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CURRENT ISSUES IN SPINAL SURGERY

SECOND OPINION PROCEDURE

Has *Sandhagen* eliminated the employer's right to proceed directly with objecting to a treating doctor's request for spinal surgery and obtaining a spinal surgery second opinion evaluation as allowed for under the *Brasher* decision, and must the employer now first submit the matter to UR?

Labor Code Section 4062(b) states the employer "may" object (read: if employer wishes to object, they must do so) within 10 days of receipt of the report requesting the spinal surgery. California Code of Regulations (Cal. Reg.), Title 8, Section 9788.1 states that the objection shall be written on the form prescribed by the Administrative Director in Section 9788.11 (DWC Form 233).

Labor Code Section 4062(b) goes on to state that if the employee is represented by an attorney, the parties *shall* seek agreement

with the other party on a California licensed board-certified (or board-eligible) orthopedic surgeon (or neurosurgeon) to prepare a second opinion report resolving the disputed surgical recommendation. If no agreement is reached within 10 days, or if the employee is not represented by an attorney, an orthopedic surgeon or neurosurgeon shall be randomly selected by the administrative director to prepare the second opinion report, which is supposed to issue within 45 days of the date the employer received the spinal surgery request from the applicant's treater. If the second opinion report recommends surgery, the employer shall authorize the surgery. If the second opinion report does not recommend the surgery, the employer shall file a Declaration of Readiness to Proceed (presumably to an Expedited Hearing, since the issue involves treatment), and the employer shall not be liable for medical

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treatment costs for the disputed surgery or any temporary disability arising there from if the disputed surgery is performed prior to the completion of the second opinion process.

Essentially, in a represented case, the Labor Code requires, that the employer file and serve an objection *and* must also attempt to agree upon an AME on the issue. Furthermore, Labor Code Section 4062(a) states that the “[e]mployer objections to the treating physician’s recommendation for spinal surgery shall be subject to subdivision (b), *and after denial of the physician’s recommendation, in accordance with Section 4610.*” (Emphasis added.) Thus, the Labor Code appears to require that the employer first submit the request for surgery to Utilization Review before objecting, and may only object if UR denies the surgery.

Thus, under the Labor Code, we are looking at the following time line and requirements in a represented case: The treating doctor recommends/requests spinal surgery on Day 1. Within the next 10 days, the employer must:

- a) submit the recommendation/request to UR;
- b) contact applicant attorney and seek an agreement upon an AME on the issue; and
- c) if UR denies the surgery, object to the surgery request via Form 233.

However, in *Brasher v. Nationwide Studio Fund*; SCIF (2006 SPD) 71 CCC 1282; (2007) *Writ Den.*) 72 CCC 229, a 2006

significant WCAB Panel Decision, the Board panel gave the defendant the option to (1) authorizing the surgery, (2) objecting to the surgery pursuant to LC Section 4062(b) by filing a DWC Form 233 within 10 days of receipt of the doctor’s recommendation/request, (3) submit the recommendation to utilization review, or (4) pursue both options 2 and 3, either simultaneously or by filing an objection after a utilization review denial, meeting the timelines for each process. If the employer chose to refer the matter to UR first, and if UR denied the surgical request, it is the *employee* who must object, within 10 days of receipt of the denial, (but apparently only via LC 4062.2 procedure because Form 233 appears to be designed for use by an employer only).

The *Brasher* decision therefore lays out procedures that deviate substantially from those stated in the Labor Code in that it 1) does not require the employer to first seek an agreement with the applicant’s attorney to utilize an AME (in a represented case), and 2) does not require the employer to first submit the issue to Utilization Review. Under *Brasher*, an employer may simply file and serve a completed Form 233 Objection and await the issuance of the report from the doctor randomly selected by the Administrative Director.

Furthermore, if the employer chose to refer the matter to UR first, and if UR denied the surgical request, it is the *employee* who must object.

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On July 3, 2008, the Supreme Court clarified the law governing UR and medical treatment disputes in the case of *SCIF v. WCAB (Sandhagen)*; *Sandhagen v. WCAB*, 44 Cal. 4th 230. The Court held that an employer may not bypass the utilization review process and instead invoke section 4062's provisions to dispute an employee's treatment request. The Court reasoned that the Legislature intended for *employers* to use the utilization review process in section 4610 to review and resolve any and all requests for treatment, and if dissatisfied with an employer's decision, an *employee*--and only an *employee*--may use section 4062's provisions to resolve the dispute over the treatment request. In short, an employer must utilize the UR process to dispute treatment requests. However, while *Sandhagen* clarifies sections 4610 and 4062(a), it does not directly address section 4062(a) and (b) as they pertain to spinal surgery requests.

There then appears to be a conflict between the two decisions: *Brasher* on the one hand, which specifically allows the UR process to be bypassed in spinal surgery second opinion procedure, and *Sandhagen* on the other hand, which mandates UR process for "all disputes regarding treatment." Thus, the reasoning of the *Brasher* decision will need to be reconciled with the *Sandhagen* decision in order for there to be some clarification concerning an employer's duties in spinal surgery second opinion procedure. Until that actually occurs, it is this writer's opinion that the safest route to take would be the *Sandhagen* route. This is for several reasons: 1) The *Sandhagen*

decision comes from the State's highest Court, 2) is the more recent decision, and 3) it is in keeping with the current wording of the Labor Code.

Accordingly, in the represented case, this writer recommends that the employer who wishes to dispute a recommendation/request for surgery do all of the following within 10 days of receipt of the request:

- 1) (immediately) submit the request to UR;
- 2) contact applicant attorney and seek an agreement upon an AME on the issue; and
- 3) if UR denies the surgery, object to the surgery request via Form 233.

Obviously, if the UR certifies the surgery, then the employer must provide it, and must not submit the Form 233. What is a little ambiguous is the time allowances for agreeing to an AME and submitting Form 233 if no agreement is reached. The Labor Code states that both must occur within 10 days of receipt of the surgical request. However, how can one be reasonably allowed 10 days to seek an agreement on an AME and still determine within that same 10 days that one cannot be reached and still get the Form 233 out on time, especially when the matter must first be sent to UR and the surgery denied by UR? One possibility may be for the employer to send the Form 233 out at the same time as initially contacting applicant's attorney to seek an agreement on an AME (and after UR has denied the surgery). But then, the Labor Code does not specify how the Administrative Director should be notified as to whether or not an agreement on an AME has been reached following the

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submission of Form 233, and whether or not the AD still needs to randomly select the second opinion doctor, or how that doctor should be informed whether he/she still needs to issue the report within 45 days of the initial surgical request.

Lastly, Reg. 9788.1(a) states that Form 233 “must be executed by a principal or employee of the employer, insurance carrier, or administrator.” Not only does this tend to confirm that the applicant should not use this form to object to a UR’s denial of a surgery request, but it also suggests that an employer or insurance carrier or administrator’s *attorney* should not complete/execute the form, but only the “employer, insurance carrier, or administrator” or a “principal or employee” thereof. This may be seen as a “ticky-tack” issue, and some may say that the defense attorney “steps into the shoes” of the defendant employer, insurance carrier, or administrator,” but the Labor Code does appear to be fairly clear on who may execute the form, and in no dictionary this author has seen does “principal” or “employee” include a defendant’s attorney. Furthermore, the “Declaration Regarding Receipt of Report” portion of Form 233 does appear to be specifically designed to be signed by the employer, insurance carrier or administrator, which makes sense, really, since the doctors requesting treatment normally send their requests directly to the employer, insurance carrier or administrator versus the defense attorney. Indeed, often the treating doctor is not even made aware of who the defense attorney is by the time they issue their surgical request.

Thus, it is this author’s opinion that the safest thing to do is to instruct the insurance adjuster to complete and submit Form 233 when the time to do so is appropriate.

Article by Stephen Gargaro, Encino Office

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