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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALBERT LOBO,

Applicant,

vs.

**COUNTY OF SAN BERNADINO, permissibly
self-insured,**

Defendants.

Case No. ADJ7505520
(Pomona District Office)

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We granted reconsideration of defendant's Petition for Removal and for Reconsideration on April 2, 2014 to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant sought removal in response to and reconsideration of the Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on January 16, 2014. The WCJ found that applicant sustained industrial injury to his bilateral upper extremities, bilateral lower extremities and internal systems; that applicant was entitled to reimbursement for self-procured medical treatment and expenses, including a wheelchair, caregiver services by Kim Watt, home health care services by Martha Rios, home modifications, an adjustable bed, costs for a trip to Florida, and mileage; the issue of penalty or interest was deferred; and the issue of applicant's attorney's fees was deferred.

Defendant contended that the WCJ should have found that care giver Halimah Shenghur was not entitled to payment for home health care services and that applicant was not entitled to reimbursement for services provided by Ryan Pinkham and Mark Leach; and that the WCJ erred in awarding applicant reimbursement for modifications to his home.

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

1 We have reviewed the record and have considered the allegations of the Petition for Removal and
2 for Reconsideration and the Answer and the contents of the Report, and we now issue our decision after
3 reconsideration. Here, the F&A issued on January 16, 2014, and on June 12, 2014, we issued *Neri*
4 *Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682
5 (Appeals Board en banc) (*Neri Hernandez*) concerning home health care services. Therefore, we have
6 considered *Neri Hernandez* in reaching our decision. For the reasons discussed below, and for the
7 reasons stated in the Report which we adopt and incorporate, we will amend the F&A to find that
8 applicant is entitled to home health care services; that Shenghur is entitled to reimbursement; that
9 applicant's claims for reimbursement for payment to Pinkham and Leach are deferred; and that all
10 remaining home health care services issues are deferred (Finding of Fact, 2h.), otherwise affirm the F&A,
11 and return the matter to the WCJ for further proceedings consistent with this opinion.

12 FACTS

13 While employed as a deputy sheriff corporal from January 1, 1990 to April 24, 2010, applicant
14 sustained injury to his bilateral upper extremities, bilateral lower extremities, and internal system in the
15 form of respiratory, renal, gastrointestinal, heart and diabetes. Applicant also claimed injury to psyche as
16 a compensable consequence.

17 In January 2010, applicant contracted a lung infection and developed pneumonia. On April 24,
18 2010, he was hospitalized, went into septic shock, suffered multiple cardiopulmonary arrests with
19 resuscitation and multi-organ failure, and became comatose. Next, he developed disseminated
20 intravascular coagulation, which led to clots in all of his extremities and then gangrene, so that eventually
21 both of applicant's legs up to his knees, his left arm above the elbow, and all of the fingers of his right
22 hand were amputated. Applicant was hospitalized for almost eight months. Throughout this time, and
23 even when he was discharged to his home, applicant was not expected to live. (See Exhibit Y, Mark H.
24 Hyman, M.D., Record Review, May 2, 2011.)¹

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26 ¹ *Many of applicant's exhibits are improperly filed in the Adjudication file in FileNet in EAMS, causing*
27 *difficulties with review of the evidentiary record. Applicant is advised that the filings must be corrected as soon as*
possible with an appropriate title and a document date, that exhibits must be designated as evidence, and that
duplicate filings must be removed.

1 According to a summary by Mark H. Hyman, M.D., the Agreed Medical Evaluator (AME) in
2 internal medicine, on November 22, 2010, applicant was evaluated at Casa Colina Hospital for
3 Rehabilitative Medicine by Kerry Gott, M.D. (Exhibit Y, Mark H. Hyman, M.D., Record Review,
4 November 14, 2012, pp. 2-3.) Dr. Hyman stated that Dr. Gott's notes reflected that applicant was
5 "currently at home with a home health agency supervision for his coccygeal wound care and had a
6 primary caregiver at home that did the daily dressing change. . . Dr. Gott instructed the caregiver about
7 dressing change and would order supplies to be delivered to [applicant]'s home and to the home health
8 agency." (Exhibit Y, pp. 2-3.)

9 On May 2, 2011, applicant was examined by Dr. Hyman. With respect to future medical care, Dr.
10 Hyman opined that:

11 "Mr. Lobo will require home care of 12 hours per day, 7 days per week.
12 This will require meal preparation, bathing assistance, transfers from his
13 bed to his wheelchair and transfers to the bathroom. He will require
14 transportation with a disability access van. He will require provision of
15 daily medications for his diabetes and care for his stumps should any
difficulties arise. He will also require treatment of any exacerbations of
upper respiratory infections including antibiotics, inhaled therapy and
potential hospitalization." (Exhibit Z, Mark H. Hyman, M.D., May 2,
2011, p. 9.)

16 The report was signed by Dr. Hyman on May 6, 2011.

17 Subsequently, the parties entered into Stipulations with Request for Award, and an Award issued
18 on November 28, 2012. The parties stipulated that applicant sustained cumulative injury to the body
19 parts of "respiratory; arm-multiple parts; lower extremity-multiple parts; and other as best described in
20 the report of Mark Hyman, M.D., AME 5-2-11 and depo 7-5-11." (Stipulations, p. 5.) They further
21 stipulated that applicant sustained industrial injury to: "diabetes; pneumonia with complications; renal
22 failure, resolved; ischemic colitis, resolved; gastrointestinal bleed, resolved; left below-the-knee
23 amputation; right below-the-knee amputation; left transhumeral amputation; right hand digits
24 amputation; tracheostomy; heart - myocardial infarction with history of atrial fibrillation; coronary artery
25 disease." (Stipulations, p. 5.)

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1 learn how to care for him. She needed to learn wound care and
2 medications, and general nursing care. He was severely constipated and
she had to manually remove the feces.

3 "The severe bed sore had to be cared for multiple times during the day for
4 a few months. The applicant had no mobility. She describes him as 'stiff
5 as a board.' He could not walk or use his arms or turn himself over. She
6 had to turn him regularly to prevent further bed sores. She was able to
7 transfer him from the bed to the wheelchair. She tried to carry him on her
8 back at times. . . . He could not do anything for himself at all when he first
came home from the hospital . . . She would care for him every morning
and then leave the house at 6:30. He would sometimes call her at work
around 10:00 and ask her to come home because he was in terrible pain.
She would then go home and care for him again. She would then go back
to work.

9 "She then came back in the evening and would bathe and feed him and
10 care for the wound. He had a lot of phantom pain and she could not do
11 anything about it. She would use a heating pad and try to use her own
body to stop his muscles spasms. He had nightmares. The leg spasms
were every night." (MOH, September 16, 2013, p. 2, line 15 - p. 3, line 5.)

12 "[C]aring for [] applicant is a 24-hour-a-day job. . . . She cared for applicant when he first came home
13 from the hospital and between the various caregivers that have quit. . . . Since his release from the
14 hospital, she works her regular job, 40 hours a week, and gets off at 5:00 o'clock. She then goes home
15 and works her second job caring for the applicant from 5:00 at night to 5:00 in the morning. . . .
16 [Additionally,] she works about 20 hours a week part-time for a law firm." (MOH, December 2, 2013, p.
17 4, line 22 - p. 5, line 5.) "Applicant's care needs have been similar throughout the time since he was
18 released from the hospital. He needs assistance to do basically everything. He still has the phantom
19 pains bothering him at night which require her to provide treatment." (MOH, December 2, 2013, p. 5,
20 lines 8-10.) "She asked the County for home health care services in September, October, November and
21 December of 2011. There was a meeting on 11-17-11 and this issue was discussed. She made the
22 request by calling the adjuster, Jean Story, and sending her e-mails. . ." (MOH, December 3, 2013, p. 13,
23 lines 3-8.) She has not been paid, and she "has not been offered anything for the time she spend caring
24 for the applicant." (MOH, September 16, 2013, p. 4, lines 17-20.)

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1 Defendant's adjuster Carol Jean Story testified on September 16, 2013 and December 3, 2013 in
2 pertinent part as follows:

3 She has worked as an adjuster for defendant for eleven years, and "[t]his is the worst case she has
4 handled." (MOH, September 16, 2013, p. 10, lines 5-10.) She had a meeting with applicant, Shenghur,
5 applicant's attorney and a representative from defendant when the claim was accepted in 2011, and they
6 discussed a number of issues, including home health care services. (MOH, September 16, 2013, p. 11,
7 lines 21-22; p. 12, lines 13-15; MOH, December 3, 2013, p. 3, lines 23-15.)

8 "Regarding Miss Shenghur's services, they have not been paid. This was
9 because all the County received was a lien. There was nothing showing
10 the number of hours worked. They had no idea what she actually did. The
11 witness does not know when applicant was brought home from the
hospital. She believes it was in 2010. She was aware Miss Shenghur
helped with applicant's care.

12 "She agreed that applicant was seen by Dr. Hyman. There was a report
13 from May of 2011. At that time, the doctor prescribed home health care. . .
14 . The County of San Bernardino did not provide necessary home health
15 care during the period 11-13-10 through 5-2-11.

16 "At this time, it is her understanding that applicant was already being cared
17 for. She believed it was from Miss Shenghur. Based on this, they did not
18 pay because they did not know what services or number of hours were
19 appropriate. She is asked whether she made any inquiry regarding these
20 issues. She believes that defense counsel contacted applicant's counsel
21 once the lien of Miss Shenghur was received in order to find out the hours,
22 etc. . . . She agrees that applicant would benefit from home health care."
(MOH, December 3, 2013, p. 2, line 14 - p. 3, line 4.)

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24 "Regarding Miss Shenghur's services, she has had cases where family
25 members provided services for the injured worker. They do not always
26 request payment. She does not pay unless it is requested." (MOH,
27 December 3, 2013, p. 11, lines 1-3.)

28 In her Opinion, the WCJ stated that the issue of the claim of Shenghur was "deferred pending
29 development of the record as to what services were performed and when, and as to what has been paid."
30 With respect to applicant's claims for reimbursement for payment to Pinkham and Leach, there was
31 "insufficient evidence on which to base reimbursement to applicant." (Opinion on Decision, p. 2.)

32 In her Report, the WCJ stated that the evidence showed that Shenghur provided "a substantial
33 amount of home health care services for applicant, and that defendant was well aware that she was

1 providing these services from the time applicant was released from the hospital,” but found at the time of
2 trial that Shenghur needed to submit “a more precise statement” to defendant. (Report, pp. 4-5.)
3 Alternatively, she now recommended that Shenghur be reimbursed “for 84 hours per week at \$17.50 per
4 hour minus home health care paid previously.” (Report, p. 5.)

5 DISCUSSION

6 We first address whether defendant’s Petition was appropriate as a petition for removal or
7 reconsideration. Reconsideration may only be had of a final order, decision or award. (Lab. Code, §§
8 5900, subd. (a), 5902.) An order which does not dispose of the substantive rights or liabilities of those
9 involved in the case is not a final order. (*Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)*
10 (1980) 104 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp.*
11 *Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39 [43 Cal.Comp.Cases 661].) Interim procedural orders
12 are not final orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068 [65
13 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Hansen v. Workers’ Comp.*
14 *Appeals Bd.* (1988) 53 Cal.Comp.Cases 193 (writ den.); *Jablonski v. Workers’ Comp. Appeals Bd.* (1987)
15 52 Cal.Comp.Cases 399 (writ den.).)

16 Here, the F&A did not contain orders as to the claims for home health care services provided by
17 Shenghur, or as to services provided by Pinkham and Leach. However, even though some of the issues
18 raised by defendant in its petition were not the subject of final orders, the filing of a petition for
19 reconsideration gives the Appeals Board the authority to address all issues, including those not
20 specifically raised. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals
21 Board en banc) (Lab. Code, §§ 111(a), 5300, 5301; 5309, 5310, 5906, 5908.) As a result, a grant of
22 reconsideration has the effect of causing “the whole subject matter [to be] reopened for further
23 consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923)
24 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp.*
25 *Ins. Fund v. Ind. Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) In
26 other words, once reconsideration has been granted, the Appeals Board has the full power to make new
27 and different findings on issues presented for determination at the trial level, even with respect to issues

1 not raised in the petition before it. (*Id.*; e.g., also, *Tate v. Ind. Acc. Com.* (1953) 120 Cal.App.2d 657, 663
2 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Ind. Acc. Com. (Sowell)* (1943) 58 Cal.App.2d
3 262, 266-267 [8 Cal.Comp.Cases 79].) Hence, all of the issues are properly before us.

4 As set forth in the WCJ's Report, applicant proved that his self-procured medical treatment,
5 including in the form of home health care services, was reasonably required and that services were
6 provided by Shenghur. (§ 4600(a)(h); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*
7 (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981]; *Dubon v. World Restoration, Inc.*, (2014)
8 79 Cal.Comp.Cases 313; see §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d
9 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35
10 Cal.Comp.Cases 500].)

11 However, with respect to home health care services, sections 4600(h), 4603.2(b)(1), and 5307.8
12 were enacted as of January 1, 2013. Applicant's claim for home health care services arose before the
13 enactment of the statutes, and the F&A issued on January 16, 2014 after the statutes took effect. In *Neri*
14 *Hernandez*, we concluded that sections 4600(h), 4603.2(b)(1), and 5307.8 "apply to all requests for home
15 health care services and for payment thereof where no final decision on the request had issued by January
16 1, 2013." (79 Cal.Comp.Cases at p. 688.) Consequently, sections 4600(h), 4603.2(b)(1), and 5307.8
17 apply to applicant's claim for home health care services.

18 In *Neri Hernandez*, we summarized the impact of section 4600(h):

19 "Section 4600(h) makes clear that home health care services are included
20 in the definition of 'medical treatment,' but it also limits an employer's
21 duty to provide that treatment by imposing two additional conditions
22 which are part of an injured worker's burden of proof. The first condition
23 requires that home health care services be prescribed by a physician, and
24 an employer may become liable for home health care services provided 14
25 days prior to receipt of a prescription. The second condition requires that
26 an employer's liability for home health care services is subject to either
27 section 5307.1 or section 5307.8. Section 5307.1 applies where an official
medical fee schedule or Medicare schedule covers the type of home health
care services sought. When the type of services sought is not covered by
an official medical fee schedule or Medicare schedule, section 5307.8
applies." (*Id.* at pp. 688-689.)

1 We begin with the prescription requirement. In *Neri Hernandez*, we held that:

2 "The prescription required by section 4600(h) is either an oral referral,
3 recommendation or order for home health care services for an injured
4 worker communicated directly by a physician to an employer and/or its
5 agent; or, a signed and dated written referral, recommendation or order by
6 a physician for home health care services for an injured worker."
(*Id.* at p. 693.)

6 Here, Dr. Hyman's report was dated May 2, 2011, was in writing and was signed on May 6, 2011.
7 (Exhibit Z.) It identified applicant and Dr. Hyman and it stated that applicant needed home care. We
8 find that this letter is a prescription for home health care services within the meaning of section 4600(h).
9 Yet, in Dr. Hyman's record review of November 14, 2012, he referred to a medical record of November
10 22, 2010 by Kerry Gott, M.D., at Casa Colina Hospital for Rehabilitative Medicine. (Exhibit Y.) Dr.
11 Hyman's summary reflected that applicant had "home health agency supervision for his coccygeal
12 wound care and had a primary caregiver at home that did the daily dressing change. . . Dr. Gott instructed
13 the caregiver about dressing change and would order supplies to be delivered to [applicant]'s home and
14 to the home health agency." (Exhibit Y, pp. 2-3.) While this record is not evidence, it may be that a
15 prescription for home health care services by Dr. Gott or another physician existed as early as the time
16 when applicant was discharged from the hospital.

17 In determining when defendant's liability for home health care services begins, section 4600(h)
18 provides that an employer's liability is limited to 14 days before the date that the prescription was
19 received. In other words, because the clock begins to run 14 days before receipt, the limit is akin to a
20 statute of limitations or other filing deadline. As a result, an applicant must show the date of actual
21 receipt and not the date of service in order to prove when the liability period began. Here, Dr. Hyman's
22 report was signed on May 6, 2011 and presumably served that same day, and defendant's adjuster Story
23 admitted that she received the report. Therefore, defendant "received a prescription" as required by
24 section 4600(h). But, the evidence in the record is not clear as to the actual date that defendant first
25 received it. Moreover, as explained above, defendant may have "received a prescription" at an earlier
26 date. Thus, although we find that defendant is liable for home health care services, the record requires
27 further development as to when that liability began, and we will defer that issue.

1 In considering the amount of services that applicant was and is entitled to, since a section 5307.8
2 schedule has not been enacted, "an injured worker continues to bear the burden to demonstrate a
3 reasonable hourly rate for the type of services provided and the number of reasonably required hours
4 based on substantial evidence." (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at p. 694.) Here, Dr.
5 Hyman's report described the type of services contemplated under section 5307.8 and prescribed home
6 health care services of twelve hours per day, seven days per week. The WCJ recommended that payment
7 be awarded to Shenghur for 84 hours per week at the rate of \$17.50 per hour, less payments previously
8 paid by defendant. We agree with her recommendation, and we find that applicant is entitled to home
9 health care services of twelve hours per day, seven days per week and that Shenghur is entitled to
10 payment at the rate of \$17.50 per hour in an amount to be adjusted, taking into account previous
11 payments by defendant and the other provisions of section 5307.8 as discussed below. Since an earlier
12 prescription may exist which has different recommendations for the number of hours of care, we will
13 defer the issue of whether applicant was entitled to a different amount of hours in the time before
14 defendant received Dr. Hyman's report.

15 Under section 5307.8, a defendant is not liable for services which were "regularly performed" and
16 provided to an applicant before the industrial injury. However, an award of hours of supervision may be
17 made where the medical evidence supports a finding that an applicant is in need of twenty four hour
18 supervision, or any part thereof, as a result of an industrial injury and there is no evidence that the need
19 pre-existed the industrial injury. Here, because the circumstances of applicant's injury were unusual and
20 the consequences severe, it is unlikely that there is an overlap with services regularly performed before
21 applicant's injury. Nonetheless, applicant should set forth with particularity the services performed, and
22 explain which services occurred before, if any, and which occurred after the injury. Separately, when an
23 applicant or a provider under section 5307.8 is seeking payment, a defendant is entitled to receive the
24 documentation specified in section 4603.2(b)(1). (*Id.* at pp. 695-696.) Additionally, section 5307.8
25 allows an applicant's attorney to request an award of attorney's fees on the net award of past home health
26 care services. (*Id.*)

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1 Nothing in section 4600(h) precludes a claim for home health care services under both section
2 5307.1 and section 5307.8. Here, because Dr. Hyman's prescription describes the type of services that
3 fall under section 5307.8, we do not address whether applicant is also entitled to the type of services that
4 fall under section 5307.1.

5 In sum, we find that applicant is entitled to home health care services and that Shenghur is
6 entitled to reimbursement. Based on the WCJ's Opinion, we also find that applicant's claims for
7 reimbursement for payment to Pinkham and Leach are deferred. Finally, because of the new issues
8 raised herein and by *Neri Hernandez*, we will defer all other home health care services issues. We
9 believe that development of the record is required, and the WCJ has jurisdiction to develop the record as
10 appropriate and render decisions on all deferred issues. (See §§ 5701, 5906; *Tyler v. Workers' Comp.*
11 *Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]; *McDuffie v. Los Angeles County*
12 *Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

13 In the interim, we strongly encourage the parties to adjust all of these issues informally.

14 Finally, even though the issue of penalties and sanctions is not before us, we remind defendant of
15 its obligation to provide benefits.

16 In *Ramirez v. Workers' Compensation Appeals Board* (1970) 10 Cal.App.3d 227, 234 [35
17 Cal.Comp.Cases 383], the Court said:

18 "Upon notice or knowledge of a claimed industrial injury an employer has
19 both the right and *duty to investigate the facts* in order to determine his
20 liability for workmen's compensation, but he must act with expedition in
21 order to comply with the statutory provisions for the payment of
22 compensation which require that he *take the initiative in providing*
23 *benefits*. He must seasonably offer to an industrially injured employee that
24 medical, surgical or hospital care which is reasonably required to cure or
25 relieve from the effects of the industrial injury...[Italics added]." (Accord,
26 *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 366-
27 367 [44 Cal.Comp.Cases 1156, 1172]; *Dorman v. Workers' Comp. Appeals*
Bd. (1978) 78 Cal.App.3d 1009, 1020 [43 Cal.Comp.Cases 302, 308].)

24 Moreover, in *United States Cas. Co. v. Industrial Acc. Com. (Moynahan)* (1954) 122 Cal.App.2d
25 427, 435 [19 Cal.Comp.Cases 8], the Court said:

26 "Section 4600 of the Labor Code places the responsibility for medical
27 expenses upon the employer when he has knowledge of the injury....[¶]

1 The duty imposed upon an employer who has notice of an injury to an
2 employee is *not...the passive one of reimbursement but the active one of*
3 *offering aid in advance and of making whatever investigation is necessary*
4 *to determine the extent of his obligation and the needs of the employee.*
5 [Italics added].”

6 Defendants also have a regulatory duty to conduct a reasonable and good faith investigation to
7 determine whether benefits are due. Specifically, Rule 10109 provides, in relevant part that:

8 “(a)...[A] claims administrator must conduct a reasonable and timely
9 investigation upon receiving notice or knowledge of an injury or claim for
10 a workers’ compensation benefit.

11 “(b) A reasonable investigation must attempt to obtain the information
12 needed to determine and timely provide each benefit, if any, which may be
13 due the employee.

14 “(1) The administrator may not restrict its investigation to preparing
15 objections or defenses to a claim, but must fully and fairly gather the
16 pertinent information The investigation must supply the information
17 needed to provide timely benefits and to document for audit the
18 administrator's basis for its claims decisions. The claimant's burden of
19 proof before the Appeal Board does not excuse the administrator's duty to
20 investigate the claim.

21 “(2) The claims administrator may not restrict its investigation to the
22 specific benefit claimed if the nature of the claim suggests that other
23 benefits might also be due.

24 “(c) The duty to investigate requires further investigation if the claims
25 administrator receives later information, not covered in an earlier
26 investigation, which might affect benefits due.

27 * * *

“(e) Insurers, self-insured employers and third-party administrations shall
deal fairly and in good faith with all claimants, including lien
claimants.”(Cal. Code Regs., tit. 8, § 10109.)

In *Neri Hernandez*, we reiterated that “when an employer receives other notice that home health
care services may be needed or are being provided, an employer has a *duty* under section 4600 to
investigate.” (79 Cal.Comp.Cases at p. 695; see *Braewood Convalescent Hosp., v. Workers’ Comp.*
Appeals Bd. (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566].)

Here, applicant and his caregiver, Halimah Shenghur described in great detail the highly personal
and intimate life-saving care that she provided to applicant. We cannot fathom how defendant’s adjuster
Carol Jean Story remained indifferent in the face of their pleas for help. Moreover, we remind defendant

1 that it may not sit idly by and wait until it receives an official request, and it may not refuse to make at
2 least partial payment when it is clear that benefits are owed.

3 We admonish defendant that unreasonable delays and refusals to provide appropriate and
4 reasonably necessary medical treatment may result in penalties. (§ 5814.) We further admonish
5 defendant that a bad-faith or frivolous delay in providing medical treatment or a failure to provide
6 medical treatment may result in a sanction for each bad-faith or frivolous act or failure to act (§5813; Cal.
7 Code Regs., tit. 8, § 10561), and that a defendant's breach of its duties under Rule 10109 may result in
8 audit penalties. (Cal. Code Regs., tit. 8, §§ 10111.1(c)(6) & (d)(1), 10111.2(b)(1) & (2); see *Romano v.*
9 *The Kroger Co. dba Ralph's Grocery, Co.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 215.)

10 Accordingly, we affirm the F&A, except that we amend it to find that applicant is entitled to
11 home health care services; that Shenghur is entitled to reimbursement; that applicant's claims for
12 reimbursement for payment to Pinkham and Leach are deferred; and that all remaining home health care
13 services issues are deferred. (Finding of Fact, 2h.) We return the matter to the WCJ further proceedings
14 consistent with this opinion, and we recommend that a status conference be set.

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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 Award issued by the WCJ on January 16, 2014 is **AFFIRMED** except that
4 it is **AMENDED** as follows:

5 Finding of Fact, 2 is amended to add the following.

6 FINDINGS OF FACT

7 h. The report of Mark Hyman, M.D., dated May 2, 2011 is a prescription,
8 and based on that prescription applicant is entitled to home health care
9 services in the amount of twelve hours per day, seven days per week and
continuing.

10 Halimah Shenghur is entitled to reimbursement of \$17.50 per hour for
11 home health care services provided to applicant, in an amount to be
12 adjusted by the parties with jurisdiction reserved to the WCJ. Payment
13 shall take into account services that were regularly performed in the same
manner and to the same degree prior to the date of injury, if any; services
previously paid by defendant; and applicant's attorney's fees.

14 The issue of when defendant's liability began is deferred pending
15 development of the record, to be adjusted by the parties with jurisdiction
reserved to the WCJ.

16 The issue of whether a different amount of home health care services was
17 reasonably required before defendant received Dr. Hyman's report of May
18 2, 2011 is deferred pending development of the record, to be adjusted by
the parties with jurisdiction reserved to the WCJ.

19 Applicant's claims for reimbursement for payment to Ryan Pinkham and
20 Mark Leach are deferred pending development of the record, to be
21 adjusted by the parties with jurisdiction reserved to the WCJ.

22 All other home health care services issues are deferred.

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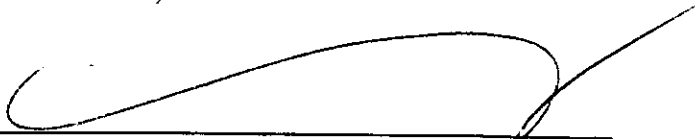
1 IT IS FURTHER ORDERED that the matter is RETURNED to the WCJ for further
2 proceedings consistent with this opinion.

3
4 WORKERS' COMPENSATION APPEALS BOARD

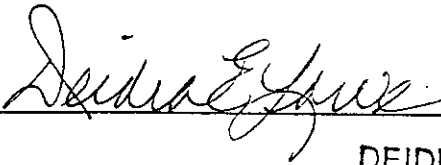
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8 RONNIE G. CAPLANE

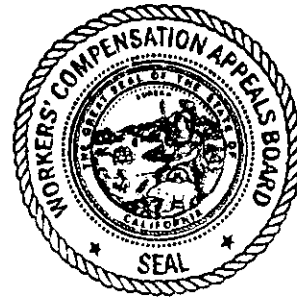
9 I CONCUR,

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12 MARGUERITE SWEENEY

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15 DEIDRA E. LOWE



16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 **AUG 01 2014**

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

20 ALBERT LOBO


21 LAW OFFICES OF BRIAN W. COLLINS, INC., ATTN: BRIAN W. COLLINS
22 O'CONNOR * TELEZINSKI, ATTN: JOSEPH C. TELEZINSKI

23 AS/jp

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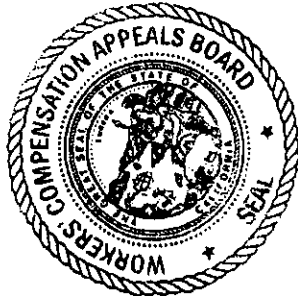
1 IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in
2 the above case, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at 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 Pomona District Office or any other district office of the WCAB and shall not be e-filed in the Electronic
7 Adjudication Management System.

8 **WORKERS' COMPENSATION APPEALS BOARD**

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10 
11 _____
12 DEIDRA E. LOWE

13 I CONCUR,

14 
15 _____
16 RONNIE G. CAPLANE



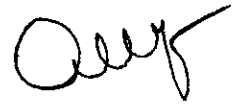
17 
18 _____
19 MARGUERITE SWEENEY

20 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

21 APR 02 2014

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

24 ALBERT LOBO
25 BRIAN COLLINS
26 O'CONNOR & TELEZINSKI



27 abs

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

CASE NUMBER: ADJ7505520
POMONA DISTRICT OFFICE

ALBERT LOBO

-vs.-

COUNTY OF SAN
BERNARDINO;
permissibly self-insured,

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Catherine J. Coutts

DATE: February 20, 2014

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Applicant, born _____ while employed by County of San Bernardino beginning January 1, 1990 through April 24, 2010 sustained injury arising out of, and occurring in the course of employment to his bilateral upper extremities, bilateral lower extremities and internal systems.

Decision issued herein on January 16, 2014.

Defendant has filed a timely Petition for Reconsideration/Removal, objecting to said decision in the following particulars:

1. Petitioner contends that the undersigned erred in awarding applicant reimbursement for modifications to his home;
2. Petitioner further contends that the undersigned erred in ordering development of the record regarding the home health care claim of Halimah Shenghur;

3. Petitioner further contends that the undersigned erred in ordering development of the record regarding applicant's claim of reimbursement for amounts paid to Ryan Pinkham and Mark Leach.

FACTS ON DISPUTED ISSUE(S)

Applicant filed a claim for continuous trauma injuries sustained while working as a deputy sheriff. The claim was originally denied by the defendant. After determination by an Agreed Medical Evaluator (AME) that the injuries were industrially related the claim was accepted. The parties eventually stipulated that applicant is totally permanently disabled. This is based on the fact that applicant is a multi-level amputee as a result of his industrial illness. He is confined to a wheelchair. An Award was issued on 11/28/12.

The matter proceeded to trial on the issue of whether applicant was entitled to reimbursement for a variety of expenses, including home modifications, medical equipment and home health care. Decision issued awarding applicant reimbursement for several items, including the home modifications. This is the only item ordered for reimbursement that is addressed in the Petition for Reconsideration. There was an order for development of the record for other items, including some of the home health care. This aspect of the decision is the subject of the Petition for Removal.

DISCUSSION

The primary item of reimbursement addressed by petitioner concerns the order that applicant be reimbursed for the expenses to modify his home. Petitioner argues that as all aspects of the modifications were not approved by Utilization Review (UR) they are not compensable. (Petition pg. 6) No legal authority is presented to show that this is an area in which UR applies. It is not a question of appropriate medical treatment. Petitioner also references the opinion of the AME in this

regard. Petitioner appears to both rely on the AME's opinion but also question whether it constitutes substantial evidence on the issue. (Petition, pg. 3, line 21 to pg. 4, line 6; Petition, pg.6, lines 11-16) Petitioner did not provide any authority to support the argument that the AME has the needed expertise to address the question of what home modifications are required for someone in applicant's condition. This is supported by the language petitioner quotes from the AME deposition when the doctor comments that this is not a medical determination. (Petition, pg. 3, line 24 to pg. 4, line 1) The undersigned agrees with the AME in this regard. A prime example is the quote from the AME set forth in the Petition, where he addresses the issue of the floor surface applicant requires. (Petition, pg.3, line 23) Surely Petitioner does not intend to argue that all applicant is entitled to is a hard floor surface, even if that consists only of the concrete slab under his house. (Petition, pg. 5, line 16-18). This is simply not a reasonable conclusion.

Instead of relying on only a medical opinion, applicant presented the testimony of witness Hector Mendez who was in charge of the construction done to modify applicant's home. The witness explained why the various modifications were performed, including the larger shower, the placement of drains, the switch from sliding exit doors to French style doors, the selection of the flooring material and other items. The undersigned found his testimony to be credible, accurate and persuasive. He further testified that the invoice presented represented only part of the actual costs of the work, as he and others donated additional services to assist applicant in getting his home arranged. (SOE, 12/2/13, pg. 2-3) No evidence was presented that convinced the undersigned that any of the modifications were not necessary or had been performed in an extravagant manner. The defense presented witness Edward Lok Ng who testified regarding what modifications were appropriate. The witness was clearly knowledgeable and credible, but his testimony did not provide any reasonable basis on which to deny reimbursement for the modification expenses. This witness

only reiterated what had already been determined appropriate by defendant's UR. He did not make any independent analysis of what applicant's needs might be. (SOE, 9/16/13, pg. 6-8) His area of expertise is the compliance of public facilities with the requirements of ADA accommodations. This is not necessarily controlling on the issue of what is appropriate in a home setting. The undersigned found the evidence submitted by applicant sufficient to justify ordering reimbursement for the home modifications performed.

Petitioner also requests Removal regarding that aspect of the decision that orders development of the record regarding some aspects of the home healthcare costs. Petitioner states this has resulted in significant prejudice or irreparable harm. There is no explanation as to how any harm has resulted, as there has been no order that any payment is due. It may be that no reimbursement is ever ordered if the record is not sufficiently developed. Petitioner is incorrect in stating that this order "presumes petitioner must pay something." (Petition, pg.4, lines 22-24) The purpose of the development of the record is to allow the parties to present further evidence in a situation in which the record is not complete enough to allow a determination of the contested issue. Here, there is evidence that Ms. Shenghur provided a substantial amount of home health care services for applicant, and that defendant was well aware that she was providing these services from the time applicant was released from the hospital. After review of the evidence the undersigned formed the opinion that this was not a situation in which there was insufficient evidence on which to make a finding, but rather that the form of the evidence needs clarification. The statement that Ms. Shenghur submitted needs to be presented in a format that allows defendant to review and analyze what dates and hours of services are clearly payable and which they wish to contest. Ms. Shenghur testified credibly at trial as to the many hours of services she provided, and that she is so overwhelmed by the situation that her paperwork may not be entirely complete. (SOE, 9/16/13, pg.

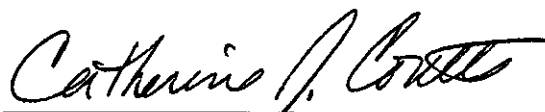
2-4; SOE, 12/2/13, pg.4) As it was clear to the undersigned that reimbursement is appropriate, and in consideration of the entire picture of this case, the undersigned believed it was reasonable to allow Ms. Shenghur to attempt to submit a more precise statement for defendant's review and processing. Should the Board disagree with this aspect of the decision, the undersigned agrees with Applicant, that Ms. Shenghur be reimbursed "for 84 hours per week at \$17.50 per hour minus home health care paid previously." (Answer to Petition, pg. 5, lines 26-27)

Petitioner argues that there is error in the decision regarding the claims for home health care related to services performed by Ryan Pinkham and Mark Leach. Review of the decision reflects a finding that there was insufficient evidence on which to order reimbursement for those amounts. There is no order that the record be developed regarding those expenses. The basis for the request for Reconsideration or Removal regarding that aspect of the decision is not clear to the undersigned.

CONCLUSION

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

DATE: February 20, 2014



Catherine Coutts
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

I am over age 18, not a party to this proceeding, and am employed by the State of California, DWC, Pomona District Office of the WCAB, located at 732 Corporate Center Drive, Pomona, CA 91768.

On February 21, 2014 I deposited in the United States mail at 732 Corporate Center Drive, Pomona, CA 91768 a sealed envelope containing a copy of REPORT & RECOMMENDATION ON PLEADING by Albert Lobo postage fully paid addressed to the party or parties listed below by US Mail service. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By: 