



CERVANTES V. EL AGUILA FOOD PRODUCTS, INC., SAFECO INSURANCE CO. OF ILLINOIS, SUPERIOR NATIONAL INSURANCE CO., IN LIQUIDATION, CALIFORNIA INSURANCE GUARANTEE ASSOCIATION (2009) WCAB En Banc, 37 CWCR 276. Prepared by Ted Harrison, Esq. of the Fresno Office

The WCAB in an En Banc decision addressed Defendant's obligations regarding Utilization Review under LC 4610 and LC 4062 (b) second opinions re spinal surgery post the *Sandhagen* decision.

Applicant sustained several industrial injuries to his low back in 1996, 1997, and 1998 and on September 2, 2003 a Stipulated Findings and Award issued including future medical. A September 30, 2008 report requested authorization for a lumbar MRI; the November 4, 2008 report said that applicant "may be a surgical candidate" pending the results of the MRI; and the December 13, 2008 report set forth the MRI findings. In a January 16, 2009 report, Dr. Dureza said: "I do feel somewhat confident that the patient would benefit from surgery . . . Therefore, I am requesting L4-L5 and L5-S1 posterior lumbar interbody fusion with pedicle screw fixation and extensive decompression by a Gill Procedure. . . . Authorization should be forthcoming in order to prevent further neurological and musculoskeletal deterioration." There was no clear statement requesting authority.

On 2/25/09 Dr. Dureza faxed a letter to Safeco captioned "WRITTEN REQUEST FOR SURGERY AUTHORIZATION" and detailing the surgery needed.

On 03/04/09 Safeco received a UR report that the surgery was not medically necessary.

At the expedited hearing both the reports of Dr. Dureza and the UR report by Dr. Deutsch were admitted into evidence and a Findings and Award issued ordering the spinal surgery because Dr. Dureza's reports were more persuasive.

Reconsideration was granted in light of the California Supreme Court decision in *Sandhagen*, to address Defendant's obligations under LC 4610; LC 4062(b) and the *Brasher* decision which held that when UR denies spinal surgery it is *the injured employee* who must object within 10 days of the denial per LC 4062(b).

The panel reversed the trial court decision and sent the case back for trial consistent with its ruling as follows:

When the treating physician recommends spinal surgery a Defendant must undertake Utilization Review.

The panel relied on *Sandhagen* noting that even though it was not a spinal surgery case the ruling by the California Supreme Court clearly applied.

If UR approves the surgery or if UR is not timely completed Defendant must authorize the spinal surgery.

The panel relying on *Sandhagen* stated that the procedure in LC 4062(b) was only available when Defendant “disputed” the spinal surgery and if UR certified it or Defendant failed to timely UR the PTP’s surgery recommendation, there is simply no dispute.

A Defendant May Object under Section 4062(b) to a Spinal Surgery Request, but any Objection Must Comply with Administrative Director Rule 9788.1 and Use the Form Required by Administrative Director Rule 9788.11.

The panel noted the specific language in LC 4062(b) allowing a Defendant to object, but stated such objection could only be made after UR denied the surgery.

The Defendant Must Complete its Utilization Review Process within 10 days of its Receipt of the Treating Physician’s Report, Which Must Comply with Administrative Director Rule 9792.6(o), and, if Utilization Review Denies the Requested Surgery, any Section 4062(b) Objection Must Be Made within the Same 10-day Period

In explaining this ruling the panel noted that regarding spinal surgery, the “denial” language of sections 4062(a) and 4610(g)(3)(A) was construed to include any UR decision that does not fully approve the specific spinal surgery recommended by the treating physician. Therefore, a UR decision that modifies or delays a spinal surgery request would be a “denial.”

Noting that LC 4610(g) (1) provides that the determination be made no more than 14 days from the PTP’s report requesting authorization, the panel said it was necessary to “harmonize” the statutes applicable to spinal surgery, and held that only with spinal surgery, UR must be completed within 10 days.

The panel specifically overruled the holding in *Brasher* which required Applicant to make the 4062 objection after a UR denial of spinal surgery.

Recognizing the strict timing requirements being placed on Defendants, the panel ruled that they were only triggered by a treating physician’s report that complies with AD Rule 9792.6(o). This provision defines a request for authorization as a written confirmation of an oral request (within 72 hours) or a written request for a specific course of treatment in a Doctors First Report of Injury, or a PR-2, which if in narrative form must include at the top a clearly marked request for authorization.

A Defendant who fails to meet the 10 day time limit or comply with the AD Rules loses the right to a second opinion and must authorize the surgery.

Referring to the fact that a Defendant who fails to timely object under LC 4062(a) loses the right to object, the panel found no reason why this principle should not apply to Defendant’s losing its 4062(b) right regarding spinal surgery.

The panel emphasized further that Defendant would lose its 4062(a) right if it fails to comply with AD Rule 9788.1 which requires (1) a copy of the treating physician’s report; (2) an employee-specific reason for its objection; and (3) distinct and particularized declarations under penalty of perjury regarding when the treating physician’s report was received and when the defendant served its objection. Failing these requirements is “tantamount” to failing to object.

