

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. LBO 0340807**

4 **LISA SIMMONS,**

5 *Applicant,*

6 **vs.**

7 **STATE OF CALIFORNIA, DEPT. OF**  
8 **MENTAL HEALTH (METROPOLITAN**  
9 **STATE HOSPITAL), Legally Uninsured; and**  
10 **STATE COMPENSATION INSURANCE**  
11 **FUND (Adjusting Agent),**

12 *Defendant(s).*

**OPINION AND DECISION**  
**AFTER RECONSIDERATION**  
**(EN BANC)**

13 The Appeals Board granted reconsideration of the May 6, 2004 Findings and Award  
14 issued by the workers' compensation administrative law judge (WCJ), to further study the record  
15 and the applicable law. This is our Decision After Reconsideration.

16 Lisa Simmons (applicant) sustained an industrial injury to her right shoulder and bilateral  
17 wrists on August 20, 2002. At the time of her injury, she was employed as a janitor by the State  
18 of California, Department of Mental Health (Metropolitan State Hospital), legally uninsured and  
19 adjusted by State Compensation Insurance Fund (collectively, SCIF).

20 In his May 6, 2004 decision, the WCJ found that right shoulder surgery is necessary to  
21 cure or relieve the effects of applicant's injury. Moreover, the WCJ determined that the  
22 utilization review reports of Patricia D. Pegram, M.D., which SCIF had obtained to determine  
23 the medical necessity of the proposed right shoulder surgery, are not admissible in evidence  
24 because they are not the reports of an examining or treating physician.

25 In its petition for reconsideration, SCIF contends in substance: (1) that the utilization  
26 review reports of Dr. Pegram should have been received in evidence consistent with the  
27  
28

1 utilization review process established by Labor Code section 4610;<sup>1</sup> (2) that the intent of section  
2 4610 is to provide an expedited and efficient method for defendants to determine the medical  
3 necessity of proposed treatment and to eliminate the agreed medical evaluator (AME) and  
4 qualified medical evaluator (QME) procedures set forth in section 4062; (3) that, under section  
5 4604.5(c), in effect at the time of the April 28, 2004 trial, the American College of Occupational  
6 and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM guidelines)  
7 are presumptively correct on the issue of extent and scope of medical treatment; and (4) that,  
8 because Dr. Pegram's utilization review reports are presumed to be correct under section  
9 4604.5(c), and because applicant did not offer any evidence establishing that a variance from the  
10 ACOEM guidelines is reasonably required to cure or relieve her from the effects of her injury,  
11 applicant is not entitled to right shoulder surgery on an industrial basis.

12 Applicant did not file an answer to defendant's petition. The WCJ, however, prepared a  
13 Report and Recommendation on Petition for Reconsideration (Report) recommending that the  
14 May 6, 2004 decision be affirmed.

15 Because of the important legal issue presented, and to secure uniformity of decision in  
16 the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned  
17 this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, §115.)<sup>2</sup>

18 Based on our review of the relevant statutory and case law, we hold:

- 19 (1) If a defendant undertakes utilization review to determine whether a  
20 proposed treatment is medically necessary, and if the utilization  
21 review physician finds that the treatment is medically necessary but  
22 raises questions as to whether the treatment is industrially-related, the  
23 utilization review report is admissible in evidence for the limited  
24 purposes of establishing: (a) utilization review was undertaken and

25 <sup>1</sup> All further statutory references are to Labor Code.

26 <sup>2</sup> The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and  
27 WCJs. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*  
28 (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Board*  
(2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, §11425.60(b).)

1 the date(s) of the utilization review physician’s report(s); (b) the  
2 utilization review physician found the proposed treatment to be  
3 medically necessary; and (c) the utilization review process has  
4 resulted in a dispute as to whether the industrial injury caused or  
5 contributed to the need for the treatment;

6 (2) A utilization review physician’s report is *not* admissible for the  
7 purpose of determining whether the industrial injury caused or  
8 contributed to the need for a particular treatment, i.e., a utilization  
9 review physician may address only the issue of whether a particular  
10 treatment is *medically necessary*;

11 (3) Where a utilization review physician finds that a treatment is  
12 medically necessary but questions whether the need for that treatment  
13 is causally related to the industrial injury, the defendant must either:  
14 (a) authorize the treatment; or (b) timely deny authorization based on  
15 causation within the deadlines set forth in section 4610(g)(1); timely  
16 communicate the denial based on causation to both the treating  
17 physician and the applicant within the deadlines set forth in section  
18 4610(g)(3)(A); and timely initiate the AME/QME process within 20  
19 days of the receipt of the utilization of physician’s report, if the  
20 employee is represented by an attorney, or 30 days, if the employee is  
21 unrepresented, in accordance with section 4062(a);<sup>3</sup> and

22 (4) Although the ACOEM guidelines are “presumptively correct on *the*  
23 *issue of extent and scope of medical treatment*” (Lab. Code,  
24 §4604.5(c) (emphasis added)), they are *not* presumptively correct on  
25 the issue of whether a need for medical treatment is causally related  
26 to the industrial injury.

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27 <sup>3</sup> In reaching this holding, we are *not* addressing any issues relating to proposed spinal surgery under  
28 sections 4610(g)(3)(A) & (B) and 4062(b).

1           Moreover, while this case involves the issue of whether treatment for an admitted  
2 industrially injured body part is causally related to the industrial injury, similar reasoning and  
3 principles will apply in the context of cases where injury to one body part is admitted but injury  
4 to another body part is denied. In such cases, a utilization review physician's reports will *not* be  
5 admissible on the issue of whether the disputed body part is industrial. If in prescribing  
6 treatment for the disputed body part, the treating physician either explicitly or implicitly  
7 determines for the first time that the injury to the disputed body part is industrial, then utilization  
8 review is *not* appropriate. Instead, the defendant must initiate the AME/QME process within the  
9 deadlines established by section 4062(a).<sup>4</sup>

10           Here, the WCJ's May 6, 2004 decision finding that right shoulder surgery is necessary to  
11 cure or relieve from the effects of applicant's injury does not fully comply with the principles  
12 above. Accordingly, we will rescind the decision. Instead, we will admit Dr. Pegram's  
13 utilization review reports for the limited purposes of establishing: (1) that utilization review was  
14 undertaken and the dates of Dr. Pegram's utilization review reports; (2) that Dr. Pegram  
15 considered the proposed right shoulder surgery to be medically necessary; and (3) that, as a  
16 result of Dr. Pegram's utilization review, a dispute arose over whether applicant's injury caused  
17 or contributed to her need for right shoulder surgery.

18           When SCIF received Dr. Pegram's utilization review reports questioning whether  
19 applicant's need for right shoulder surgery was causally related to her industrial injury, SCIF did  
20 *not* initiate the AME/QME process under section 4062(a). Until now, no binding Appeals Board  
21 or Court of Appeal decision has interpreted the procedure to be followed when a utilization  
22 review physician finds a treatment to be reasonably necessary but questions whether the  
23 treatment is industrially-related. Therefore, in this case, we will remand the matter to the WCJ  
24 to allow SCIF a reasonable time to initiate the AME/QME procedure. After completion of the  
25 AME/QME procedure, the WCJ should again determine the issue of applicant's entitlement to  
26 right shoulder surgery.

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27 <sup>4</sup> If no body part is accepted as industrial, the parties must follow the procedures set forth in section  
28 4060.

1 **I. BACKGROUND**

2 Applicant sustained an injury to her right shoulder and both wrists on August 20, 2002.

3 She was initially diagnosed with adhesive capsulitis of the right shoulder. She was  
4 placed on temporary total disability until October 15, 2002, when she returned to modified duty.  
5 She again became temporarily totally disabled on October 29, 2002.

6 On December 4, 2002, applicant had a right shoulder MRI. It showed no evidence of a  
7 rotator cuff tear, but it showed evidence of down-sloping of the acromion with mild to moderate  
8 impingement on the supraspinatus tendon.

9 On December 11, 2002, applicant had right shoulder surgery, apparently authorized by  
10 SCIF. She never returned to work after that surgery.

11 Following the December 2002 right shoulder surgery, applicant complained of constant  
12 right shoulder pain, as well as limited motion of and popping sounds in that shoulder.  
13 Eventually, her treating physicians decided that the right shoulder surgery had failed.

14 On May 27, 2003, applicant had another right shoulder MRI. The new MRI showed  
15 post-operative changes in the soft tissues and acromioclavicular joint, an abnormal signal in the  
16 anterior aspect of the supraspinatus tendon, and a small amount of fluid in the subdeltoid bursa.  
17 The radiologist read the MRI as “suspicious for a small full thickness rotator cuff tear.”

18 On or about October 16, 2003, applicant started treating with Hillel Sperling, M.D. After  
19 reviewing the May 27, 2003 right shoulder MRI, Dr. Sperling ordered a repeat MRI scan  
20 because the May 2003 scan “was almost five months ago” and “[i]t was not clear whether there  
21 was a rotator cuff tear.”

22 On December 4, 2003, applicant had another right shoulder MRI. Although the  
23 radiologist’s report on this third MRI is not in the WCAB’s file, Dr. Sperling stated in his  
24 December 18, 2003 report that he had reviewed this MRI. Dr. Sperling’s December 18, 2003  
25 reading of the MRI states: “There is a perforation, which is complete. There is a tear of the  
26 rotator cuff tendon. There are postoperative changes seen in the acromion.” Dr. Sperling’s  
27 December 18, 2003 report diagnosed applicant to have a rotator cuff tear. He recommended  
28 open rotator cuff repair surgery. He stated that the indications for surgery were: (1) persistent

1 pain in the right shoulder, despite the prior right shoulder surgery; (2) a frozen right shoulder;  
2 and (3) MRI evidence of a rotator cuff tear.

3 SCIF referred the issue of right shoulder surgery for utilization review. On January 5,  
4 2004, the utilization review physician, Dr. Pegram, issued a report stating:

5 “Based on the results of R [right] shoulder MRI sx [surgery] is  
6 indicated. However, AOE/COE [injury arising out of and in the  
7 course of the employment] issue re: R shoulder has not been resolved.  
8 // [applicant] has been TTD [temporarily totally disabled] since  
9 injury? Definitely TTD since 1st R shoulder sx 12/11/02. 1st MRI  
prior to 1st sx revealed no tears. R shoulder MRI 12/4/03 reveals  
rotator cuff tear.”

10 On January 16, 2004, SCIF sent a letter to Dr. Sperling (with copies to applicant and her  
11 attorney) stating it was delaying a decision on the request for right shoulder surgery. The letter  
12 appended Dr. Pegram’s January 5, 2004 report. It also asked the following question:

13 “MRI of right shoulder reveals no tear on 12/11/02. MRI of right  
14 shoulder dated 12/4/03 reveals rotator cuff tear. Claimant has been off  
15 work since 12/10/02, how is the tear industrially related?”

16 On January 22, 2004, Dr. Sperling issued a responsive report opining why the rotator cuff  
17 tear is industrially related. He stated:

18 “Despite a normal right shoulder MRI on 12/4/02, the patient had an  
19 impingement syndrome that is a clinical diagnosis, which occurred as  
20 a result of the industrial accident. With normal daily activities the  
21 impingement disrupted the vascularity of the right shoulder therefore  
22 causing a rotator cuff tear, which is evident in the right shoulder MRI  
of 12/4/03.”

23 Dr. Sperling then again requested authorization for rotator cuff repair surgery.

24 Thereafter, SCIF wrote to Dr. Pegram, once more inquiring about the right shoulder  
25 surgery issue. SCIF’s note to Dr. Pegram stated:

26 “Sx [surgery] appears to be M/N [medically necessary] but you had  
27 issues for M.D. to address as per your 1/5/04 review/response to clt  
28 [claimant].”

1 On February 2, 2004, Dr. Pegram issued a responsive note stating that her  
2 recommendation was to “delay.” She further said:

3 “[SCIF should obtain a] 2nd opinion regarding MN [medical  
4 necessity] for sx [surgery] under the auspices of workers comp &  
5 explanation of RCT [rotator cuff tear]. Dr. Sperling’s explanation of  
6 appearance of RCT is highly questionable.”

7 On February 6, 2004, SCIF sent a letter to Dr. Sperling (with copies to applicant and her  
8 attorney) denying authorization for the right shoulder surgery, based on the utilization review  
9 reports of Dr. Pegram.

10 On April 28, 2004, the issue of applicant’s entitlement to right shoulder surgery came on  
11 for an expedited hearing. On the basis of applicant’s objection, the WCJ excluded Dr. Pegram’s  
12 two utilization reports from evidence because they were not the reports of an examining or  
13 treating physician.

14 On May 6, 2004, the WCJ issued the decision at issue, allowing right shoulder surgery  
15 based on Dr. Sperling’s reports. The WCJ’s opinion stated that the ACOEM guidelines did not  
16 become presumptively correct under section 4604.5(c) until 90 days after their publication, i.e.,  
17 they did not become presumptively correct until March 22, 2004. The WCJ stated, therefore,  
18 that the “presumption is not applicable to services requested in January [2004].”

19 SCIF then timely sought reconsideration.

## 20 **II. DISCUSSION**

21 The WCJ is correct that, ordinarily, only the reports of attending or examining physicians  
22 are admissible in evidence in workers’ compensation proceedings. (Lab. Code, §5703(a);  
23 *Sweeney v. Workmen’s Comp. Appeals Bd.* (1968) 264 Cal.App.2d 296, 301-305 [33  
24 Cal.Comp.Cases 404].) Nevertheless, the statutory scheme created by section 4610 makes it  
25 clear that utilization review reports are an essential part of the WCAB’s record in any post-  
26 utilization review proceedings regarding medical treatment disputes. Accordingly, the Appeals  
27 Board has concluded that this scheme creates a *limited* exception to the section 5703(a). That is,  
28 even though utilization review physicians are not “attending or examining” physicians within the

1 meaning of section 5703(a), utilization review reports generated under section 4610 are  
2 admissible in WCAB proceedings, *if their admission would be consistent with the statutory*  
3 *scheme. (Willette v. Au Electric Corp. (2004) 69 Cal.Comp.Cases 1298, 1306-1307 & fn. 9*  
4 *(Appeals Board en banc).)* Utilization review reports that are not consistent with section 4610's  
5 statutory scheme, however, are *not* admissible in evidence. (*Sandhagen v. Cox & Cox*  
6 *Construction, Inc. (2004) 69 Cal.Comp.Cases 1452, 1458-1459 (Appeals Board en banc)*  
7 *[utilization review reports obtained in violation of the mandatory time deadlines of section*  
8 *4610(g)(1) are not admissible in evidence].)*

9 We hold that Dr. Pegram's reports are admissible for the limited purposes of showing: (1)  
10 utilization review was undertaken by SCIF and the dates of Dr. Pegram's reports; (2) Dr. Pegram  
11 considered the proposed right shoulder surgery to be medically necessary;<sup>5</sup> and (3) as a result of  
12 Dr. Pegram's utilization review, there is now a dispute as to whether applicant's injury caused or  
13 contributed to this need for surgery.

14 Admitting Dr. Pegram's reports for these purposes is consistent with the utilization  
15 review scheme established by section 4610. This is because SCIF had the right to undertake  
16 utilization review with respect to Dr. Sperling's request for right shoulder surgery (Lab. Code,  
17 §4610) and because, prior to undertaking utilization review, SCIF did not know that a causation  
18 issue would arise.

19 However, we further hold that Dr. Pegram's utilization review reports are *not* admissible  
20 for the purpose of determining the issue of whether applicant's industrial injury caused or  
21 contributed to her need for right shoulder surgery. To admit Dr. Pegram's reports for this  
22 purpose would be inconsistent with the utilization review scheme established by section 4610.

23 In this regard, section 4610(a) states:

24 \_\_\_\_\_  
25 <sup>5</sup> As discussed above, Dr. Pegram's January 5, 2004 report concedes that, "[b]ased on the results of  
26 [applicant's] R [right] shoulder MRI sx [surgery] is indicated." Although Dr. Pegram's January 5, 2004  
27 report goes on to raise an "AOE/COE issue" (i.e., an industrial causation issue) regarding the right  
28 shoulder surgery, Dr. Pegram does not question the *medical necessity* of the surgery. Indeed, based on  
Dr. Pegram's January 5, 2004 report, SCIF admitted in a subsequent note to Dr. Pegram that "Sx  
[surgery] appears to be M/N [medically necessary]."



1 “For purposes of this section, ‘utilization review’ means utilization  
2 review or utilization management functions that prospectively,  
3 retrospectively, or concurrently review and approve, modify, delay,  
4 or deny, based in whole or in part *on medical necessity to cure and*  
5 *relieve*, treatment recommendations by physicians, as defined in  
6 Section 3209.3, prior to, retrospectively, or concurrent with the  
7 provision of medical treatment services pursuant to Section 4600.”  
8 (Emphasis added.)

9 Thus, by section 4610(a)’s express terms, utilization review is directed solely at determining the  
10 “medical necessity” of treatment recommendations. Therefore, section 4610 does *not* authorize  
11 a utilization review physician to determine whether the employee’s industrial injury caused or  
12 contributed to a need for treatment.

13 This interpretation of the utilization review statutory scheme is consistent with section  
14 4610(f)(2), which provides that utilization review criteria shall be consistent with the medical  
15 treatment utilization review schedule adopted pursuant to section 5307.27. Section 5307.27, in  
16 turn, states that this medical treatment utilization schedule “shall address, at a minimum, *the*  
17 *frequency, duration, intensity, and appropriateness* of all treatment procedures and modalities  
18 commonly performed in workers’ compensation cases.” (Emphasis added.) Accordingly, section  
19 4610(f)(2) and section 5307.27, when read together, demonstrate that utilization review does not  
20 encompass an assessment of whether a need for treatment is causally related to the industrial  
21 injury.

22 This interpretation of the utilization review statutory scheme is also consistent with  
23 Administrative Director Rule 9792.6(n), which states in relevant part: “Utilization review does  
24 not include determinations of the work-relatedness of injury or disease ... .” (Cal. Code Regs.,  
25 tit. 8, §9792.6(n).)

26 Finally, this interpretation is consistent with the nature of the utilization review process.  
27 A utilization review physician does not physically examine the applicant, does not obtain a full  
28 history of the injury or a full medical history, and might not review all pertinent medical records.  
Yet, each of these steps is relevant, if not essential, to determining whether the need for a  
particular treatment is causally related to the industrial injury.

1           Accordingly, utilization review reports are *not* admissible for the purpose of determining  
2 whether the employee’s industrial injury caused or contributed to a need for treatment.

3           We next address the procedures to be followed when a utilization review physician  
4 concludes that a treatment for an undisputed body part is medically necessary but questions the  
5 causal relationship between the need for treatment and the industrial injury.

6           Under these circumstances, a defendant has only two options. Either it must approve the  
7 treatment or it must deny the treatment. (Lab. Code, §4610 (a).)<sup>6</sup>

8           If a defendant decides to deny authorization for concurrent or prospective treatment  
9 based on a question arising in utilization review regarding the treatment’s causal connection to  
10 the injury, then the defendant must reach this decision to deny within the time deadlines  
11 established by section 4610. This means that a decision to deny treatment based on a question of  
12 causation raised by a utilization physician “shall be made in a timely fashion that is appropriate  
13 for the nature of the employee’s condition, not to exceed five working days from the receipt of  
14 the information reasonably necessary to make the determination, but in no event more than 14  
15 days from the date of the medical treatment recommendations by the physician.” (Lab. Code,  
16 §4610(g)(1); but see also, §4610(g)(2) & (g)(5).)

17           Once the decision has been made to deny prospective or concurrent treatment based on a  
18 utilization physician’s causation question, this decision must be communicated to the treating  
19 physician by phone or fax within 24 hours. (Lab. Code, §4610(g)(3)(A).) Also, such decisions  
20 must be communicated in writing to both the treating physician and the applicant within 24  
21 hours for concurrent review and within two business days for prospective review. (Lab. Code,  
22 §4610(g)(3)(A).)

23           Finally, and most pertinent to our decision here, where a decision to deny treatment has  
24 been made based on an issue raised by the utilization review physician regarding the causal  
25 relationship of the treatment to the industrial injury, then “disputes shall be resolved in

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26 <sup>6</sup>           Where an issue exists as to causal connection between the injury and the treatment, a defendant  
27 may elect to authorize the treatment. For example, a defendant may decide that the avoidance of medical-  
28 legal and litigation costs, or even potential penalties or sanctions, might be more appropriate than  
disputing the treatment.

1 accordance with Section 4062.” (Lab. Code, §4610(g)(3)(A).)

2 Section 4062(a) provides, in relevant part:

3 “If either the employee or employer objects to a medical  
4 determination made by the treating physician concerning any medical  
5 issues not covered by Section 4060 or 4061 and not subject to Section  
6 4610, the objecting party shall notify the other party in writing of the  
7 objection within 20 days of receipt of the report if the employee is  
8 represented by an attorney or within 30 days of receipt of the report if  
9 the employee is not represented by an attorney. ... If the employee  
10 objects to a decision made pursuant to Section 4610 to modify, delay,  
11 or deny a treatment recommendation, the employee shall notify the  
12 employer of the objection in writing within 20 days of receipt of that  
13 decision. These time limits may be extended for good cause or by  
14 mutual agreement. ...”

15 As discussed above, utilization review can be undertaken to determine the medical  
16 necessity of a treatment, but it cannot be undertaken to determine whether an employee’s injury  
17 has caused or contributed to the need for that treatment. Therefore, when a defendant’s decision  
18 to deny treatment has been made based on an issue of industrial causation raised by a utilization  
19 review physician, the decision is *not* “made pursuant to Section 4610” within the meaning of  
20 section 4062(a). In such circumstances, the decision to deny is really an objection “to a medical  
21 determination made by the treating physician concerning [a] medical issue[] not covered by  
22 Section 4060 or 4061 *and not subject to Section 4610.*” (Lab. Code, §4062(a) (emphasis added).)  
23 In essence, the defendant is objecting to the treating physician’s explicit or implicit  
24 determination that the need for the prescribed treatment was caused, in whole or in part, by the  
25 industrial injury. Such an issue of causation is outside the scope of utilization review.  
26 Accordingly, it is not the employee’s responsibility either to object to the treatment denial based  
27 on causation or to initiate the AME/QME procedure established by section 4062(a). Rather, it is  
28 the defendant’s duty to object to the treating physician’s causation determination and to initiate  
the AME/QME procedure under section 4062(a).

Ordinarily, when a defendant objects to a treating physician’s medical determination on  
an issue not subject to section 4610, the defendant has 20 days from the receipt of the treating  
physician’s report to object, if the employee is represented by an attorney, or 30 days from

1 receipt, if the employee is not represented. (Lab. Code, §4062(a).) Nevertheless, section 4062(a)  
2 expressly provides that “[t]hese time limits may be extended for good cause . . . .” And, where a  
3 utilization review physician’s report raises for the first time a question of whether the industrial  
4 injury caused or contributed to a need for treatment prescribed by a treating physician, we  
5 conclude there is “good cause” to extend the time limits for a defendant to object to the treating  
6 physician’s report by 20 days (in represented cases) or 30 days (in unrepresented cases) from the  
7 defendant’s receipt of the utilization physician’s report. (Lab. Code, §4062(a).)<sup>7</sup>

8 For the guidance of the workers’ compensation community, we reiterate that a defendant  
9 is *not* required to undertake utilization review in every case. (*Sandhagen v. Cox & Cox*  
10 *Construction, Inc.* (2005) 70 Cal.Comp.Cases 208 (Appeals Board en banc).) Accordingly, if a  
11 defendant believes at the time a treating physician prescribes treatment that there is or may be an  
12 issue of whether the proposed treatment for an admitted body part is causally related to the  
13 industrial injury, the defendant may elect to bypass utilization review and, instead, timely initiate  
14 the AME/QME procedures of section 4062(a). If the defendant does elect to undertake  
15 utilization review, however, it must complete that utilization review within the deadlines  
16 mandated by section 4610. (*Sandhagen v. Cox & Cox Construction, Inc., supra*, 69  
17 Cal.Comp.Cases 1452.)

18 The foregoing discussion applies when a utilization review physician determines that a  
19 proposed treatment for an admitted body part is medically necessary, but questions whether the  
20 industrial injury caused or contributed to the need for the treatment.

21 A different procedure applies where there has been an admission to or a determination of  
22 industrial injury to at least one body part, but where the treatment prescribed relates to a different  
23 and *disputed* body part that the treating physician has explicitly or implicitly found to be  
24 industrial. For the reasons discussed above, utilization review cannot be conducted for the  
25 purpose of determining whether there was an industrial injury to the disputed body part. Instead,

26 <sup>7</sup> This is also consistent with the provisions of section 4610(g)(5) which, although not directly  
27 applicable in this situation, recognizes that the denial of a treatment request often cannot be made within  
28 normal timeframes “because the [defendant] is not in receipt of all of the information reasonably  
necessary” to make a decision.

1 in the context of an admitted injury, if a treating physician prescribes treatment for a *disputed*  
2 body part, then the defendant must timely initiate the AME/QME procedure in accordance with  
3 section 4062(a), if it has not already done so or if the time deadlines of section 4062(a) have not  
4 already elapsed.<sup>8</sup> In any event, a utilization review physician’s report is *not* admissible on the  
5 issue of whether the disputed body part is industrial.

6 Here, SCIF did not initiate the AME/QME procedure of section 4062(a) after it received  
7 Dr. Pegram’s reports questioning whether the surgery proposed by Dr. Sperling was causally  
8 related to applicant’s admitted injury. But because this is a case of first impression, we direct the  
9 WCJ on remand to give SCIF a reasonable opportunity to initiate the AME/QME procedures.  
10 (See *Willette v. Au Electric Corp.*, *supra*, 69 Cal.Comp.Cases at p. 1309 (Appeals Board en  
11 banc).)<sup>9</sup>

12 As to the ACOEM issue in this case, SCIF is correct: (1) that it is liable only for medical  
13 treatment reasonably required to cure or relieve the effects of the injury (Lab. Code, §4600); (2)  
14 that, under the law presently in effect, “reasonably required” medical treatment generally “means  
15 treatment that is based upon ... the updated [ACOEM guidelines]” (Lab. Code, §4600(b)); and  
16 (3) that the ACOEM guidelines are “presumptively correct on the issue of extent and scope of  
17 medical treatment, regardless of date of injury.” (Lab. Code, §4604.5(c).) SCIF, however, is  
18 completely mistaken in asserting that a utilization review physician’s opinions are presumed to  
19 be correct under section 4604.5(c) and in asserting that the utilization review process was  
20 intended to “eliminate” the QME/AME procedures established by section 4062(a). (See *Willette*  
21 *v. Au Electric Corp.*, *supra*, 69 Cal.Comp.Cases 1298 (Appeals Board en banc).)

22 Here, however, there are no bona fide ACOEM issues.

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23 <sup>8</sup> If the treating physician had previously determined that there was an industrial injury to the  
24 disputed body part, then section 4062(a) would have been triggered at that time. If, subsequently, the  
25 treating physician first prescribes treatment for the disputed body part, then defendant does not get a  
“second bite of the apple” on the causation issue, i.e., section 4062(a) is not re-triggered on the industrial  
injury issue.

26 <sup>9</sup> Because applicant is represented, and because her injury occurred before January 1, 2005, the  
27 AME or QME report should be obtained in accordance with the procedure set forth in former section  
28 4062, as it existed before its amendment by Senate Bill 899 (SB 899). (*Simi v. Sav-Max Foods, Inc.*  
(2005) 70 Cal.Comp.Cases 217 (Appeals Board en banc).)

1 Dr. Pegram agrees that rotator cuff surgery is medically necessary in light of the results  
2 of applicant's December 4, 2003 right shoulder MRI. Moreover, the December 4, 2003 MRI  
3 indicates that applicant has a significant tear, and the ACOEM guidelines specifically state that  
4 "[r]otator cuff repair is indicated for significant tears that impair activities by causing weakness of  
5 arm elevation or rotation, particularly acutely in younger workers." (ACOEM Guidelines, Chapter 9,  
6 p. 210.)

7 Dr. Pegram does question whether applicant's need for rotator cuff surgery is causally  
8 related to her August 20, 2002 injury. Yet, the ACOEM guidelines only are "presumptively  
9 correct on *the issue of extent and scope of medical treatment ...* ." (Lab. Code, §4604.5(c)  
10 (emphasis added).) Thus, although ACOEM contains a chapter on causation (ACOEM  
11 Guidelines, Chapter 4), this chapter is *not* presumptively correct on the issue of whether a need for  
12 medical treatment is causally related to the industrial injury.

13 Accordingly, on remand, the ACOEM guidelines will have no presumptive effect on the  
14 determination of whether an applicant's August 20, 2002 injury caused or contributed to her  
15 need for rotator cuff surgery.

16 For the foregoing reasons,

17 **IT IS ORDERED**, as the Decision After Reconsideration of the Appeals Board (En  
18 Banc), that the Findings and Award issued by the workers' compensation administrative law  
19 judge on May 6, 2004 is **RESCINDED**.

20 **IT IS FURTHER ORDERED** that the January 5, 2004 and February 2, 2004 reports of  
21 Patricia D. Pegram, M.D., are **ADMITTED IN EVIDENCE** for the limited purposes of  
22 showing: (1) that utilization review was undertaken by defendant; (2) that Dr. Pegram found  
23 that right shoulder surgery was reasonably necessary; (3) that, as a result of Dr. Pegram's  
24 utilization review report(s), there is now a dispute as to whether applicant's need for right  
25 shoulder surgery was caused or contributed to by her August 20, 2002 injury; and (4) the date(s)  
26 on which Dr. Pegram questioned whether the industrial injury caused or contributed to the need  
27 for surgery.

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2             **IT IS FURTHER ORDERED** that that this matter is **REMANDED** to the workers’  
3 compensation administrative law judge for further proceedings and a new decision, consistent  
4 with this opinion.

5   ***WORKERS’ COMPENSATION APPEALS BOARD (EN BANC)***

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  ***MERLE C. RABINE, Chairman***

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  ***WILLIAM K. O’BRIEN, Commissioner***

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  ***JAMES C. CUNEO, Commissioner***

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  ***JANICE J. MURRAY, Commissioner***

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  ***FRANK M. BRASS, Commissioner***

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20    **I DISSENT.**  
21    **(See attached Dissenting Opinion.)**

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23    \_\_\_\_\_  
  ***RONNIE G. CAPLANE, Commissioner***

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25     ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

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27     ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES***  
28     ***AS SHOWN ON THE OFFICIAL ADDRESS RECORD***

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**DISSENTING OPINION OF  
COMMISSIONER CAPLANE**

I dissent.

Labor Code section 4610(a) spells out the purpose of utilization review very specifically and very narrowly as “review and approve, modify, delay, or deny, based in whole or in part on *medical necessity* to cure and relieve, *treatment recommendations by physicians...*” (Emphasis added.) The utilization review doctor is provided with only those medical records necessary to evaluate the treatment recommendation and does not examine the injured worker. (Lab. Code, §4610(d).) The majority opinion expands this statutory mandate to allow a utilization review doctor also to offer an opinion on the more substantive issue of causation. If causation is raised in the report, the time within which a defendant can avail itself of the QME procedure under Labor Code section 4062 begins running anew, allowing medical examinations that might otherwise be time barred. The majority goes on to hold that the utilization review report is admissible to show that a dispute exists.

In interpreting statutes, we are bound to apply the clear and unambiguous command of the statutes; when the plain language of the statute is not ambiguous and is unequivocal, we must follow it. (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286]; *Atlantic Richfield Co. v. Workers’ Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500]; *Cal. Ins. Guar. Ass’n v. Workers’ Compensation Appeals Bd. (Karaiskos)* (2004) 117 Cal.App.4th 350, 355 [69 Cal.Comp.Cases 183].)

Labor Code section 4610(a) is clear and unambiguous. It expressly limits utilization review to the “medical necessity” of treatment recommendations. By allowing the utilization review doctor to offer an opinion on causation and then to allow that report in evidence, albeit for the sole purpose of showing that a dispute exists, the Appeals Board has gone beyond the judicial and entered the legislative realm.

Furthermore, by giving the employer what amounts to a second opportunity to avail itself of the QME option, the Appeals Board has lengthened a process that was intended to expedite medical treatment.

1 Clearly, none of this was intended by the express terms of Labor Code section 4610.

2 In our en banc decisions in *Sandhagen I* and *Sandhagen II*, we held that utilization  
3 review and a QME are not mutually exclusive. Both can be pursued simultaneously. (*Sandhagen*  
4 *v. Cox & Cox Construction, Inc.* (2005) 70 Cal.Comp.Cases 208; *Sandhagen v. Cox & Cox*  
5 *Construction, Inc.* (2004) 69 Cal.Comp.Cases 1452.) In the present case the defendant could and  
6 probably should have done just that. Although defendant claims that the utilization review  
7 report was its first indication that the condition leading to Ms Simmons' need for surgery might  
8 not be job related, there was ample evidence to alert the defendant to the causation issue.

9 Ms. Simmons' first surgery was in December 2002 after which, she never returned to  
10 work and the activities that had caused her injury in the first place. Five-and-a-half months after  
11 her surgery, she had an MRI, which was negative. Seven months and another MRI later, the  
12 rotor cuff tear appears and a second surgery is recommended. There were no surprises here. All  
13 of the medical reports setting out this information, had been provided to defendant. It seems that  
14 the above should have been sufficient to suggest that causation should be explored.

15 While defendants should not have to pay for medical treatment unrelated to an industrial  
16 injury, it is not within our purview to rewrite the law in order to protect them from their own  
17 mistakes.

18 For these reasons, I dissent. I would admit Dr. Pegram's reports for the limited purpose  
19 of establishing that the proposed surgery is medically necessary and I would award the requested  
20 surgery based on Dr. Sperling's opinions and Dr. Pegram's reports.

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***RONNIE G. CAPLANE, Commissioner***

***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

***6/17/05***

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