

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

WCAB Case No. ADJ3299212 (MF); ADJ1198812; ADJ943529
MON 0205468; MON0241022; MON0241021

LISA WEILMANN VS. UNITED TEMPORARY SERVICES;
TIG/ZENITH

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: HON. YVONNE R. JONES

DATES OF INJURY: 4/90 through 2/95

**REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

**I.
INTRODUCTION**

Lisa Weilmann, born 3/24/1958, while employed during the period 4/90 through 2/95 as a word processor/HR manager at Brea, California, by United Temporary Services sustained injury arising out of and in the course of employment to bilateral upper extremities, neck, fibromyalgia, and psyche.

Petitioner contends the following:

1. That pursuant to Labor Code Section 4610.5 any dispute over a utilization review decision is subject to the Independent Medical Review (IMR).

2. There is no statutory authority or supporting case law that requires that the physician that reviews the treatment to request was also personally sign his or her decision when rendered.
3. There is no specific requirement that the doctors assigned to review the treatment request has to be licensed to practice in the same specialty as the doctor from whom the treatment request is originally made.
4. UR was conducted in a valid manner even without the review of the AME report and/or the entire medical record.

II.

SUMMARY OF FACTS

The parties resolved the case by Stipulations and Award on 7/18/02. The award provided future medical treatment to bilateral upper extremities, neck, fibromyalgia, and psyche. Dr. Seymour Levine, a rheumatologist, serves as an AME and has served in that capacity since November 19, 2001. Board Exhibits Y medical report of Dr. Levine dated 3/21/08, page 1). On May 7, 2007 Steven B. Graff-Radford, D.D.S , a dentist and expert on headaches referred Applicant to Dr. Venuturupalli, a rheumatologist. (Board Exhibit Y page 3.)

The Petition for Reconsideration relates to four UR denials that were submitted by Applicant's physicians which are as follows:

1. A request for Botox to treat migraine headaches was submitted by Dr. Venuturupalli on 8/30/13. (Exhibit B). It is undisputed that the request was received by Genex, Petitioner's utilization review company, on 8/30/13, reviewed by Genex and a timely modified certification of the medication Botox issued on 9/9/13. (Exhibit B). The reviewer was Dr. Eddie Sassoon, M.D., American Bd. of Physical Medicine and Rehabilitation, CA-C43258.
2. A request for Xyrem for shoulder tendinitis was submitted by Dr. Venuturupalli on 9/9/13. (Exhibit D). It is undisputed that Genex issued a timely non-certification of the medication, Xyrem on 9/16/13. (Exhibit D). The review was done by Dr. Colby Young, M. D. American Bd. of Orthopedic Surgery. CA-A 62978.
3. A request for Botox for migraine headaches although reason not given was submitted by Dr. Steven B. Graff-Radford, D.D.S on 9/19/13 for 200 units of Botox every 3 month for a year for headaches.(Exhibit C). It is undisputed that Genex issued a timely non-certification for Botox on 9/26/13. (Exhibit C). The review was done by Dr. John Obermiller M.D. American Bd. of Physical Medicine and Rehabilitation. CA-C 53716.

4. A review for Xyrem for insomnia was submitted by Dr. Venuturupalli on 9/5/13. (Exhibit A). It is undisputed that it was received by Genex on 10/2/13, was reviewed and a timely non-certification issued on 10/9/13. (Exhibit A). The review was done by Dr. Jamie Lee Lewis M.D. Physical Medicine and Rehabilitation, Bd. Certified in Pain Medicine. CA-A 83972.

III.

DISCUSSION

1. **Issues of timeliness and compliance with statutes and regulations covering UR are legal disputes within the jurisdiction of the WCAB.**

In **Dubon** the Board issued an *en banc* Opinion and Decision After Reconsideration on 2/27/14 and stated the following:

“As amended by SB 863, section 4604 still possess the WCAB with jurisdiction to determine all non-medical disputes regarding timeliness and other procedural matters governing UR. 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.

In 2013, based on the foregoing statutory provisions and on its general rulemaking authority, the WCAB adopted Rule 10451.2 (c) (1) provides, in pertinent part:

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 disputes. Such non-IMR 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....Still has the burden of showing entitlement to the recommended treatment..."(Emphasis added.)

According to Dubon, supra, the issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB. Hence the WCAB has jurisdiction to determine the validity of the UR done contrary to the assertions of Petitioners.

2. **A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision.**
 - a. **The absence of a signature on the UR decision is not a minor defect.**

Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination. Dubon, supra, the determination as to whether a

defect is minor or immaterial is to be determined by the trier of fact. Here the Petitioner argues that the failure of the reviewer to sign the non-certification is a minor defect and is perhaps curable.

A UR determination which is not signed by the reviewer is not inadmissible pursuant to Regs 10606 but will be considered in weighing the evidence. Here none of the UR decisions were signed. (Exhibit A through Exhibit D) The absence of signatures in the opinion of this WCJ is not a minor defect in that without a signature this WCJ gives the decisions little weight on the issue of compliance with UR procedures.

b. **This WCJ erred when she found that the physicians that issued the UR de-certifications that these medical treatment services were not within the scope of the physician's practice**

Labor code section 4610 (e) provides the following:

“No person other than a licensed physician who is **competent to evaluate the specific clinical issues involved in the medical treatment services, and where these services are within the scope of the physician's practice,** requested by the physician may modify, delay, or deny request for authorization of medical treatment for reasons of medical necessity to cure and relieve.”

Labor code 4610 (e) has a two-tier test. First it must be found that the doctors competent to evaluate the specific clinical issues. Second, the services must be within the scope of the physician's practice.

1. In the UR Decision for decertification of the Dr. Venaturupalli's request for Botox for migraine headaches, the reviewer Eddie Sassoon, M.D. is a member of him his or her own is a will or is he my client will be rating meaning and is in minor is a school as a gross and a is a him in all move in his the American Bd. of Physical Medicine and Rehabilitation. It is within the jurisdiction of this WCJ to determine whether the physician is competent to evaluate the specific clinical issues involved in the medical treatment services and whether the services are within the scope of his practice.

The American Academy of Physical Medicine and Rehabilitation defines this field of medicine as follows:

“Physical medicine and rehabilitation (PM&R), also called physiatry, is the branch of medicine emphasizing the prevention, diagnosis, and treatment of disorders – particularly related to the nerves, muscles, and bones – that may produce temporary or permanent impairment. PM&R is one of 24 medical specialties certified by the American Board of Medical Specialties. PM&R provides integrated care in the treatment of conditions related to the

brain, muscles, and bones, spanning from traumatic brain injury to lower back pain.”

From the description of the specialty and it appears that these services are within the scope of the physician's practice however it is not clear if he is competent to evaluate the specific clinical issues involved in determining the request for Botox for migraine headaches.

2. A request for Xyrem shoulder tendinitis was submitted by Dr.

Venuturupalli on 9/9/13. (Exhibit D). It is undisputed that a timely non-certification issued on 9/16/13 (Exhibit D). The review was done by Dr.

Colby Young, M. D. American Bd. of Orthopedic Surgery. CA-A 62978.

The American Board of Medical Specialties describes an orthopedic surgeon as follows:

“They manage special problems of the musculoskeletal system involving the following:

Diagnosis of injury or disorder

- **Treatment** with medication, exercise, surgery or other treatment plans.
- **Rehabilitation** by recommending exercises or physical therapy to restore movement, strength and function.
- **Prevention** with information and treatment plans to prevent injury or slow the progression of diseases. “

From the description of the specialty and it appears that these services are within the scope of Dr. Colby’s practice however it is not clear if he is competent

to evaluate the specific clinical issues involved in determining the request for Xyrem for shoulder tendinitis.

3. A request for Botox for migraine headaches was submitted by Dr. Steven B. Graff-Radford, D.D.S on 9/19/13. (Exhibit C). It is undisputed that a timely non-certification issued on 9/26/13. (Exhibit C). The review was done by Dr. John Obermiller M.D. American Bd. of Physical Medicine and Rehabilitation. CA-C 53716.

From the description of the specialty from American Bd. of Physical Medicine and Rehabilitation, it appears that these services are within the scope of Dr. Obermiller's practice however it is not clear if he is competent to evaluate the specific clinical issues involved in determining the request for Botox for migraine headaches.

4. A review for Xyrem for insomnia was submitted by Dr. Venuturupalli on 9/5/13. (Exhibit A). It is undisputed that a timely non-certification issued on 10/9/13. (Exhibit A). The review was done by Dr. Jamie Lee Lewis M.D. Physical Medicine and Rehabilitation, Bd. Certified in Pain Medicine. CA-A 83972.

From the description of the specialty from American Bd. of Physical Medicine and Rehabilitation, it appears that these services are within the scope of Dr. Lewis' practice however it is not clear if she is competent to evaluate the

specific clinical issues involved to determine the request for Xyrem for insomnia.

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- c. **In the opinion of this WCJ the UR reviewers were not given sufficient medical records to determine the medical necessity of the treatment requested.**

The scope of section 4610 requirement that every employer shall establish a utilization process in compliance with this section and that utilization review process shall be governed by written policies and procedures (4610(c), it is not limited to his timeliness mandates. Section 4610 expresses that UR decision should be based on the information that is reasonably necessary to make the determination and that if the decision to delay or deny is based on incomplete or insufficient information, the UR decision shall specify the additional information needed. **Dubon, supra.**

The UR physician is to be provided with a reviewed sufficient medical records to determine the medical necessity of a treatment request.

1. In the first request from Dr. Venuturupalli and dated 8/30/13 (Exhibit

B) the reviewer made his determination on the following documents:

-Health insurance claim form, 5/6/13

-Office visit, Dr. Swamy Venuturupalli, 4/19/13 and 7/23/13

- Atty. letter, 8/22/13

- The report of Dr. Graff-Radford DDS 8/17/12

2. In the request from Dr. Venuturupalli dated 9/9/13 (Exhibit D), the reviewer based his determination on the following:

- 8/17/12-Evaluation notes by Steven Graff-Radford, D.S.S

- 7/23/13: Evaluation notes by Bryant Uy, PA

- 8/20/13-Pain Center letter

- 8/22/13-Attorney Letter

- 9/5/13-DWC form RFA

3. In the request from Dr. Graff Radford dated 9/19/13, (Exhibit C), the reviewer based his determination on the following:

- Office note from Steven B. Graff-Radford dated 8/20/13

- State of California Division of Workers' Compensation

Request for Or authorization for Medical Treatment form RFA from Dr. Graff Radford dated 9/19/13.

4. In the request from Dr. Venuturpalli and dated 9/5/13 (Exhibit A) the reviewer basis termination of the following:

- Progress noes from Dr.Venuturupalli dated 7/23/13, 9/5/13, an undated

- Progress notes from Dr. Graff-Radford dated 8/20/13, 9/19/13

- Miscellaneous information dated 8/30/13, 9/9/13, 9/30/13, 10/1/13, and 10/2/13

Applicant suffers from fibromyalgia which is a disease in which the brain and spinal cord over-interpret sensation. Rheumatologists are pain management experts, so it would make sense for them to see people with fibromyalgia. AME Dr. Seymour Levine is a rheumatologist. Dr. Venuturupalli, the referring doctor is also a rheumatologist and both have seen Applicant since 2008. According to the medical reports of Dr. Levine dated 9/2/09 and 11/4/12, 3/21/08 (Exhibit XX and Exhibit Z and Exhibit Y, respectively),

Applicant's condition is very complicated. Over the years, the doctors have spent a lot of time trying to prescribed medication which will relieve her pain. In his report dated 3/21/08 (Exhibit Y), Dr. Levine believes the patients with fibromyalgia are best served by being in the hands of providers knowledgeable about this chronic pain syndrome. Dr. Levine also stated that Dr. Venuturpalli is a very capable rheumatologist.

According to Dr. Levine, Applicant has seen Dr. Graff-Radford D.S.S. on a regular basis. Dr. Levine further stated that he knows Steve Graff-Radford D.S.S. personally and that Dr. Graff-Radford is well known throughout the medical community for his expertise in treating headaches such as migraine headaches. He also has considerable expertise in the treatment of temporomandibular joint

syndrome and chronic myofascial pain that may accompany temporomandibular syndromes. Dr. Graff Radford is a well-respected member of Cedars-Sinai Pain Center.

Because of the complexity of the case the UR reviewers should have either asked for the prior medical reports of the AME or the prior reports should have been given to them.

AME Dr. Levine reported that Xyrem has been studied in patients with fibromyalgia and there are publications regarding its value in the syndrome in terms of decreasing the chronic pain, improving the disturbance in mood, and improving the disturbances sleep that characterizes the fibromyalgia syndrome. (Bd. Exhibit Y at page 11). The reviewer's should have been given all 3 of Dr. Levine's reports in order for them to make a medical determination as to the medical necessity of Botox and Xyrem for this Applicant.

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.



Yvonne Jones
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

DATED: MARCH 6, 2014

SERVED ON: 3/7/14

LISA WEILMANN
ROWEN GURVEY VAN NUYS
SHAW JACOBMEYER ENCINO
TIG INSURANCE COMPANY

BY: *Augustine Boccone*