WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL A. WILLETTE, ***Applicant,*** **vs.** **AU ELECTRIC CORPORATION; and STATE COMPENSATION INSURANCE FUND,** ***Defendant(s).***	**Case No. SJO 0245781** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On August 9, 2004, the Appeals Board granted reconsideration of the May 17, 2004 Findings and Award issued by the workers' compensation administrative law judge ("WCJ").

In the May 17, 2004 decision, it was found that Michael A. Willette ("applicant") sustained industrial injury to his low back and tailbone on October 13, 2003, while employed as an alarm installer by Au Electric Corporation, the insured of State Compensation Insurance Fund ("defendant"). In relevant part, it was further found that applicant will need further medical treatment to cure or relieve the effects of his injury, including the treatment jointly prescribed by his primary treating physician, Michael D. Butcher, M.D., and his secondary pain management physician, Hessam Noralahi, M.D., consisting of a TENS unit, water therapy, and acupuncture.

Moreover, at the May 12, 2004 trial preceding his decision, the WCJ determined that the utilization review reports of Roger Chappelka, M.D., are not admissible in evidence because they are not the reports of an examining or treating physician, they do not include the statutorily required declaration, and they are not signed.

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

utilization review process established by Labor Code section 4610;[1] (2) under section 4604.5(c), in effect at the time of the May 12, 2004 trial and the May 17, 2004 decision, the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines ("ACOEM guidelines") are presumptively correct on the issue of the extent and scope of medical treatment; (3) Dr. Chappelka's utilization review reports observe that the ACOEM guidelines do not find acupuncture to be efficacious and do not recognize TENS units to be an effective modality of treatment; and (4) even if Dr. Chappelka's utilization review reports are not admissible, the record contains no evidence from which the WCJ could conclude either that the ACOEM guidelines support the treatment requested, that a variance from the ACOEM guidelines is warranted, or that other evidence-based medical treatment guidelines support the treatment requested.

Applicant, who is unrepresented, did not file an answer to defendant's petition, however, the WCJ prepared a Report and Recommendation on Petition for Reconsideration ("Report") recommending that the petition be denied.

Because of the important legal issues presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, has 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 an employer's utilization review physician does not approve an employee's treating physician's treatment authorization request in full, then an unrepresented employee (if he or she desires to dispute the utilization review physician's determination) must timely object, and then a panel qualified medical examiner ("QME") must be obtained to resolve the disputed treatment issue(s);

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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; *Gee v. Workers' Comp. Appeals Board* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].)

(2) Once the panel QME's evaluation has been obtained, neither the treating physician nor the utilization review physician may issue any further reports addressing the post-utilization review treatment dispute;

(3) The panel QME should ordinarily be provided with and consider both the reports of the treating physician and the utilization review physician regarding the disputed issues;

(4) If a post-utilization review medical treatment dispute goes to trial after the panel QME issues his or her report, both the treating physician's and the utilization review physician's reports are admissible in evidence; and

(5) When a WCJ or the Appeals Board issues a decision on a post-utilization review medical treatment dispute, the reports of the panel QME, the treating physician, and the utilization review physician will all be considered, but none of them is necessarily determinative.

I. BACKGROUND

On December 15, 2003, applicant had an evaluation with defendant's QME in orthopedic surgery, Duc M. Nguyen, M.D.[3] Dr. Nguyen found that applicant had sustained an industrial injury to his low back and tailbone on October 13, 2003; however, based on the evaluation, Dr, Nguyen opined that applicant was permanent and stationary as of December 15, 2003, without any permanent disability, although he said applicant would need six weeks of physical therapy.

After seeing Dr. Nguyen, applicant began treatment with Dr. Butcher, an orthopedic surgeon. As part of applicant's treatment, Dr. Butcher referred him to Dr. Noralahi for pain management. Eventually, Dr. Butcher and Dr. Noralahi prescribed a TENS unit, water therapy, and acupuncture, among other treatment modalities.

Based on utilization review reports issued by Dr. Chappelka, defendant denied the

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[3] It appears that this was an evaluation under former section 4060 to determine the compensability of applicant's claim, before defendant had accepted liability for it. Of course, under former section 4060, a QME was required to address all issues. (See, former Lab. Code, §4060(e) [repealed effective 4/19/04].) Accordingly, after opining that applicant's injury was industrial, Dr. Nguyen also then addressed the question of medical treatment.

requests for a TENS unit, water therapy, and acupuncture. In essence, Dr. Chappelka's utilization review reports concluded that applicant had been declared permanent and stationary without any disability, that he is not in need of any further medical treatment at this time, that no justification had been given for the requested treatment, and that, in any event, the requested treatment did not fall within the ACOEM guidelines.

On April 14, 2004, applicant filed a declaration of readiness to proceed to an expedited hearing on the issue of medical treatment.

The matter came on for an expedited hearing on May 12, 2004, at which the WCJ excluded Dr. Chappelka's reports, largely because they are not the reports of an examining or treating physician. Thereafter, the WCJ issued the May 17, 2004 decision allowing the treatment prescribed by Drs. Butcher and Noralahi.

Applicant has not been represented by an attorney at any point in these proceedings.

II. DISCUSSION

We focus here on construing recently enacted or amended sections 4610, 4062, 4062.1, and 4062.3 with respect to the procedures they establish for resolving post-utilization review disputes regarding treatment prescribed by an unrepresented employee's physician(s). This opinion is not intended to and does not address all of the myriad issues that surround the utilization review process.

When the Appeals Board interprets workers' compensation statutes, its fundamental objective is to determine the Legislature's intent so as to effectuate the purpose of the law. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286]; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476]; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652].)

The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388; *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [68 Cal.Comp.Cases 693]; *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*) (1999) 76

Cal.App.4th 513, 516 [64 Cal.Comp.Cases 1350].) Thus, in interpreting statutory provisions, we will first look to the express language of the statutes themselves. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 387; *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d at p. 230.) When the statutory language is clear and unambiguous, the WCAB will enforce the statute according to its plain terms. (*DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at p. 387; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (*Arvizu*) (1982) 31 Cal.3d 715, 726 [47 Cal.Comp.Cases 500].)

Additionally, however, a statute's words must be construed in the context both of the entire statute and the entire statutory scheme, so that the language is harmonized both internally and with related statutes, to the extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (*Steele*) (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1]; *DuBois v. Workers' Comp. Appeals Bd.*, *supra*, 5 Cal.4th at pp. 387-388; *Moyer v. Workmen's Comp. Appeals Bd.*, *supra*, 10 Cal.3d at pp. 230-231; *Gee v. Workers' Compensation Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1427 [67 Cal.Comp.Cases 236]; *American Psychometric Consultants, Inc. v. Workers' Comp. Appeals Bd.* (*Hurtado*) (1995) 36 Cal.App.4th 1626, 1639 [60 Cal.Comp.Cases 559].) Further, it is a principle of statutory construction that the word "shall," as used in the Labor Code, ordinarily connotes a mandatory duty. (Lab. Code, §15 ["'[s]hall' is mandatory and 'may' is permissive"]; see also, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 109; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.)

Here, applying these principles to sections 4610, 4062, 4062.1, and 4062.3, as they were in effect at the time of the May 12, 2004 trial and the May 17, 2004 decision, we conclude the following.

A. Where An Employer's Utilization Review Physician Does Not Approve A Treatment Authorization Request In Full, Then An *Unrepresented* Employee Who Desires To Dispute The Utilization Review Physician's Determination Must Timely Object And Then A Panel QME Must Be Obtained To Report On The Dispute.

If an employer's utilization review physician denies, in whole or in part, the medical treatment requested or provided by the employee's treating physician, then an unrepresented

employee who disputes the utilization review physician's determination must timely object to that determination and, thereafter, a panel QME is *required* to be obtained to report on the disputed treatment issue(s).[4] This interpretation is consistent with the express language of sections 4610, 4062, 4062.1, and 4062.3. Specifically, section 4610 states, in relevant part:

> "If the [treating physician's] request [for authorization of medical treatment] is not approved in full, *disputes shall be resolved in accordance with Section 4062.*" (Lab. Code, §4610(g)(3)(A) (emphasis added).)
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> and:
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> "If the insurer or self-insured employer disputes whether or not one or more services offered concurrently with a utilization review were medically necessary to cure and relieve, *the dispute shall be resolved pursuant to Section 4062.*" (Lab. Code, §4610(g)(3)(B) (emphasis added).)

In turn, section 4062 states, in relevant part:

> "*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* ... [and] [i]f the employee is not represented by an attorney, the employer *shall* immediately provide the employee with a form ... to request assignment of a panel of three [QMEs], [and] the evaluation *shall* be obtained as provided in Section 4062.1 ... ." (Lab. Code, §4062(a) (emphasis added).)[5]

Also, section 4062.1 provides, in relevant part:

> "Within 10 days of the issuance of a panel of [QMEs], the employee *shall* select a physician from the panel to prepare a medical evaluation, the employee *shall* schedule the appointment, and the employee *shall* inform the employer of the selection and
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[4] Disputes regarding spinal surgery must be resolved under section 4062(b). (Lab. Code, §4610(g)(3)(A); see also, §4062(a) & (b).)

[5] Section 4062(a) provides that, in general, the employee must notify the employer of the objection in writing within 20 days of receipt of the decision to modify, delay, or deny a treatment recommendation; however, these time limits may be extended for good cause or by mutual agreement. (Lab. Code, §4062(a).)

> the appointment." (Lab. Code, §4062.1(c) (emphasis added).)
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> and
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> "The unrepresented employee *shall* ... participate in the evaluation." (Lab. Code, §4062.1(d) (emphasis added).)

Further, section 4062.3 provides, in relevant part:

> "Upon completing a determination of the disputed medical issue, the [QME] ... *shall* serve the formal medical evaluation ... on the employee and the employer." (Lab. Code, §4062.3(i) (emphasis added).)

Thus, because section 4610 states that disputes under that section "shall" be resolved in accordance with section 4062, and because section 4062 states that, if *the employee* objects to a decision made pursuant to section 4610 not to fully approve a treatment recommendation, *the employee* "shall" notify the employer of the objection within specified time frames, then it is incumbent on the employee to make a timely objection under 4062 to a utilization review physician's determination to disapprove, in whole or in part, the treating physician's prescribed treatment.[6] Also, because section 4062(a) provides that a panel QME evaluation "shall" be obtained, because sections 4062.1(c) and 4062.1(d) provide that the employee "shall" select a panel QME, schedule the appointment, inform the employer of the selection, and participate in the evaluation, and because section 4062.3(i) provides that the panel QME "shall" serve a report that determines the disputed medical issue, then a panel QME report must be obtained whenever an unrepresented employee timely disputes a utilization review determination regarding treatment.

B. Once The Panel QME's Evaluation Has Been Obtained, Neither The Treating Physician Nor The Utilization Review Physician May Issue Any Further Reports Addressing The Post-Utilization Review Treatment Dispute.

The panel QME's evaluation is the *only* medical evaluation that may be obtained to

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[6] We recognize that neither section 4610(g)(3)(A) nor 4610(g)(3)(B) specifically addresses the issue of retrospective utilization review (i.e., section 4610(g)(3)(A) is concerned with both prospective and concurrent utilization review and section 4610(g)(3)(B) is concerned with only concurrent utilization review). Nevertheless, section 4062(a) makes it clear that the employee must object to *any* decision made under section 4610 to modify, delay, or deny a treatment recommendation.

resolve any dispute regarding a utilization review physician's determination not to fully approve a treating physician's treatment request; the treating physician and the utilization review physician cannot issue supplemental reports or provide testimony, either at trial or by deposition, in rebuttal to the panel QME's report. This interpretation is consistent with the language of sections 4610 and 4062. Once more, section 4610 states, in relevant part:

> "If the [treating physician's] request [for authorization of medical treatment] is not approved in full, *disputes shall be resolved in accordance with Section 4062*." (Lab. Code, §4610(g)(3)(A) (emphasis added).)
>
> and:
>
> "If the insurer or self-insured employer disputes whether or not one or more services offered concurrently with a utilization review were medically necessary to cure and relieve, *the dispute shall be resolved pursuant to Section 4062*." (Lab. Code, §4610(g)(3)(B) (emphasis added).)

In turn, section 4062 states, in relevant part:

> "If the employee objects to a decision made pursuant to Section 4610 ... , the employee shall notify the employer of the objection ... . If the employee is not represented by an attorney, the employer shall immediately provide the employee with a form prescribed by the medical director with which to request assignment of a panel of three qualified medical evaluators, the evaluation shall be obtained as provided in Section 4062.1, *and no other medical evaluation shall be obtained*." (Lab. Code, §4062(a) (emphasis added).)

Because the panel QME's evaluation is the *only* medical evaluation that "shall" be obtained to resolve a dispute regarding a utilization review physician's determination not to fully approve a treating physician's treatment request, then, once the panel QME's evaluation has been obtained, the treater and the utilization review physician cannot comment further (i.e., they cannot do any further "evaluation") on the post-utilization review dispute.

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C. The Panel QME Should Ordinarily Be Provided With And Consider Both The Treating Physician's Reports And The Utilization Review Physician's Reports Relating To The Disputed Issues.

When a panel QME assesses a post-utilization review dispute regarding a treatment request, the panel QME should ordinarily be provided with and consider the treating physician's and the utilization review physician's reports regarding the disputed issues, subject to the limitation just discussed.[7]

This interpretation is consistent with section 4062.3, which provides that "[a]ny party may provide to the ... [panel QME] any of the following information: (1) [r]ecords prepared or maintained by the employee's treating physician or physicians [and] (2) [m]edical and nonmedical records relevant to determination of the medical issue." (Lab. Code, §4062.3(a).) In this regard, we conclude that a utilization review report is a "medical record" within the meaning of section 4062.3(a)(2).

This interpretation is also consistent with the statutory scheme. If the panel QME is going to make "a determination of the disputed medical issue" (Lab. Code, §4062.3(i); see also, §4062.3(a)(2)), then clearly the QME must have the reports that created the medical treatment dispute. (See also, Lab. Code, §4062.3 (the panel QME "shall identify ... [a]ll information relied upon in the formulation of his or her opinion.").)

Finally, this interpretation is consistent with the principles that "[a] medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises" (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358]), that "[m]edical reports and opinions are not substantial evidence if they are ... based ... on inadequate medical histories" (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]), and that "[t]he chief value of an expert's testimony ... rests upon the [m]aterial from which his opinion is fashioned and the [r]easoning by which he progresses

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[7] The panel QME ordinarily should also consider any relevant ACOEM guidelines (or, in the future, treatment guidelines adopted by the Administrative Director of DWC under section 5307.27) and/or any relevant other evidence-based medical treatment guidelines generally recognized by the national medical community and that are scientifically based. (Lab. Code, §4604.5(e); see also, §5703(h).)

from his material to his conclusion; ... it does not lie in his mere expression of conclusion." (*People v. Bassett* (1968) 69 Cal.2d 122, 141, 144; see also, *Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692 [13 Cal.Comp.Cases 80] ["the value of an expert's opinion is dependent upon its factual basis"].)

D. At Any Trial On A Post-Utilization Medical Treatment Dispute, Both The Treating Physician's Reports And The Utilization Review Physician's Reports Are Admissible Evidence.

If a post-utilization review medical treatment dispute goes to trial after the panel QME issues his or her report, both the treating physician's reports and the utilization review physician's reports are admissible evidence.

Of course, a treating physician's reports are ordinarily admissible in evidence. (Lab. Code, §5703(a).) And, in the context of a post-utilization review medical treatment dispute, the treating physician's reports are an essential element of the record in determining, for example: the actual nature of the treating physician's disputed treatment recommendation and the reasons for it (see generally, e.g., Lab. Code, §§4610(a) & (e), 4062(a)); the timeliness of the defendant's utilization review (see generally, e.g., Lab. Code, §4610(g)); and whether the panel QME considered *all* of the treating physician's relevant reports. (Lab. Code, §4062.3(a) & (d).)

We also conclude that the reports of the utilization review physician are admissible. We recognize, of course, that a utilization review physician is not an "attending or examining physician" within the meaning of section 5703(a) and that the reports of non-attending/examining physicians are generally not admissible in workers' compensation proceedings, at least if their admission would be inconsistent with the statutory scheme. (*Sweeney v. Workmen's Comp. Appeals Bd.* (1968) 264 Cal.App.2d 296, 301-305 [33 Cal.Comp.Cases 404].) Further, we are aware that, in the past, it has been has held that utilization review physician reports are *not* admissible. (*Czarnecki v. Golden Eagle Insurance Co.* (1998) 63 Cal.Comp.Cases 742 (significant panel decision).)

Yet, the situation in *Czarnecki* is readily distinguishable from that present here. When *Czarnecki* issued, there was no statutorily-established utilization review process. Rather, there

was merely statute directing the Administrative Director of DWC to adopt model utilization protocols (see former, Lab. Code, §139(e)(8)) and an Administrative Director's rule establishing a pilot utilization review program. (See former Cal. Code Regs., tit. 8, §9792.6.)[8] Moreover, neither the statutory provision nor the Administrative Director's rule provided that the utilization review physician's opinion would be admissible for resolving medical treatment disputes. To the contrary, DWC's publication regarding the utilization review rule implicitly recognized the continuing validity of former section 4062 for resolving medical treatment disputes. Thus, in the absence of any statutory utilization review procedure, *Czarnecki* concluded that the rule adopted by the Administrative Director could not be relied upon to circumvent or override the then existing statutory procedure for resolving medical treatment disputes under former section 4062. Therefore, the utilization review reports were deemed inadmissible.

Now, however, there is a statutory scheme in place that specifically provides for utilization review reports to assess the medical necessity of treating physician's treatment recommendations. (Lab. Code, §4610.) And, at any trial regarding a post-utilization review treatment dispute, the utilization review physician's report is relevant to determining: the reasons for the decision regarding medical necessity (Lab. Code, §4610(g)(4), see also, e.g., §4610(e) & (f)(2)); what procedures, information, and criteria the utilization review physician used (Lab. Code, §4610(c), (d), & (f)); whether the utilization review decision was made by a person legally competent to make it (Lab. Code, §4610(e)); whether the utilization review decision was timely made and/or communicated (Lab. Code, §4610(g)); the nature of the disputed medical issue (Lab. Code, §4062(a)); and whether the panel QME considered all of the utilization review reports, i.e., whether the panel QME's report constitutes substantial evidence. (Lab. Code, §4062.3(a)(2).) Thus, the statutory scheme makes it clear that the utilization review report is an essential part of ///

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[8] When the utilization review provisions of section 4610 went into effect, the Legislature repealed Labor Code section 139 and, also, expressly repealed Administrative Director Rule 9792.6. (See, Stats. 2003, ch. 639, §§8, 49 [SB 228].)

the record in determining a post-utilization review medical treatment dispute.[9]

Moreover, when utilization review reports are offered in evidence, the reports are not rendered inadmissible solely because they do not contain statements under penalty of perjury that there has been no violation of section 139.3 and/or the information is true and correct. (See, Lab. Code, §§5703(a)(2), 4628(j).) Because a utilization review physician is not referring the applicant for treatment, the anti-self-referral provisions of section 139.3 are irrelevant and inapplicable. Moreover, because a utilization review physician's opinion is not a "medical-legal report" within the meaning of section 4628, the declaration provisions of that statute are inapplicable. Further, although medical reports "should" be signed (Cal. Code Regs., tit. 8, §10606(o)), the failure to sign a report does not make it inadmissible. (Cal. Code Regs., tit. 8, §10606.)

Thus, the overall statutory scheme contemplates the admission of utilization review reports in evidence in proceedings relating to post-utilization review disputes.

E. When A Decision Is Rendered On A Post-Utilization Review Medical Treatment Dispute, The Reports Of The Panel QME, The Treating Physician, And The Utilization Review Physician Will All Be Considered, But None Of Them Is Necessarily Determinative.

When faced with differing medical opinions from the panel QME, the treating physician, and the utilization review physician on the issue of whether prescribed treatment is reasonably required to cure or relieve the effects of the employee's injury, the WCJ or the Appeals Board need not rely on the opinion of a particular physician. It is the WCAB, and not any individual physician, which is the ultimate trier-of-fact on medical issues. (*Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792-793 [52 Cal.Comp.Cases 419]; *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd. (Carey)* (1978) 87 Cal.App.3d

[9] Because the utilization review reports are admissible under the statutory scheme, we are not persuaded that they are made inadmissible under section 5703. Section 5703, which lists items that the Appeals Board "may receive as evidence ... in addition to sworn testimony," is not strictly exclusive. Items not listed in section 5703 can be admitted, at least if their admission is not inconsistent with a statutory provision.

740, 753 [43 Cal.Comp.Cases 1372].) Of course, in determining whether to rely on the panel QME, the treating physician, or the utilization review physician, the WCJ or the Appeals Board will consider the weight to be given to the respective opinions and will consider whether they constitute substantial evidence. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280-281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; see also, Cal. Code Regs., tit. 8, §10606 [compliance with Rule 10606 goes to weight to be given report]; *Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (*Kemp*) (1981) 122 Cal.App.3d 905, 917 [46 Cal.Comp.Cases 913] [a report that is "woefully inadequate" in its compliance with Rule 10606 should not be relied upon].)

F. Application Of These Principles To The Present Case

Here, following the post-utilization review dispute over applicant's entitlement to medical treatment, the statutory procedure outlined above was not followed. That is, the dispute was not resolved by going to a panel QME in accordance with the provisions of sections 4610, 4062(a), 4062.1, and 4062.3. Instead, the post-utilization review medical treatment dispute went to trial and the WCJ attempted to resolve the dispute based on the opinions of the treating physicians. Moreover, at trial, the WCJ erroneously excluded the utilization review physician's reports. Accordingly, we will rescind the May 17, 2004 decision and remand this matter to the WCJ for further proceedings and a new decision consistent with this opinion.

In rescinding and remanding, we recognize that the statutory procedure we have discussed is relatively new and that no binding Appeals Board or Court of Appeal decision has previously interpreted this procedure. Therefore, we will give the parties an opportunity to comply with the procedure outlined here before they proceed to a new trial and before the WCJ issues a new decision. That is, in view of the relative newness of the statutory procedure, we will for purposes of this opinion forgive any failure to date to comply with the relevant statutory deadlines and we will not now address any potential consequences of failures to comply with the statutory timelines in the future.

On remand, therefore, defendant shall immediately provide applicant with the form

prescribed by the Medical Director of the Division of Workers' Compensation ("DWC") with which to request a panel of three QMEs. (Lab. Code, §4062(a).) Upon receipt of the form, applicant shall request a panel of three QMEs by submitting the form to the Medical Director or, if applicant fails to submit the form within 10 days after defendant has both furnished him with it and requested him to submit it, then defendant may submit the form to the Medical Director. (Lab. Code, §4062.1(b).) The party submitting the request form shall designate the medical specialty of the physicians that will be assigned to the panel. (*Id.*) Next, within ten days of the issuance of the QME panel, applicant shall select a physician from the panel, he shall schedule the appointment with that QME, and he shall inform defendant both of his selection and of the appointment. (Lab. Code, §4062.1(c).) If applicant does not inform the employer of the QME selection within ten days of the assignment of the panel of QMEs, then defendant may select the panel QME. (*Id.*) If applicant informs defendant of the selection of the panel QME selection within ten days of the assignment of the panel but he has not made the appointment, or if defendant selects the panel QME, then defendant shall arrange the appointment. (*Id.*) Once the appointment with the panel QME is made, the parties should provide the QME with the reports of the treating physicians, the utilization review reports, and any other medical or nonmedical records that they deem relevant. (Lab. Code, §4062.3(a).)[10] Finally, applicant shall attend and participate in the panel QME's evaluation (Lab. Code, §4062.1(d)), and the panel QME shall serve both applicant and defendant with his or her report on the disputed medical issues. (Lab. Code, §4062.3(i).)

Once this panel QME process is completed, applicant or defendant may bring the matter on calendar before the WCJ by filing either a declaration of readiness to proceed (Cal. Code Regs., tit. 8, §10410) or a declaration of readiness to proceed to an expedited hearing. (Cal.

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[10] Generally, it is the defendant that will have the principal responsibility for transmitting the treating physician reports and utilization review reports to the panel QME. Nevertheless, *either party* may submit any relevant medical or nonmedical records to the QME. (Lab. Code, §4062.3(a).) However, any information that a party proposes to provide to a panel QME shall be served on the opposing party at least 20 days in advance. (Lab. Code, §4062.3(b).) If the opposing party objects to the consideration of nonmedical records within ten days thereafter, the records shall not be provided to the panel QME (*id.*), unless a WCJ or the Appeals Board rules otherwise.

Code Regs., tit. 8, §10415.)

Because we are rescinding the WCJ's decision and are remanding the matter to him so that the parties may comply with the statutory procedure, we will not now address any ACOEM issues.

The panel QME should address any such issues in the first instance, and then the WCJ should address the ACOEM issues at any new trial.

For the foregoing reasons,

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IT IS ORDERED, as the Decision After Reconsideration of the Board (En Banc), that the Findings and Award issued by the workers' compensation administrative law judge on May 17, 2004, be, and it is hereby, **RESCINDED** and that this matter be, and it is hereby, **REMANDED** to the trial level 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

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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