Must Medical Treatment Be Automatically Awarded if The Employer Does An Untimely UR?

Under *Dubon II*, an untimely utilization review (UR) confers upon the WCAB jurisdiction to award medical care.

Must the medical treatment that was subject to the untimely UR automatically be awarded by the WCAB?

A strong argument can be made for the answer "No." The WCAB can only award medical treatment that is warranted under the Medical Treatment Utilization Schedule, or falls under one of the ranked standards of § 4610.5.

Labor Code §4600 (b) provides in pertinent part, "*As used in this division and notwithstanding any other law*, medical treatment that is reasonably required to cure or relieve . . . means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27[1]."

§4600 is in Division 4 of the Labor Code. Division 4 covers all of the medical treatment, utilization review, and IMR statutes. Thus, the scope of allowable medical treatment under the Labor Code is necessarily tied to the AD treatment guidelines.

Dubon II (*Dubon v. World Restoration, Inc*. (2014) 79 Cal. Comp. Cases 1298 (Appeals Board en banc opinion)) held in pertinent part that if a UR decision is untimely, the determination of medical necessity may be made by the WCAB *based on substantial medical evidence consistent with Labor Code §4604.5*.

Requiring that medical evidence be "consistent with Labor Code §4604.5" means that a mere medical opinion that treatment is "necessary" cannot carry the required burden of proof.

§4604.5 (a) has both a presumption of correctness, and a limited path for rebuttal, and it reads in pertinent part:

> "(a) The recommended guidelines set forth in the medical treatment utilization schedule adopted by the administrative director pursuant to Section 5307.27 *shall be presumptively correct on the issue of extent and*

[1] The AD has adopted a Medical Treatment Utilization Schedule (MTUS) consisting of Title 8 Cal. Code Regs. §9792.20 through §9792.26. This includes ACOEM Chapters 1, 2, 3, 4, & 5 (§ 9792.22), and chronic pain guidelines (See § 9792.24.2)

scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury."

For dates of injury after 2013, or for older injuries after July 1, 2013, Labor Code §4610.5 defines "medical necessity" to mean treatment that is not only reasonably required to cure or relieve, but it also must be assessed in a pecking order, "allowing reliance on a lower ranked standard *only if every higher ranked standard is inapplicable.*" The §4610.5 ranked standards are:

1) The guidelines adopted by the administrative director pursuant to Section 5307.27 (i.e., the MTUS).

2) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.

3) Nationally recognized professional standards.

4) Expert opinion.

5) Generally accepted standards of medical practice.

6) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious.

§4610.5 would permit a doctor's bare-bones opinion that treatment is "necessary" only if it can be shown that the MTUS, peer-reviewed scientific and medical evidence, and nationally recognized professional standards all have nothing to offer on the disputed treatment.

Since ACOEM and the MTUS are quite comprehensive, the chances that disputed medical treatment isn't covered is remote.

Apart from statutes, cases also support a high burden of proof when the WCAB has jurisdiction to award medical care.

For example, in *Sandhagen*, the California Supreme Court stated, "[N]otwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means

demonstrating that the treatment request is consistent with the uniform guidelines (§4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence. (§ 4604.5.)" *SCIF v WCAB* (*Sandhagen*) 73 Cal. Comp. Cases 981, 990.

In *Otten v CIGA* , a WCAB panel decision, the Board held that even if there were a defective UR, neither the PTP nor the AME's opinions were substantial evidence to warrant an award of the requested treatment, because the reports did not identify applicable medical guidelines to support the treatment. In pertinent part the case held:

> "Nowhere does [the PTP] identify any applicable medical guidelines or other medical evidence that supports the radio frequency ablation and rhizotomy he proposes. Similarly, in his July 16, 2010 and April 22, 2011 reports, [AME] Dr. Isono summarily describes radiofrequency ablation and fluoroscopically guided rhizotomy as 'medically appropriate' based upon applicant's diagnosis at that earlier time, but those conclusory reports do not address applicant's current circumstances and intervening medical history, and they ***provide no citation to any supporting medical papers, studies, guidelines or other medical evidence***." (Emphasis added). Otten, 2014 Cal. Wrk. Comp. P.D. LEXIS 358, *11-12.

In *Chairez v Cherokee Bindery*, a WCAB panel decision, there appears to have been an untimely UR determination. The WCAB panel held, "the WCJ should consider that even if it is determined that a utilization review is untimely or otherwise invalid, the applicant still has a burden of proving that the requested treatment conforms with the requirements of Labor Code section 4604.5 by showing that it is in accord with the appropriate guidelines, or by rebutting the presumption of reasonableness of treatment in accord with those guidelines, or by showing that a variance from those guidelines is reasonably required to cure and relieve applicant from the effects of his industrial injury." *Chairez*, 2012 Cal. Wrk. Comp. P.D. LEXIS 506, at page 9.

In *Flores v. Harbor Rail Transportation*, a WCAB panel decision, it was held that "defendant's failure to conduct utilization review does not relieve applicant of the evidentiary burden of showing, by a preponderance of the evidence, that the requested medical treatment is reasonably required to cure or relieve the effects of his injury. *Flores v. Harbor Rail Transp*., 2013 Cal. Wrk. Comp. P.D. LEXIS 14, *18.

In *Ruvalcaba v. Cal. Community News*, a WCAB panel decision, the failure to UR treatment did not make defendant automatically liable for treatment, or relieve the lien

claimant of its burden to establish that treatment rendered was consistent with ACOEM Guidelines or that variance from ACOEM Guidelines was reasonable. *Ruvalcaba v. Cal. Community News*, 2014 Cal. Wrk. Comp. P.D. LEXIS 136.

In summary, an untimely UR should not amount to an automatic award of the disputed medical care. The WCAB can only award medical treatment if there is an opinion that the disputed medical treatment is warranted under the Medical Treatment Utilization Schedule, or falls under one of the ranked standards of § 4610.5.

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