

1 on Petition for Reconsideration (Report), recommending that we deny reconsideration. For the reasons
2 stated below, we will find that applicant is entitled to Nucynta and Neurontin on an industrial basis and
3 the applicant is entitled to a penalty under Labor Code section 5814 and applicant's attorney is entitled to
4 a fee pursuant to Labor Code section 5814.5.

5 We will briefly review the relevant facts. On November 5, 2012, defendant issued a utilization
6 review decision denying authorization for a prescription of Nucynta 50 mg and Neurontin 300 mg. (Exh.
7 G.) On July 19, 2013, defendant issued an "appeal review" of the November 5, 2012 utilization review
8 decision affirming the November 5, 2012 utilization review decision. (Exh. 3, Exh. A.) On June 28,
9 2013, defendant issued a utilization review decision authorizing several prescriptions including
10 Neurontin 300 mg. (Exh. C, D,)

11 Labor Code section 4610.5, which provides for independent medical review of utilization review
12 decisions, applies to "any dispute over a utilization review decision if the decision is communicated to
13 the requesting physician on or after July 1, 2013, regardless of the date of injury." (Lab. Code
14 § 4610.5(a)(2).) The November 5, 2012 utilization review decision predates July 1, 2013 and
15 accordingly is not subject to independent medical review. The June 28, 2013 utilization review decision
16 authorized the disputed treatment of Neurotin 300 mg. The July 18, 2013 utilization review decision
17 authorized the disputed flexor patches. The July 19, 2013 "appeal review" decision was a review of an
18 earlier utilization review decision and, as such, is not a utilization review decision subject to independent
19 medical review. Because none of the disputed denials of treatment were communicated to a requesting
20 physician on or after July 1, 2013, none of the disputed utilization review decisions are subject to
21 independent medical review.

22 Labor Code section 4610(g)(6) provides that "A utilization review decision to modify, delay, or
23 deny a treatment recommendation shall remain effective for 12 months from the date of the decision
24 without further action by the employer with regard to any further recommendation by the same physician
25 for the same treatment unless the further recommendation is supported by a documented change in the
26 facts material to the basis of the utilization review decision." Labor Code section 4610(g)(6) does not
27 apply to authorized treatment.

1 With respect to the prescription for Nucynta, we have insufficient evidence to determine whether
2 the utilization review decision or decisions were timely made and whether defendant relied on section
3 4610(g)(6) or submitted additional requests for that prescription to utilization review. Accordingly, we
4 will defer that issue with jurisdiction reserved at the trial level.

5 Turning to the issue of penalties, the issue of whether a delay or a refusal to pay a benefit is
6 “unreasonable” is a question of fact to be resolved by the Board. (Lab. Code, § 5814; *Gallamore v.*
7 *Workers’ Comp. Appeals Bd.* (1979) 23 Cal.3d 815, 823 [44 Cal.Comp.Cases 321, 325]; *Kampner v.*
8 *Workers’ Comp. Appeals Bd.* (1978) 86 Cal.App.3d 376, 383 [43 Cal.Comp.Cases 1198, 1204];
9 *Laucirica v. Workers’ Comp. Appeals Bd.* (1971) 17 Cal.App.3d 681, 684 [36 Cal.Comp.Cases 1283,
10 1285].) In this case, defendant’s delay of treatment that was authorized by a utilization review physician
11 was unreasonable. However, with respect to the denied prescription for Nucynta, defendant could
12 reasonably rely on the utilization review denial. Accordingly, we will amend the Findings and Award to
13 award a penalty and an attorney’s fee on the delayed provision of Neurontin.

14 Applicant’s attorney is also entitled to a fee pursuant to Labor Code section 5814.5 which states
15 that:

16 “When the payment of compensation has been unreasonably delayed or
17 refused subsequent to the issuance of an award by an employer that has
18 secured the payment of compensation pursuant to Section 3700, the appeals
19 board shall, in addition to increasing the order, decision, or award pursuant
to Section 5814, award reasonable attorneys’ fees incurred in enforcing the
payment of compensation awarded.” (Lab. Code, § 5814.5.)

20 In *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (en banc), the Appeals
21 Board held that the WCJ may only allow fees based on the reasonable number of hours expended by
22 applicant’s attorney for legal services rendered in enforcing the unreasonably delayed prior award, and
23 not based on hours expended for any other purpose. On the issue of “reasonableness,” the WCJ should
24 take note of the Appeals Board’s statement in *Ramirez* that in determining attorney’s fees under Labor
25 Code section 5814.5, the Appeals Board approves the method for calculating attorney’s fees for
26 obtaining vocational rehabilitation set forth in *Rocha v. Puccia Construction Co.* (1982) 47
27 Cal.Comp.Cases 377 (en banc). In *Rocha*, the Board stated that “the best method of evaluating the worth

1 of these services is based on the time and effort expended by the attorney as reflected in the hours of
2 work devoted to securing rehabilitation services for the client. The fee, however, may not be entirely
3 disproportionate to the amount of benefits obtained. If, for instance, counsel spends long hours to obtain
4 benefits of small value, the fee should not be strictly based on the number of hours without regard to the
5 benefits obtained. Where there are sufficient benefits involved, however, the fee based on time and effort
6 is appropriate.” (*Ramirez, supra*, 73 Cal.Comp.Cases at p. 1335; *quoting Rocha* at 47 Cal.Comp.Cases
7 377, 381.) In this case, an award of a 5814.5 attorney’s fee is reasonable and well supported.

8 Finally, we admonish defendant that applicant has an award of medical treatment and the
9 utilization review cycle of denials and authorizations for applicant’s prescription medications appears
10 arbitrary. While defendant is entitled to submit every prescription request to utilization review, we
11 suggest that defendant should consider whether doing so is cost effective and fulfills its obligation to
12 provide applicant with medical treatment to cure or relieve him from the effects of his industrial injury.

13 We also note that although the record contains sufficient evidence to enable us to issue a decision
14 on the Neurontin prescription and the penalty associated with it, the record does not contain sufficient
15 evidence to address the other issues raised by the parties. Accordingly, we will defer all other issues with
16 jurisdiction reserved at the trial level.

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 For the foregoing reasons,

2 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
3 Appeals Board, that the January 31, 2014 Findings and Award is **RESCINDED** and the following is
4 **SUBSTITUTED** in its place:

5 **FINDINGS OF FACT**

6 1) Applicant, JESUS CORDOVA, while employed as a heavy
7 equipment operator/maintenance person (Occupational Group No. 470) at Concord, California by
8 Garaventa Enterprises, sustained injury arising out of and occurring in the course of employment to his
9 cervical spine, left upper extremity and lumbar spine.

10 2) State Compensation Insurance Fund was the employer's workers' compensation
11 insurance carrier on the date of injury.

12 3) The injury caused 100% permanent total disability.

13 4) Applicant was awarded provision for further medical care by way of a December 31,
14 2010 Findings and Award.

15 5) Applicant's primary treating physician, Douglas Grant, M.D., requested authorization
16 of a prescription Neurontin 300 mg on June 24, 2013.

17 6) Defendant issued a utilization review decision on June 28, 2013 certifying 1
18 prescription of Neurontin 300 mg from June 14, 2013 through August 24, 2013.

19 7) Defendant's denial of the Neurontin prescriptions was unreasonable, thereby entitling
20 applicant to a Labor Code Section 5814 penalty.

21 8) Applicant's attorney is entitled to a Labor Code Section 5814.5 fee for enforcement of
22 the December 31, 2010 medical Award.

23 9) All other issues are hereby deferred, with jurisdiction reserved at the trial level.

24 ///

25 ///

26 ///

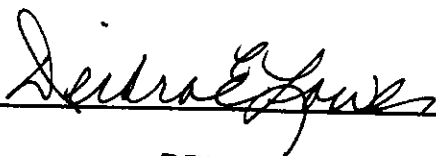
27 ///

AWARD

AWARD IS MADE in favor of JESUS CORDOVA and against GARAVENTA ENTERPRISES and STATE COMPENSATION INSURANCE FUND as follows:

- (a) Authorization of the May 21, 2013 and June 24, 2013 prescriptions of Neurontin;
- (b) A Labor Code Section 5814 penalty on the prescription for Neurontin, to be adjusted by the parties, with jurisdiction reserved together with an attorney's fee pursuant to Labor Code section 5814.5 to be adjusted by the parties with jurisdiction reserved;
- (c) Interest as provided by law.

WORKERS' COMPENSATION APPEALS BOARD

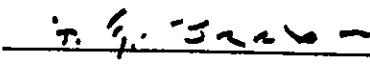


DEIDRA E. LOWE

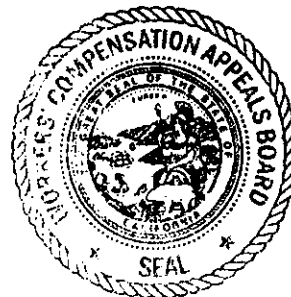
I CONCUR,



RONNIE G. CAPLANE



FRANK M. BRASS



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 15 2015

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

**JESUS CORDOVA
OTIS & GEARHEART
STATE COMPENSATION INSURANCE FUND**



MWH:bgr:jp