



Significant Decision

No. 19-03

September 12, 2019

PUNI PA'U V. DEPT OF FORESTRY / SCIF

**WCAB SIGNIFICANT PANEL DECISION
(ADJ 9159725 / 7757931 / 9640668)**

FILED: SEPTEMBER 11, 2019

Saturdays are not “working days” for purposes of determining the timeliness of a Utilization Review determination under Labor Code section 4610.

Significance: Relying on the benefit of hindsight, the WCAB has reversed course and ruled that Saturdays are not “working days” for purposes of determining the timeliness of a UR decision under Labor Code section 4610. Instead, “working days” are defined as days other than Saturdays, Sundays, or state holidays.

Facts: In an accepted injury case, a Request for Authorization was received on 3/12/18, and the treatment request was denied seven days later on 3/19/18. The sequence of events (including an identical seven-day response time) was repeated the following month. Applicant took the case to trial, arguing that defendant had failed to render either determination within five working days as mandated by Labor Code section 4610. The WCJ held that the denials were timely, because neither of the intervening Saturdays or Sundays counted as “working days” under the statute. Applicant appealed.

Holding: In a decision designated as a “Significant Panel Decision,” the Appeals Board has upheld the WCJ and has determined that Saturdays do not count toward the “five working days” deadline for utilization review determinations: “The phrase ‘working day’ as it appears in Labor Code section 4610 does not include Saturdays based on standard modern usage, as reflected in dictionary definitions, statutory and regulatory enactments, and judicial decisions.”

Discussion: By statute, utilization review determinations for prospective or concurrent medical treatment must be made within “five working days from the receipt of a request for authorization” in order to be construed as timely and valid (Labor Code §4610). But the implementing regulation (Cal. Code Regs., tit. 8, § 9792.9.1) requires utilization review decisions to be made within “five (5) business days from the date of receipt” of the treatment request.

In a prior case, *Cal. Dept. of Corrections v. WCAB (Gomez)* (2018) 83 Cal. Comp. Cases 530 (writ denied), a different Board panel reasoned that “working days” under Labor Code section 4610 are equivalent to “business days” under Civil Code section 9, and under that construction held that the Friday after Thanksgiving constituted a “working day” for purposes of utilization review calculations.

This time, and “with the benefit of hindsight,” the WCAB has concluded that the rationale in *Gomez* required reconsideration because “the situation is more complex than it initially appears.” This time, the Board’s statutory interpretation took a more practical view: “The very fact that the Legislature chose a different term

to govern timeliness of UR decisions under [§4610(i)(1)] suggests an intent to differentiate” between a working day and a normal business day as defined elsewhere. “If the Legislature had intended to tie ‘working day’ to ‘business day’ under Civil Code section 9, we see no reason why it simply would not have done so.”

Thus, the Board panel here turned to traditional rules of statutory construction as well as a review of how “working day” has been defined throughout history. Acknowledging that both “working days” and “business days” had historically included Saturdays, the decision traced the evolution of those terms into modern times. Noting that even Black’s Law Dictionary has changed its definition of business day to exclude Saturdays, the panel identified a modern trend toward excluding Saturdays from the definition of either “working day” or “business day.”

Ultimately, the panel held that the standard, modern definition of the phrase “working day” is a day other than a Saturday, a Sunday, or state holiday as defined in the Government Code. In so holding, the decision refers to the underlying legislative intent “that medical treatment issues be resolved through the UR system as a general rule, with WCAB intervention only in limited circumstances.” Future litigants and appellate practitioners alike may find this pronouncement directly from the Board to be quite useful indeed.

Buried within all of this good news is one major problematic point: The *Pa’u* decision has only been designated as a Significant Panel Decision, and not an en banc decision. According to the Board, “significant” decisions are intended to augment the body of binding appellate court and en banc case law; a “significant” decision must involve an issue of general interest, especially on a new or recurring issue where there is little or no published case law, and all Commissioners must have agreed that the panel decision is significant. Given these lofty goals, one must seriously question why the *Pa’u* decision was not simply awarded en banc status. The panel decision was written by WCAB Chair Katherine Zalewski, with Commissioners Marguerite Sweeney and Deidra Lowe concurring -- three of the most senior members of the Appeals Board who probably represent the far ends and the middle of the political spectrum of the current Commissioners. Indisputably, this decision should have been rendered en banc. As it is, with only a “significant” designation attached to it, future litigants and even WCJs are free to ignore this ruling. So really, why bother?

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