WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELEANOR DIAZ NEVAREZ, *Applicant*

vs.

ELK GROVE UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured administered by SCHOOLS INSURANCE AUTHORITY, *Defendants*

Adjudication Number: ADJ9712319
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. We have received an amended Petition for Reconsideration from defendant. Pursuant to Workers' Compensation Appeals Board (WCAB) Rule 10964(a), we have accepted and considered defendant's supplemental pleadings. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on April 22, 2025 and 60 days from the date of transmission is Saturday June 21, 2025. The next business day that is 60 days from the date of transmission is June 23, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on June 23, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 22, 2025 and the case was transmitted to the Appeals Board on April 22, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 22, 2025.

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 20, 2025

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

ELEANOR DIAZ NEVAREZ
LAUGHLIN, FALBO, LEVY & MORESI
ELECTRONIC WAVEFORM LAB

TF/kl

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

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NOTICE OF TRANSMISSION TO THE APPEALS BOARD

INTRODUCTION

Issue	Disagreement with Decision Regarding UR Procedure as it relates to a request for additional information by the adjuster
Date of Findings and Award:	March 28, 2025
Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification of Petition:	Verified

PETITIONER'S CONTENTION(S)

Petitioner, Defendant-Elk Grove Unified School District, petitions for reconsideration of the Findings of Fact and Opinion on Decision issued March 28, 2025, arguing that the undersigned Workers' Compensation Judge (WCJ) misapplied the law in determining that utilization review (UR) was untimely. Specifically, the defendant contends that the Request for Authorization (RFA) was incomplete and returned in accordance with 8 CCR§ 9792.9.l(c)(2)(A) and that no further obligation existed absent a corrected RFA.

As discussed below, the petition must be denied. The WCJ correctly applied 8 CCR § 9792.9.1(f) and the evidence supports the conclusion that the RFA was procedurally complete. Defendant's failure to issue a timely denial with required conditional language rendered the UR untimely as a matter of law.

FACTUAL BACKGROUND:

The underlying facts[2] are not in dispute. Although numerous facts were agreed

[2] The stipulated facts are contained in finding of fact 1-23 of the F&A and are as follows: On September 25, 2013, applicant sustained an admitted right ankle injury. Defendant did not have a Medical Provider Network (MPN), and applicant designated her primary treating physician. On March 5, 2018, applicant's primary treating physician, Dr. Masoud Ghalambor, issued a PR-4 inclusive of treatment history and recommendations for future medical treatment (Joint Exhibit 101). In March of 2018, Applicant changed primary treating physicians to Dr. Jacob Rosenberg. Dr. Rosenberg works at 1PM Medical Group (1PM). On May 21, 2018, the claim was settled by Stipulations with Request for Award at 13% to the right ankle. Dr. Rosenberg requested and defendant authorized physical therapy. Applicant received 6 sessions of physical therapy at Crux Rehabilitation from March 21,2018, to April 5, 2018 (Joint Exhibit 114 to 121). Dr. Rosenberg issued additional reports on May 3, 2018 and June 6, 2018 (Joint Exhibits 122 and 123). On July 18, 2018, Dr. Rosenberg reported that "A thorough history of the patient's previous treatments indicate a failure of a variety of initially recommended conservative treatments including physical therapy or home exercise, medications and trial of a TENS unit during physical therapy visits for home use." Dr. Rosenberg further ordered a one-month trial of a H-Wave device citing the Official Disability Guidelines (ODG) and the patient's previous use & failure of Physical Therapy, medication and a TENS unit. The one-month trial will be utilized to monitor and measure effectiveness of H-Wave home use and potential for continued use (Joint Exhibit 102). On July 26, 2018, Electronic Waveform Lab delivered an H-Wave unit to applicant for a 20-day trial. The report of same date indicates that the Applicant had failed the following conservative treatment options: Medications (Including Norco and Ibuprofen); Physical Therapy (12+ visits); TENS (Clinical use in 2010 & 2017) and indicates TENS did not provide adequate relief (Joint Exhibit 104). A Patient Outcome Report of August 15, 2018 notes that after 20-days of use, the H-Wave device had increased applicant's functionality with walking and other ADLs (Joint Exhibit 105). On August 27,2018, Dr. Brian Bernhardt, from 1PM, signed a Request for Authorization for a H-Wave Device, and supplies (electrodes and conductive gel) which included a frequency and duration provision for 10 months. The Request for Authorization was accompanied by a I-page report (PR-2 narrative equivalent) signed by Dr. Bernhardt (Joint Exhibit 106 & 107).

On August 28, 2018, Dr. Rosenberg's Physician Assistant (PA) issued a PR-2 stating that applicant's pain levels decreased since the last visit. He noted applicant works full-time. He noted usage of the H-Wave device at 1.5 hours per day and that applicant reported decreased swelling in the Applicant's ankle and allows the Applicant to sleep 6-7 hours per night. It is also reported that the Applicant stopped using Voltaren gel (Joint Exhibit 108). On September 11, 2018, 1PM faxed and defendant received the August 27, 2018 Request for Authorization which was signed by Dr. Bernhardt. On September 11, 2018, Dr. Bernhardt/IPM's Request for Authorization and PR-2 were faxed to and received by Defendant. The PR-2 indicates that the patient utilized home H-Wave at no cost for evaluation purposes from 7/26/18 to 8/15/18. Patient has reported the ability to perform more activity and greater overall function due to the use of the H-Wave device. Patient has given these examples of increased function due to H-Wave: "Walk further, more family interaction." The patient is utilizing the home H-Wave 1 time per day, 5 days per week, 30-45 minutes per session. (Joint Exhibit 108). On September 13, 2018, Defendant sent a facsimile to Dr. Rosenberg returning the Request for Authorization signed by Dr. Bernhardt and requested additional information regarding the Request for Authorization (Joint Exhibit 109). Defendants September 13, 2018 request for additional information was sufficient to start the utilization review (UR) process. On October 4, 2018, after 70 days of use, a Patient Outcome Report indicates the Applicant

upon by the parties, the relevant facts are as follows:

- On August 27, 2018, Dr. Brian Bernhardt (IPM) submitted a signed RFA for an H-Wave unit and supplies.
- On September 11, 2018, the defendant received this RFA.
- On September 13, 2018, the defendant returned the RFA to the physician and requested additional documentation (Joint Exhibit 109).
- No conditional denial was issued thereafter.
- The defendant did not issue a UR decision within 14 days.

DISCUSSION

The dispute relates to the following findings of fact:

> 24. Since the PTP never responded to the September 18, 2018 request for additional information, Defendant had until September 25, 2018 (14 days from the receipt of the RFA) to issue a denial of the RFA with the stated condition "that the request will be reconsidered upon receipt of the information."
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> 25. Defendant's action of requesting additional information within a timely manner commenced the utilization review process.
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> 26. Since Defendant, through the claims professional, timely requested additional information from the PTP with no response, Defendant was not required to continue with the UR process via a

reported increased function including the ability to walk further and stand longer. The Applicant reported 40 percent improvement with the H-Wave (Joint Exhibit 110). On October 9, 2018, Dr. Rosenberg reported the Applicant has increased activity levels. It is reported that the Applicant uses the H-Wave 1.5 hours daily which lowers pain levels and relaxes the Applicant. The treatment plan included future appointments for Acupuncture and H-Wave (Joint Exhibit 111). On October 16, 2018, Electronic Waveform Lab sent invoicing to defendant in the amount of$3,384.92 for an H-Wave unit and supplies (electrodes/gel). On October 30, 2018, defendant objected to the Electronic Waveform Lab invoicing of$3,384.92 (Joint Exhibit 112). On November 12, 2020, Electronic Waveform Lab filed a lien in the amount of $4,319.04 for the H-Wave unit provided on July 26, 2018 and for the supplies which were provided through 9/20/2020. On November 12, 2020, Defendant objected to the related invoicing stating that no properly submitted Request for Authorization was received from the primary treating physician for this durable medical equipment. (Joint Exhibit 112). On November 21, 2018, Dr. Brian Bernhardt reports that the Applicant is completing a home exercise and stretching program. It is reported that the Applicant walks the malls and uses the H-Wave. Treatment plans and past interventions include chiropractic care, physical therapy, ankle surgery and "failed" medications (Voltaren gel & Motrin 800mg) (Joint Exhibit 113).

medical reviewer.

27. Defendant failed to issue a denial of the RFA with the mandatory language regarding reconsideration upon receipt of additional information.

28. Defendant did not follow the requirements for an appropriate utilization review after a request for additional information.

29. The utilization review was untimely.

(See F&A, Pages 3-4)

Specifically, Defendant argues this was a valid "return of an incomplete request" under § 9792.9.1(c)(2)(A), but this legal theory is unsupported by the facts or applicable law. It is undisputed that the PTP never responded to the request for additional information.

Based on the current undisputed facts, the RFA was procedurally complete and triggered UR obligations. Specifically, the RFA signed by Dr. Bernhardt was not "incomplete" within the meaning of§ 9792.9.l(c)(2)(A). It was signed by a physician, identified the employee and the recommended treatment, and was accompanied by a narrative referencing failed conservative modalities. Therefore, UR obligations were triggered on September 11, 2018, when defendant received the RFA. Defendant's request for additional information invoked§ 9792.9.l(f), not§ 9792.9.l(c)(2)(A). The defendant timely responded within five business days by requesting additional information. This conduct invoked 8 CCR§ 9792.9.l(f)(l)(A), which allows such a request where the information reasonably necessary to make a determination is missing. Once that request was made, § 9792.9.1 (f)(3)(A) applied: "If the information reasonably necessary ... is not received within 14 days ... the reviewer shall deny the request with the stated condition that the request will be reconsidered upon receipt." No such conditional denial was issued. Thus, UR was procedurally defective and untimely.

Defendant's reliance on § 9792.9.1(c)(2)(A) is misplaced. The regulation cited by defendant, 8 CCR§ 9792.9.l(c)(2)(A), applies only where a submitted RFA is facially and procedurally deficient. This includes scenarios where the RFA is unsigned, does not identify the injured worker or provider, omits a specific treatment recommendation, or lacks any accompanying documentation of medical necessity. In those situations, a non-physician reviewer may return the RFA marked "not complete" within five business days, and the UR timeline does not commence until a properly completed RFA is received. That was not the case here. The August 27, 2018, RFA was signed by a physician, clearly identified the patient, specified the treatment sought (H- Wave device), and included narrative documentation referencing prior treatment failures. As such, the request was procedurally complete and did not fall within the purview of

subsection (c)(2)(A). Petitioner's reliance on that regulation is therefore misplaced.

In its final argument, Petitioner contends that it "could not logically be the legislative intent for IMR to be utilized for non-substantive denials." The petitioner incorrectly asserts that any UR determination-regardless of its compliance with statutory and regulatory requirements-must proceed to IMR. This interpretation is legally flawed. The statutory IMR process (Lab. Code§§ 4610.5-4610.6) is predicated on a *valid* and *substantively reviewed* UR decision. A UR determination that fails to meet the legal standards for timeliness, medical review, or adequacy is not a valid decision and therefore cannot trigger IMR. The Legislature could not have intended that defective or procedurally invalid UR denials serve as a basis for IMR. Doing so would improperly shift the burden to the injured worker and deprive the WCAB of its fundamental adjudicatory role.

CONCLUSION:

The WCJ's decision properly applied existing law. The RFA was procedurally complete and triggered UR obligations. Defendant's actions placed the case squarely within the scope of § 9792.9.1(f), not§ 9792.9.l(c)(2)(A). The absence of a timely denial with the mandatory conditional language rendered UR untimely and invalid.

RECOMMENDATION:

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: April 22, 2025

Peter M. Wilkens

WORKERS' COMPENSATION JUDGE