WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NORBERTO ARREDONDO, ***Applicant,*** **vs.** **TRI-MODAL DISTRIBUTION SERVICES, INC.; STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ2440992 (LAO 0846692)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted applicant's petition for reconsideration of the January 22, 2015 Finding Of Fact of the workers' compensation administrative law judge (WCJ) in order to further study the issues. The WCJ found in full that, "The WCAB lacks jurisdiction to review the denial of care issued by Utilization Review [UR] and upheld by Independent Medical Review [IMR]." The admitted claim of industrial injury to the back and psyche was earlier addressed by entry of a stipulated award of future medical treatment on November 9, 2006.

Applicant contends that the IMR determination did not issue within the time specified in Labor Code section 4610.6(d) and, for that reason, the WCAB has jurisdiction to determine the medical treatment dispute based upon the evidence presented at the hearing on January 15, 2015.[1]

An answer was received from defendant. The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

The WCJ's decision is affirmed as the Decision After Reconsideration. Although the WCJ misconstrued section 4610.6(d) as discussed below, he correctly concluded that the IMR determination in this case is valid. IMR is governmental action and the timeframes set forth in section 4610.6(d) are

[1] Further statutory references are to the Labor Code.

directory and not mandatory. In that no grounds for appeal of the IMR determination under section 4610.6(h) were established at trial, the IMR determination in this case is final and binding on applicant.

BACKGROUND

It was earlier stipulated that applicant sustained industrial injury to his back and psyche with a need for future medical treatment. Applicant's primary treating physician, Daniel Capen, M.D., submitted requests for authorization to defendant for medications, a back brace, and eight sessions of physical therapy on or about October 25, 2013. (Joint Exhibit 5.) Defendant timely conducted UR and notified applicant and his physician on or about December 17, 2013, that UR denied certification for the requested medications. (Joint Exhibit 2.) The UR notice further advised that the requested back brace and physical therapy were "conditionally non-certified" because the UR reviewer did not receive information requested from Dr. Capen.

Applicant appealed the UR determination by requesting IMR on December 24, 2013, and again on December 30, 2013. (Joint Exhibits 1 and 4.) On March 25, 2014, before the IMR determination issued, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing requesting an award of the medication prescribed by Dr. Capen. An expedited hearing was calendared for May 29, 2014, pursuant to that declaration.

On April 25, 2014, the IMR determination issued, upholding the UR non-certification of the requested medications.[2] Applicant contended that the IMR determination was invalid because it did not issue within the time described in section 4610.6(d), and for that reason the treatment request was subject to determination by the WCAB. According to the May 29, 2014 Minutes Of Hearing (May 29, 2014, MOH), the WCJ decided on that date to convert the expedited hearing into a mandatory settlement conference and to set the matter for regular hearing "because of the complexity of the issues." (May 29, 2014, MOH, 2:12-13.) The dispute was set for hearing on January 15, 2015.

[2] It appears IMR did not address the requested back brace and physical therapy because they were only "conditionally" not certified by UR and the UR process did not reach a final determination on those items. For that reason, there was no final UR decision to be evaluated through IMR.

The issue heard by the WCJ on January 15, 2015 is described in the Minutes Of Hearing of that date (January 15, 2015, MOH) as follows: "Does the WCAB have jurisdiction to determine a medical treatment dispute where the IMR/administrative director has failed to issue a determination within the statutory 30 days where the Applicant filed a DOR but not a verified appeal per Labor Code Section 4610.6?" (January 15, 2015, MOH, 2:18-21.)

Following the trial, the WCJ concluded that the IMR determination was valid and the WCAB had no authority to determine the medical treatment dispute. The WCJ explains the reasons for his January 22, 2015 decision in his Report in pertinent part as follows:

> IMR is the sole means of reviewing a UR denial. As stated in L.C. section 4610.5(e):
>
> > '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.'
>
> The above provision seems to rule out any power of the Board to review a UR denial until IMR has been completed. Moreover, while applicant filed a DOR prior to the issuance of the IMR determination, it has since been issued. That would seem to trigger L,C. section 4610.6(g), which provides as follows:
>
> > 'The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties.' (emphasis added)
>
> It is true that IMR determinations must be issued within thirty days of receipt of the request (cf. L.C. section 4610.6(d)), and that did not happen here. The administrative director may extend the period for no more than 3 days. (Ibid). However, that merely provided a potential basis for appeal, namely, that to the extent that the administrative director impliedly extended the deadline beyond the three- day maximum, he acted 'in excess of [his] powers.' L.C. section 4610.6(h) (1). It must be emphasized that applicant never appealed the determination on that or any other grounds. Even if such an appeal had been filed and upheld on that basis, however, L.C. section 4610(i)) strictly delineates the consequences:
>
> > 'If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event

> that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. 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.' (emphasis added).

It is clear that IMR is the sole means for challenging a UR determination, that an IMR determination must be appealed within thirty days of issuance, and, perhaps most importantly, 'in no event' may the board contravene such a determination. The undersigned believes 'no event' means just that, and that it includes the event that occurred here, namely, that the IMR determination issued beyond the thirty day period. Moreover, that the determination issued after the filing of the declaration of readiness is irrelevant. There is nothing in the Labor Code that implies that the director forfeits jurisdiction of the issue if he or she does not act within the thirty day period, or that any action taken thereafter would necessarily be null and void, and therefore any decision at this time by a 'workers' compensation judge [or] the appeals board' in applicants favor would constitute a 'determination.., contrary to the determination of the independent medical review organization' in violation of the express terms of the statute.

There seems little doubt that the legislature intended to take out of the hands of the WCAB the issue of the appropriateness of medical treatment, provided the parties follow the requisite review procedure, as happened here. While the delay in this case was unfortunate, the undersigned sees nothing in the Labor Code that would as a consequence vest jurisdiction of the issue back with the board. (Emphasis and bracketed material in original.)

DISCUSSION

The WCJ writes in his Report that under section 4610.6(d), an IMR determination is to issue "within thirty days of receipt of the request." That is an incorrect statement. In fact, section 4610.6(d) provides that an IMR determination should issue "within 30 days of the receipt of the request for review *and supporting documentation*..." (Emphasis added.) Administrative Director (AD) Rule 9792.10.5(a)(1) provides that relevant documents in most instances are to be provided to the IMR organization "within fifteen (15) days" after the matter has been assigned for IMR. (Cal. Code Regs., tit. 8, § 9792.10.5(a)(1).) The 15 days allowed by the AD to provide supporting documentation *is in addition to* the 30 day period described in section 4610.6(d) because under that section the 30 day period does not begin to run until "receipt of the...supporting documentation." (*Id.*) Thus, the time allowed

from the date a request for regular IMR review is received to the date an IMR determination issues under the AD Rules is 45 days because 15 days are allowed for submission and receipt of supporting documentation. (Cf. Cal. Code Regs., tit. 8, §§ 9792.10.4(a)(5), 9792.10.7(g)(1).)

We also do not agree with the WCJ's statement in the Report that an employee may appeal an IMR determination that has not yet issued pursuant to section 4610.6(h)(1).[3] This is because section 4610.6(h) plainly provides for review of an IMR determination *after* it has issued. It does not describe any grounds for appeal *before* an IMR determination issues.

While we do not adopt the WCJ's discussion of those two points in his Report, we affirm his determination that the WCAB does not have statutory authority to disregard the IMR determination in this case for the reasons set forth in the Report and below.

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) In most instances this can be accomplished by considering the plain meaning of a statute because the words of the statute, "generally provide the most reliable indicator of legislative intent." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575], internal quotation marks omitted.) However, it is also important that the statutory language is not considered in isolation. Instead, the entire substance of the statute is to be examined in order to construe the language in context and to harmonize the different parts of the statute. (*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified*

[3] Section 4610.6(h) provides in pertinent part as follows: "A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed...within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal: (1) The administrative director acted without or in excess of the administrative director's powers. (2) The determination of the administrative director was procured by fraud. (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5. (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability. (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion."

School Dist. (2009) 46 Cal.4th 822, 831; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1].)

When the Legislature enacted the UR process, it provided that medical treatment decisions be determined consistent with the Medical Treatment Utilization Schedule (MTUS) promulgated by the AD pursuant to section 5307.27.[4] (Lab. Code, § 4610(c).) The use of the MTUS as part of the UR process evidences the Legislature's intention to promulgate a uniform standard of reasonable medical treatment based upon "evidence-based, peer-reviewed, nationally recognized standards of care." (Lab. Code, § 5307.27.)

It is apparent from the face of SB 863 that the Legislature subsequently enacted the IMR process in order to have medical professionals apply the MTUS and the other treatment standards prescribed in section 4610.5(c)(2) to determine medical treatment disputes not resolved by UR.[5] Section 4610(b) requires *every* employer to establish a UR process, and section 4610(c) requires that UR policies and procedures "*shall* ensure that decisions based on the medical necessity to cure and relieve of proposed medical treatment services are consistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27." (Emphasis added.) Similarly, section 4610.5 makes IMR applicable to "any dispute over a utilization review decision," and requires that any such dispute, "shall be resolved *only*" by IMR. (Emphasis added.)

The Legislature has directed that IMR determinations "shall be presumed to be correct" and they may be reviewed only by a verified appeal based on one or more specified grounds. (Lab. Code, § 4610.6(h).) Untimeliness is *not* listed as a ground for appeal in section 4610.6(h) and nothing in the

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[4] Section 5307.27 provides as follows: "On or before December 1, 2004, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases."

[5] As set forth in section 4610.5(c)(2), the standards and the order they are to be applied are as follows: "(A) The guidelines adopted by the administrative director pursuant to Section 5307.27. (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service. (C) Nationally recognized professional standards. (D) Expert opinion. (E) Generally accepted standards of medical practice. (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious."

IMR statutes authorizes a WCJ or the Appeals Board to determine medical necessity. To the contrary, section 4610.6(i) expressly 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."[6] (Emphasis added.) The Legislature further specified in section 4610.6(i) that if an IMR decision is reversed as part of an appeal on the limited grounds specified in section 4610.6(h), the dispute is to be "remanded" to the AD for submission to another IMR. In short, under the IMR process created by the Legislature, *all* medical treatment disputes are to be determined by medical professionals using evidence-based, uniform treatment standards.

The Legislature charged the AD with the responsibility of conducting IMR. In this way, IMR is distinctly different than UR, which a defendant is obligated to perform within the statutory and regulatory framework. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]; *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298, 1312 (Appeals Board en banc) (*Dubon II*).)

As designed by the Legislature, IMR is governmental action that occurs under the auspices and control of the AD. The AD contracts with the IMR organization to "conduct reviews" and to "*assist the division* [of workers' compensation] in carrying out *its* responsibilities." (Lab. Code, 139.5(a)(2), emphasis added.) The IMR organization and medical professionals who are "retained to conduct reviews shall be deemed to be consultants" who assist the AD in performing IMR. (Lab. Code, 139.5(b)(1).) Services provided by the IMR organization are specifically declared by the Legislature to be a "*state function*" as described in Government Code section 19130(b)(2). (Lab. Code, 139.5(f), emphasis added.) As such, the Legislature "specifically *mandated or authorized the performance of the work by independent contractors*." (Gov. Code, § 19130(b)(2), emphasis added.) The AD reviews and approves

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[6] Section 4610.6(i) provides in full as follows: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. 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."

employee requests for IMR. (Lab. Code, 4610.5(k).) A determination by the IMR organization "*shall be deemed to be the determination of the administrative director* and shall be binding on all parties." (Lab. Code, § 4610.6(g), emphasis added.)

The fact that IMR is governmental action is significant in considering the effect of the time provisions for completion of IMR that are contained in section 4610.6(d). This is because it has long been recognized that statutory provisions that guide governmental action in the conduct of business, and which do not limit its power or render its exercise ineffectual if the requirements are not met, are intended to provide "order, system, and dispatch in proceedings" and as such, "are not usually regarded as mandatory *unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.*" (*French v. Edwards* (1871) 80 U.S. (13 Wall.) 506, 511 [20 L.Ed. 702, 703] (*French*), emphasis added.)

The "mandatory" or "directory" designation does not refer to whether a particular statutory requirement is obligatory or permissive, but instead denotes "whether the failure to comply with a particular procedural step will or will not have the effect of invalidating the governmental action to which the procedural requirement relates." (*City of Santa Monica v. Gonzales* (2008) 43 Cal.4th 905, 923–924, quoting *People v. McGee* (1977) 19 Cal.3d 948, 959 (*McGee*); *French, supra* 80 U.S. at p. 511; *Ricardo v. Ambrose* (1954) 211 F.2d 212, 220-221.)

In evaluating whether a time provision is directory or mandatory the Courts consider "whether the statutory requirement at issue was intended to provide protection or benefit to … individuals …or was instead simply designed to serve some collateral, administrative purpose." (*McGee*, *supra*, 19 Cal.3d at 963.) If it is the latter, the language is construed as directory, and failure to comply with the time provision does not invalidate the late governmental action. (See, e.g., *People v. Gray* (2014) 58 Cal.4th 901, 909 [city's compliance with statutory requirement of issuing warning notices for 30-day period before using red light camera to issue citations construed to be directory]; *People v. Lara* (2010) 48 Cal.4th 216, 227 [statutory deadlines to petition to extend sex offender commitment construed to be directory] (*Lara*); *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145 [statutory time for issuance of decision found to be directory] (*CCPOA*); *In re Richard S.*

(1991) 54 Cal.3d 857, 866 [the word "shall" in court rules construed to be directory]; *Cal-Air Conditioning, Inc. v. Auburn Union School Dist.* (1993) 21 Cal.App.4th 655, 673 [statute requiring school district to present supporting affidavit construed to be directory] (*Cal-Air*); *Gowanlock v. Turner* (1954) 42 Cal.2d 296, 301 [directory language in city charter did not require that employees work certain hours]; *Woods v. Department of Motor Vehicles* (1989) 211 Cal.App.3d 1263, 1257 [statute allowing 30 days for conduct of hearing construed to be directory]; *Castorena v. City of Los Angeles* (1973) 34 Cal.App.3d 901, 908 [reapportionment ordinance valid although enacted subsequent to charter designated directory deadline]; cf. *Cake v. City of Los Angeles* (1913) 164 Cal. 705, 709-710 [tax assessment valid even though not adopted within time limit prescribed by statute]; *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 931 [wage resolution valid though enacted prior to date specified in city charter]; *Garrison v. Rourke* (1948) 32 Cal.2d 430, 434-436 [judicial decision valid though rendered after statutorily prescribed period]; but see *Pulcifer v. County of Alameda* (1946) 29 Cal.2d 258, 262-263 [ordinance increasing compensation of elected official invalid because not enacted at least six months prior to election as required by city charter].)

There is "no simple, mechanical test" for making the determination. (*McGee*, *supra*, 19 Cal.3d at pp. 961–962.) Courts look to the procedure's purpose or function. "If the procedure is essential to promote the statutory design, it is 'mandatory' and noncompliance has an invalidating effect. If not, it is directory." (*Cal-Air, supra* 21 Cal.App.4th at p. 673.) "[P]rovisions defining time and mode in which public officials shall discharge their duties and which are obviously designed merely to secure order, uniformity, system and dispatch in the public bureaucracy are generally held to be directory." (*Id.*) As the Supreme Court observed:

> [T]he construction of particular provisions must be left for determination in such light as the obvious purpose they were intended to accomplish may afford…No one should be at liberty to plant himself upon the nonfeasances or misfeasances of officers…which in no way concern himself, and make them the excuse for a failure on his part to perform his own duty. On the other hand, he ought always to be at liberty to insist that directions which the law has given to its officers for his benefit shall be observed. (McGee, supra, 19 Cal.3d at p. 962.)

Here, there is no question that the Legislature intended to guide the AD on when an IMR determination should issue when it enacted section 4610.6(d). However, the Legislature implemented *no* provision for invalidating IMR if a determination does not issue within the section 4610.6(d) timeframes. Construing untimeliness as grounds for appeal under section 4610.6(h) would be inconsistent with the Legislature's intention in enacting the IMR process because the remedy for a successful section 4610.6(h) appeal is remand of the dispute to the AD for completion of another IMR. (Lab. Code, § 4606.6(i).) No valid purpose is served by having a second IMR performed when the only demonstrated concern with the first IMR determination is that it did not issue within the section 4610.6(d) timeframe. Thus, the timeframes described in section 4610.6(d) are properly construed to be directory and not mandatory. (*CCPOA, supra*; *Edwards, supra*; *Lara, supra.*)

Construing the section 4610.6(d) timeframes as "directory" is consistent with the overall statutory design because it promotes the Legislature's goal of assuring that the objective medical treatment standards identified in section 4610.5(c)(2) are uniformly applied by medical professionals in all instances. It is also consistent with the expressed legislative intention that that IMR apply to "*Any* dispute" over a UR decision (Lab. Code, § 4610.5(a)(1), emphasis added), and that UR disputes be resolved "*only* in accordance" with section 4610.5 (Lab. Code, § 4610.5(b), emphasis added). Invalidating an IMR simply because it did not issue within the section 4610.6(d) timeframe would be in direct conflict with those statutory provisions and legislative goals.

The Legislature requires that medical treatment disputes be evaluated through IMR in order to assure that medical necessity is objectively and uniformly determine based upon the MTUS and other recognized standards of care. IMR is governmental action performed under the auspices and control of the AD. An IMR determination is a determination of the AD. The Legislature provided guidelines in section 4610.6(d) on when an IMR determination should issue, but it enacted no provision that invalidates an IMR determination if it is not made within those section 4610.6(d) timeframes. In light of the statutory design of IMR, we construe the section 4610.6(d) timeframes to be directory and not mandatory. For that reason, an IMR determination is valid even if it does not issue within those timeframes.

The decision of the WCJ is affirmed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the January 22, 2015 Finding Of Fact of the workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

DEIDRA E. LOWE

I DISSENT (SEE SEPARATE DISSENTING OPINION),

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 12 2015

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

NORBERTO ARREDONDO
MOORE & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

JFS/abs

DISSENTING OPINION OF COMMISSIONER SWEENEY

I dissent. I would return the case to the trial level for a prompt decision on whether the IMR in this case is untimely and invalid for that reason, and if so, whether the requested medical treatment is supported by substantial medical evidence as defined by statute and should be awarded.

The time requirements of section 4610.6(d) must be construed as mandatory in order to uphold the basic constitutional and statutory provisions of workers' compensation law that require prompt provision of medical care. Under the California constitution, the WCAB is obligated to "enforce a complete system of workers' compensation" that includes "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury," and it is mandated "to accomplish substantial justice in all cases expeditiously." (Cal. Const., Article XIV, § 4; cf. *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93] ["notice of injury provides the employer with the opportunity to render medical assistance and *if he fails to avail himself of the opportunity promptly, he has neglected to provide treatment within the meaning of section 4600*," emphasis added] (*McCoy*).)

Section 4610.6 obligates the administrative director and the IMR organization to undertake prompt and accurate determinations of treatment disputes, in accordance with express timeframes and other requirements. The Legislature has included the mandatory term "shall" in specifying time limitations, because timeliness is essential to the legislative goal that the IMR process be expeditiously completed.

Treatment delayed is treatment denied. If the governmental agency tasked with the duty to provide IMR is excused from statutory timeframes, then there will be instances when necessary treatment is denied de facto. Such a result thwarts the incontrovertible basis of workers' compensation law.

If the IMR organization fails to act within the prescribed time, the controversy is no longer covered by section 4610.5 and the treatment dispute may be heard and determined by the WCAB pursuant to its constitutional mandate and the statutory authority provided in sections 4604 and

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5502(b)(1).[7] This is the same remedy that applies when a utilization review (UR) decision is untimely and therefore invalid, as held in *Dubon II*, *supra*, 79 Cal.Comp.Cases at pps.1299-1300.[8]

Nothing in the IMR statutes suggests that the Legislature's establishment of the section 4610.5 time limits for issuance of an IMR determination were intended only to serve some "collateral, administrative purpose" as described in *McGee*, *supra*, and as concluded by the majority. To the contrary, the establishment of absolute time periods within which IMR must be concluded is "essential to promote the statutory design" as described in *Cal-Air*, *supra*, because in the absence of such time frames there is no avenue for the WCAB to enforce the state's constitutional mandate that reasonable medical treatment be expeditiously provided, and no efficacious remedy for the injured worker.

When the UR section 4610 process fails to reach a determination within the allotted time, the request for treatment authorization remains unaddressed. (Lab. Code, § 4610(g); *Sandhagen*, *supra*; *Dubon II*, *supra*.) As the Supreme Court wrote in *Sandhagen* in addressing UR, "the Legislature intended utilization review to ensure quality, standardized medical care for workers *in a prompt and expeditious manner*. To that end [UR] *balances the dual interests of speed and accuracy*, emphasizing the *quick resolution of treatment requests*..." (*Sandhagen*, *supra*, 44 Cal.4th at p. 241, emphasis added.) For the same reason, section 4610.6(d) requires that an IMR determination be made within the specified times. Regardless of how a treatment dispute is addressed, the employer is liable to promptly provide reasonable medical treatment. (Lab. Code, § 4600; *McCoy*, *supra*; *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566] ["Section

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[7] Section 4604 provides in pertinent part as follows: "[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." (Italics added.)

Section 5502(b)(1) provides in pertinent part that an expedited hearing may be obtained to determine, "The employee's entitlement to medical treatment pursuant to Section 4600, except for treatment issues *determined* pursuant to Sections 4610 and 4610.5." (Italics added.) In that a treatment dispute has not been properly "determined" by an IMR that does not timely issue within the allowed time, section 5502(b)(1) supports the issuance of such a determination by the WCAB.

[8] Construing section 4604 as discussed herein is not inconsistent with section 4610.6(i), because section 4610.6(i) only precludes determinations of medical necessity by the WCAB that are "contrary to the determination of the independent medical review organization." That circumstance does not exist when there is no timely, valid IMR determination by the independent medical review organization.

4600 requires more than a passive willingness on the part of the employer to respond to a demand or request for medical aid...This section requires some degree of active effort to bring to the injured employee the necessary relief"].)

As discussed in *Dubon II*, Senate Bill 863 (SB 863) was enacted in 2012 to amend the procedures for resolving post-UR disputes over the "medical necessity" of treatment requests, but it did not change the procedural requirements of section 4610 for UR decisions. (*Dubon II, supra,* 79 Cal.Comp.Cases at p. 1312; Stats. 2012, ch. 363.) Nor did SB 863 amend section 4604 to remove WCAB jurisdiction to determine non-medical disputes regarding the timeliness of UR.

In *Dubon II*, as in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon I*), the Appeals Board majority reasoned that when a UR decision is not timely issued in compliance with statutory deadlines, there is no valid UR dispute for IMR to resolve.[9] (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1306; citing *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 363 [75 Cal. Comp. Cases 81] ["A dispute does not legally arise unless the employer prompts the utilization review in a timely fashion."].) As the Appeals Board observed in *Dubon II*, the issue of timeliness is a legal dispute. (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1307.)

As with an untimely UR, the issue of timeliness of an IMR determination is a legal dispute that is within the jurisdiction of the WCAB. (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1309; cf. Lab. Code, § 4604, Lab. Code, § 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"]; see also Cal. Code Regs., tit. 8, § 10451.2(c)(1)(C).)

Construing the time requirements of section 4610.6(d) to be mandatory is consistent with how all the other time periods in section 4610.6 are applied. These include the time within which an employee must request IMR, and the time within which an employer must comply with an IMR determination.

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[9] In *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 313, 315 (Appeals Board en banc) (*Dubon I*), the Appeals Board held that "[a] UR determination is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR determination," but that holding was modified in *Dubon II* to describe a UR as "invalid...only if it is untimely." (*Dubon II, supra*, 79 Cal.Comp.Cases at p. 1300.)

(Lab. Code, § 4610.5(h)(1) ["employee may submit a request for independent medical review to the division no later than 30 days after the service of the utilization review decision"]; Lab. Code, § 4610.5(k) [failure to timely pay or authorize treatment determined by IMR to be reasonable subjects employer to an administrative penalty in addition to any other fines and penalties that are due].)

The goal of prompt delivery of reasonable and necessary treatment is undermined if the timeframes in section 4610.6 are construed to be directory for the IMR organization and the Administrative Director, but mandatory for injured workers and claims administrators. The WCAB should exercise the same authority regardless of the fact that it is the IMR organization that failed to meet the section 4610.6(d) time requirements.

I do not agree with the majority that it is necessary to construe the section 4610.6 timeframes as "directory" in order to promote the legislative goal of assuring the uniform application of objective medical treatment standards. To the contrary, the WCAB is bound by the same statutory standards as the IMR medical professionals in deciding whether medical treatment should be provided.[10] A judge's decision to award requested treatment must be based upon substantial medical evidence from medical professional(s) who have applied the objective medical treatment standards identified in §4610.5(c)(2).

Recognizing the authority of the WCAB to address treatment disputes that have not been timely addressed by the IMR organization balances the fundamental need for expeditious provision of medical treatment with the legislative goal of having treatment disputes determined by applying the standards enumerated in section 4610.5(c)(2). (See footnote 5, *supra*, majority opinion.) Thus, enforcing the constitutional mandate by expeditiously determining medical treatment disputes is not inconsistent with the legislative goal of having treatment requests evaluated by UR and IMR.

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[10] Upon a finding of untimely IMR, the WCAB/WCJ must determine the propriety of the treatment request based upon substantial medical evidence including that the proposed treatment is supported by the MTUS. (See, Lab. Code, § 4600(b) ["medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27."].) The employee may meet this burden by showing that the treatment is within the presumptively correct MTUS. (Lab. Code, § 4604.5(a).) Or, as further provided in section 4604.5(a), the employee might rebut the MTUS presumption of correctness. (Lab. Code, § 4604.5(a) ["The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury"].)

Moreover, as with the time requirements for conduct of UR, the Legislature expressly requires in section 4610.6(a) that the IMR organization "*shall* conduct the review in accordance with this article and any regulations or orders of the administrative director" and section 4610.6(d) further specifies that the IMR organization "*shall* complete its review and make its determination...within 30 days of the receipt of the request for review and supporting documentation, or within less time as prescribed by the administrative director." (Emphasis added.) As defined by the Labor Code, " 'Shall' is mandatory and 'may' is permissive." (Lab. Code, § 15.)

The need for mandatory time limits is emphasized by the requirement in section 4610.5(n) that when there is an "imminent and serious threat to the health of the employee" all necessary information and documents must be delivered to the IMR organization within 24 hours of approval of the request for review, and why section 4610.6(d) expressly provides for "expedited" completion of IMR "within three days of the receipt" of that information. These IMR time limits are meaningless if construed to be merely directory. The workers' compensation statutes are to be "liberally construed" with the purpose of "extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, § 3202.) It is the injured workers who suffer the consequences of debilitating pain, prolonged periods of missed work, increased disabilities and death when reasonable medical treatment is delayed without regard for the constitutional mandate that it be expeditiously provided.

It is a maxim of jurisprudence that "For every wrong there is a remedy." (Civ. Code, § 3523.) If the IMR organization does not issue a determination within the times mandated by section 4610.6(d), the medical treatment dispute is no longer covered by section 4610.5. As such, it may be heard at a section 5502(b)(1) expedited hearing and determined by a WCJ pursuant to the WCAB's authority to resolve controversies under section 4604. This would provide the same remedy for an untimely and invalid IMR as applies for an untimely and invalid UR. (Lab. Code, §§ 4604 and 5502(b)(1); *Dubon II, supra.*)

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In this case, applicant contends that the IMR determination did not issue within 30 days after receipt of supporting documentation as required by section 4610.6(d). If true, the medical treatment dispute is no longer within section 4610.5, and the controversy is subject to determination by the WCAB at a section 5502(b)(1) expedited hearing pursuant to section 4604. In that applicant properly requested an expedited hearing to address the medical treatment dispute, the WCJ should have determined whether the IMR determination is untimely and therefore invalid, and whether the medical treatment request is supported by substantial evidence. I would return the case to the trial level for that purpose.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 12 2015

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

NORBERTO ARREDONDO
MOORE & ASSOCIATES
STATE COMPENSATION INSURANCE FUND

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