# 2018 Cal. Wrk. Comp. P.D. LEXIS 529

Workers' Compensation Appeals Board (Board Panel Decision)

Opinion Filed November 5, 2018

W.C.A.B. No. ADJ8844834—WCJ M. Victor Bushin (VNO); WCAB Panel: Commissioners Sweeney, Razo, Lowe

**Reporter**
2018 Cal. Wrk. Comp. P.D. LEXIS 529 *

## Hector Garcia, Applicant v. Barrett Business Services, Inc., PSI, Defendant

**Status:**

**CAUTION:** This decision has not been a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision, as these decisions are subject to appeal. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

**Disposition: [*1]**

Reconsideration is *granted*, and the June 18, 2018 Findings And Order is *affirmed*.

## Core Terms

workers' compensation, patient, panel decision, concurrent, reconsider, recommend, untimely, request information, petition for reconsideration, rehabilitate, cure

## Headnotes

HEADNOTES

**Medical Treatment-Utilization Review-Concurrent Review-WCAB affirmed WCJ's finding that defendant's 3/26/2018 utilization review (UR) determination was untimely, when applicant's primary treating physician**

**submitted 3/15/2018 request for authorization (RFA) for six months of continued inpatient care at Center for Neuro skills (CNS) for applicant who suffered traumatic brain injury while employed as truck driver on 3/6/2013, and WCAB determined that where RFA involves concurrent medical treatment in form of inpatient stay such as applicant's stay at CNS, Labor Code § 4610(i) requires that UR decision be issued no more than 72 hours after receipt of information reasonably necessary to make determination and that decision be communicated to requesting physician within 24 hours, and in this case defendant failed to timely issue and communicate UR decision, thereby making UR untimely and giving WCAB jurisdiction over medical treatment request; WCAB found that WCJ's award of requested treatment was supported by substantial medical evidence**. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 5.02, **[*2]** 22.05[6]; Rassp & Herlick, California Workers' Compensation Law, Ch. 4, § 4.10.]

## Counsel

For applicant-***Odjaghian*** Law Group

For defendant-Kegel, Tobin & Truce

**Opinion By:** Commissioner Marguerite Sweeney

## Opinion

**OPINION AND DECISION AFTER RECONSIDERATION**

Defendant's petition for reconsideration of the June 18, 2018 Findings And Order of the workers' compensation administrative law judge (WCJ) was previously granted in the Appeals Board's September 10, 2018 Order Granting Reconsideration, Notice Of Intention To Apply Labor Code Section 4610(i), And Order Allowing Supplemental Briefing (September 10, 2018 NIT). It is admitted that applicant sustained industrial injury to multiple body parts and traumatic brain injury as the result of a traffic collision while employed by defendant as a truck driver on March 6, 2013.

In his June 18, 2018 Findings And Order the WCJ found that, "the Utilization Review Determination dated March 26, 2018 was not timely" and that applicant is in need of continued in-patient care at the Center for Neuro Skills (CNS) for six months. Defendant contends in its petition for reconsideration that its March 26, 2018 UR determination was timely, that the UR denial can only be challenged by way of **[*3]** Independent Medical Review (IMR) and that the WCAB is without authority to award applicant's continued care at CNS.

The September 10, 2018 NIT, which is incorporated by this reference, provided notice of the intention to apply the provisions of Labor Code section 4610(i) regarding a "concurrent" utilization review (UR) to the record in this case as part of the Decision After Reconsideration. As addressed in the September 10, 2018 NIT, the WCJ determined that defendant did not issue a timely UR determination, but did not address the statutory provisions concerning "concurrent" review of a request for authorization to provide treatment contained in Labor Code section 4610(i).

Applicant's Supplemental Brief was received on September 24, 2018, pursuant to the order in the September 10, 2018 NIT allowing supplemental briefing. A supplemental brief was not received from defendant.

The WCJ's finding that the March 26, 2018 UR was untimely is affirmed as part of the Decision After Reconsideration, albeit because the UR determination did not issue within the time allowed by Labor Code section 4610(i) for a "concurrent" utilization review. The WCJ's June 18, 2018 orders are also affirmed.

***DISCUSSION***

As **[*4]** set forth in the September 10, 2018 NIT, it is averred in applicant's answer that he was admitted to inpatient treatment in May 2016, and transferred into CNS in July 2017. On March 15, 2018, applicant's primary treating

physician Vibhay Prasad, M.D., submitted a request for authorization (RFA) for applicant's continued stay at CNS. (Applicant's Exhibit 2.) Defendant responded to the RFA on March 22, 2018 by requesting additional information. (Defendant's Exhibit B.) On March 26, 2018, a UR determination issued. (Defendant's Exhibit C.)

In his Report, the WCJ explains that he found that defendant's UR determination was untimely and invalid for that reason. As addressed in the September 10, 2018 NIT, the WCJ is correct that an untimely UR is invalid. However, in making that determination, the WCJ did not address the specific statutory provisions of Labor Code section 4610(i) that apply when an RFA involves "concurrent" medical treatment in the form of an inpatient stay, like applicant's inpatient stay at CNS. (Lab. Code, § 4610; see also Cal. Code Regs., tit. 8, § 9792.6.1(c) [" 'Concurrent review' means utilization review conducted during an inpatient stay"]; *King v. Comppartners, Inc*. (2018) 5 Cal.5th 1039, 1048 [83 Cal.Comp.Cases 1532] **[*5]** ["When…a utilization reviewer decides to deny the recommendation of a treating physician in the midst of treatment, that determination must be communicated to the requesting physician within 24 hours of the decision. [citation deleted] In these so-called concurrent review cases, the statute provides that 'medical care shall not be discontinued until the employee's physician has been notified of the decision and a care plan has been agreed upon by the physician that is appropriate for the medical needs of the employee.'"].)

Under Labor Code section 4610(i)(3), when the employee's condition is one in which the employee faces an imminent and serious threat to his or her health, a "concurrent" UR decision, "shall be made in a timely fashion that is appropriate for the nature of the employee's condition, *but not to exceed 72 hours* after the receipt of the information reasonably necessary to make the determination." (Italics added; see also Cal. Code Regs., tit. 8, § 9792.9.1(e)(3).) In this case, the record reflects that defendant did not make a UR decision within 72 hours of receiving the RFA.

Moreover, Labor Code section 4601(i)(4)(A) provides that when a utilization reviewer decides to **[*6]** deny the recommendation of a treating physician in the midst of treatment, that determination must be communicated to the requesting physician within 24 hours of the decision. That did not occur in this case. A UR decision that is not timely communicated is untimely, and a WCJ may determine the medical treatment request. (*Bodam v. San Bernardino County/Department of Soc. Servs*. (2014) 79 Cal.Comp.Cases 1519, 1521 [2014 Cal. Wrk. Comp. LEXIS 156] (significant panel decision) [1] ["A defendant is obligated to comply with all time requirements in conducting UR, including the timeframes for communicating the UR decision"].)

In addition, the WCJ's order allowing applicant's continued stay at CNS appears to be reasonable medical treatment for the reasons expressed by the WCJ in the section of his Report beginning at the bottom of page three and entitled "Continued Stay For Six Months (DOS 4/1/2018–9/30/2018) Is Medically Necessary," which is incorporated by this reference. As discussed in the Report, the WCJ determined that his finding that applicant is in need of continued in-patient care is supported by substantial medical evidence. The finding that applicant is entitled to continue care at CNS also appears to be supported by Labor Code section 4610(i)(4)(C), which provides in pertinent part that, "[I]n the case of concurrent review, medical care shall not be discontinued until the employee's physician has been notified of the decision and a care plan has been agreed upon by the physician that is appropriate for the medical needs of the employee." CNS employee Jolanta Baranowski testified at the trial on June 5, 2018, that "[t]here is no safe discharge plan at this point." (June 5, 2018 Minutes Of Hearing And Summary **[*8]** Of Evidence, 5:21.)

Accordingly, the WCJ's finding that the March 26, 2018 UR was untimely is affirmed as the Decision After Reconsideration as are his June 18, 2018 orders.

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[1] Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd*. (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; **[*7]** *Larch v. Workers' Comp. Appeals Bd*. (1999) 64 Cal.Comp.Cases 1098, 1099–1100 (writ den.).)

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 18, 2018 Findings And Order of the workers' compensation administrative law judge is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Marguerite Sweeney

I concur,

Commissioner Jose H. Razo

Commissioner Deidra E. Lowe

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**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION**

***INTRODUCTION*:**

On July 12, 2018, Defendant filed a timely verified Petition for Reconsideration on the grounds that the Judge erred in finding the request for additional information was perfunctory. The Defendant contends:

a) The WCJ lacked jurisdiction because there was a timely utilization review determination, and;

b) If the WCJ did have jurisdiction, the services requested were not reasonable and necessary.

***STATEMENT OF RELEVANT FACTS*:**

Applicant, Hector Garcia, born October 11, 1963, while employed on March 6, 2013, as a truck driver, at Santa Cruz County, **[*9]** Arizona, by Barrett Business Services, Inc., sustained injury arising out of and in the course of employment to his ribs, chest, left leg, shoulders, hips, left side and head resulting in a traumatic brain injury.

On June 5, 2018, the parties appeared before the undersigned WCJ for an expedited trial on the extension of care at the Center for Neuro Skills (hereinafter CNS). The matter was submitted on the issues of timeliness of the utilization review denial and if it was not timely, the reasonable and necessity of continued care at CNS. On June 18, 2018, the court issued a findings and order that the utilization review was untimely and the continued care at CNS was reasonable and necessary. It is from these findings that Defendant seeks relief.

***DISCUSSION*:**

THE UTILIZATION REVIEW DETERMINATION DATED MARCH 26, 2018 WAS NOT TIMELY

In the opinion and decision the undersigned WCJ incorrectly stated that the defendant did not provide the court with a list of the information requested on March 20, 2018 from Dr. Vibhay Prasad (Opinion on Decision dated June 18, 2018, page 2). Any defect contained in the Opinion on Decision under Labor Code section 5313 is cured by the herein WCJ's Report and Recommendation on Reconsideration (*Smales v. Workers' Comp. Appeals Bd*. (1980) 45 Cal. Comp. Cases 1026 **[*10]** (writ denied)).

Defendant's March 26, 2018 utilization review (UR) determination issued in response to request for authorization (RFA) received by defendant on March 15, 2018 was untimely. The defendant had five business days to issue a UR determination and five days to request additional information what would extend the time. In order to extend time, the information requested must be in one of the three categories below:

(A) The claims administrator or reviewer is not in receipt of all of the information reasonably necessary to make a determination.

(B) The reviewer has asked that an additional examination or test be performed upon the injured worker that is reasonable and consistent with professionally recognized standards of medical practice.

(C) The reviewer needs a specialized consultation and review of medical information by an expert reviewer. (Cal. Code Regs. tit. 8, § 9792.9.1(f)(1)).

In this case, the current PR-2, Treatment Plan and Ortho QME were requested. (Exhibit B). The requested information is not a request for an additional examination or test nor is the information requested a need for a specialized consultation, therefore, the additional information does not fit into **[*11]** categories B and C above. "If the employer, insurer, or other entity cannot make a decision within the timeframes specified in paragraph (1), (2), or (3) of subdivision (i) because the employer or other entity is not in receipt of, or in possession of, all of the information reasonably necessary to make a determination, the employer shall immediately notify the physician and the employee, in writing, that the employer cannot make a decision within the required timeframe, and specify the information that must be provided by the physician for a determination to be made. Upon receipt of all information reasonably necessary and requested by the employer, the employer shall approve, modify, or deny the request for authorization within the timeframes specified in paragraph (1), (2), or (3) of subdivision (i)." (Cal. Lab. Code § 4610(j)(2)). If the information requested was truly necessary, a non-certification due to lack of information would have been issued allowing the applicant to supply the three documents and then have the RFA considered within five days. However, pursuant to exhibit B communication with the doctor was not established and the documents alleged to be necessary for a **[*12]** determination was not received. The UR doctor did not have to defer a decision, but was able to make a medical determination without the documents, therefore, the documents requested were not necessary for the determination and the requested information does not fit in category A. There is no legal reason to extend time and the UR determination was not produced in the five days allowed by law. The court has Jurisdiction over the treatment requested.

CONTINUED STAY FOR SIX MONTHS (DOS 4/1/2018–9/30/2018) IS MEDICALLY NECESSARY

Cal. Lab. Code § 4600 states that the employer shall provide such treatment which is reasonably required to cure or relieve from the effects of the injury. So long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself. (*Granado v. Workmen's Comp. App. Bd.*, 69 Cal. 2d 399, 401 (1968)). CA MTUS does not address a request for assisted living program. ODG-TWC states that interdisciplinary rehabilitation **[*13]** programs are recommended. Criteria for residential transitional rehabilitation includes patient requiring neurobehavioral treatment for moderate to severe deficits, patient demonstrates moderate to severe cognitive dysfunction, patient requires treatment from multiple rehabilitation disciplines, patient is medically complex, requiring physician or nursing interventions and up to 24 hours of nursing, patient will benefit from combination therapies, patient is unsafe, patient diagnosed with severe postconcussion syndrome, patient is unable to feed orally, or family is unavailable to provide for patients level of care while participating in rehabilitation. Continued stay requires measurable progress documented toward pre-established goals with gains sustained. In this case, it is unsafe to discharge the applicant. (MOH, page 5:5). The Applicant has no home for him to go back to. He has no family support. (MOH, page 5:5). A continued stay is justified by the measurable progress made by the Applicant. He has lost 35–40 pounds and he is benefiting from daily participation in the enrichment center, therapeutic and leisure activities. (Exhibit C, page 13).

Furthermore, one of the reasons for **[*14]** continued care is the Patient able to benefit from intensive therapy (equal to or greater than 4 hours per day, 5 to 7 days per week), and family is unable to provide for patients level of care while participating in rehabilitation. (Exhibit 5, page 12). The Applicant is receiving psychologicaling weekly and CBT sessions weekly and sees Dr. Prasad every six weeks (Exhibit C, page 10). Applicant has a certified clinical case manager assigned to him. (MOH, page 4). The case manager meets with him on a daily basis and talks to him for 10 minutes to an hour and a half each day. (MOH, page 4). Applicant's primary diagnosis is TBI (traumatic brain injury). (Exhibit 5, page 4).

Based on the credible testimony of Jolanta Baranowski, there is no safe discharge plan and discharging him may subject him to bodily harm. The Petition for Reconsideration mentions that the treatment costs $ 35,000.00 per month. Considering the costs of the treatment, the cost of a deposition of the panel qualified medical examiner is meniscal. The panel qualified medical examiner could confirm it would be detrimental to release the applicant thereby making the treatment necessary to cure or relieve the applicant from **[*15]** the effects of the injury or the panel qualified medical examiner can recommend a viable safe discharge plan to the PTP. Without an alternative, the treatment is necessary to prevent bodily harm to the applicant.

***RECOMMENDATION*:**

The undersigned WCJ respectfully recommends that Defendant's Petition for Reconsideration filed July 13, 2018 be denied.

M. Victor Bushin

Workers' Compensation Administrative Law Judge

Dated: July 16, 2018



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**End of Document**