WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCES STEVENS, ***Applicant,*** **vs.** **OUTSPOKEN ENTERPRISES, INC.; STATE COMPENSATION INSURANCE FUND,** ***Defendant.***	**Case No. ADJ1526353 (SFO 0441691)** **OPINION AND ORDER DENYING APPLICANT'S PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of the May 27, 2014 Findings And Order of the workers' compensation administrative law judge (WCJ) who found that the WCAB "does not have jurisdiction to determine the constitutionality of Labor Code section 4610.5 and 4610.6," that the February 20, 2014 Independent Medical Review (IMR) determination that the home health aide and four prescriptions requested by applicant's treating physician, Babak Jamasbi, M.D., are not medically necessary and appropriate "does not constitute a plainly erroneous express or implied finding of fact on a matter of ordinary knowledge not subject to expert opinion," that the Administrative Director "did not act without or in excess off her powers in the IMR determination," that applicant did not prove a basis for appeal under Labor Code section 4610.6(h), and that there is no basis for an appeal of the IMR determination because the WCAB does not have "jurisdiction to determine the medical necessity of the treatment addressed in said determination or whether error of law has been made in the determination."[1] Based upon those findings the WCJ denied applicant's appeal of the February 20, 2014 IMR determination.

It was earlier found by the WCJ on August 16, 2013, that applicant sustained industrial injury to her feet, shoulders, low back and psyche while working for defendant as a magazine editor on October 28, 1997, causing total permanent disability.

Applicant contends that the IMR procedures set forth in sections 4610.5 and 4610.6 deny her due

[1] Further statutory references are to the Labor Code.

process and are in contradiction of Article XIV, section 4 of the California Constitution, which states that the workers' compensation laws "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character," that the WCJ erred in not reviewing the February 20, 2014 IMR determination as to the medical necessity of the home health aide and four medications prescribed by Dr. Jamasbi, and that the IMR determination is deficient and does not constitute substantial evidence regarding the medical necessity of those items.

An answer was received from defendant.

The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

We have carefully reviewed the record and considered the allegations of applicant's petition, the answer and the WCJ's Report. For the reasons stated by the WCJ in her Report, which is adopted and incorporated by reference except as discussed below, and for the reasons below, applicant's petition is denied.

BACKGROUND

As earlier found on August 16, 2013, applicant is totally permanently disabled as a result of her October 28, 1997 industrial injury. Her condition requires her to use a wheelchair. For several years applicant had the assistance of a home health aide and used certain medications prescribed by Dr. Jamasbi to relieve her symptoms. Defendant paid for the wheelchair, the home health aide and the prescription medications as part of its obligation under section 4600 to provide reasonable medical treatment.

In late 2012, the home health aide assisting applicant was injured and was unable to continue to provide those services. This led Dr. Jamasbi to submit a Request For Authorization (RFA) to defendant for a new home health aide along with a request to refill four prescriptions, including Ativan (lorazepam), cyclobenzaprine (Flexeril), diclofenac sodium anti-inflammatory cream (Voltaren), and hydrocodone bitartrate / acetaminophen (Norco).[2]

[2] The trademark names of formulations of the generic medications are capitalized.

Along with the RFA form, Dr. Jamasbi included copies of his narrative reports of applicant's visits to his office on June 21, 2013 and July 19, 2013. In the July 19, 2013 report Dr. Jamasbi noted that applicant "has required home health aid for the past 3-4 years" for assistance with "personal hygiene tasks such as bathing and dressing," assistance in transferring from the wheelchair to the shower/toilet/bed, and with tasks "such as going to the pharmacy, going grocery shopping, and reaching/carrying, and meal preparation." He further wrote that applicant is unable to perform those activities herself because of the risk of falling, and that she has a "history of frequent falls when she tries to do these activities herself." No improvement in applicant's condition or change in her circumstances from the time the home health aide was initially provided by defendant is described in the RFA or accompanying reports.

On July 25, 2013, defendant's utilization review (UR) provider issued a determination denying authorization for the requested home health aide and all four medications. On August 14, 2013, applicant requested IMR of the UR determination. Seven months later, on February 20, 2014, an IMR determination denying all those treatment requests was issued by Maximus Federal Services, Inc., the entity hired by the Administrative Director to conduct IMRs.[3]

Applicant appealed the February 20, 2014 IMR determination to the WCAB, and an expedited hearing was conducted by the WCJ on May 19, 2014. The issues described in the Minutes of Hearing and Report were submitted for decision based upon the documents placed into evidence by the parties. No testimony was taken. On May 27, 2014 the WCJ issued her decision as described above.

DISCUSSION

While the WCAB has jurisdiction to hear appeals from IMR determinations, section 4610.6(h) expressly limits any such appeal to five grounds, as follows:

> "A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review

[3] While the IMR was pending, Dr. Jamasbi appealed the UR denial of the medications to defendant on August 20, 2013. On August 23, 2013 the UR provider again issued a determination that the medicines were not medically necessary. On October 8, 2013, Dr. Jamasbi submitted another request for a home health aide to defendant. That request was denied on October 14, 2013 based upon the earlier July 25, 2013 UR denial, which was said to be effective for 12 months pursuant to Labor Code 4610(g)(6). On October 14, 2013, Dr. Jamasbi submitted another request for the four medications, but that request was also denied on October 17, 2013 based upon the earlier UR denial.

> determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and *shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal*:
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> (1) The administrative director acted without or in excess of the administrative director's powers.
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> (2) The determination of the administrative director was procured by fraud.
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> (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
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> (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
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> (5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion." (Emphasis added; cf. Cal. Code Regs., tit. 8, § 10957.1.)

Moreover, the remedy provided for any successful appeal of an IMR pursuant to section 4610.6(h) is limited by section 4610.6(i) to the conduct of another IMR, as follows:

> "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. *In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.*" (Emphasis added; cf. Cal. Code Regs., tit. 8, § 10957.1(m).)

The effect of the limiting provisions of sections 4610.6(h) and (i) is to preclude meaningful appeal of an IMR determination to the WCAB under many circumstances. For example, section 4610.6(d) requires that the IMR determination of a medical treatment request be made within 30 days from the receipt of necessary documents. However, it appears that 30 day time period was far exceeded in this case as shown by the 7 month delay between the date when the IMR was requested and the date the IMR determination eventually issued. There are no consequences for failing to expeditiously conduct

an IMR like those that may occur when there is untimeliness in the UR process. (See, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]; *Cervantes v. El Aguila Food Products, Inc.* (2009) 74 Cal.Comp.Cases 1336 (Appeals Board en banc).)

The lack of a meaningful appeal of the merits of an IMR determination to the WCAB also precludes the Appeals Board from addressing conflicts between the law establishing the scope of medical treatment an employee is entitled to receive under section 4600, and the IMR provider's understanding of what constitutes medical treatment. Such a conflict appears to exist in this case with regard to the provision of a home health aide.

It is well established that a defendant is obligated by section 4600 to provide an injured worker with home health services when reasonably required to "cure or relieve" the effects of the industrial injury, and that those services may include attendant services to help with bathing, dressing, housekeeping and shopping. (Lab. Code, 4600(h); *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452 [37 Cal.Comp.Cases 564] [practical nursing services provided by injured worker's wife may be reimbursable under section 4600 as medical treatment]; *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 41 [49 Cal.Comp.Cases 454] [housekeeping services may be reimbursable under section 4600 as medical treatment]; *Neri-Hernandez v. Geneva Staffing* (ADJ7995806, June 12, 2014) 79 Cal.Comp.Cases __ (Appeals Board en banc) [home health care services are included in the section 4600 definition of medical treatment].)

In this case, the IMR determination states that that "Medical treatment does not include home maker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed." In that applicant's condition requires "care" other than homemaker services it is uncertain why the quoted statement was included in the IMR determination. It is also unclear if it is the basis for the IMR determination. However, "uncertainty" and "lack of clarity" are not listed in section 4610(h) as grounds for appealing an IMR determination to the WCAB and we have no statutory authority to address those concerns in this case. Moreover, even if such an appeal was available, the only remedy allowed by section 4610.6 is to order another IMR.

We acknowledge applicant's contention that the lack of a meaningful IMR appeal and remedy is inconsistent with the California Constitution's mandate that the workers' compensation law "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Article XIV, § 4.) However, as discussed in the Report, the WCAB has no authority to determine the constitutionality of the IMR statutes as sought by applicant. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028 [58 Cal.Comp.Cases 793]; *Niedle v. Workers' Comp. Appeals Bd.* (2001) 87 Cal.App.4th 283 [66 Cal.Comp.Cases 223]; cf. Cal. Const., Article III, § 3.5.)

In sum, for purposes of appeal to the WCAB it does not matter whether the reasons given for an IMR determination support the determination unless the appealing party proves one or more of five grounds for appeal listed by the Legislature in section 4610(h) by clear and convincing evidence. Applicant did not do that in this case. The WCJ's May 27, 2014 denial of applicant's IMR appeal is affirmed.

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For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the May 27, 2014 Findings And Order of the workers' compensation administrative law judge is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

DEPUTY

~~RICK DIETRICH~~

PARTICIPATING, BUT NOT SIGNING

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 11 2014

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

FRANCES STEVENS
JOSEPH WAXMAN
STATE COMPENSATION INSURANCE FUND

JFS/abs

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

FRANCES STEVENS, *Applicant,* vs. **OUTSPOKEN ENTERPRISES; STATE COMPENSATION INSURANCE FUND;** *Defendants.*	**Case No. ADJ1526353 (SFO0441691)** REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Francie R. Lehmer, Workers' Compensation Judge, hereby submits her report and recommendation on the Petition for Reconsideration filed herein.

Introduction

On June 11, 2014, applicant filed a petition for reconsideration of the findings and order which issued in this case on May 28, 2014. In my decision, I denied applicant's appeal of the Independent Medical Review (IMR) determination of February 20, 2014, finding that the Appeals Board does not have jurisdiction to determine the constitutionality of Labor Code sections 4610.5 and 4610.6; that the IMR determination dated February 20, 2014 does not constitute a plainly erroneous express or implied finding of fact on a matter of ordinary knowledge not subject to expert opinion; that the Administrative Director did not act without or in excess of her powers in the aforementioned IMR determination; that applicant has not

proven a basis under Labor Code section 4610.6(h) for an appeal of the aforementioned IMR determination; and that as there is no basis for an appeal of the aforementioned IMR determination, I do not have jurisdiction to determine the medical necessity of the treatment addressed in such determination or whether an error of law has been made in the determination.

Applicant seeks reconsideration of the decision on the grounds that the evidence does not justify the findings of fact, the findings of fact do not support the order, decision or award and that I acted without or in excess of my powers.

Applicant asserts that she has been denied due process by Labor Code section 4610.6, which prevents cross examination of the anonymous, non-treating, non-examining reviewing physician employed by the independent medical review company, Maximus, and bars judicial review of the IMR determination upholding utilization review denials of medical treatment. Applicant further asserts that the IMR decision is deficient in that it does not allow applicant to know the specific evidence being relied on, whether the IMR physician reviewed the entirety of the medical file or the specifics of the decision making process. In addition, applicant asserts that the enactment of Labor Code section 4610.6, as it provides for independent medical review by Maximus, has released defendant from its obligation to be bound by opinions of the agreed medical evaluator, Dr. Schoffermann. Applicant also asserts that I erred in not reviewing the IMR decision as to medical necessity, including whether home health care is subject to IMR.

Applicant requests that the Appeals Board issue an opinion addressing jurisdiction of the WCAB to rule on the constitutional challenges being asserted; that the Appeals Board hold that Labor Code section 4610.6 is in violation of the California Constitution, which mandates

that the legislature enact workers' compensation laws which provide substantial justice expeditiously and without encumbrance; that the Appeals Board hold that this section violates applicant's right to due process by prohibiting cross examination of the anonymous, non-treating, non-examining reviewer and judicial review of denials of medical treatment, and that the Appeals Board hold that I erred in not addressing the medical necessity of the treatment in issue.

Applicant's petition for reconsideration was timely filed and accompanied by the verification required under Labor Code section 5902.

Discussion

For the convenience of the Appeals Board, my Opinion on Decision is set forth below:

"Procedural History

"This matter came on for hearing before Francie Lehmer, Workers' Compensation Judge, on May 19, 2014. The parties stipulated at a previous trial on May 20, 2013 that Frances Stevens, born October 18, 1967, while employed on October 28, 1997 as a magazine editor, Occupational Group 111, at San Francisco, California by Outspoken Enterprises, Inc., insured by State Compensation Insurance Fund, sustained injury arising out of and in the course of employment to the bilateral feet, bilateral shoulders, low back and psyche. Following the trial in 2013, I found applicant permanently and totally disabled.

"Documentary evidence was received and the matter was submitted for decision on May 19, 2014 on applicant's claim for medications and home health care, which were denied by utilization review (UR) and Independent Medical Review (IMR). The issues for trial were framed by the parties as follows:

> "1) Does the workers' compensation judge have jurisdiction to determine the constitutionality of Labor Code sections 4610.5 and 4610.6?
>
> "2) Does the workers' compensation judge have jurisdiction to review the Medical Necessity Determination rendered in the IMR Determination dated February 20, 2014, pertaining to denial of home health care and medications?

"3) Does the denial of home health care services in the IMR Determination dated February 20, 2014 constitute an error of law, over which the workers' compensation judge has jurisdiction to determine medical necessity, as it arguably asserts that home health care is not medical treatment, contrary to *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal. App. 3d 36, *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal. App. 3d. 452 and Labor Code section 5307.1(a)(1); and is the denial of home health care, as described in the IMR Determination of February 20, 2014, subject to UR and IMR if home health care does not constitute medical care?

"4) Does the alleged "error of law" referred to in Issue Number 3 above constitute grounds for IMR appeal under Labor Code section 4610.6(h)(1): [the Administrative Director acted without or in excess of the Administrative Director's power,] if the MTUS provision relied upon by the IMR physician is contrary to case authority and statutory authority cited in Issue Number 3 above?

"5) Does the alleged "error of law" referred to in Issue Number 3 above result in a plainly erroneous express or implied finding of fact, and thereby constitute a ground for IMR appeal under Labor Code section 4610.6(h)(5) if the MTUS home health care provision relied upon by the IMR physician is contrary to case authority and statutory authority cited in Issue Number 3 above?

"6) Does the IMR appeal filed by applicant on 03/17/14 comply with Regulation 10957.1(g)(1), limitations of issues raised, constitutionality not being one of them, and/or 10957.1(h) (failure to serve IMR unit) and, if so, what effect does such noncompliance have regarding such IMR appeal?

"Applicant asserts that the IMR appeal is timely, relying on the authorities cited and applicant's reply to defendant's answer to the IMR appeal reply dated April 16, 2014.

"There has been no assertion that the utilization review decision was untimely or otherwise procedurally inadequate.

"A decision has now issued and the following is the basis for that decision.

"The Evidence

"Applicant's treating physician, Babak Jamasbi, M.D., wrote a report dated July 19, 2013 (Defendant's Exhibit N) in which he noted that applicant had a history of right foot fracture with development of complex regional pain syndrome in the

right leg, with the pain subsequently spreading to the left leg. Applicant was using a motorized wheelchair because she could not stand or walk due to pain. She had utilized a home health aide for the past 3-4 years, eight hours per day, five days per week, for assistance with personal hygiene such as bathing and dressing, assistance transferring from the wheelchair to the shower/toilet/bed and tasks such as going to the pharmacy, grocery shopping, meal preparation and reaching/carrying. Applicant frequently fell when she tried to perform these activities on her own. After the home health aide was injured and unable to work, Dr. Jamasbi requested authorization for replacement home health assistance five days per week, eight hours per day, in his Request for Authorization dated July 22, 2013. (Defendant's Exhibit N.) At the same time, he submitted a request for Ativan, Cyclobenzaprine, Diclofenac and Hydrocodone.

"Both the home health care and the medications were denied by UR and subsequently by IMR. The utilization review report from Bunch CareSolutions dated July 25, 2013 stated:

' "1) Regarding the requested Home Health Aid, 8 hrs./day, 5 days/week, MTUS Chronic Pain Medical Treatment Guidelines state that home health services are recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time for time or "intermittent" basis, generally up to no more than 35 hours per week. **Medical treatment does not include homemaker services like shopping, cleaning and laundry, and personal care given by home health aides like bathing, dressing and using the bathroom when this is the only care needed.** (CMS, 2004) (page 51)

' "2) ODG states that home health services are recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or "intermittent" basis. **Medical treatment does not include homemaker services like shopping, cleaning and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed.** (CMS, 2004) Medicare Coverage of Home Health Care: 1. Your doctor must decide that you need medical care at home, and to make a plan for your care at home. 2. You must need at least one of the following: intermittent skilled nursing care, or physical therapy, or speech-language therapy, or continue to need occupational therapy. 3. The home health agency caring for you must be approved by the Medicare program (Medicare-certified). 4. You must be homebound, or normally unable to leave home unassisted. To be homebound means that leaving home takes considerable and taxing effort. Medicare doesn't pay for 24-hour-a-day care at home; prescription drugs; meals delivered to your home; homemaker services like shopping, cleaning and laundry; and personal care given by home health aides like bathing, dressing and using the bathroom when this is the only care you need. (ODG, Low Back Chapter and http://www.medicare.gov/Publications/Pubs/pdf/10969.pdf)" (Emphasis added.) (Defendant's Exhibit O, page 2.)

"On page 6 of the aforementioned report from Bunch CareSolutions, it was stated:

' "Regarding the requested home health aide, eight hours/day, five days/week, there is no documentation that the patient was homebound on a part-time or intermittent basis, the patient requires recommended medical treatment, and homemaker services like shopping, cleaning and laundry, and personal care given by home health aides like bathing, dressing and using the bathroom is not the only care needed. Additionally, the proposed number of hours exceeds home health guidelines." (Defendant's Exhibit O, page 6.)

"Dr. Jamasbi appealed the UR denial by filing another Request for Authorization on August 20, 2013 for the same medical treatment, which was subsequently denied by UR.

"The Independent Medical Review determination from Maximus dated February 20, 2014 upheld the UR determination denying medication and home health care based on the Chronic Pain Medical Treatment Guideline (MTUS), page 51, which was the same provision relied on by Bunch CareSolutions. The IMR physician reviewer's rationale for the denial of home health care was the following:

' "Recommended only for medical treatment for patients who are homebound, on a part-time or "intermittent" basis, generally up to no more than 35 hours per week. **Medical treatment does not include homemaker services like shopping, cleaning and laundry, and personal care given by home health aides like bathing, dressing and using the bathroom when this is the only care needed."** (Emphasis added.) (Applicant's Exhibit 23, page 3.)

"Applicant's counsel interprets the above IMR determination as an assertion that home health care does not constitute medical treatment, which he believes is an error of law invalidating the determination as it results in not only a plainly erroneous express or implied finding of fact under Labor Code sections 4610.6(h)(5) but also action by the Administrative Director in excess of her powers under Labor Code sections 4610.6(h)(1), and thereby providing grounds for IMR appeal.

"Jurisdiction

"Labor Code section 4610.6(h) includes a presumption that the IMR determination is correct and that the only bases for an appeal are fraud, conflict of interest, bias, an assertion that the administrative director acted in excess of his or her powers, or that the determination was the result of a certain type of erroneous express or implied finding of fact. As stated in subsection (h):

"(h) A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the

administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:

"**(1)** The administrative director acted without or in excess of the administrative director's powers.

"**(2)** The determination of the administrative director was procured by fraud.

"(3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.

"**(4)** The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.

"**(5)** The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

"If an appeal of the IMR determination is granted by the judge on one of the bases listed above, then, pursuant to subsection (i), the matter is returned to the Administrative Director to refer back to the reviewing organization for a new IMR determination by a different reviewer. Subsection (i) also states, "In no event shall a workers' compensation administrative law judge, the appeals board or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization."

"In other words, even if a judge finds fraud, conflict of interest, bias, that the Administrative Director acted in excess of his or her powers or that the determination was the result of a plainly erroneous express or implied finding of fact which was a matter of ordinary knowledge, the judge cannot make a determination of medical necessity. The statute only allows a judge, upon granting of an appeal, to return the matter to the Administrative Director for a determination by another reviewer.

"Applicant's argument that the Administrative Director acted without or in excess of her powers in the IMR Determination dated February 20, 2014 and that the denial was the result of a plainly erroneous express or implied finding of fact on a matter of ordinary knowledge not subject to expert opinion is based on her assertion that home health care, contrary to the MTUS Guideline relied upon by

IMR, constitutes medical treatment pursuant to *Smyers v. Workers' Comp. Appeals Bd.* (1984) (157 Cal. App. 3d 36 [203 Cal.Rptr. 521; 49 Cal.Comp.Cases 454]) and *Henson v. Workmen's Comp. Appeals Bd.* (1972) (27 Cal. App. 3d. 452 (writ denied)). Applicant's counsel asserts that I, therefore, have grounds under Labor Code sections 4610.6(h)(1) and (h)(5) to grant applicant's IMR appeal. Applicant further argues that if home health care is not medical care as stated in the IMR Determination, it is not subject to IMR, and I, therefore, have jurisdiction to order it.

"In *Smyers, supra*, it was held by the Court of Appeal:

' "Attendant" and "nursing" services are compensable. (2 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation, *supra*, § 16.01, pp. 16-14.1 to 16-15 [attendant]; § 4600 [nursing].) So also is "practical nursing" which includes housekeeping. (Henson v. *Workmen's Comp. Appeals Bd.*, *supra*, 27 Cal.App.3d 452, 458.) Therefore, an injured person may be compensated for the services of an "attendant" to help him dress or do personal chores, or, may be reimbursed for the services of a practical nurse who performs housekeeping services. Yet, the same injured claimant, according to *Keil* [*Keil v. State of California* (1981) 46 Cal.Comp.Cases 696], could not be compensated for pure housekeeping services without the magical "attendant" or "practical nurse" label.

' "We hold that the proper approach by the Board is to treat the question of reimbursement under section 4600 for housekeeping services as a factual question to be resolved in each case by lay and expert evidence. The test then is whether household services in the particular case before the Board are medically necessary and reasonable. If the claimant can produce evidence to answer this question in the affirmative, then the expenses for housekeeping are recoverable as a "medical treatment" under section 4600." (*Smyers v. Workers' Comp. Appeals Bd., supra,*157 Cal. App. 3d 36, 42-43.)

"While it is clear under California law that home health care constitutes medical treatment, it is also clear that pursuant to Labor Code section 4610.6(h), I do not have jurisdiction to find error in an IMR determination, unless it is pursuant to one of the exceptions outlined in subsection (h)(1) through (h)(5). I do not find the IMR determination denying home health care to be a plainly erroneous express or implied finding of fact on a matter of ordinary knowledge not subject to expert opinion. With regard to the claim that the Administrative Director (AD) acted without or in excess of her powers, I do not find that the AD acted without or in excess of her powers as I do not have jurisdiction to determine whether the MTUS provisions relied upon by the IMR physician interpret the law correctly.

"Regarding defendant's assertion that the appeal of the IMR determination filed by applicant on March 17, 2014 is defective as it allegedly does not comply with Regulation 10957.1(g)(1) since constitutionality was not one of the issues raised at the time of filing, and that it was not concurrently served on IMR Unit as

> required under California Code of Regulations, title 8, section 10957.1(h), I find that I do not need to reach this issue, since applicant has not proven a basis for appeal under Labor Code section 4610.6(h).
>
> "Concerning's the constitutionality of Labor Code sections 4610.5 and 4610.6, it is well-established law that the Appeals Board lacks jurisdiction to make a determination. (*Greener v. Workers' Comp. Appeals Bd.* (1993) 58 Cal.Comp.Cases 793 [25 Cal.Rptr.2d 539, 863 P.2d 784]. Also see *Sparrer v. Workers' Comp. Appeals Bd.* (2004) 69 Cal.Comp.Cases 1475 (writ denied).) As stated by the Court of Appeal in *Greener, supra*:
>
> ' "While the Constitution confers on the Legislature the power to establish a system of workers' compensation, section 3.5 of article III of the Constitution withholds from administrative agencies the power to determine the constitutional validity of any statute: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: . . . (b) To declare a statute unconstitutional…" (*Greener, supra* at page 798.)
>
> "Accordingly, I have no jurisdiction to overturn the IMR Determination as none of the bases for an appeal under Labor Code section 4610.6(h) have been proven; neither do I have jurisdiction to determine the constitutionality of Labor Code sections 4610.5 or 4610.6."

I remain of the opinion that I do not have jurisdiction to overturn the IMR determination under Labor Code section 4610.6(h) as there have been no allegations of material procedural defect or untimeliness in the UR decision, pursuant to *Dubon v. World Restoration, Inc. and State Compensation Insurance Fund* (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc); nor is there proof of fraud, conflict of interest or bias, proof that the administrative director acted in excess of his or her powers, or proof that the determination was the result of a plainly erroneous express or implied finding of fact which is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter subject to expert opinion, under Labor Code section 4610.6(h). Finally, I continue to believe that I have no jurisdiction to determine the constitutionality of Labor Code sections 4610.5 or 4610.6.

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Recommendation

For the foregoing reasons, I recommend that the petition for reconsideration of applicant, filed herein on June 11, 2014, be DENIED.

Francie R. Lehmer

Date: June 23, 2014

Francie R. Lehmer
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record, attached hereto.
DATE: June 24, 2014
BY: Amy Tang

SERVICE ON:

FRANCES STEVENS, US Mail

JEFF MALMUTH AND CO, US Mail

JOSEPH WAXMAN SAN FRANCISCO, US Mail

OUTSPOKEN ENTERPRISES, US Mail

REPUBLIC DOCUMENT MGMT DIAMOND BAR, US Mail

SCIF INSURED SAN DIEGO, US Mail

SCIF INSURED SANTA ROSA, US Mail

06-24-2014

OFFICIAL ADDRESS RECORD

Case Number: ADJ1526353	
FRANCES STEVENS	Injured Worker, 133 CAPERTON AVENUE OAKLAND CA 94611
JEFF MALMUTH AND CO	Lien Claimant - Other, 870 MARKET STREET SUITE 579 SAN FRANCISCO CA 94102
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