WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LISA SIMMONS, ***Applicant,*** **vs.** **STATE OF CALIFORNIA, DEPT. OF MENTAL HEALTH (METROPOLITAN STATE HOSPITAL), Legally Uninsured; and STATE COMPENSATION INSURANCE FUND (Adjusting Agent),** ***Defendant(s).***	**Case No. LBO 0340807** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

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

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

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

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

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

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

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

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

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

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[1] All further statutory references are to Labor Code.

[2] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, §10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (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).)

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

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

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

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

[3] In reaching this holding, we are *not* addressing any issues relating to proposed spinal surgery under sections 4610(g)(3)(A) & (B) and 4062(b).

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

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

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

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[4] If no body part is accepted as industrial, the parties must follow the procedures set forth in section 4060.

I. BACKGROUND

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

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

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

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

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

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

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

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

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

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

> "Based on the results of R [right] shoulder MRI sx [surgery] is indicated. However, AOE/COE [injury arising out of and in the course of the employment] issue re: R shoulder has not been resolved. *IT* [applicant] has been TTD [temporarily totally disabled] since 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."

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

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

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

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

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

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

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

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

> "[SCIF should obtain a] 2nd opinion regarding MN [medical necessity] for sx [surgery] under the auspices of workers comp & explanation of RCT [rotator cuff tear]. Dr. Sperling's explanation of appearance of RCT is highly questionable."

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

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

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

SCIF then timely sought reconsideration.

II. DISCUSSION

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

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

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

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

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

In this regard, section 4610(a) states:

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[5] As discussed above, Dr. Pegram's January 5, 2004 report concedes that, "[b]ased on the results of [applicant's] R [right] shoulder MRI sx [surgery] is indicated." Although Dr. Pegram's January 5, 2004 report goes on to raise an "AOE/COE issue" (i.e., an industrial causation issue) regarding the right 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]."

> "For purposes of this section, 'utilization review' means utilization review or utilization management functions that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part *on medical necessity to cure and relieve*, treatment recommendations by physicians, as defined in Section 3209.3, prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600." (Emphasis added.)

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

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

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

Finally, this interpretation is consistent with the nature of the utilization review process. A utilization review physician does not physically examine the applicant, does not obtain a full 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.

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

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

Under these circumstances, a defendant has only two options. Either it must approve the treatment or it must deny the treatment. (Lab. Code, §4610 (a).)[6]

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

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

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

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

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

Section 4062(a) provides, in relevant part:

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

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

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

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

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

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

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

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

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

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

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

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[8] If the treating physician had previously determined that there was an industrial injury to the disputed body part, then section 4062(a) would have been triggered at that time. If, subsequently, the 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.

[9] Because applicant is represented, and because her injury occurred before January 1, 2005, the AME or QME report should be obtained in accordance with the procedure set forth in former section 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).)

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

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

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

For the foregoing reasons,

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

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

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

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

I DISSENT.
(See attached Dissenting Opinion.)

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RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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

NPS/tab

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 statues; 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.

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

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

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

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

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

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