

1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**
3

4 **DAVID PELLETIER,**
5

6 *Applicant,*

7 **vs.**
8

9 **UNITED STRUCTURES, INC., and CIGA by**
10 **its servicing facility SEDGWICK CMS for**
11 **FREMONT INSURANCE in liquidation,**

12 *Defendants.*

Case No. ADJ3905674 (SRO 0031254)
(Santa Rosa District Office)

**OPINION AND DECISION
AFTER
RECONSIDERATION**

13 We granted applicant David Pelletier's Petition for Reconsideration on August 23, 2013 to further
14 study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

15 Applicant sought reconsideration of the Findings and Order issued on May 30, 2013 by a
16 workers' compensation administrative law judge (WCJ). In that decision, the WCJ found in pertinent
17 part that applicant's motion for dismissal of the agreed upon Nurse Case Manager (NCM) was denied.
18 Applicant contended in pertinent part that he had the right to change to a new nurse case manager and
19 that the WCJ should appoint a new nurse case manager.

20 We received an Answer from defendant. We received a Report and Recommendation (Report)
21 from the WCJ in response to the Petition for Reconsideration which recommended that applicant's
22 Petition be denied.

23 We have reviewed the record and have considered the allegations of the Petition for
24 Reconsideration, the Answer, and the contents of the Report, and we now issue our decision after
25 reconsideration. Based on our review of the record, and as discussed below, we will rescind the Findings
26 and Order, issue new orders, and return the matter to the WCJ for further proceedings consistent with this
27 opinion.

1 FACTS

2 I.

3 Applicant was employed as a carpenter and was severely injured on May 22, 1980 after a fall.
4 His case was resolved by way of a Compromise & Release on July 30, 1986 with open future medical
5 care. On January 23, 1996, the parties stipulated to use Kristen Mott as the NCM, and she continued in
6 this capacity until her retirement in August 2010. On November 23, 2010, the WCJ issued a findings and
7 order, finding in pertinent part that defendant had not shown good cause to rescind the stipulation of
8 January 23, 1996 and ordering defendant to provide applicant with a new NCM.¹ On March 23, 2011,
9 the parties agreed to use Marion Edwards as the NCM.

10 Applicant subsequently developed industrially related diabetes and peripheral neuropathy and as a
11 result has almost no sensation in his feet. On October 12, 2012, applicant was admitted to Sutter
12 Roseville Hospital for cellulitis and osteomyelitis as a result of blisters on his left foot and was
13 hospitalized until October 30, 2012. (Exhibit 13, Sutter Roseville, Item 65, October 12, 2012.) While in
14 the hospital, applicant was treated with intravenous antibiotics and had several surgeries on his foot.
15 (Exhibit 13, Item 34, October 18, 2012; Item 17, October 23, 2012.) It is undisputed that NCM Edwards
16 did not come to the hospital while applicant was hospitalized. Other than two telephone conversations
17 with applicant (Minutes of Hearing, Summary of Evidence, February 28, 2013 (MOH), p. 5, Lines 20-
18 25), NCM Edwards used text messaging and e-mail to communicate with applicant while he was in the
19 hospital. (Exhibit O, Progress Report by NCM Edwards with copies of text messages; Exhibit U,
20 Typewritten E-mail String.)² It is also undisputed that at some point during his hospitalization applicant
21 stopped communicating with NCM Edwards.

22 The hospital records document many ongoing lengthy discussions between the hospital staff and
23 applicant and his family with resulting shifts in treatment strategy. (See Exhibit 13, Items 40, 24, 23, 22,
24

25 ¹ Applicant sought reconsideration of the findings and order on other grounds. On February 2, 2011, we
26 issued an Order Denying Reconsideration. Commissioners Cuneo and Miller, who were on the panel that issued
that opinion, no longer serve on the Appeals Board. Other panel members were appointed in their place.

27 ² Hundreds of pages of e-mail and text messages were admitted into evidence in Exhibits O and U. In the
interest of brevity, we selected a few representative e-mails for the purpose of this opinion.

1 18, 15, 14; see also Exhibit O.) Several times, applicant was on the verge of discharge and then on short
2 notice was sent to surgery. (*Id.*) At various times they considered whether applicant should be
3 transferred to another facility for treatment, and it was unclear up to the time of his discharge whether
4 applicant was to be discharged to a care facility or was to receive care at home. (*Id.*) Specifically, in a
5 note dated October 29, 2012, Rafael Neiman, M.D., reported that: "I told patient and family there is at
6 least a 20% chance of an amputation." (Exhibit 13, Item 5.) And, as documented by several different
7 physicians in operative reports and notes, applicant did not want his foot amputated if at all possible.
8 (Exhibit 13, Items 43, 40, October 17, 2012; Item 17, October 23, 2012.) According to an e-mail that
9 NCM Edwards sent to applicant's attorney and defendant's claims administrator on October 19, 2012,
10 she was aware that there was "talk now of amputation of the 'entire leg' but [she did not] have that in
11 writing, it was read to [her] by Daniella in the medical record [sic]." (Exhibit U, p. 93.)

12 On October 21, 2012, applicant sent NCM Edwards a lengthy e-mail which poses numerous
13 questions and sets forth how upset he and his family were with applicant's care and how much confusion
14 had arisen at the hospital. (Exhibit U, pp. 83-85.) NCM Edwards replied to the e-mail letter on October
15 22, 2012, however, in her response she deemed the situation to be "not urgent" and labeled their
16 questions as "accusations" or "NOT true" and suggested that they "fact check." (Exhibit U, pp. 80-83.)
17 On October 23, 2012, applicant's son e-mailed NCM Edwards on behalf of his father, and advised her
18 that his father was back in surgery and asked "where are you, why aren't you here?" (Exhibit U, p. 76.)
19 In her response to that e-mail, NCM Edwards acknowledged that she knew that applicant was going back
20 in for surgery but then said that "it is not reasonable for me to 'be there' when the plan was to
21 discharge/transfer." (Exhibit U, p. 76.) Applicant's son responded by stating that applicant's attorney
22 had asked NCM Edwards to come to the hospital on "Saturday" but she had not, and stated that "if you
23 were here you would be able to do your job." (Exhibit U, p. 75.) NCM Edwards replied that she needed
24 to know what they needed, and he again responded that she needed to come to the hospital. (Exhibit U, p.
25 73.) Even after applicant was discharged and NCM Edwards was coordinating follow-up care, she
26 characterized applicant and his family as "very difficult to work with and communicate with" in an e-
27 mail to another nursing care provider on December 17, 2012. (Exhibit U, p. 8.)

1 In her report to the defendant insurance adjuster on December 26, 2012 discussing applicant's
2 hospital stay and the aftermath, NCM Edwards began with the following observation:

3 "Please note that the patient as well as his wife, son and attorney have
4 made multiple rude and false statements about his care while at Sutter
5 Roseville and of my medical case management services. This report will
6 provide 'objective' information regarding the care he received while at
7 Sutter Roseville and my interactions on his behalf as a patient advocate. .
8 ." (Exhibit O, p. 2.)

9 As her report continued, NCM Edwards summarized applicant's medical records from his hospitalization
10 and, apparently in an effort to show that applicant's concerns were magnified or distorted, highlighted
11 numerous phrases. (Exhibit O, pp. 2-6.) She concluded her report with a "Care Management Plan."
12 (Exhibit O, p. 7.) In brief, the Plan stated that NCM Edwards would: (1) Maintain telephonic contact
13 with applicant at least weekly; (2) Attend scheduled medical appointments with applicant to evaluate
14 treatment plans at least monthly; (3) Coordinate appointments with applicant "as needed to ensure proper
15 medical outcomes at least monthly;" (4) Contact defendant to discuss appointments and the case at least
16 monthly; and, (5) Continue to provide intervention for applicant "to ensure that [he] receives every
17 opportunity possible to improve his status significantly enough to maintain activities of daily living."

18 II.

19 On February 28, 2013, applicant's motion to dismiss NCM Edwards and replace her with another
20 nurse case manager went to hearing, and NCM Edwards, applicant, and applicant's wife Rebecca
21 Pelletier testified.

22 NCM Edwards testified in pertinent part as follows:

23 She was to be a liaison between the insurance company, attorneys, and medical providers and do
24 some plan assessment, but her "primary focus is on the injured worker." (MOH p. 4, lines 12-16.)
25 Preliminarily, she admitted that:

26 "[I]t is important . . . to have contact with the injured worker. [She] can
27 spend extra time with the injured worker in the waiting room and make
sure the doctor gets all the information about what might be wrong. . .
[and] it is essential to have an understanding of the patient's symptoms. . .
and important for the physician to know the injured worker's priority."
(MOH, p. 4, lines 30-39.)

1 "It is essential to have good communication with someone having injuries
2 like the applicant... and essential to know the applicant's preferences
3 regarding treatment options." (MOH, p. 5, lines 6-9.)

4 "An open communication with the injured worker helps the outcome of
5 treatment. She believes that good communication is essential to a better
6 treatment outcome." (MOH, p. 5, lines 12-15.)

7 "The injured worker would want to know about his treatment options, the
8 pros and cons of treatment, and the possible outcomes. The witness' role
9 as the medical case manager would be to explain these matters to the
10 injured worker." (MOH, p. 8, lines 5-9.)

11 With respect to her Care Management Plan, she was questioned about Items 1, 2, 3, and 5. (MOH,
12 p. 5, lines 20-25, p. 6, lines 14-16; see Exhibit O, p. 7.) Specifically, Item 2 provided for attendance with
13 applicant at scheduled medical appointments. She explained that:

14 "There are times the patient forgets what has gone on in the last month.
15 There are times doctors forget to write prescriptions. The witness is there
16 to remind them to write the prescriptions so she can get them authorized
17 without delay. She is also present at the appointment to do her own
18 assessment of the applicant's impairment or any changes that need
19 attention.

20 "There were also times the patient would leave an appointment and cannot
21 recall or is confused about what the doctor told them. The witness is there
22 to help reassure the patient about the care and what the doctor
23 recommended. This would be an essential part of being a medical case
24 manager." (MOH, p. 5, line 29 - p. 6, line 6.)

25 She then testified that:

26 "Trust [was] a necessary element for good communication between the
27 applicant and the witness. Trust would be an essential element of the
relationship. . . [and that] trust has always been an issue with the applicant
ever since their first contact. The witness has trust in the applicant but the
applicant does not have trust in providers or in the witness' case
management. This has been true ever since the first phone call contact
with the applicant." (MOH, p. 6, lines 25-27, 33-38; see p. 7, lines 5-7.)

28 She admitted that there had been communication problems throughout the time that she worked with
29 applicant and that "[t]he communication problems have now hindered her ability to educate the applicant
30 on his treatment options." (MOH, p. 7, lines 9-15; 29-31.)

31 She further admitted that she did not come to the hospital to visit applicant, inspect his wound or
32 arrange for his care while applicant was hospitalized. (MOH, p. 8, lines 11-13.) She believed that she

1 "was able to address all of the concerns of applicant and applicant's wife to the doctor over the
2 telephone." (MOH, p. 8, lines 17-19.) She testified that from her "discussion with the doctors, only one
3 doctor mentioned amputation as a concern in the future." (MOH, p. 8, lines 35-37.) She was not aware
4 that "three doctors advised [applicant] of the threat of losing his leg . . . even though she [had] reviewed a
5 thousand pages of medical records," and she further denied that applicant had told her that three doctors
6 had discussed "a possibility of amputation." (MOH, p. 8, lines 33-42.) She testified that while it was
7 important to be at applicant's regular appointments, at the hospital, "all of the doctors [were]
8 communicating with the patient and [her]," and she denied that communication would have been better if
9 she was at the hospital. (MOH, p. 8, lines 11-29; p. 9, lines 4-9.) She decided not to go to the hospital to
10 visit even though applicant's attorney wanted her to go "but there was no reason to do so given that
11 applicant would not share information with her." (MOH, p. 11, lines 28-34; see p. 13, lines 40-42.)

12 Applicant testified that he "called for Ms. Edwards to come and assist him. The applicant's wife
13 called a week later for Ms. Edwards to come to the hospital. The applicant's attorney, Linda Brown, also
14 called Ms. Edwards to come to the hospital." (MOH, p. 15, lines 15-19.) Applicant then testified that:

15 "All Ms. Edwards needed to do was to come up and see how serious it was
16 for the applicant and to make sure and to find out what was going on. The
17 applicant asked doctors and nurses questions but did not get the same
18 answers twice regarding his infection or the procedures. If Ms. Edwards
was there, she could have been the applicant's advocate." (MOH, p. 16,
lines 27-32.)

19 Applicant admitted that "[a] week or ten days into the hospitalization, the applicant stopped all
20 communication with Ms. Edwards and told the hospital to do the same. At that point, he felt Ms.
21 Edwards was hindering his care." (MOH, p. 16, lines 35-38.) In comparison, he testified that he had no
22 trust or communication issues with NCM Mott and implied that NCM Mott would have come to the
23 hospital. (MOH, p. 15, lines 40-42; p. 16, line 40 – p. 17, line 6.)

24 Applicant's spouse Rebecca Pelletier testified that she "asked Ms. Edwards to come to the
25 hospital because nothing was being done for the applicant. They were not receiving any straight answers
26 or getting any coordinated care." (MOH, p.17, lines 27-30.)

1 On May 30, 2013, the WCJ issued his decision denying applicant's motion to dismiss NCM
2 Edwards. In his Opinion, the WCJ stated in pertinent part that he did not find "any objective basis" for
3 relieving NCM Edwards from her duties as the agreed upon NCM, that NCM Edwards had ably
4 performed her duties, and that applicant's "abrupt refusal to communicate" with NCM Edwards was
5 unreasonable. (Opinion, pp. 4-5.) In his Report, the WCJ explained that applicant unilaterally refused to
6 cooperate and did not confer in good faith with defendant to select a new NCM before proceeding to a
7 formal request to dismiss NCM Edwards. (Report, p. 5.)

8 9 DISCUSSION

10 In *Lamin v. City of Los Angeles* (2004) 69 Cal.Comp.Cases 1002 (*Lamin*), we concluded that
11 reasonably required medical treatment within the meaning of Labor Code section 4600 can include the
12 services of a nurse case manager. (*Lamin, supra*, p. 1007.) We noted that when showing that a nurse
13 case manager was reasonably required, evidence of an applicant's ability or inability to manage his or her
14 medical care might be admissible and relevant. (*Lamin, supra*, p. 1008, fn 4.) As part of our analysis in
15 *Lamin*, we considered the unique role that a nurse case manager plays in a workers' compensation case
16 because a nurse case manager "must interact and coordinate with" the applicant, applicant's physicians,
17 claims adjusters, attorneys, and/or others, who are "all parties to the employee's need for medical care."
18 (*Lamin, supra*, p. 1009.) We concluded that when selecting a nurse case manager, the preferred
19 procedure was as follows:

20 "(1) the employer or insurance carrier should initially designate a nurse
21 case manager; (2) if the applicant objects (at any time) to the person
22 designated by the defendant, the parties should confer and *jointly* select a
23 nurse case manager (i.e., an "agreed" nurse case manager); and (3) if the
24 parties are unable to agree on an appropriate nurse case manager within a
reasonable period of time . . . the WCJ should resolve the parties' dispute
and appoint a nurse case manager. (Original italics.)" (*Lamin, supra*, pp.
1009-1010.)

25 Finally, we confirmed that *Castorena v. Golden West Lumber* 2004 Cal. Wrk. Comp. P.D. LEXIS 85
26 (*Castorena*) was not inconsistent with this analysis because in *Castorena*, the WCJ selected the nurse
27 case manager after the parties could not agree. (*Lamin, supra*, p. 1010.)

1 Notably, in *Castorena*, the WCJ explained that:

2 "Clearly, the nurse case manager is intimately involved in applicant's
3 medical care. *Interviewing* applicant's physicians and office staff,
4 applicant and his family and hospital personnel and then communicating
5 her findings to the claims adjuster, who then must make determinations
6 about what care to authorize [sic], [and she] *is not just a gatherer of*
7 *information*. Based on the nurse case manager's reports in evidence, a
reasonable inference can be drawn that *this type of case management is*
8 *integral to assuring that applicant's stream of care is administered well*
9 *and coordinated with all providers involved*, in addition to providing
10 information to the claims administrator. (Bold and italics added.)"
11 (*Castorena*, *supra*, p. 7.)

12 Here, the stipulation approved in 1996 and the subsequent finding of November 23, 2010
13 established that applicant reasonably required a nurse case manager, and inherent in those findings was a
14 determination that applicant lacked the ability to manage his own medical care and needed an advocate to
15 assist him in navigating the medical system. As explained in *Lamin*, defendant initially has the right to
16 select the nurse case manager, and here, defendant continued to select NCM Edwards. The issue then, is
17 what happens, as here, when the applicant objects to the employer's choice of the nurse case manager?

18 A nurse case manager plays a special role, and as emphasized in *Lamin* and *Castorena*, a nurse
19 case manager is not merely "an information gatherer," but actually must "interact with" applicant,
20 applicant's family, applicant's physicians, and hospital personnel. In fact, *Castorena* specifically refers
21 to the nurse case manager's role in "interviewing" all of the involved parties, and while there is no
22 reference to use of technological devices, here, those devices were a poor substitute for an actual meeting
23 with applicant and the other parties at the hospital and an actual examination of applicant's wounded
24 foot. NCM Edwards' own testimony at trial about explaining treatment options to an applicant and
25 attending medical appointments with an applicant highlight the importance of the need for her actual
26 presence at the bedside of applicant while applicant was facing a medical crisis with an unclear outcome.
27 And, as documented by the e-mails, as late as eleven days after applicant was admitted, his family
continued to ask NCM Edwards to come to the hospital to assist them in coordinating applicant's care.

Lamin makes clear that an applicant may object *at any time* to a defendant's choice of a nurse
case manager. Although an applicant cannot unilaterally force the appointment of a new nurse case
manager by simply declining to communicate, the evidence here indicates that applicant's dissatisfaction

1 with NCM Edwards was warranted. Applicant had several surgeries and there was discussion of an
2 amputation, and applicant and his family would have benefitted from an advocate to explain his options
3 to him and to voice his needs to the medical staff. Yet, NCM Edwards did not come to the hospital.
4 Therefore, even if NCM Edwards was communicating effectively with the physicians and other medical
5 staff, she was not adequately meeting applicant's needs.

6 The goal is to provide effective medical case management and effectiveness depends upon a level
7 of trust and communication between an applicant and the nurse case manager. An applicant has to have
8 some reasonable degree of trust in and reasonable ability to have personal access to the nurse case
9 manager, particularly in critical situations. Moreover, applicant's refusal to communicate with NCM
10 Edwards must be considered in light of the fact that he worked cooperatively and well with his prior
11 nurse case manager for many years, and here, *both* applicant and NCM Edwards acknowledged the lack
12 of trust and communication in their relationship. Thus, the evidence here supports the assignment of a
13 new nurse case manager, and we will rescind the Findings and Order.

14 That said, we agree with the WCJ that applicant should not have unilaterally refused to interact
15 with NCM Edwards and should have met and conferred with defendant and attempted to reach agreement
16 on a new nurse case manager. Therefore, we will order that NCM Edwards continue to act as the nurse
17 case manager on a temporary basis. In the interim, the parties will be given a total of ten days to reach an
18 agreement on a new nurse case manager, and, as set forth in *Lamin*, if the parties do not agree the WCJ
19 will appoint a new nurse case manager under the procedure set forth below. As explained in the orders
20 below, in the event the parties fail to reach agreement, the parties will have five days after the lapse of
21 the ten-day period in which to separately submit a list of up to five proposed nurse case managers to the
22 WCJ together with CVs for each and ten days thereafter for objection. Thereafter, within fifteen days
23 after the end of the ten-day objection period, the WCJ shall appoint a new NCM, who need not be one on
24 either party's list.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings and Order issued by the WCJ on May 30, 2013 is **RESCINDED**.

4 **IT IS FURTHER ORDERED** that Nurse Case Manager Marion Edwards shall continue to act
5 as the Nurse Case Manager for applicant David Pelletier until the WCJ appoints a new Nurse Case
6 Manager either pursuant to an agreement by the parties or, failing timely agreement, in the WCJ's
7 discretion.

8 **IT IS FURTHER ORDERED** that the parties shall have *five (5)* days plus *five (5)* additional
9 days for mailing (Cal. Code Regs., tit. 8, §§ 10507, 10508), after the date of service of this Order to agree
10 on a new Nurse Case Manager and to notify the WCJ. If the parties agree on a new Nurse Case Manager,
11 the WCJ shall issue a formal order ratifying their agreement, and the order shall be considered the
12 appointment of the new Nurse Case Manager.

13 **IT IS FURTHER ORDERED** that if the parties do not agree, the parties shall have an additional
14 *five (5)* days after the lapse of the ten-day period [or in another words, no later than *fifteen (15)* days
15 after the date of service of this Order] to separately submit a list of up to five (5) proposed Nurse Case
16 Managers to the WCJ. A CV shall be attached for each proposed Nurse Case Manager and should
17 include a description of the proposed Nurse Case Manager's qualifications, training, experience, and any
18 other information that the party proposing the name deems relevant. The list of proposed Nurse Case
19 Managers and attachments shall be concurrently served on the opposing party at the time of filing.

20 Each party shall then have *five (5)* days plus *five (5)* additional days for mailing (Cal. Code Regs.,
21 tit. 8, §§ 10507, 10508) from the date of service of the list of proposed Nurse Case Managers by the
22 opposing party to submit any written objection showing good cause why any proposed Nurse Case
23 Manager should not be appointed.

24 Within *fifteen (15)* days after the lapse of the objection period, the WCJ shall either appoint one
25 of the proposed Nurse Case Managers listed by the parties or, in his discretion, may appoint a new Nurse
26 Case Manager who is not on either list.

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1 IT IS FURTHER ORDERED that the matter is RETURNED to the workers' compensation
2 administrative law judge for further proceedings consistent with this opinion.
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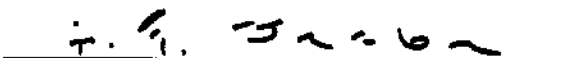
4 WORKERS' COMPENSATION APPEALS BOARD

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6  DEPUTY
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8 I CONCUR,

NEIL P. SULLIVAN

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12 MARGUERITE SWEENEY

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16 FRANK M. BRASS



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18 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

19 NOV 27 2013

20 SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR
21 ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

22 DAVID PELLETIER

23 LAW OFFICES OF LINDA JOANNE BROWN, ATTN: CHRISTOPHER H. DAHMS
24 HANNA, BROPHY, MACLEAN, MCALEER & JENSEN LLP, ATTN: ANNE H. BROWN

25 AS/jp

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1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**
3

4 **DAVID PELLETIER,**
5

6 *Applicant,*

7 **vs.**

8 **UNITED STRUCTURES, INC., and CIGA by**
9 **its servicing facility SEDGWICK CMS for**
10 **FREMONT INSURANCE in liquidation,**

11 *Defendants.*

Case No. ADJ3905674 (SRO 0031254)
(Santa Rosa District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

12 Reconsideration has been sought by applicant, with regard to a Findings and Order filed on May
13 30, 2013.

14 Taking into account the statutory time constraints for acting on the petition, and based upon our
15 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
16 opportunity to further study the factual and legal issues in this case. We believe that this action is
17 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
18 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
19 hereinafter determine to be appropriate.

20 For the foregoing reasons,

21 **IT IS ORDERED** that the Petition for Reconsideration is **GRANTED**.

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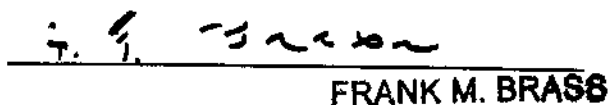
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1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
2 the above case(s), all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 Santa Rosa District Office or any other district office of the WCAB and shall not be e-filed in the
7 Electronic Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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MARGUERITE SWEENEY

13 **I CONCUR,**

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17 **FRANK M. BRASS**

18 **CONCURRING, BUT NOT SIGNING**

19 **NEIL P. SULLIVAN** **DEPUTY**



20
21 **AUG 23 2013**

22 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA** 

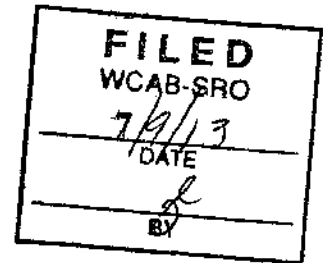
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24 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
25 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

26 **LAW OFFICES OF LINDA JOANNE BROWN, ATTN: CHRISTOPHER H. DAHMS**
27 **HANNA, BROPHY, MACLEAN, MCALEER & JENSEN LLP, ATTN: ANNE H. BROWN**
DAVID PELLETIER

AS/jp
PELLETIER David

**WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA**

SRO31254/ADJ3905674



DAVID PELLETIER

vs.

UNITED STRUCTURES, INC. and
SEDGWICK CIGA

JAMES R. JOHNSON
Workers' Compensation Judge

Date of Injury: May 20, 1980

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

On February 28, 2013 this case returned to calendar for a full day trial on the applicant's Motion for Dismissal of Marion Edwards as the Medical Nurse Case Manager, applicant's Motion for Replacement of Marion Edwards by Ms. McDonald and/or Linda Evans Shaw, and attorney's fees.

On May 20, 1980, the applicant was working as a carpenter on a scaffold 80' above the ground when his cinch line broke and he fell to the ground landing standing up. The applicant sustained severe injuries to his feet, ankles, and legs which have resulted in multiple surgeries including bilateral ankle fusions (See, Applicant Exhibit 1, report of Marvin Lipton, M.D., dated December 9, 1982).

On July 30, 1986, an Order Approving Compromise and Release was filed and served on the parties. In the approved Compromise and Release the parties then stated that on May 20, 1980, the applicant and injured worker, David Pelletier, while employed as a carpenter by United Structures,

Inc., sustained injuries arising out of and in the course of employment to both legs, both ankles, both feet, both knees, both hips, and back. The parties further agreed that all future medical expenses were to be paid by the employer.

It is further noted that the applicant has been found to reasonably require medical treatment to the agreed upon injured body parts and for headaches, hypertension and psychological conditions.

On January 23, 1996, the Appeals Board approved Stipulations which resolved issues of disputed medical treatment and penalties. In the stipulation the parties agreed to utilize Kirsten Mott as a medical management nurse. The record reflects that Ms. Mott continued in the capacity of the "medical management nurse" until her retirement.

On September 8, 2010, the case returned to calendar for a Mandatory Settlement Conference. At the hearing the parties filed a Pre-Trial Conference Statement in which the issues were noted to be: medical necessity for nurse case manager; petitions for sanctions and penalties; employment of a new medical case manager given the retirement of Kirsten Mott; and request for attorney's fees based on the allegation that defendant unreasonably refused to abide by the prior agreement.

On October 21, 2010, the case returned to calendar for a four-hour trial.

On November 23, 2010, a Findings and Order was filed and served on the parties which found, in part, that defendant had not shown good cause to rescind the Stipulation dated January 23, 1996. Defendant was then ordered to provide the applicant with a new medical case manager.

On February 2, 2011, the Appeals Board filed an Order Denying the Applicant's Petition for Reconsideration from the order denying payment of attorney's fees.

On March 9, 2011, the case returned to calendar for a Mandatory Settlement Conference. At the hearing the parties agreed that within 14 days each side would submit to the WCJ up to three names (with resumes) of field nurse case managers, and that the WCJ would thereafter appoint a "NCM". The parties advised that in the interim they would attempt to select an agreed NCM. (See, Minutes of Hearing dated March 9, 2011 at page 2).

On March 23, 2011, defendant's attorney filed a letter with the Appeals Board entitled, "Agreement to Nurse Case Manager" in which it was indicated that applicant's attorney suggested Marion Edwards as an agreed upon field nurse case manager and that defendant was specifically agreeing to Ms. Marion Edwards as the nurse case manager.

On January 8, 2013, the case returned to calendar for a Mandatory Settlement Conference. At the hearing the parties filed a Pre-Trial Conference Statement in which they described the issues as dismissal of Marion Edwards as the medical/nurse case manager and replacement by Ms. McDonald and/or Linda Evans Shaw.

On February 28, 2013, the case returned to calendar for a full day trial. At the trial judicial notice was taken of the previous Order Approving Compromise and Release and Award of Further Medical Treatment and of all previous Findings and Awards and Findings and Orders, testimony and the exhibits filed in the case. All of the offered records were accepted into evidence. Judicial notice was also taken of the defendant's attorney's letter dated March 23, 2011, regarding Ms. Marion Edwards' assignment as the agreed upon nurse case manager. After testimony from Ms. Edwards and from the applicant and the applicant's wife, the case was again submitted for decision.

On May 30, 2013, the parties were served with the Findings and Order by which the applicant's motion for dismissal of Marion Edwards as the agreed upon medical/nurse case manager was denied.

In Lamin the Board panel determined, in part, that if an injured worker objects (at any time) to the person designated by the defendant as a "nurse case manager" the parties should confer and jointly select a new nurse case manager. I agree with the comment of the Lamin panel that a nurse case manager is intimately involved in an applicant's medical care and that the applicant can object "at any time" to the designated nurse case manager. The parties must therefore confer and attempt to jointly agree upon a new agreed nurse case manager.

Based upon the above, it is found that the applicant's current motion to dismiss Marion Edwards as the agreed upon medical nurse case manager is denied. All other issues are moot.

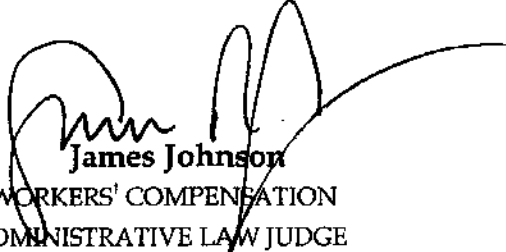
III

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

7/9/13

Date


James Johnson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

(See attached Proof of Service)

JRJ/jl