WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KATHLEEN CZARNECKI, ***Applicant,*** **vs.** **GOLDEN EAGLE INSURANCE CO., Permissibly Self-Insured,** ***Defendant.***	**Case No. SDO 0217617** **SDO 0217759** **OPINION AND DECISION AFTER RECONSIDERATION**

On May 26, 1998, reconsideration was granted in this matter to provide an opportunity to further study the legal and factual issues raised by the petition for reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant, Golden Eagle Insurance Company, seeks reconsideration of the Findings and Award, issued March 6, 1998, in which a workers' compensation referee (WCR), following an expedited hearing, ordered defendant to provide applicant, Kathleen Czarnecki, the medical treatment recommended by her treating physician, Dr. James McClurg.

Defendant contends that the finding that applicant is in need of the medical treatment recommended by Dr. McClurg is not supported by the evidence, and argues that the WCR erred in excluding its medical evidence from the record.

The issue presented is whether medical reports obtained pursuant to the Utilization Review standards promulgated by the Administrative Director of the Division of Workers' Compensation are admissible as evidence to determine the appropriateness of a recommended medical procedure.

Following our review of the record, and for the reasons set forth below, we

shall affirm the WCR's determination and deny the defendant's Petition for Reconsideration.

Applicant sustained an admitted injury to her neck, right shoulder and right upper extremity on March 4, 1996 and over the cumulative period ending March 4, 1996, while employed as a claims examiner.

In a January 13, 1997 report, applicant's treating physician, Dr. McClurg, requested authorization from defendant to perform arthroscopic surgery on applicant's right shoulder. On March 25, 1997, applicant filed a request for an expedited hearing, citing defendant's failure to respond to Dr. McClurg's recommendation.

When the matter came on for hearing on June 30, 1997, the parties had reached a stipulation authorizing Dr. McClurg to proceed with his recommended right shoulder arthroscopic acromioplasty and Mumford procedure.

On October 15, 1997, Dr. McClurg sought authorization to perform a second surgery, an open Mumford's procedure, on applicant's shoulder.

On December 1, 1997, applicant again sought an expedited hearing, based upon defendant's refusal to authorize this second surgical procedure recommended by Dr. McClurg. The matter was heard on January 26, 1998.

Applicant submitted four reports by Dr. McClurg, in which he set forth the basis for his recommendation for a second arthroscopic surgery on applicant's right shoulder, and in which he responded to the objections received from defendant's non-examining physicians at Physician Authorization Review, Inc.

Dr. McClurg states at page 2 of his November 24, 1997 supplemental report:

> Ms. Czarnecki has well established focal tenderness to the acromioclavicular joint. This has been acknowledged by the independent evaluation of Dr. Schultz which was [a] totally independent and free opinion sought directly by the patient. X-rays show a good subacromial decompression anteriorly, and a residual spike on the acromioclavicular joint. It is very difficult to treat this

> patient having opinions that have no direct contact with the patient, and their position is simply to second-guess other doctors without ever having touched the patient. On the personal side, I believe this is unethical behavior. I am hereby once again requesting authorization to perform an open distal clavicle resection as I have been attempting to do for the past several months.

Defendant offered into evidence four reports authored by physicians under the auspices of Physician Authorization Review, Inc. The first report is by Dr. Merritt Quarum, dated October 16, 1997, denying authorization for the Mumford procedure on the grounds that Dr. McClurg "failed to demonstrate any residual impingement or complaints that could be attributed to impingement."

On November 7, 1997, Dr. Clive Segil, the Corporate Medical Director of Physician Authorization Review, Inc., prepared a review of medical records and concluded that the problem involving her acromioclavical joint may be iatrogenic, meaning 'physician induced,' as she had no complaints regarding her acromioclavical joint until Dr. McClurg performed his initial surgery. He advised against surgery until he could review her x-rays and obtain a second evaluation.

When Dr. Segil reviewed applicant's x-rays, he disputed Dr. McClurg's finding of "a persistent spica on the superior aspect of the distal clavical." He further noted that in the independent evaluation by Dr. Schultz, it was recommended that applicant pursue a course of physical therapy prior to returning to the operating room. Dr. Segil indicated his agreement with Dr. Schultz's recommendation of physical therapy, and recommended against additional surgery.

Defendant also offered into evidence a two and half page publication prepared by the Division of Workers' Compensation's presenting answers to questions regarding the implementation of the utilization review process. In a section concerning the relationship between the utilization review process and

Labor Code section 4062, the DWC publication states: "Physician review of medical information for purposes of utilization review does not constitute a formal medical evaluation." It further states "[i]f an insurer denies a request and the physician expresses disagreement in any way within seven days, then the insurer must issue a written explanation of the denial, which will serve as an 'objection' pursuant to LC 4062. However, the insurer may invoke LC 4062 at an earlier stage." (Def. Exh. B. Emphasis added.) In response to a question concerning the role of the WCAB in the utilization review process and the admissibility of utilization review as evidence, DWC states: "Disputes over medical treatment in individual cases will continue to be determined by the WCAB. DWC will work closely with the WCAB, and will conduct training for judges on utilization review issues and the utilization review regulation. Many of the issues related to the impact of the UR process on WCAB determinations will be resolved in the courts or through future legislative clarification."

At the hearing on January 26, 1998, applicant objected to the admission into evidence of the reports authored by Dr. Quarum and Dr. Segil of Physician Authorization Review, Inc., on the grounds that defendant never provided an objection in writing to the treatment recommendations of Dr. McClurg, under Labor Code section 4062. Applicant cited Labor Code section 5703, and stated that she was relying upon the presumption afforded the opinion of the treating physician under Section 4062.9.

At the hearing, applicant testified that she received 20 physical therapy treatments between August and September of 1997 and 17 more in December and January, involving range of motion therapy. She requested authorization for the second surgery, noting that the initial procedure relieved the pain in the posterior part of her shoulder but left her with pain on the top of her shoulder. Despite her range of motion physical therapy, her pain has remained the same.

The WCR refused to admit defendant's reports into evidence. In his Opinion on Decision of March 6, 1998, the WCR justified the exclusion of the reports authored by Physician Authorization Review by relying on Labor Code section 5703's requirement of a physical examination. Therefore, in the absence of any medical evidence averse to Dr. McClurg's recommended surgical procedure, the WCR awarded this treatment to applicant.

Discussion

Defendant argues that reports prepared pursuant to the Utilization Review Standards in Rule 9792.6, are admissible, notwithstanding the requirements of Labor Code section 4062 and 5703.

Labor Code section 4062 provides a process for obtaining medical evaluations to resolve disputes over "a medical determination made by the treating physician concerning . . . the extent and scope of medical treatment." This process requires the parties to seek to reach agreement upon an Agreed Medical Examiner or failing that, to obtain a Qualified Medical Examination.

If a party objects to a treating physician's recommendation, and obtains a QME report, and the other party chooses to rely upon the opinion of the treating physician, Labor Code section 4062.9 provides that "the findings of the treating physician are presumed to be correct. This presumption is rebuttable and may be controverted by a preponderance of medical opinion indicating [a] different level of impairment. However, this presumption shall not apply where both parties select qualified medical examiners."

Labor Code section 5703 sets forth the evidence, other than sworn testimony, which the WCAB may receive to prove a fact in dispute; subdivision (a) specifies "Reports of attending or examining physicians" without further definition. Section 10606 of the Rules of Practice and Procedure sets forth an extensive list of factual items which should be included in such a medical report,

including "(f) findings on examination." The single exception in this rule to reports by examining physicians provides that "[i]n death cases, the reports of non-examining physicians may be admitted into evidence in lieu of oral testimony."

Administrative Director's Rule 9792.6 defines utilization review as follows:

> (5) 'Utilization review' is a system used to manage costs and improve patient care and decision making through case by case assessments of the frequency, duration, level and appropriateness of medical care and services to determine whether medical treatment is or was reasonably required to cure or relieve the effects of the injury. Utilization review includes, but is not limited to, the review of requests for authorization, and the review of bills for medical services for the purpose of determining whether medical services provided were reasonably required to cure or relieve the injury, by either an insurer or a third party acting on an insurer's behalf.

Defendant asserts that the utilization review standards were created for the purpose of providing a prompt and effective review of a request for medical treatment without the time consuming delays involved in the AME/QME process required by Labor Code section 4062.

Defendant further suggests that as reports obtained to support an employer's petition for change of treating physician under Rule 9786 do not have to conform to the requirements of Section 5703, it would be anomalous to allow non-examining physician reports to be admitted under Rule 9786, but excluded under Rule 9792.6. Finally, defendant argues that the more general provisions of law in Labor Code sections 4062 and 5703 must yield to the more specific Administrative Director's Rule 9792.6.

We do not believe the existence of the utilization review procedure provides defendant with the authority to circumvent the medical evaluation process required by Statute.

Labor Code section 5703 requires that a medical report be authored by a physician who has personally examined an applicant. Under Section 5703

reports written by physicians who do not conduct a physical examination of the applicant are not admissible as evidence. (*Sweeny* v. *Workmen's Comp. Appeals Board* (1968) 264 Cal.App.2d 296 [33 Cal. Comp. Cases 404].) Support for the requirement that a physician, whose report is offered as substantial evidence, must conduct a physical examination is further found in Rule 10606, noted above, which specifies the matters to be covered in a physician's written report, including at subsection (f), "the findings on examination."

Furthermore, in the DWC publication offered by defendant, it specifically mentions that the receipt of a utilization review report which denies authorization for a recommended treatment constitutes an "objection" for purposes of Labor Code section 4062. This is a recognition of the continued viability of the AME/QME process, rather than authorization to circumvent it. At the point that Dr. Quarum issued his report denying authorization, defendant was required to seek to resolve the dispute by resorting to the AME/QME process, to designate a physician who would examine applicant and prepare an admissible report.

Defendant's contention that the utilization review process was intended to avoid the time consuming delays mandated by Section 4062, is not supported by citation to any authority. Indeed, DWC's publication on this issue indicates that complying with the AME/QME process is still required. It is beyond the Administrative Director's authority to create, by regulation, an exception to the statutory requirement in Section 4062. Defendant has offered no support for its contention that a regulation issued by the Administrative Director may take precedence over a provision of the Labor Code.

The rule of construction cited by defendant is not applicable where the more specific rule is a regulation rather than a statute. Code of Civil Procedure section 1859 directs that "[i]n the construction of a statute the intention of the legislature ... is to be pursued, if possible; and when a general and particular provision are

inconsistent, the latter is paramount to the former." Consequently, "where the same subject matter is covered by inconsistent provisions, one of which is special and the other general, the special one, whether or not enacted first, is an exception to the general statute and controls unless an intent to the contrary clearly appears." (*Warne* v. *Harkness* (1963) 60 Cal. 2d 579, 588.) This rule of construction however cannot apply here, as the Administrative Director's Rule does not have the same legal standing as an enactment of the legislature. Labor Code section 139(e)(8), which requires the Administrative Director to "adopt model utilization protocols in order to provide utilization review standards," does not specifically authorize the issuance of a rule which overrides the statutory mandate of Labor Code section 4062. We shall not, therefore, give this rule the preemptive effect sought by defendant.

Accordingly, we shall affirm the WCR's decision to exclude the medical evidence offered by defendant and award applicant the medical treatment recommended by Dr. McClurg. Dr. McClurg's opinion is substantial evidence upon which the WCR properly relied to determine applicant was in need of additional surgery to cure or relieve the effects of her industrial injury.

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For the foregoing reasons,

IT IS ORDERED that, as our Decision After Reconsideration, the Findings and Award, issued March 6, 1998 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Robert N. Ruggles

I CONCUR,

/s/ Colleen S. Casey

/s/ Douglas M. Moore, Jr.

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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