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November 15, 2006

**VIA EMAIL**

Re: Utilization Review Admissibility Decided By The California Court of Appeal

Dear Clients and Colleagues:

In its decision of November 14 in *SCIF v. WCAB, Sandhagen*, The California Court of Appeal, 3rd District, adopted the WCAB application of Labor Code §4610. While this decision turns over no new ground, it does emphasize the critical importance of adhering to the timelines set forth in Labor Code §4610 and the limitations on using Utilization Review.

Labor Code Section 4610 requires every employer to establish a program of Utilization Review and establishes the timelines that each review must meet (see footnote 1 for the timelines)<sup>1</sup>. The questions addressed in the *Sandhagen* decision include: 1) Is UR mandatory when an employer makes a medical decision? 2) If the UR report does not comply with the timelines in LC §4610, may it nevertheless be submitted to the WCAB or to a subsequent medical examiner, IE QME or AME? 3) If the UR report is untimely,

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<sup>1</sup> Prospective or concurrent decisions 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 recommendation by the physician. In cases where the review is retrospective, the decision shall be communicated to the individual who received services, or to the individual's designee, within 30 days of receipt of information that is reasonably necessary to make this determination."

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is the employer precluded from utilizing the medical legal process of LC §4062 to obtain an opinion for consideration by the WCAB on the appropriateness of the prescribed medical procedure?

The Court answers as follow:

1). **Is UR mandatory when an employer makes a medical decision?** The Court answers, no. The WCAB and the Court find no legislative language or intention to require that Utilization Review be used in every instance. The employer must have a Utilization Review process in place that meets with the Administrative Director's protocols, but it need not resort to that process in every instance. It may utilize Labor Code Section 4062 to obtain a more comprehensive opinion on the appropriateness of the treatment.

2) **If the UR report does not comply with the timelines in LC §4610, may it nevertheless be submitted to the WCAB or to a subsequent medical examiner, IE QME or AME?** The Court answers, no. The Court follows the logic of the WCAB and holds that Utilization Review reports that are untimely obtained may not be admitted into evidence on the issue for which they were solicited nor may an untimely UR report be submitted for review by a QME or AME. In part the basis for this decision is that in general the UR reports are not admissible without an exception to the Labor Code Sections that require that an admissible report be prepared by an examining physician. The Court cites a WCAB decision in *Willette* and finds, however, that “The WCAB determined the statutorily created UR process yielded a UR report that was an essential part of the WCAB’s record in any post-UR proceeding regarding a medical treatment dispute. Therefore, the WCAB held that section 4610 created a limited exception to section 5703’s prohibition against admitting reports of nonattending, nonexamining physicians.” The corollary to this limited exception is that it extends only to UR reports that are obtained within the protocols of LC §4610. Untimely reports do not, and therefore are not admissible.

3) **If the UR report is untimely, is the employer precluded from utilizing the medical legal process of LC §4062 to obtain an opinion for consideration by the WCAB on the appropriateness of the prescribed medical procedure?** The Court answers, no. Mr. Sandhagen argued in his own Petition for Writ that only the applicant may invoke the provisions of LC §4062 to obtain a QME opinion once the employer utilizes Utilization Review under LC §4610. Again in resolving this claim the Court follows the WCAB conclusions. “Accordingly, the WCAB correctly found: “Any other interpretation of

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section 4062(a) would lead to absurd results, in violation of basic principles of statutory construction. As discussed above, the Legislature has not required a defendant to follow the [UR] process in every case. Yet, if a defendant elected to exercise its right not to undertake [UR], but then were entirely precluded from using the QME/AME process to resolve the medical treatment dispute, the defendant would be worse off than it would have been had section 4610 never been enacted.” This portion of the opinion does leave several unresolved questions. Important among these is what is the significance of the phrase “not subject to Section 4610” that is found in LC §4062 in the sentence, “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 . . . .”

The *Sandhagen* decision calls for each employer to review its UR process and strategy. If the UR opinion is not going to be available within the time limits set forth in the UR plan, then it is very important that the time limits imposed by Labor Code Section 4062 be met for obtaining a QME or AME. Otherwise, the employer will have no admissible medical basis for denial of the requested treatment or procedure and it will be subject to penalties under Labor Code §5814 as well as administrative penalties imposed by the Administrative Director.

Very truly yours,

PEARSON, SOTER, WARSHAW & PENNY, LLP  
THEODORE A. PENNY

TAP/wlc