WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FELIX NINO MOTA, *Applicant,* vs. **ALLGREEN LANDSCAPE; NATIONAL INSURANCE COMPANY, Administered by FARA ADJUSTING SERVICES,** *Defendants.*	**Case No. ADJ2567272 (AHM 0105012)** **OPINION AND DECISION AFTER RECONSIDERATION**

On December 23, 2011, we granted the petitions for reconsideration filed by defendant Everest National Insurance Company and lien claimant Teodora Mota (Mrs. Mota) in order to allow sufficient opportunity to further study the factual and legal issues in this case. This is our Decision After Reconsideration.

Applicant, while employed as a landscaper on August 13, 2001, sustained an industrial injury to his head, neck, jaw, low back, right leg, right shoulder, left wrist, sense of smell, chest, psyche, gastrointestinal, pulmonary, eyes, hearing, gums, liver, nasal fracture, face, urinary, and impotency. The injury was caused by a horrific motor vehicle accident that rendered him unconscious and in a coma for a month or longer (Exhibit X, page 2). On August 31, 2005, he received a stipulated Award of 89% permanent disability and need for further medical treatment. There was no lien for services of Mrs. Mota at the time of the Award.

On November 7, 2007, applicant's attorney, who had filed a Substitution of Attorney on September 4, 2007, filed a Declaration of Readiness to Proceed (DOR), identifying the issue of: "Failure to provide retro/prospective homecare per Dr. Gregory Bonomo dated 4/21/04 and Dr. Thomas Curtis report dated 12/1/04." In her Report and Recommendation, the workers' compensation administrative law judge (WCJ) correctly states that there is no other lien filed on behalf of Mrs. Mota either in the

paper file or in EAMS. However, the DOR provides notice of the lien, and defendant does not dispute the existence of the lien.

The issue of the lien for home health care of Mrs. Mota came to trial on July 21, 2011. The parties stipulated "that the defendant offered two to four hours of home health care based on the findings of Dr. Haldeman.[1] In June of 2011, they attempted to provide 16 to 18 hours per day of home health care with an LVN per the recommendation of the AME. On both occasions, the applicant and his wife refused the defendant's offer of home health care. It was also stipulated that the applicant and his wife live in a bedroom in a trailer where other people live and there are owner's privacy rights" (Minutes of Hearing and Summary of Evidence [MOH/SOE] dated July 21, 2011, pages 4-5).

At trial, Mrs. Mota testified without contradiction that "[s]he came to the United States when she learned of her husband's injury. She received legal permission to enter the United States and entered on August 16, 2001. Her husband had been sent to a rehabilitation hospital. She was with him all the time after she arrived, even sleeping at the hospital. She was taught how to bathe him, take him for a walk and what to do when he was going to leave the hospital. She fed him orally. She was taught how to give him his medications" (MOH/SOE, page 5). She also testified that "[s]he puts a catheter on him every night before he goes to bed. She was taught to administer the catheter at a doctor's office about 4 years ago. She has taken care of him since he got out of the hospital day and night" (MOH/SOE, page 5). There was also expert testimony on the value of Mrs. Mota's services by Sally Glade, on behalf of applicant, and Kelly Winn, on behalf of defendant.

On October 4, 2011, the WCJ issued Findings and Orders. She found that the lien for any services provided by Mrs. Mota before September 1, 2005, is barred by Labor Code section 4903.5;[2] that the Immigration Reform and Control Act of 1986 does not bar Mrs. Mota from receiving the reasonable value of her services between September 1, 2005, and July 21, 2011; and that the reasonable rate to be paid Mrs. Mota is at the median LVN rate for Orange County as set forth by witness Kelly Winn. She ordered that the sum to be awarded to Mrs. Mota, attorney's fees and penalties, if any, were deferred.

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[1] The record is not clear as to when this offer was made.

[2] Unless otherwise specified, all statutory references are to the Labor Code.

On reconsideration, defendant contends that it has no liability for home health care because it was not requested by a primary treating physician subject to the utilization review process; that requiring it to pay Mrs. Mota would constitute a constructive retroactive hiring in violation of the Immigration Reform and Control Act of 1986; and that the majority of services provided by Mrs. Mota were rendered at an unskilled healthcare worker level rather than an LVN level. Applicant has filed an Answer.

On reconsideration, Mrs. Mota contends that her claim for reimbursement for services provided between November 14, 2001 (applicant's release from the hospital) and August 31, 2005, is not barred by section 4903.5. Defendant has filed an Answer.

We first consider defendant's petition. With regard to utilization review, applicant contends that defendant did not raise this issue at trial. It is not identified in the Minutes of Hearing, and the WCJ does not recall that issue being raised. In any case, defendant does not claim that it was unaware that Mrs. Mota was providing home health care services after applicant was released from the hospital, only that it did not get a formal request from a primary treating physician. It does not cite any statutory or judicial authority for the proposition that it is not liable for any medical services for which it has not had the opportunity to engage in utilization review. In addition, section 4610, which requires that employers establish a utilization review process, was enacted in 2003 ch. 639 (SB 228), effective January 1, 2004. Prior to that date, there was no utilization review. For these reasons, we hold that defendant's alleged lack of opportunity for utilization review does not bar applicant's claim for reimbursement for Mrs. Mota.

With regard to the Immigration Reform and Control Act, we note first that Mrs. Mota has never been and is not now an employee of defendant. Defendant has never controlled and will not control the details of her work. It has never had and does not now claim the right to terminate her services at will. See, generally, *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341 [54 Cal.Comp.Cases 80. Because Mrs. Mota is not an employee, this case is distinguishable from both *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* (2002) 535 U.S. 137, and *Reyes v. Van Elk, Ltd.* (2007) 148 Cal.App.4th 604, both of which involved claims by employees for back wages.

Furthermore, Mrs. Mota has provided medical services to her husband, services for which

defendant does not dispute its liability. If applicant had chosen to move to Mexico after his injury for medical treatment and rehabilitation, and if Mrs. Mota had provided exactly the same services, defendant would be liable for those services, and there would be no issue as to her employment status or her right to reimbursement. The fact that these services were provided within the United States by a non-employee does not change the result.

Finally, section 3207 defines "compensation" as "compensation under this division and includes every benefit or payment conferred by this division upon an injured employee . . . ." "This division" is Division Four of the Labor Code. It includes section 4600, which requires employers to provide medical treatment "that is reasonably required to cure or relieve the injured from the effects of his or her injury." Section 4903 provides that "[t]he appeals board may determine, and allow as liens against any sum to be paid as compensation, any amount determined as hereinafter set forth in subdivisions (a) through (i)" (emphasis added). Subdivision (b) provides that liens may be allowed for "[t]he reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Section 4600) . . . ."

Thus, Mrs. Mota's lien is a lien against applicant's compensation, not a claim on her own behalf. While payment may be made directly to Mrs. Mota, it is applicant's compensation, and her claim is derivative from his right to compensation. Where a physician is awarded reimbursement for medical services pursuant to section 4903(b), that physician does not thereby become an employee of defendant. Neither does Mrs. Mota.

With regard to defendant's contention that the majority of the services provided by Mrs. Mota were rendered at an unskilled healthcare worker level rather than an LVN level, we note that the parties agreed on Lawrence M. Richman, M.D., as agreed medical evaluator (AME) on the issue of need for home health care. In Exhibit X, Dr. Richman concluded that applicant requires "an LVN for the purpose of home health care, and that care should be provided the patient during the wakeful hours, approximating 16-18 hours per day, depending on the patient's time when he retires to slumber and awakens in the morning" (page 99). Defendant did not attempt to cross-examine Dr. Richman on this opinion. Where there is an AME, his opinion should ordinarily be followed unless there is good reason

to find that opinion unpersuasive (*Power v. Workers' Comp. Appeals Bd.* (1986) 79 Cal.App.3d 775 [51 Cal.Comp.Cases 114]). We find no reason to believe that Dr. Richman's opinion is unpersuasive.

In *State Farm Insurance Co. v. Workers' Comp. Appeals Bd.* (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69], the Court held that some home healthcare services provided by applicant's spouse "if medically necessary and reasonable, were compensable as medical treatment but not at an LVN hourly rate" and that other services were not medically reasonable (76 Cal.Comp.Cases at 80). However, in this case, there is substantial medical evidence supporting the need for LVN services 16 to 18 hours per day. Therefore, detailed description of services provided by Mrs. Mota day by day is not required.

For all of these reasons, we affirm the Findings and Orders with regard to issues raised by defendant's Petition for Reconsideration.

As to Mrs. Mota's petition, section 4903.5(a) provides: "No lien claim for expenses as provided in subdivision (b) of Section 4903 may be filed after six months from the date on which the appeals board or a workers' compensation administrative law judge issues a final decision, findings, order, including an order approving compromise and release, or award, on the merits of the claims, after five years from the date of the injury for which the services were provided, or after one year from the date the services were provided, whichever is later." This subdivision is a statute of limitations, and it is disjunctive.

In this case, Mrs. Mota's lien was not filed within six months of the stipulated Award nor within five years of the date of injury. However, Mrs. Mota's services have been provided continuously since November 14, 2001.

In her Opinion on Decision, the WCJ states: "As [the lien of Mrs. Mota] was [filed] more than 2 years after Judge Nash's award, the court agrees that any lien filed in October 2007 for services provided by 8/31/05 is barred by Labor Code §4903.5" (page 5). She awarded reimbursement for services provided after the Award. Thus, it appears that the WCJ applied two provisions of the statute: one to bar reimbursement for services prior to the Award because the lien was not filed within six months of the date of the award, and another to allow reimbursement for services after the Award because the lien was filed within one year from the date the services were provided.

We disagree with this reading of the statute. The statute specifies three dates before which a lien must be filed, "whichever is later." In this case, the dates were February 28, 2006 (six months from the date of the Award), August 13, 2006 (five years from the date of injury), and unlimited at this time, because services continue to be provided. The latest date is the third alternative, and it is the alternative that must be applied pursuant to the statute. There is nothing in the statute that limits reimbursement for services that have been continuously provided because of failure to meet one or both of the earlier limitations on filing of the lien.

In its Answer to Mrs. Mota's petition, defendant contends "that analyzing the plain meaning of the phrase 'after one year from the date the services were provided' leads to one conclusion. That conclusion is that when a lien is filed more than six months after the issuance of the Award and more than five years after the date of injury, the lien claimant is limited to recovery for services rendered within the one-year period preceding the filing of the lien" (page 2). We disagree. If services had been provided intermittently, defendant's reading of the statute is plausible. However, here services were provided continuously. Therefore, the statute does not bar reimbursement for any of those services.

Defendant contends that its reading of the statute "is consistent with the prior defense of latches and by its clear language limits these late filed liens to services rendered within one year from the date the lien is filed" (page 3). However, as we noted above, defendant does not claim to have been ignorant of the services provided by Mrs. Mota prior to the filing of the lien, and defendant has not claimed any inability to defend against the lien because of the date of filing.

For all of these reasons, we affirm the Findings and Orders dated October 4, 2011, except that we amend it to provide that Mrs. Mota be reimbursed for services provided from November 14, 2001, to present and continuing.

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For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders dated October 4, 2011, is **AFFIRMED**, except as **AMENDED** below:

FINDINGS OF FACT

2. The lien for any services provided by Mrs. Teodora Mota before 9/1/2005 is not barred by Labor Code section 4903.5.

3. The Immigration Reform and Control Act of 1986 does not bar Mrs. Mota from receiving the reasonable value of her services between November 14, 2001, to the present and continuing.

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ORDERS

IT IS ORDERED that the request for an order for services provided by Teodora Mota before 9/1/2005 is granted.

IT IS FURTHER ORDERED that the issue of the sum to be award Mrs. Teodora Mota for services from November 14, 2001, to present and continuing, attorney fees, and penalties, if any, are deferred.

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

SUSAN V. HAMILTON DEPUTY

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 31 2012

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

FELIX NINO MOTA
GRAIWER & KAPLAN
STOCKWELL, HARRIS, WOOLVERTON & MUEHL

MR/ara