GOVERNMENT OF THE DISTRICT OF COLUMBIA
Department of Employment Services
Labor Standards Bureau

Office of Hearings and Adjudication
COMPENSATION REVIEW BOARD

(202) 671-1394-Voice
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CRB No. 09-009

CYNTHIA L. TURNER,

Claimant –Petitioner,

v.

RESTAURANT ASSOCIATES and CAMBRIDGE INTEGRATED SERVICES,

Employer—Respondent.

Appeal from a Compensation Order of
Administrative Law Judge Henry McCoy
AHD No.08-244, OWC No.623657

Jessica G. Bhagan, Esq., for Petitioner

John P. Rufe, Esq., for Respondent

Before: E. COOPER BROWN, *Chief Administrative Appeals Judge*, LESLIE A. MEEK[1] and JEFFERY P. RUSSELL, *Administrative Appeals Judges*.

E. COOPER BROWN, *Chief Administrative Appeals Judge*, on behalf of the Review Panel; LESLIE A. MEEK**,** *Administrative Appeals Judges*, concurring in part and dissenting in part.

DECISION AND REMAND ORDER

JURISDICTION

Jurisdiction is conferred upon the Compensation Review Board (CRB) pursuant to D.C. Official Code §§ 32-1521.01 and 32-1522, 7 DCMR § 250, *et seq*., and the Department of Employment Services (DOES) Director's Administrative Policy Issuance No. 05-01 (February 5, 2005).

[1] Administrative Law Judge Meek is appointed by the Director of DOES as an Interim Board Member pursuant to DOES Administrative Issuance No. 09-01 (October 10, 2008) in accordance with 7 DCMR § 252.2 and DOES Administrative Policy Issuance No. 05-01 (February 5, 2005).

OVERVIEW

This appeal follows the issuance of a Compensation Order by the Administrative Hearings Division (AHD), Office of Hearings and Adjudication, D. C. Department of Employment Services (DOES). Pursuant to the Compensation Order, which was issued September 26, 2008, the presiding Administrative Law Judge (ALJ) found that Claimant-Petitioner (Petitioner) sustained a disabling neck condition medically causally related to a previously-sustained work injury. However, the ALJ denied authorization for requested neck surgery pending referral of the question of the reasonableness and necessity of such surgery to a utilization review provider. Pursuant to appeal filed with the CRB on October 24, 2008, Petitioner seeks reversal of the ALJ's denial of her request for authorized neck surgery.

For the reasons hereafter set forth, the Compensation Order herein appealed is vacated and this matter is remanded with instructions that a Compensation Order issue awarding Petitioner the relief she seeks.

DISCUSSION

As an initial matter, the scope of review by the Compensation Review Board (CRB) and this Review Panel, as established by the Act and as contained in the governing regulations, is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. *See* D.C. Official Code § 32-1521.01(d)(2)(A). "Substantial evidence," as defined by the District of Columbia Court of Appeals, is such evidence as a reasonable person might accept to support a particular conclusion. *Marriott Int'l v. D. C. Dept of Employment Services*, 834 A.2d 882 (D.C. 2003). Consistent with this standard of review, the CRB and this Review Panel are constrained to uphold a Compensation Order that is supported by substantial evidence, even if there is also contained within the record under review substantial evidence to support a contrary conclusion, and even where the reviewing authority might have reached a contrary conclusion. *Marriott,* 834 A.2d at 885.

The instant case presents a claim for authorization of medical treatment -- specifically neck surgery. Pursuant to the Compensation Order herein appealed, the presiding ALJ found that Petitioner's current neck condition, consisting of chronic debilitating neck pain, is medically causally related to a work injury she sustained in November of 2005. The ALJ nevertheless denied authorization for medical treatment because the requested authorization is not ripe for disposition in the absence of a determination of the reasonableness and necessity of the requested neck surgery pursuant to the utilization review procedures under D.C. Official Code § 32-1507(b)(6). On appeal Petitioner challenges the denial of the requested authorization for neck surgery as arbitrary, capricious, and not in accordance with the law on various procedural and constitutional due process grounds.

In order to fully understand the issue presently before us, it is necessary to recount the procedural context within which it arises. Pursuant to a final order issued by the Office of Workers' Compensation, Petitioner was originally awarded temporary total disability wage loss

benefits and payment of causally related medical benefits as a result of a work-related head injury sustained on November 15, 1005. Subsequently, when Respondent refused to pay for the neck surgery herein at issue, Petitioner filed a claim with OWC seeking authorization of the surgery. On March 10, 2008, OWC issued a Memorandum of Informal Conference recommending that Petitioner's request be granted. In response, Respondent filed an Application for Formal Hearing with AHD contesting the determination that Petitioner's neck condition was work-related.

Upon initiation of the proceedings before AHD, Respondent asserted as the sole issue to be presented for resolution that neither Petitioner's current neck condition nor the requested medical treatment were causally related to the original work incident of November 2005. The issue of the reasonableness and necessity of the recommended surgery was not raised. Similarly, in the parties' subsequently-filed AHD Joint Pre-Hearings Statement, only the issue of medical causation was identified.[2] Respondent did not raise the issue of the reasonableness and necessity of the proposed surgery.

As the Compensation Order notes (at pg 6), at the beginning of the Formal Hearing held before AHD in this matter, Respondent's counsel stated on at least three separate occasions in response to repeated queries of the presiding ALJ, that if medical causation was found, the reasonableness and necessity of the recommended surgery would not be at issue and the authorization for surgery could be granted.[3] The exclusive issue identified by Respondent for adjudication was the issue of medical causation. HT at 8, 10. Notwithstanding, during the course of his cross-examination of Petitioner, Respondent's counsel suddenly, without notice and over the strong objections of Petitioner's counsel, interjected for the first time the issue of the reasonableness and necessity of the requested surgery. HT at 27 *et seq*. Comp Order at 6.

The ALJ did not rule at the time of the hearing on Respondent's motion seeking to interpose the reasonableness and necessity of the requested surgery; stating that he would address the issue in the compensation order. HT at 36. This the ALJ did, ruling in the Compensation Order that inasmuch as Respondent raised the issue of the reasonableness and necessity of the recommended neck surgery, and inasmuch as the issue had not been subjected to the utilization review process, Respondent was "directed to submit the requested medical care for surgery on Claimant's neck to the UR process", further ruling that once the UR process was

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[2] Said JPHS *inter alia*, serves the purpose of advising the parties of the contested issues to be addressed at the formal hearing. 7 DCMR § 222.

[3] The presiding ALJ initially asked whether, "in the event that a causal relation is found, are you still contesting that surgical intervention would be the necessary remedy?"; to which Respondent's counsel, having noted that Respondent's IME medical expert did not render an opinion that the surgery is not medically necessary, stated the issue was, "Simply a causation issue." Hearing Transcript (HT) at 10.

In follow up, the ALJ again stated, "So, if I should find causation, then I can just go ahead and grant her claim for relief, which is the surgery", to which Respondent's counsel responded, "We defended on causation [before OWC]. Therefore . . . rather than go through that process here today, if causation is found . . . authorization for surgery could be incorporated into a compensation order." HT at 10-11.

Finally, in conclusion to this matter that ALJ stated, "I just want it to be clear on the record so that there is no separate issue later on, and that it can naturally flow on the finding of causation, if causation is found. Okay?"; to which Respondent's counsel affirmed by stating, "Yes." HT at 12.

completed, "a new application for formal hearing may be filed." Comp Order at 7. Accordingly the ALJ concluded, "Claimant's requested authorization for neck surgery is not ripe for decision pending submission of the request to utilization review." *Id.*

While *Transportation Leasing v. D.C. Dept of Employment Services*, 690 A.2d 487 (D.C. 1997) is cited for the proposition that Petitioner's due process rights were violated by Respondent's last-minute interjection without prior notice of the issue of reasonableness and necessity, we find *Transportation Leasing* inapposite to the issue herein. Granted, there is language within the Court's decision that might suggest its applicability to the instant case. The Court of Appeals noted that it has previously held:

> '[I]n general, an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his [or her] position.' We have observed, moreover, that this notice guarantee has its 'roots in constitutional due process.' We also have stressed that this notice requirement embraces the proposition that an agency 'may not change theories in midstream without affording reasonable notice of the change.'

Transportation Leasing, 690 A.2d at 489 (citations omitted).

Nonetheless, *Transportation Leasing* addressed the due process rights of an employer in defending itself against a claim for relief that was awarded without affording the employer prior notice thereof. The court held that the requirements of procedural due process were not met because the employer was not afforded adequate pre-hearing notice of the claim upon which relief was in that case granted, given that such failure resulted in prejudice to the employer in defending itself against the claim. *Transportation Leasing*, 690 A.2d at 490.

We are not in the instant case confronted with an assertion of due process violation of an employer's rights in defending itself against a claim for relief. Rather, we are called upon to address the question of whether an employer, having stipulated prior to hearing that a specific issue would not be raised in defense to a claim, can subsequently during the course of the hearing raise that issue and assert the defense that it had previously waived. The procedural due process protection articulated in *Transportation Leasing* is intended to assure that an employer is afforded adequate notice of any and all claims presented thereby affording the employer the opportunity to adequately defend itself against liability. To apply *Transportation Leasing* to the instant case by holding that Petitioner's due process rights were violated, thus requiring that this matter be returned to AHD for rehearing, would lead to a most incongruous result, turning the purpose of procedural due process on its head, by opening the legal door to affording employer's in their defense of claims for disability what might best be classified as *hyper* due process. Were we to apply *Transportation Leasing* to the instant case, we would effectively be affording employer's the right to raise previously waived issues and defenses without prior notice mid-way through a hearing before AHD, because the sanction for so doing would be, at worst, continuing or rescheduling the hearing in order to permit the claimant an opportunity to counter the previously-waived defense. The merits of following such an untenable course should be self-evident.

In workers' compensation cases, a party may enter into binding factual stipulations "thereby eliminating the need to offer evidence upon a relevant issue." *Oubre v. D.C. Dep't of Employment Servs*., 630 A.2d 699, 703 (DC 1993), citing *Madison Hotel v. D.C. Dep't of Employment Servs*., 512 A.2d 303, 107 (DC 1986). Such stipulations are considered binding not only upon the parties to the litigation but also upon the court. *Cowan v. United States*, 331 A.2d 323, 327 (D.C. 1975). In the instant case, Respondent effectively stipulated, by way of its pre-hearing written submissions and its counsel's oral representations upon commencement of the formal hearing that there was no issue as to the reasonableness and necessity of the surgery being sought should the ALJ find that Petitioner's neck problems were medically causally related to her prior work injury. Based thereon, it was fully reasonable on the part of Petitioner to proceed with proof of her claim for relief based upon the only issue identified by the Respondent as a bar to that relief.

Thus, regarding the ALJ's decision refusing to authorize Petitioner's requested neck surgery based upon Respondent's apparent change of litigation strategy mid-way through the formal hearing, while we find *Transportation Leasing* inapposite, we nevertheless respectfully disagree with the ALJ's acceding to Respondent's reassertion of the issue of reasonableness and necessity into this case. Having initially represented that the reasonableness and necessity of the medical treatment sought was not an issue should medical causation be established, Respondent waived the right to subsequently interject the issue as a defense, particularly where, as here, no evidence was cited in support thereof that wasn't previously available to Respondent and there is no issue of unfair surprise or some other factor warranting the unusual and irregular procedure attempted to be employed by Respondent in this instance.

In this case there is no question but that Respondent was aware of the nature of the medical care recommended by Petitioner's attending physician that Petitioner sought. Yet, at no time did the Respondent challenge the reasonableness and necessity of that medical care, in which event the utilization review procedures provided for under the Act could have been invoked. *See* D.C. Official Code § 32-1507(b)(6). By not only failing to do so but expressly stipulating to the reasonableness and necessity of the medical care being sought, and proceeding to formal hearing before AHD, Respondent waived any objection to providing the medical care except the objections that were properly raised in the lead up to the formal hearing.

Petitioner further asserts that the ALJ's open-ended order without time limit for securing utilization review is further grounds for reversal, as arbitrary and capricious because it affords no guarantee that Respondent will actually engage the utilization process; thereby raising the prospect that the requested medical care could be thwarted indefinitely should Respondent deliberately delay seeking utilization review. While we agree with Petitioner's concerns, in light of our holding that Respondent waived raising the issue of the reasonableness and necessity of the neck surgery Petitioner seeks, it is unnecessary that we reach and decide this particular issue.

Finally, the majority notes that our colleague in dissent raises the issue of utilization review. We do not comment with respect to the assertions made relative to this subject other than to make clear that nothing said by the majority in this opinion addresses the issue as it is not necessary or relevant to the disposition of the instant appeal.

CONCLUSION

Having expressly waived the issue of the reasonableness and necessity of the medical treatment sought by Petitioner prior to commencement of the formal hearing in the instant case, Respondent was barred from asserting it mid-way through the hearing as a defense against authorization of the treatment upon the finding by the ALJ that Petitioner's neck condition was medically causally related to her prior work injury.

ORDER

The Compensation Order herein appealed is AFFIRMED IN PART and REVERSED AND REMANDED IN PART. The Compensation Order is AFFIRMED to the extent that it found Petitioner's neck condition medically causally related to her prior work injury. The Compensation Order is REVERSED with respect to its order requiring referral of the issue of reasonableness and necessity for utilization review, and accordingly this matter is REMANDED to AHD for entry of an order awarding Petitioner her requested medical treatment.

FOR THE COMPENSATIOREVIEW BOARD:

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E. COOPER BROWN
Chief Administrative Appeals Judge

March 6, 2008
DATE

Leslie A. Meek, Administrative Appeals Judge, *concurring in part and dissenting in part;*

I concur with the majority's opinion vacating and remanding the ALJ's September 26, 2008 decision. However I write separately as I disagree with the majority's opinion that a party has the ability to waive the authority of the utilization review process. I also disagree with the majority's assertion that Petitioner's request for authorization of surgery was"not ripe for decision" due to Respondent's submission of a request for utilization review.

The majority asserts employer has waived its right to utilization review because Respondent stipulated prior to hearing, that a request for utilization review would not be raised in defense to Petitioner's claim. I disagree.

I am of the opinion that based upon the wording of the Act, one cannot waive the utilization review process.

The Act states, "Any medical care or service furnished or scheduled to be furnished under this chapter shall be subject to utilization review. Utilization Review may be accomplished prospectively, concurrently, or retrospectively." *See*, D.C. Official Code, Section 32-1507(b)(6).

The provision is quite clear. All medical treatment is susceptible to (capable of undergoing), the process of utilization review[4]. As such, one does not have the privilege to waive the authority or application of this process. In addition, this provision permits a request for utilization review to be made; before medical treatment is furnished or scheduled to be furnished, during the time that a particular medical treatment is furnished or scheduled to be furnished, or after a particular medical treatment is furnished or scheduled to be furnished. The language of this provision itself gives one the opportunity to make a request for utilization review at virtually any time during the claims process that a physician sets forth a recommendation for treatment. Said language is an additional prohibitive factor to the concept of waiver of utilization review process.

The issue here is not the Respondent's failure to make an appropriate or timely request for utilization review, but rather the ALJ's failure to apply the proper procedural response to said request for utilization review.

An individual is entitled to fair and adequate notice of administrative proceedings that will affect his (or her) rights, in order that he (or she) may have an opportunity to defend his (or her) position. This notice guarantee has its roots in constitutional due process. This notice requirement embraces the proposition that an agency may not change theories in midstream without affording reasonable notice of the change. *Transportation Leasing Co. v. Department of Employment Services*, 690 A.2d 487 (D.C. App. 1997).

The requirements of procedural due process are met if upon review the court is satisfied that the complainant was given adequate opportunity to prepare and present his (or her) position to the hearing examiner and that no prejudice resulted from the originally deficient notice. *Transportation Leasing Co. v. Department of Employment Services*, 690 A.2d 487 (D.C. App. 1997). See also, *Teklu v. Jurys Doyle Hotel*, CRB No. 08-16, AHD No. 05-241, OWC No. 601765 (January 23, 2008).

D.C. Official Code §32-1507 states in relevant part;

> (6) Any medical care or service furnished or scheduled to be furnished under this chapter shall be subject to utilization review. Utilization review may be accomplished prospectively, concurrently, or retrospectively.

[4] I do not believe this provision requires the utilization review process to be invoked in every instance where a question arises regarding the medical care or service to be furnished as asserted by the CRB in *Gonzalez v. UNICO Service Company*, CRB No. 07-005, AHD No. 604331. D.C. Official Code § 32-1507(6)(B) states; "When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual." This provision provides the Mayor, employee or employer with the *option* to initiate review of requested medical care via utilization review when the necessity, character or sufficiency of said medical care requires clarification. The Act merely offers the utilization review as an available right that may be initiated.

(B) When it appears that the necessity, character, or sufficiency of medical care or service to an employee is improper or that medical care or service scheduled to be furnished must be clarified, the Mayor, employee, or employer may initiate review by a utilization review organization or individual.

7 DCMR 232. Utilization Review.

232.1 Any medical care or service furnished or scheduled to be furnished under the Act shall be subject to utilization review. The review may be performed before, during or after the medical care or service is provided.

232.2 A utilization review organization or individual used pursuant to the Act shall be certified by the Utilization Review Accreditation Commission.

232.3 The employee, employer or the Office may initiate the review, accepting as a given the diagnosis of injury, where it appears that the necessity, character or sufficiency of medical services is improper or clarification is needed on medical service that is scheduled to be provided.

232.4 The report of the review shall specify the medical records considered and shall set forth rational medical evidence to support each finding. The report shall be authenticated or attested to by the utilization review individual or by an officer of the utilization review organization. The report shall be provided to the employee, employer and the Office.

232.5 A utilization review report which conforms to the provisions of § 232.4 of this chapter may be admissible in all proceedings with respect to any claim to determine whether medical care or service was, is, or may be necessary and appropriate to the diagnosis of the claimant's injury or disability.

232.6 If the medical care provider disagrees with the opinion of the utilization review organization or individual, the medical care provider may submit a written request to the utilization review organization or individual for reconsideration of the opinion. The request shall contain reasonable medical justification for the request and shall be made within sixty (60) calendar days from actual receipt of the utilization review report.

232.7 If a dispute arises between the medical care provider, employee, or employer on the issue of necessity, character, or sufficiency of the medical care or service or fees charged by the medical care provider, the dispute shall be resolved by the Director upon application for a hearing. Any party adversely affected by the Director's Decision shall appeal to the D.C. Court of Appeals. Copies of all reports shall be furnished to all interested parties.

> 232.8 The cost of a utilization review shall be paid by the employer, if the employee seeks the review and is the prevailing party.

7 DCMR 299. Definitions.

299.1 The definitions found in § 2 of the Act (§ 36-301, D.C. Code, 1981 ed.)[5], shall apply to this chapter. In addition, the following terms shall have the meaning ascribed:

> Utilization Review - evaluation of only the necessity, character, and sufficiency of both the level and quality of medically related services provided an injured employee based upon medically related standards (D.C. Code Section 36-301 (r-1) and § 36-307(b)[6].

On April 15, 2008 Respondent submitted to AHD, an application for formal hearing. At that time Respondent requested a determination regarding the causal relation of Petitioner's work injury to her medical condition. In its application, Respondent was asked to state the issues it planned to present for resolution at the hearing. Respondent replied, "Claimant's alleged condition is not causally connected to the 11/15/05 incident; treatment is not causally related to the incident." On April 23, 2008, a Scheduling Order was issued by AHD requiring both parties to complete in unison, a Joint Pre-hearing Statement (JPHS). Said JPHS *inter alia*, serves the purpose of advising the parties of the contested issues to be addressed at the formal hearing. 7 DCMR 222. The parties filed a JPHS on June 4, 2008 and Respondent set forth what it deemed to be the "contested issue of fact and law." Employer stated, "Claimant's alleged neck condition is not causally connected to the 11/15/2005 incident; and the recommended cervical spine surgery is therefore not causally connected to the 11/15/2005 incident. Claimant struck her head on a cabinet." At no time before the hearing did Respondent take issue with the "reasonableness and necessity" of the medical treatment recommended or being offered to Petitioner.

At the onset of the formal hearing in this matter the ALJ identified as an issue, "medical-causal relationship." When the ALJ inquired as to whether this assertion was correct, Respondent replied, "That is correct Your Honor". Hearing Transcript (HT) p. 8. Later during the hearing the ALJ set forth an additional inquiry to Respondent regarding the issues to be presented. Respondent's answer, "Simply a causation issue itself." HT p. 10.

It was not until Respondent began his cross-examination of Petitioner that Respondent asserted "reasonableness and necessity" to be an issue. Petitioner immediately objected to Respondent's assertion of a new issue. HT pp. 27-28. At hearing the ALJ noted the Respondent's position, promised to address the newly submitted issue in the Compensation Order when issued and proceeded with the formal hearing. HT p.36. After the formal hearing concluded, the ALJ issued a Compensation Order in the matter. 2007)."

[5] The District of Columbia Municipal Regulations currently cite to Sections of the Act utilizing outdated Section numerals. This section has since been renumbered as §32-1501.
[6] See footnote 1. This section has since been renumbered as §32-1507.

It is evident upon review of the record the procedural requirements of due process have not been met, as Petitioner was not given an opportunity to prepare a response to Respondent's newly raised issue of "reasonableness and necessity". The D.C. Court of Appeals has determined,

> "…an individual is entitled to fair and adequate notice of administrative proceedings that will affect his [or her] rights, in order that he [or she] may have an opportunity to defend his or her position. We have observed, moreover, that this notice guarantee has its 'roots in constitutional due process.' We have also stressed that this notice requirement embraces the proposition that an agency 'may not change theories in midstream without affording reasonable notice of the change."

Transportation Leasing Co. v. Department of Employment Services, 690 A.2d 487 at 489, (DC App. 1997) citations omitted. If a new issue is raised for consideration during the course of a hearing, the opposing party is entitled to at least a continuance.

The majority posits that the ALJ was correct in concluding Petitioner's claim could not be ruled upon until Respondent's request for utilization review was satisfied. The basis for the ALJ's September 26, 2008 decision was what the ALJ deemed,

> The policy in this jurisdiction that the reasonableness and necessity of medical procedures, recommended or sought, are subject to mandatory procedures of utilization review as set forth in D.C. Official Code §32-1507(b)(6). *Chaupis v. George Washington Hospital,* CRB No. 08-075, AHD Nol. 07-112A, OWC Nos. 60834 and 622922 (March 4, 2008), citing and quoting from its exhaustive review of the provision in *Gonzales* [sic] *v. UNICO Services Company*, CRB No. 07-005, AHD No. 06-155, OWC No. 604331 (February 21, 2007).

Turner v. Restaurant Associates, AHD No. 08-244, OWC No. 623657.

Utilization review is not mandatory and a request therefore does not stay a formal hearing proceeding nor does such a request render a claim "not ripe for disposition."

The majority herein maintains the CRB's ruling in *Gonzalez* and *Chaupis*, asserting the utilization review process is mandatory and exclusive in cases involving the reasonableness and necessity of medical care. I am of the opinion the majority herein, and the review panel in *Gonzalez* and *Chaupis* fail to apply the plain meaning of the Act or in the alternative, fail to substantiate the need to rely upon an alternative construction of the Act.

Upon review of the language of §32-1507(b)(6)(B), it is prudent to first determine, "if the language is plain and admits of no more than one meaning**.**" *Hiligh v. Federal Express Corporation and Alexis Inc.*, CRB No. 05-36, OHA No. 99-138, OWC 513435 citing, Davis v. United States, 397 A.2d 951, 956 (D.C. 1979).

> "When the language of a statute is plain and unambiguous, the plain meaning of that language is binding. *See* *Hudson Trail Outfitters v. D.C. Department of Employment Services*, 801 A.2d 987, 990 (D.C. 2002) (citation

omitted)."However, 'even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve.'" *Hively v. D.C. Department of Employment Services,* 681 A.2d 1158, 1161 (D.C. 1996) (citation omitted). In that event, the court will "look to policy and the statute's 'manifest purpose' in order to assist" in the interpretation of ambiguous statutory language. *Hively,* at 1163.

Both the Supreme Court and the D.C. Court of Appeals have recognized that "words are inexact tools at best, and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on superficial examination.'" *Harrison v. Northern Trust Co.*, 317 U.S. 476, 87 L. Ed. 407, 63 S. Ct. 361 (1943) (citations omitted); Davis, supra, 397 A.2d at 956; *see Sanker v. United States,* 374 A.2d 304, 307 (1977) (quoting *Lynch v. Overholser*, 369 U.S. 705, 710, 8 L. Ed. 2d 211, 82 S. Ct. 1063 (1962) ("The decisions of this Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself to the bare words of a statute, ... for 'literalness may strangle meaning**.**'") (citations omitted).

As the D.C. Court of Appeals has explained, it is appropriate to look beyond the plain meaning of statutory language in several different situations. "First, even where the words of a statute have a 'superficial clarity,' a review of the legislative history or an in-depth consideration of alternative constructions that could be ascribed to statutory language may reveal ambiguities that the court must resolve. *Sanker, supra*, 374 A.2d at 307 (quoting *Barbee v. United States*, 392 F.2d 532, 535 n. 4 (5th Cir.), cert. denied, 391 U.S. 935, 20 L. Ed. 2d 855, 88 S. Ct. 1849 (1968) ('Whether or not the words of a statute are clear is itself not always clear')); accord *Davis, supra,* 397 A.2d at 956. Second, 'the literal meaning of a statute will not be followed when it produces absurd results.' *Varela,* supra, 424 A.2d at 65 (quoting *District of Columbia National Bank v. District of Columbia*, 121 U.S. App. D.C. 196, 198, 348 F.2d 808, 810 (1965) (citations omitted)); *Berkley v. United States*, 370 A.2d 1331, 1332 (D.C. 1977) (per curiam) ("statutes are to be construed in a manner which assumes that Congress acted logically and rationally"). Third, whenever possible, the words of a statute are to be construed to avoid "obvious injustice." *Metzler v. Edwards*, 53 A.2d 42, 44 (D.C. Mun. App. 1947); see *Center for National Policy Review on Race & Urban Issues v. Weinberger*, 163 U.S. App. D.C. 368, 372, 502 F.2d 370, 374 (1974) ('[a] court may qualify the plain meaning of a statute" to avoid consequences that would be "plainly ... inequitable'). Finally, a court may refuse to adhere strictly to the plain wording of a statute in order "to effectuate the legislative purpose," *Mulky v. United States*, 451 A.2d 855, 857 (D.C. 1982), as determined by a reading of the legislative history or by an examination of the statute as a whole. *Floyd E. Davis Mortgage Corp. v. District of Columbia,* 455 A.2d 910, 911 (D.C. 1983) (per curiam) ("a statute is to be construed in the context of the entire legislative scheme"); *Dyer v. D. C. Department of Housing and Community Development*,

> 452 A.2d 968, 969-70 (D.C. 1982) ("the use of legislative history as an aid in interpretation is proper when the literal words of the statute would bring about a result completely at variance with the purpose of the Act"); *District of Columbia v. Orleans*, 132 U.S. App. D.C. 139, 141, 406 F.2d 957, 959 (1968) ("the 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned, by equitable construction or recourse to legislative history")." *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 753-754 (D.C. 1983) (en banc).

Hiligh id.

Section 32-1507 (b)(6)(B) of the Act provides the Mayor, employee or employer with the *option* to initiate review of requested medical care via utilization review when the necessity, character or sufficiency of said medical care requires clarification. This provision in no way *requires* the utilization review process to be invoked in such instances. The Act merely offers the utilization review as an available right that *may* be initiated.

In this instance, the need to look beyond, or deviate from the plain meaning of the statutory language in §§32-1507 (b)(6)(B) has not been justified by the majority, not in this decision nor in the holdings in *Gonzalez* or *Chaupis*. No recognition of ambiguities in the language of the statue has been made; no expectation that some absurdity will result upon the reliance of the plain meaning of the provisions has been offered; the record is void of any assertion that an injustice will occur by relying upon the plain meaning of this provision; and there is no identification of a legislative purpose that would be thwarted by relying upon the plain meaning of the statute.

Absent an in-depth review of the legislative history of these provisions, we must rely upon the plain meaning of the statute. *See Hiligh*. In my opinion, the plain meaning of the statute is clear. The Act does not mandate the initiation of the utilization review process when the issues of reasonableness and necessity are raised.

I am of the opinion the Order of September 26, 2008 denying Petitioner's claim pending utilization review is not in accordance with the law for the above noted reasons.

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Leslie A. Meek
Administrative Appeals Judge