worker, to be completed by the claims administrator (Exhibit "G"), 7.
18 A clear statement advising the injured employee that any dispute shall be resolved in accord
19 with IMR, and that an objection to the utilization review must be communicated on the
20 enclosed DWC IMR Form within 30 calendar days of receipt of the decision, 8. Included
21 statutory language (8 CCR 9792.9.1(5)(I)), 9. The name and specialty (and other identifying
22 information) of the reviewer.
23

24 Not all procedural violations of section 4610 and 8 CCR 9792.9.1 render a utilization
25 review decision invalid. The standard set by Dubon (*en Banc*) requires a material procedural
26 defect that undermines the integrity of the UR decision.
27
28

1 ***2. The utilization review determination dispute is with regard only to the medical***
2 ***necessity of Dr. Behravan’s treatment request, and subject to IMR.***

3 Dubon confirmed that the statutory and regulatory compliance of a utilization review
4 determination is within the purview of the WCAB; however, if there is a timely and valid UR,
5 the issue of medical necessity shall be resolved through the IMR process if requested by the
6 injured worker. In this case, the injured submitted IMR to review the dispute regarding the
7 medical necessity of Dr. Behravan’s request and Defendant has demonstrated their utilization
8 review determination is both timely and valid. The injured worker still has the statutory
9 remedy of IMR which remains ongoing. Defendant requests the WCAB issue a Findings and
10 Order in accord with the holding in Dubon and permit this medical necessity of the requested
11 treatment to be determined through the IMR process.
12

13
14 ***3. Absent a documented change in material facts relevant to the basis of the Utilization***
15 ***Review Denial of the December 17, 2013 request for 180 pills of Norco 10/325,***
16 ***further action by the employer with regard to the January 13, 2014 request for 180***
17 ***pills of Norco 10/325 was not required.***
18

19 Labor Code § 4610(g)(6) was a basis for the WCAB’s holding in Dubon, as the 12
20 month application of a valid utilization review determination presented a compelling rationale
21 for judicial scrutiny of procedural validity of utilization review determinations. The WCAB
22 noted the particular importance of procedural scrutiny “since SB 863 amended the Labor Code
23 to bar an injured worker from renewing a treatment request for 12 months absent a documented
24 material change in circumstances.” (Dubon at Page 9)

25 Applicant’s counsel has challenged the integrity of defendant’s January 15, 2014
26 utilization review of Dr. Behravan’s December 17, 2014 request for authorization of 180 pills
27
28

1 of Norco 10/325, and determination to deny, based on the reviewer's non-consideration of Dr.
2 Behravan's subsequent January 13, 2014 request for 180 pills of Norco 10/325.

3 An alternative legal theory, that defendant needed to conduct utilization review of the
4 January 13, 2014 RFA for 180 pills of Norco 10/325 because a utilization review
5 determination had not yet been made on the December 17, 2013 RFA for 180 pills of Norco
6 10/325, has been offered by applicant's counsel. Both arguments are incorrect, contrary to
7 statutory authority, and if true would create an unworkable utilization review process.
8

9 Looking to statutory authority, LC § 4910 (g)(6) states: "A utilization review
10 decision to modify, delay, or deny a treatment recommendation shall remain effective for 12
11 months from the date of the decision without further action by the employer with regard to any
12 further recommendation by the same physician for the same treatment unless the further
13 recommendation is supported by a documented change in the facts material to the basis of the
14 utilization review decision." (LC §4610(g)(6)).

15 The Administrative Director has also codified rules in accord with LC 4910 (g)(6) in
16 CCR, Chapter 8, Reg. 9792.9 (o). LC § 4610 mandates that when a UR determination is made,
17 certain procedural requirements "shall be met", and "shall" invokes mandatory compliance with
18 the labor code statute at issue. ((Lab. Code, § 15; *Smith v. Rae-Venter Law Group* (2003) 29
19 Cal.4th 345, 357 ("As used in the Labor Code, 'shall' is mandatory"))
20

21 In the present case, the medical treatment requested on December 17, 2013 (Exhibit "A")
22 and January 13, 2014 (Exhibit "G") was the same, 180 pills of Norco 10/325 mg. This is not a
23 situation where the request for treatment had been modified to a different class of medication (such
24 as slow acting or non-opioid analgesic), the treatment requested on December 17, 2013 and
25 January 15 2014 is identical. The January 13, 2014 report expressly states that the injured worker
26 "is doing about the same without complaints of any new pain" and does not provide documentation
27 of any change of circumstances, let alone facts material to the basis of the [January 15, 2014]
28 utilization review decision to deny provision of 180 pills of Norco 10/325.

1 In response to applicant’s alternative argument that utilization review of Dr. Behravan’s
2 January 13, 2014 RFA, LC § 4610(g)(6) imposes a mandatory effective period of 12 months where
3 the action need not take any action on further recommendations “*by the same physician for the*
4 *same treatment.*” (4610 (g)(6) emphasis added). While the subsequent request, made by the same
5 physician for the same treatment, was made two days before the timely utilization review
6 determination to deny the treatment was made, LC § 4601 (g)(6) provides two separate rights to
7 the employer.

8 The first right extended to the employer in LC 4610 (g)(6) is a 12 month period where
9 the utilization review determination is effective, commencing on the date of determination. This
10 ensures that the utilization review determination cannot be undermined by repetitive, continuous,
11 or frivolous requests for authorization by the same physician for the same treatment.

12 The second right vested in an employer by LC 4610 (g)(6) is the right to take no further
13 action on repetitive, continuous, or frivolous requests for authorization for by the same physician
14 for the same treatment unless there has been a change of facts foundational to the utilization
15 review decision. While opposing counsels position is that this subsequent right only vests upon the
16 employer at the decision date, to agree would contradict LC § 4610 (g)(6) and promote the very
17 occurrence LC § 4610(g)(6) was designed to prevent. SB 863 amended the Labor Code to bar an
18 injured worker from renewing a treatment request for 12 months absent a documented material
19 change in circumstances, and this amendment was a basis for the Dubon holding.

20
21
22 ***4. The provision of 180 pills of Norco 10/325 mg is not medically necessary as the AME***
23 ***in this case only recommended prescription pain medication if the injured worker***
24 ***sustained functional improvement as a result of taking the Norco 10/325. The***
25 ***injured worker has not sustained functional improvement as a result of the***
26 ***continued use of Norco 10/325 mg.***
27
28

1 Medical Necessity, as defined in Labor Code § 4610.5(c)(2), means any medical
2 treatment that is reasonably required to cure or relieve the injured employee of the effects of
3 his or her injury. The treatment requested must: 1. Fall under the ACOEM and MTUS
4 guidelines, 2. Be based on peer reviewed scientific and medical evidence regarding the
5 effectiveness of the disputed treatment, 3. Based on nationally recognized professional
6 standards, 4. Generally accepted standards of medical practice; or 5. Treatments that are likely
7 to provide a benefit to a patient for conditions for which other treatments are not clinically
8 efficacious. These standards “shall be applied in the order listed, allowing reliance on a lower
9 ranked standard only if every higher ranked standard is inapplicable to the employee’s medical
10 condition.” (LC§ 4610.5 (c)(2))
11

12 Norco 10/325 mg for chronic pain does fall under the CA MTUS 2009, and there is a
13 presumption of reasonableness when a requested treatment is in accord with the ACOEM or
14 CA MTUS Guidelines. However, the presumption of reasonableness is one that shifts the
15 burden of proof, and can be rebutted by substantial medical evidence indicating the treatment
16 is not medically necessary.
17

18 In the present case Joel Renbaum, MD acted as AME and issued a report dated
19 September 15, 2011 (Exhibit “F”) indicating that “The use of prescription pain medication as
20 needed to reduce chronic discomfort is reasonable if it allows the patient to improve their
21 function.” (Exhibit “F”, page 7) The treatment reports of Dr. Behravan spanning July 01/2011
22 to September 18, 2013 (Exhibit ‘H’) demonstrate a consistent level of functioning which
23 plateaued in 2012 supported by the report narratives authored by Dr. Behravan.
24

25 The utilization reviewer reviewed these medical reports, the AME report, and Dr.
26 Behravan’s December 17, 2013 RFA in making a determination to deny further provision of
27 Norco 10/325 mg in light of the unimproved functioning of Mr. Montoya and risk of harmful
28 side-effects of Mr. Montoya’s continued use of Norco 10/325 mg with no measurable benefit.

1 Upon preponderance of the substantial medical evidence in the present case, Mr. Montoya's
2 continued use of Norco 10/325 mg is not treatment that is medically necessary and his
3 continued use could result in harmful side effects with little or no medical benefit.
4

5 CONCLUSION

6 Defendant's position, as outlined in the above points and authorities, asserts the
7 position that there are no material procedural defects with regard to the utilization review of
8 Dr. Behravan's December 17, 2013 request for 180 pills of Norco 10/325 mg. While the
9 WCAB has jurisdiction to make this inquiry, if there is not a procedural material defect
10 undermining the integrity of the utilization review, then inquiry into medical necessity is to be
11 conducted and determined through IMR. There simply is not a material procedural defect
12 undermining the integrity of the utilization review in this case. The retrospective review was
13 timely, competent, and in accord with the labor code and regulations applicable to utilization
14 review procedures.
15

16 The January 13, 2013 RFA for the same medication by the same physician did not
17 effectuate a new RFA requiring subsequent utilization review as that request did not present a
18 documented change of facts material to the basis of the ongoing utilization review. A basis for
19 the Dubon decision was the amendment to the labor code barring renewed treatment requests
20 for 12 months, and IMR is the injured workers' remedy for his dispute of the January 15, 2014
21 utilization review determination.
22

23 Defendant adamantly believes that IMR is the appropriate forum for the applicant's
24 dispute of the January 15, 2014 utilization review determination. However, defendant must
25 also address the issue of medical necessity if the WCJ disagrees with defendant's position
26 despite the evidence and facts discussed above. Without waiver of defendant's position that
27 there are no material procedural defects with regard to the utilization review and that IMR is
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1 the appropriate arbiter of medical necessity, the facts in this case are that the AME determined
2 continued use of prescription pain medication was necessary so long as the injured worker's
3 continued use of prescription pain medication resulted in improved functioning. There is no
4 documented improvement to Mr. Montoya's functioning. He continues to report the same pain
5 levels, degree of activity, and increase in pain symptoms with increased activity despite his
6 continued use of prescription pain medication.

7
8 **WHEREFORE**, defendant submits this Trial Brief to the Honorable Judge Rados, and
9 requests a Finding and Order that Defendant's utilization review is timely, valid, and void of
10 material procedural defects. If the WCAB finds the utilization review materially defective,
11 defendant request the WCJ to issue an order finding the continued use of Norco 10/325 by Mr.
12 Montoya is not of medical necessity as the proposition of harmful results resulting from the
13 continued use of the Norco is prevailing as no functional improvement to Mr. Montoya has
14 been derived from his continued use of prescription pain medication. Defendant asks that the
15 issues of sanctions and defendant's attorney's fees be deferred.

16
17 Dated: April 17, 2014

18
19 Respectfully submitted,

20 **Bradford & Barthel, LLP**

21
22 By: _____
23 PATRICK C. GORMAN
24 Attorneys for Defendants
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28