Darren P. Wong (SBN 170304)
State Compensation Insurance Fund
2275 Gateway Oaks Drive #200
Sacramento, CA 95833

Mailing Address: P.O. Box 3171
Suisun City, CA 94585-6171

Telephone: 916-924-5012

Attorney for Defendant
State Compensation Insurance Fund

SP604521
01519234

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE DUBON,

Applicant,

v.

WORLD RESTORATION, INC. AND STATE COMPENSATION INSURANCE FUND,

Defendants.

ADJ4274323 (ANA 0387677)
ADJ1601669 (ANA 0388466)

PETITION FOR RECONSIDERATION of the OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)

Defendant STATE COMPENSATION INSURANCE FUND, the workers' compensation insurance carrier for WORLD RESTORATION, INC., hereby petitions for reconsideration of the OPINION AND DECISION AFTER RECONSIDERATION (EN BANC) issued on February 27, 2014 by the Workers' Compensation Appeals Board (Appeals Board), on the grounds that:

1. By the order, decision or award the Appeals Board acted without or in excess of its powers;

2. The evidence does not justify the findings of fact.

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ARGUMENTS

1. The Appeals Board no longer has authority over issues of utilization review timeliness and or compliance with statutes and regulations.
2. The Appeals Board no longer has authority over issues of medical necessity.
3. If the Appeals Board again finds it has authority over utilization review timeliness and or compliance with statutes and regulations, it should make appropriate rulings on such issues and then allow IMR to determine medical necessity.
4. It is the responsibility of the requesting physicians to provide all supporting documentation for their requests for authorization.
5. The DWC regulation and WCAB rule granting the Appeals Board authority over utilization review issues, other than the limited grounds for appeal of an IMR decision, are invalid because they exceed the scope of the Labor Code.

STATEMENT OF FACTS

On September 23, 2013, the WCJ issued her decision. The applicant filed a timely petition for reconsideration. On October 23, 2013 the WCJ issued her Report and Recommendation on Reconsideration. On December 16, 2013, the Appeals Board granted reconsideration to further study the factual and legal issues presented. On February 27, 2014 the Appeals Board issued its en banc decision which is the subject of this Petition for Reconsideration. The Appeals Board found:

1. IMR solely resolves disputes over the medical necessity of treatment requests. Issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB.

2. A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.
3. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.
4. If there is a timely and valid UR, the issue of medical necessity shall be resolved through the IMR process if requested by the employee.

The Appeals Board further found invalid the utilization review decision denying the surgery and returned the matter to the trial Judge to determine whether applicant's recommended spinal surgery is medically necessary.

DISCUSSION

The Appeals Board no longer has authority over issues of utilization review timeliness and or compliance with statutes and regulations.

The Legislature intended for IMR to address any dispute over a utilization review decisions. This includes issues of timeliness and or compliance with statutes and regulations regarding the utilization review decision. The Legislature's intent can be found in the plain meaning of Labor Code § 4610.5(a) and (b), which provide:

> (a) This section applies to the following disputes:
>
> (1) Any dispute over a utilization review decision regarding treatment for an injury occurring on or after January 1, 2013.

> (2) Any dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.
>
> (b) A dispute described in subdivision (a) shall be resolved only in accordance with this section.

Based upon the clear and unambiguous meaning of Labor Code § 4610.5(a) and (b), the Legislature intended that "any dispute" over utilization review decisions "shall be" resolved under § 4610.5. According to Labor Code § 15, "Shall" is mandatory and "may" is permissive. Thus it is mandatory that any dispute, including issues of timeliness and or compliance with statutes and regulations regarding utilization review decisions, be resolved through the IMR process found in § 4610.5. It is highly unlikely that a Court of Appeal would somehow find issues of timeliness and or compliance with statutes and regulations regarding utilization review decisions do not fall within the definition of "any dispute" under § 4610.5(a) and (b). The Courts have consistently held that when the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388).

Petitioner respectfully contends the Appeals Board incorrectly relies upon Labor Code § 4604 as conferring authority to determine whether a utilization review decision is timely and or in compliance with statutes and regulations. The Appeals Board wrote:

> As amended by SB 863, however, section 4604 still vests the WCAB with jurisdiction to determine all non-medical disputes regarding timeliness and other procedural matters governing UR. (Stats. 2012, ch. 363, § 40.) Specifically, section 4604 provides that: "[c]ontroversies between

> employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5."

(Opinion and Decision After Reconsideration at p. 6).

The Appeals Board therefore concluded that because the role of an IMR physician is limited to assessing medical necessity, disputes over whether a utilization review decision is timely and or in compliance with statutes and regulations must be resolved solely by the WCAB. This finding is contrary to the Legislature's expressed intent and the plain meaning of Labor Code § 4610.5(a) and (b) which unambiguously provides that IMR is to address "any" dispute involving utilization review decisions.

The Legislature expressly stated it intended for the Administrative Director to address such issues. Labor Code § 4610(i) provides in relevant part:

> If the administrative director determines that the employer, insurer, or other entity subject to this section has failed to meet any of the timeframes in this section, or has failed to meet any other requirement of this section, the administrative director may assess, by order, administrative penalties for each failure. A proceeding for the issuance of an order assessing administrative penalties shall be subject to appropriate notice to, and an opportunity for a hearing with regard to, the person affected. The administrative penalties shall not be deemed to be an exclusive remedy for the administrative director.

Thus, the Administrative Director has authority to not only impose administrative penalties for untimely or procedurally defective utilization review decisions but may

pursue other remedies as well. This authority is specifically granted to the Administrative Director. Significantly absent is any mention of the Appeals Board. If the Legislature had intended for issues of timeliness and or compliance with statutes and regulations governing utilization review to be within the jurisdiction of the Appeals Board they would have said so. See *California Compensation & Fire Co. v. Industrial Acci. Com.*, (1961) 193 Cal. App. 2d 6, 10; where the Court of Appeal stated in regard to a different statutory interpretation by the Industrial Accident Commission that, "Had the Legislature meant what the commission says it meant there seems little doubt but that it could have said so clearly."

Instead the Legislature enacted Labor Code § 4604 which states that controversies between employer and employee shall be determined by the Appeals Board except as otherwise provided by section 4610.5. And § 4610.5(a) and (b) which specifies that IMR is to address "any dispute" over a utilization review decisions. Moreover, the Legislature specifically stated that a utilization review decision may be reviewed only by independent medical review and that an employer shall have no liability unless the utilization review decision is overturned by independent medical review. Labor Code § 4610.5(e) provides:

> A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section. Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section.

Thus, the plain meaning of Labor Code § 4610.5(e) demonstrates that the Legislature did not intend for the Appeals Board to "review" issues of utilization review timeliness and or compliance with statutes and regulations. Such issues are to be reviewed only by independent medical review. When read together it is without question that these statutes demonstrate the Legislature intended for the Appeals Board to have no authority over issues of utilization review timeliness and or compliance with statutes and regulations.

The rules governing statutory construction are well established. The Appeals Board's objective should be to ascertain and effectuate the Legislature's intent. *(City of Huntington Beach* v. *Board of Administration* (1992) 4 Cal.4th 462, 468; *Mejia* v. *Reed* (2003) 31 Cal.4th 657, 663). In determining legislative intent, the Appeals Board should look to the statutory language itself. *(Mejia* v. *Reed, supra,* 31 Cal.4th at p. 663). If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. *(Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735). But the plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. *(Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387). Thus, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. *(Moore v. Panish* (1982) 32 Cal.3d 535, 541; see also *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *City of Huntington Beach* v. *Board Administration, supra,* 4 Cal.4th at p. 468). Where several codes are to be construed, they must be regarded as blending into each other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof. *(Tripp v. Swoap* (1976) 17 Cal.3d 671, 679, *Mejia* v. *Reed, supra,* 31 Cal.4th at p. 663.)

When an examination of statutory language in its proper context fails to resolve an ambiguity, Courts also may turn to the legislative history of an enactment as an aid to its interpretation. (See, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239; "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *(Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387.) If ambiguity still remains courts cautiously take the third and final step in statutory construction and "apply reason, practicality, and common sense to the language at hand." *(Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1239; see also, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663.) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. *(Dyna-Med, Inc.* v. *Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387). In this case, the interpretation that best follows the plain meaning of the aforementioned Labor Code sections and also ensures that all are harmonized and have effect is that the Appeals Board has no authority over issues of timeliness or compliance with statutes and or regulations governing utilization review.

The Appeals Board no longer has authority over issues of medical necessity.

Even if the Appeals Board has authority over issues of utilization review timeliness and or compliance with statutes and regulations, nowhere did the Legislature state that if a utilization review is found invalid, then the issue of medical necessity is not subject to IMR but is to be determined by the Appeals Board. In this case the Appeals Board finds:

> Where there is no valid UR decision subject to IMR, the issue of medical necessity must be determined by the WCAB. (Lab. Code, §§ 4604 ("[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, ... *except as otherwise provided by Section 4610.5*" (italics added)); 5300 (providing that "except as otherwise provided in Division 4," the WCAB has exclusive initial jurisdiction over claims "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto").)

(Opinion and Decision After Reconsideration at p. 13).

The Appeals Board appears to find implicit authority to address medical necessity issues when they determine the utilization review decision is invalid. However, such a finding is directly contrary to the expressed intent of the Legislature to make IMR the exclusive method for resolving disputes over medical necessity. As noted above, based upon the language of Labor Code § 4610.5(a) and (b), the IMR process applies to "any dispute" over utilization review decisions. This includes disputes over medical necessity. Moreover, as noted above, the Legislature specifically stated in Labor Code § 4610.5(e) that a utilization review decision may be "reviewed" only by independent medical review and that an employer shall have no liability unless the utilization review decision is overturned by independent medical review. The language in Labor Code § 4610.5(e) is unequivocal. Petitioner respectfully contends the holding of the Appeals Board would rewrite section 4610.5(e) to read an employer shall have no liability unless the utilization review decision is overturned by independent medical review or the Appeals Board finds the utilization review decision is invalid. Such a reading is entirely in conflict with the plain meaning of section 4610.5(e). Moreover, Labor Code § 4610.5(k) provides in relevant part that if there appears to be any medical necessity issue, the dispute "shall" be

resolved pursuant to an independent medical review. And Labor Code § 4610.6(i) provides that in no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.

These statutes leave no doubt that the Legislature did not intend for the Appeals Board to review the issue of medical necessity if it found the utilization review decision is invalid. To the contrary, the Legislature has made it abundantly clear that IMR is to be the exclusive method for resolving disputes over medical necessity. A Court must apply the plain language of the statute if it is unambiguous on its face. (*Lewis v. Superior Court* (1999) 19 Cal. 4th 1232, 1245).

To reinforce the point even more the Legislature included in SB 863 uncodified section 1(d) which declares the Legislature's recognition of problems with the Appeals Board resolving disputes over medical necessity:

> That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.

(Stats. 2012, ch. 363, § 1(d) [uncodified].)

Furthermore, uncodified section 1(e) is evidence of the Legislatures intent to have IMR replace the Appeals Board as the arbiter of medical necessity disputes. Section 1(e) states:

> That having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to

> using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy.

(Stats. 2012, ch. 363, § 1(e) [uncodified].)

In addition, uncodified section 1(g) declares the Legislature's plenary power to provide for the settlement of "any disputes" arising under the workers' compensation laws:

> That the establishment of independent medical review and provision for limited appeal of decisions resulting from independent medical review are a necessary exercise of the Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of this state and to control the manner of review of such decisions.

(Stats. 2012, ch. 363, § 1(g) [uncodified].)

Moreover, the Legislature's intent to replace the Appeals Board with IMR as arbiter of medical necessity issues is expressly stated in the Legislative history. The report of the Senate Committee on Labor and Industrial Relations dated September 1, 2012 at pgs. 7 and 8 states:

> SB 863 proposes to change the way medical disputes are resolved. Currently, when there is a disagreement about medical treatment issues, each side attempts to obtain medical opinions favorable to its position, and then counsel for each side tries to convince a workers' compensation judge based on this evidence what the proper treatment is. This system of

> "dueling doctors" with lawyers/judges making medical decisions has resulted in an extremely slow, inefficient process that many argue does not provide quality results. Long delays in obtaining treatment result in poorer outcomes, reduced return to work potential and excessive costs in the system, none of which are good for injured workers. SB 863 would instead adopt an independent medical review system patterned after the long-standing and widely applauded IMR process used to resolve medical disputes in the health insurance system. Thus, a conflict-free medical expert would be evaluating medical issues and making sound medical decisions, based on a hierarchy of evidence-based medicine standards drawn from the health insurance IMR process, with workers' compensation-specific modifications. The bill contains findings that this system would result in faster and better medical dispute resolution than existing law. (See http://www.leginfo.ca.gov/bilinfo.html).

As noted above, "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *(Dyna-Med, Inc. v. Fair Employment & Housing Com., supra,* 43 Cal.3d at p. 1387).

If the Legislature had intended for the Appeals Board to decide medical necessity issues after a finding the utilization review decision is invalid it would have expressly said so. (*California Compensation & Fire Co. v. Industrial Acci. Com., supra,* 193 Cal. App. 2d at p. 10). Instead the Legislative history states the intent of SB 863 is to change the way medical disputes are resolved and the uncodified portions of SB 863 contain findings that IMR would result in faster and better medical dispute resolution than existing law. The Appeals Board making determinations of medical necessity is the existing law the Legislature intended to replace. The Appeals Board's finding in this

case is exactly what the Legislature wanted to avoid, which is a system of "dueling doctors" with lawyers/judges making medical decisions. The Appeals Board must find that IMR is the sole method for resolving medical necessity disputes.

If the Appeals Board again finds it has authority over utilization review timeliness and or compliance with statutes and regulations, it should make appropriate rulings on such issues and then allow IMR to determine medical necessity.

Assuming arguendo that the Appeals Board has authority over issues of utilization review timeliness and or compliance with statutes and regulations; the Appeals Board should, when appropriate, refer the Defendant to the Administrative Director to impose administrative penalties under Labor Code § 4610(i). The Appeals Board has made similar referrals in the recent past. (See *Romano v. Kroger Co.*, 2013 Cal. Wrk. Comp. P.D. LEXIS 125). The Appeals Board could also rule, after a finding the utilization review decision is invalid, that Labor Code § 4610(g)(6) does not apply. This would lift the bar to an injured worker renewing a treatment request for 12 months after the utilization review decision absent a documented material change in circumstances. Moreover, the Appeals Board could issue a finding that the Defendant's utilization review decision is invalid and order that the IMR reviewer cannot consider it. Such a system would allow the Appeals Board to hear issues of utilization review timeliness and or compliance with statutes and regulations while leaving IMR as the arbiter of medical necessity issues. Such orders would be entirely consistent with (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 73 Cal.Comp.Cases 981), wherein the Supreme Court held:

> The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34, § 9.)

> Accordingly, notwithstanding 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).

(*Id.* at p. 990).

The Supreme Court in *Sandhagen* in essence held that proving the utilization review decision is invalid does not automatically entitle the employee to receive the disputed treatment. The employee must carry their burden of proof notwithstanding whatever an employer does or does not do. But the Supreme Court did not address whether the Appeals Board or IMR must determine medical necessity after a finding that the utilization review decision is invalid because IMR did not exist when *Sandhagen* was decided.

The interpretation that harmonizes the various SB 863 statutes and takes into consideration the Legislative history is that after the Appeals Board finds the utilization review decision is invalid and orders that the IMR reviewer may not consider it, the employee must demonstrate to the IMR reviewer that the treatment request is consistent with the uniform guidelines or, alternatively, rebut the application of the guidelines with a preponderance of scientific medical evidence. This effectuates the Legislature's declared goal of having medical professionals ultimately determine the necessity of requested treatment in furtherance of the social policy of using evidence-based medicine to provide injured workers with the highest quality of medical care (See Labor Code § 1(e)); while also enabling the Appeals Board to review issues of utilization review timeliness and or compliance with statutes and regulations.

The employee may argue that the primary holding in *Sandhagen* precludes IMR from deciding issues of medical necessity if the Appeals Board finds the utilization review decision is invalid. In *Sandhagen* the Supreme Court held that a defendant must conduct UR for all medical treatment disputes and that, if a defendant fails to meet the timelines for UR under section 4610, it may not object to the recommended treatment through the procedures of section 4062. (*Id.* pgs. 985 and 986). Petitioner does not challenge the holding in *Sandhagen* and does not seek to use the section 4062 dispute resolution process. To the contrary, Petitioner seeks a finding requiring the employee carry their burden on medical necessity within the IMR process as required by sections 4610.5 and 4610.6 while also ordering when appropriate that the IMR reviewer may not consider an invalid utilization review decision. Such a finding is entirely consistent with *Sandhagen* and the Legislature's intent in enacting SB 863.

Moreover, such a finding would be entirely consistent with Cal. Code Regs., tit. 8 § 10451.2(c)(1)(C) which provides in relevant part:

> (c) Medical Treatment Disputes Not Subject to Independent Medical Review and/or Independent Bill Review:
>
> (1) Where applicable, independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely and otherwise procedurally proper utilization review (UR). . . .All other medical treatment disputes are non-IMR/IBR disputes. Such non-IMR/IBR disputes shall include, but are not limited to:
>
> . . . .
>
> (C) a dispute over whether UR was timely undertaken or was otherwise procedurally deficient; however, if the employee prevails in this assertion,

> the employee or provider still has the burden of showing entitlement to the recommended treatment;

Thus, under § 10451.2(c)(1)(C) a dispute over whether UR was timely undertaken or was otherwise procedurally deficient in a non-IMR/IBR issue to be resolved by the Appeals Board and if the employee prevails in this assertion, the employee still has the burden of showing entitlement to the recommended treatment. Moreover, Cal. Code Regs., tit. 8 § 10451.2(c)(3) provides that the employee must carry their burden within the IMR process if they prevail on a non-IMR/IBR dispute:

> If a non-IMR/IBR dispute is resolved in favor of the employee or the medical treatment provider, then any applicable IMR and/or IBR procedures established by the Labor Code and the Rules of the Administrative Director shall be followed.

Thus, under § 10451.2(c)(3) once the employee prevails on the issue of whether UR was timely undertaken or was otherwise procedurally deficient then any applicable IMR procedures shall be followed. In order to comply with § 10451.2 the WCAB Judge must make appropriate rulings, such as a finding the IMR reviewer may not consider the utilization review decision, and then allow IMR to determine medical necessity.

It is the responsibility of the requesting physicians to provide all supporting documentation for their requests for authorization.

In its Opinion and Decision After Reconsideration the Appeals Board finds that a Defendant is required to provide the utilization review physician with adequate medical

records. Notably, the Appeals Board does not provide any citation in support of this finding:

> If a UR decision is invalid because its integrity was undermined due to the defendant's failure to provide the UR physician with adequate medical records or because the UR physician failed to consider them, there is no valid UR determination and no basis for the employee to invoke IMR.

(Opinion and Decision After Reconsideration at p. 12).

Petitioner respectfully contends there is no obligation in the Labor Code or California Code of Regulations requiring a Defendant provide the utilization review physician with adequate medical records. It is not up to the claims adjuster to determine what medical records are necessary to support the RFA, especially considering the very short timeframes for completion of utilization review. That responsibility lies with the requesting physician. Labor Code § 4610(g)(B)(4) provides in relevant part:

> If a utilization review decision to 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.

Thus, the utilization review doctor is required to specify the information that is needed and communicate it to the requesting physician. Therefore, it is the responsibility of the utilization review physician to request sufficient medical records from the requesting physician and it is the requesting physician's responsibility to provide those records. Accordingly, failure by the Defendant to provide the utilization review physician with

adequate medical records does not result in a procedurally defective utilization review decision.

The DWC regulation and WCAB rule granting the Appeals Board authority over utilization review issues, other than the limited grounds for appeal of an IMR decision, are invalid because they exceed the scope of the Labor Code.

Cal. Code Regs., tit. 8 § 9792.10.1 provides that an employer will have liability if the utilization review decision is overturned by IMR or the Appeals Board. Cal. Code Regs., tit. 8 § 9792.10.1(a) states in relevant part:

> Neither the employee nor the claims administrator shall have any liability for medical treatment furnished without the authorization of the claims administrator if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review *or the Workers' Compensation Appeals Board* under this Article. (Emphasis added).

Cal. Code Regs., tit. 8 § 9792.10.1(a) exceeds the authority granted by Labor Code § 4610.5(e) which as noted above provides neither the employee nor the employer shall have any liability for medical treatment if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review. There is no reference to the employer having liability if the Appeals Board overturns the utilization review decision in Labor Code § 4610.5(e).

In addition, Cal. Code Regs., tit. 8 § 10451.2 is in conflict with the Labor Code. This is the regulation that gives the Appeals Board jurisdiction to determine whether UR

was timely undertaken or was procedurally deficient. For reasons noted above the Appeals Board no longer has authority over issues of utilization review timeliness and or compliance with statutes and regulations. Thus Cal. Code Regs., tit. 8 § 9792.10.1(a) and Cal. Code Regs., tit. 8 § 10451.2 must be found invalid by the Appeals Board under Government Code § 11342.2 which states in relevant part, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute."

Moreover, the Appeals Board must strike down the above noted regulations based upon Labor Code § 5300(f) and *Mendoza v. Huntington Hospital Workers' Comp. Appeals Bd.* (2010) 75 Cal.Comp.Cases 634, 640 (Appeals Board en banc) [discussing the WCAB's jurisdiction to determine the validity of Rule 30(d)(3)].) As the court of Appeal stated in *Boehm & Associates v. Workers' Comp. Appeals Bd.*, (1999) 76 Cal. App. 4th 513, 518-519:

> [W]e note that the Legislature possesses the plenary constitutional authority to create and enforce a workers' compensation system (Cal. Const., art. XIV, § 4); therefore, any decision of the appeals board or regulation promulgated by the Director of the Division of Workers' Compensation in contradiction to the Workers' Compensation Act is invalid. (See Coca-Cola Co. v State Bd. of Equalization (1945) 25 Cal.2d 918, 922 [156 P.2d 1][administrative regulations may not contravene terms of statutes under which they are adopted]).

Petitioner respectfully contends the above noted regulations contravene the terms of the statutes under which they were adopted.

CONCLUSION

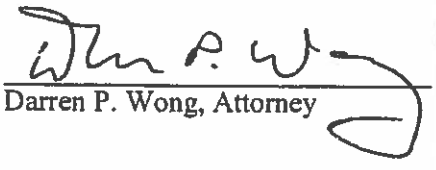
For the foregoing reasons the finding in this case should be annulled and a new finding should issue holding the Appeals Board has no jurisdiction over issues of utilization review timeliness and or compliance with statutes and regulations and issues of medical necessity. As an alternative, the if the Appeals Board again finds it has authority over utilization review timeliness and or compliance with statutes and regulations, it should make appropriate rulings on such issues and then allow IMR to determine medical necessity.

WHEREFORE, Defendant State Compensation Insurance Fund respectfully prays that this Petition for Reconsideration be granted, that the OPINION AND DECISION AFTER RECONSIDERATION (EN BANC) dated February 27, 2014 be set aside, that the Appeals Board issue a new decision finding that the Appeals Board has no jurisdiction over issues of utilization review timeliness and or compliance with statutes and regulations and issues of medical necessity or as an alternative, if the Appeals Board again finds it has authority over utilization review timeliness and or compliance with statutes and regulations, it should make appropriate rulings on such issues and then allow IMR to determine medical necessity, and that the Board make such other and further orders as it deems just and proper.

Dated: March 24, 2014

Respectfully submitted,

STATE COMPENSATION INSURANCE FUND

By: 
Darren P. Wong, Attorney

VERIFICATION - CCP 446, 2015.5

I am the attorney for State Compensation Insurance Fund in the above-entitled action or proceeding. I have read the foregoing **PETITION FOR RECONSIDERATION** and know the contents thereof. I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 24, 2014 at Sacramento, California.

Darren P. Wong

SCIF INSURED SANTA ANA
CELIA TAPIA-SOTO
714-565-5899
CTAPIA-SOTO@SCIF.COM

PROOF OF SERVICE BY MAIL - CCP 1013a, 2015.5

I declare that I am employed in the County of Orange, State of California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1750 East Fourth Street, Suite 550, Santa Ana, California 92705-3909. On March 24, 2014, I served the attached **PETITION FOR RECONSIDERATION OF THE OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)** on the interested parties in said cause, by placing a true copy thereof, enclosed in an envelope addressed as follows:

Maurice L. Abarr, Esq.
Law Office of Maurice L. Abarr
201 East Sandpointe, Suite 480
Santa Ana, CA 92707

Jose F. Dubon
1904 East Willow Street
Anaheim, CA 92805

World Restoration Inc.
893 North Batavia Street
Orange, CA 92868

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice such envelope would be sealed and deposited with U.S. postal service on that same day with postage thereon fully prepaid at Santa Ana, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 24, 2014, at Santa Ana, California.

S MICHELLE FLORENTINE
Michelle Florentine

Jose F. Dubon
01519234
ADJ4274323