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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSHUA HUBBARD,

Applicant,

vs.

**UNITED PARCEL SERVICE; LIBERTY
MUTUAL INSURANCE COMPANY,**

Defendants.

Case Nos. **ADJ4142754 (AHM 0142785)**
ADJ6726440
(Long Beach District Office)

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Opinion and Decision After Reconsideration (Decision) issued on April 21, 2015, by the Appeals Board. In our Decision, we rescinded the workers' compensation administrative law judge's (WCJ) Joint Findings and Order issued on October 20, 2014, which found that the lien of Southern California Psychodiagnostics was not allowable as a lien of medical treatment and found that the lien was instead, an allowable lien for medical-legal expenses. Defendant contends that even if lien claimant's report is viewed as a medical-legal report, it is not an allowable expense because it was not used to prove or disprove a fact in dispute and was not substantial medical evidence.

We have not received an answer from lien claimant or applicant.

We have considered the allegations of the Petition for Reconsideration. Upon further review of the record we will grant defendant's petition for reconsideration, rescind our Decision issued on April 21, 2015, rescind the WCJ's Joint Findings and Order issued on October 20, 2014, and substitute a new decision disallowing the lien as a medical legal expense because such an expense is not allowable pursuant to Labor Code section 4064(d).¹

¹ All future references are to the Labor Code unless noted.

1 **FACTS**

2 Applicant was employed by defendant as a part-time supervisor and suffered a cardiac arrest on
3 December 1, 2006 while in the course of his employment, and claimed injury to his neuro, psyche and
4 internal (ADJ4142754). He also claimed cumulative injury from January 7, 2008 to February 3, 2009 to
5 his psyche, internal, chest and nervous system (ADJ6726440).

6 **I.**

7 On February 13, 2012, May 21, 2012, and March 12, 2013, the parties proceeded to trial on the
8 underlying cases. They stipulated that both claims were timely denied. The issues at trial were whether
9 applicant's injury arose out of his employment and whether Jens Dimmick, M.D., was applicant's
10 primary treating physician. Defendant also asserted a good faith personnel action defense under section
11 3208.3 to applicant's claimed injury to psyche. Applicant testified on May 21, 2012, in pertinent part as
12 follows: He collapsed at work on December 1, 2006; he was treated at San Antonio Hospital and then
13 was an inpatient at Casa Colina for a year. (Minutes of Hearing, Summary of Evidence (MOH) May 21,
14 2012, p. 3, lines 14-17.) "He treated for memory problems and problems with his cognitive skills. . .
15 [and] for a brain injury. . . . [He] has problems with both his short term and long term memories." (*Id.*
16 at p. 3, lines 17-21.) A Joint Finding and Order issued on June 21, 2013, finding that applicant did not
17 sustain a cumulative industrial injury to his neuro, psyche, and internal and that he did not sustain the
18 burden of proof to show that he sustained an industrial injury on December 1, 2006.² The WCJ did not
19 make a finding as to whether Dr. Dimmick was applicant's primary treating physician, although she
20 considered his reports in reaching her decision.

21 On August 26, 2014, the issue of lien claimant's lien for \$3,602.50 proceeded to trial. The parties
22 stipulated that Dr. Dimmick referred applicant to Dr. Procci "as described in Dr. Dimmick's report dated
23 12/14/10." Defendant contended that since the primary treating physician referred applicant for
24 diagnostic testing, the charges were for treatment.

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26 ² On September 5, 2013, we denied reconsideration of the June 13, 2012 decision. Commissioner Moresi, who was on the
27 Appeals Board panel that issued that order, no longer serves on the Appeals Board. Another panel member was assigned to
take his place.

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II.

Physiatrist David Patterson, M.D., is the medical director at Casa Colina. On July 23, 2007, Dr. Patterson issued a letter. (Exhibit 3, David Patterson, M.D., July 23, 2007.) He stated that he had been applicant's physiatrist since his admission to Casa Colina on December 14, 2006, and under his care, applicant had transitioned from Casa Colina Acute Care Unit to Casa Colina Transitional Center for physical and cognitive therapies. Upon discharge, applicant was referred to Gentiva Rehab Without Walls. In pertinent part, he concluded that: "Client's progress has allowed him to return home with his family but this client's barriers remain his attention and memory deficits. . . Client has been involved in individual counseling and will need updated neuropsychological evaluation for reassessment."

On September 28, 2007, Dr. Patterson wrote to applicant's attorney. (Exhibit 3, September 28, 2007.) In pertinent part he stated that: "It is of my opinion that Mr. Hubbard does need treatment and I am requesting that we seek a possible second opinion to help make the case that this is, in fact, an industrial related injury. . ."

On September 24, 2008, internist and panel Qualified Medical Evaluator (QME) Paul J. Grodan, M.D., examined applicant and issued a report. (Exhibit A, Paul J. Grodan, M.D., September 24, 2008.) He reviewed and summarized extensive medical records. He concluded that applicant had "significant anoxic damage to his brain" and "clearly sustained cognitive residuals from hypoxia of his brain." (*Id.* at pp. 17-18.) He then stated that:

However, in order to assess accurately the degree of his cognitive disorder he requires neuropsychological testing. There was one report I reviewed from January 11, 2007, but that was too proximal to the occurrence. He will require updated neuropsychological evaluation and based on those conclusions I may comment further.

Furthermore, I would recommend that the Whole-Person impairment assessment in Mr. Hubbard, due to his memory and cognitive impairment, would be best deferred to neurological expertise with neuropsychological assessment. At this time, I do not find sufficient information in the file to allow such assessment from my perspective. . . [A]ny and all current residuals have to be attributed to the occurrence on December 01, 2006. However, whether it was industrial or not is deferred.

1 In summary, as noted in the joint letter point #9 I do recommend a
2 neurological assessment including neuropsychological testing to
3 objectively assess the cognitive/memory deficits. (*Id.* pp. 19, 20, 21.)

4 On December 30, 2008, neuropsychologist Laura Seibert Ph.D., Director of Neuropsychology at
5 Casa Colina evaluated applicant. (Exhibit 9, Laura Seibert Ph.D., December 30, 2008.) She reported
6 that applicant had a comprehensive neuropsychological evaluation on January 11, 2007 while at Casa
7 Colina. (*Id.*, p. 1.) She reviewed applicant's medical records, interviewed applicant and his mother, and
8 administered tests. She gave applicant printed materials which outlined his rights under the Americans
9 with Disabilities Act (ADA), recommended that applicant discuss treatment with Ritalin with
10 Dr. Patterson, encouraged applicant to seek psychotherapy treatment for therapy and for cognitive coping
11 strategies and advised him to refrain from driving. (*Id.* at pp. 7-8.) She did not opine as to industrial
12 causation and did not discuss workers' compensation benefits, including applicant's ability to work,
13 entitlement to temporary or permanent disability, or level of impairment.

14 On March 29, 2009, Dr. Grodan issued a supplemental report. (Exhibit A, March 29, 2009.) He
15 reported that after applicant's cardiac arrest "there was sufficient cerebral anoxia period to cause central
16 nervous system residuals. I suggested in my report that he should have a neuropsychological evaluation
17 and evaluation by a neurology specialist to ascertain the degree of his cognitive impairment." (*Id.* at
18 p. 4.) He stated that "[i]f the neuropsychological assessment is obtained, I will issue a supplemental
19 report, if necessary." (*Ibid.*)

20 On January 13, 2010, Dr. Grodan reevaluated applicant and issued a report. (Exhibit A,
21 January 13, 2010.) In pertinent part, he concluded that applicant's "subjective and objective factors of
22 disability are solely related to his cerebral dysfunction — a consequence of anoxic encephalopathy. The
23 only objective assessment would be comprehensive neuropsychological profile and cognitive function
24 testing. The opinions I expressed in my initial evaluation report remain unchanged." (*Id.* at p. 22.) He
25 noted that he had "not seen a neuropsychological evaluation since the one performed on
26 January 11, 2007." (*Id.*, p. 23.) He further concluded that:

27 ///

1 The only recommendation I would have is to obtain an updated
2 evaluation by a Board Certified Psychiatrist with expertise in
3 neuropsychological/cognitive disorders. Considering there was a
4 baseline assessment on January 11, 2007 an updated assessment may
5 reveal whether there was an interval change. It may be helpful in
6 further assessing the continuous trauma submission considering that if
7 he had deterioration and if the stress, even though caused by his
8 medical condition, is considered legally as employment stress, then
9 there may be a nexus to cerebral dysfunction deterioration. However,
10 it is not likely that this will be the finding. (*Ibid.*)

11 On December 7, 2010, specialist in internal medicine Jens Dimmick, M.D., issued a primary
12 treating physician's supplemental report which was a review and summary of applicant's medical
13 records. (Exhibit 2, Jens Dimmick, M.D., December 7, 2010.) He stated that he had received notice that
14 defendant's insurance company had denied liability for applicant's claim so that applicant's claim was a
15 contested claim and he was preparing the report at applicant's attorney's request "for the purpose of
16 proving or disproving a contested claim." (*Id.* at p. 1.) In pertinent part, with respect to applicant's
17 hospital admission in 2009 and applicant's claim of cumulative injury, he opined that: "The disability
18 that ensued following his 2009 admission was primarily of a psychiatric nature and a psychiatrist needs
19 to evaluate the patient to discuss the work-relatedness of those psychiatric issues." (*Id.* at p. 14.)

20 On December 13, 2010, Dr. Patterson issued a report after review of Dr. Grodan's reports of
21 March 29, 2009 and January 13, 2010. (Exhibit 3, December 13, 2010.) He noted that:

22 Dr. Grodan also states there has been no formal neuropsychological
23 testing. However, there has been formal neuropsychological testing,
24 but it did not render an opinion regarding factors related to ongoing
25 stress at work versus Mr. Hubbard having difficulty working due to
26 consequences of his anoxic encephalopathy and injury, and therefore
27 Mr. Hubbard's continuous struggles in the workplace environment are
in fact related to the consequences of his anoxic encephalopathy. I
would concur with Dr. Grodan that a qualified medical examination
by a neuropsychologist may help delineate further the issue regarding
cumulative trauma with a February of 2008 to February of 2009
timeframe. (*Id.*, pp. 1-2.)

28 On December 14, 2010, Dr. Dimmick examined applicant and issued a narrative PR-2 report.
29 (Exhibit 2, December 14, 2010.) Under the category of "MEDICAL TREATMENT," he stated that:

1 "The patient needs neuropsychological testing at this time to assess the intellectual impairments that he
2 may have developed, if any, as a result of his injury." (*Id.* at p. 2.)

3 On March 1, 2011, Dr. Dimmick examined applicant and issued a narrative PR-2 report. (Exhibit
4 2, March 1, 2011.) He noted that applicant had not yet had neuropsychological testing. Under the
5 category of "MEDICAL TREATMENT," he stated that: "The patient needs neuropsychological testing
6 before his case is wrapped up." (*Id.* at p. 2.)

7 On June 7, 2011, Dr. Grodan issued a supplemental report after reviewing Dr. Dimmick's
8 March 1, 2011 report. (Exhibit A, June 7, 2011.) He stated that: "[Dr. Dimmick] then noted that
9 Mr. Hubbard can continue working daylight hours and that neuropsychological testing is necessary and
10 everybody is in agreement with that." (*Id.* at p. 2.)

11 On July 19, 2011, Martin V. Ross, PhD., of Southern California Psychodiagnostics issued a report
12 following his evaluation of applicant, which included interviewing applicant and administering tests.
13 (Exhibit 1, Martin V. Ross, PhD., July 19, 2011.) Dr. Ross reviewed Dr. Dimmick's report of
14 December 14, 2010, and noted that he was willing to review any other medical records if they were
15 provided to him. (*Id.* at p. 2.) He stated that: "Because of Mr. Hubbard's history of anoxic brain injury
16 and cognitive impairment, he was referred for comprehensive neuropsychological examination by
17 Jens W. Dimmick, M.D., in order to determine the nature and extent of neuropsychological
18 impairment. . . . It was noted [in Dr. Dimmick's report] that the patient needed neuropsychological
19 testing, thus the current referral, in order to assess the intellectual impairment that the patient may have
20 developed, if any, as a result of his injury." (*Ibid.*) Dr. Ross concluded that applicant had a moderate
21 degree of neuropsychological impairment "primarily attributed to the anoxic episode" but that "[s]ome
22 degree of dysfunction may be secondary to physical and emotional symptoms, such as fatigue,
23 depression, and anxiety." (*Id.* at p. 14.) In his opinion, applicant had a whole person impairment of 26%
24 "solely within the realm of cognitive functioning." (*Id.* at p. 15.) He further concluded that "[i]n light of
25 the continuing emotional symptoms, additional psychotherapy, in conjunction with psychotropic
26 medication, is recommended. I defer to Dr. Dimmick regarding the appropriateness of additional
27 cognitive or vocational rehabilitation." (*Ibid.*)

1 On February 2, 2012, Dr. Dimmick examined applicant and reviewed the report from Dr. Ross.
2 (Exhibit 2, February 2, 2012.) Dr. Dimmick stated that: "Dr. Ross' report is appreciated. He clearly puts
3 in perspective the patient's impairments and disabilities as a result of his brain injury that occurred as a
4 result of anoxia in December 2006." (*Id.* at p. 2.) Dr. Dimmick concluded that applicant had reached
5 maximum medical improvement and that his impairment was "best described by Dr. Ross as an
6 approximately 26% whole person impairment that occurred with those findings" and that "[a]s pointed
7 out by Dr. Ross, the patient should have ongoing psychological support including psychotropic
8 medications on an indefinite basis for the time being." (*Ibid.*)

9 DISCUSSION

10 An employer's liability for services by a medical provider to an injured worker arises under two
11 circumstances. Under section 4600, an employer is required to provide reasonable and necessary
12 medical treatment to cure and relieve from the effects of an industrial injury. An employer may also be
13 liable for medical-legal expenses. (§§ 4620, 4621.)

14 Both parties agree that defendant is not liable for lien claimant's report if it is characterized as
15 medical treatment, because applicant's injury was found not industrial. The sole question for trial was
16 whether the report is a reimbursable medical-legal expense. Medical-legal expenses are defined by
17 section 4620, which states:

18 (a) For purposes of this article, a medical-legal expense means any
19 costs and expenses incurred by or on behalf of any party, the
20 administrative director, or the board, which expenses may include X-
21 rays, laboratory fees, other diagnostic tests, medical reports, medical
records, medical testimony. . . for the purpose of proving or disproving
a contested claim.

22 Applicant's claim was denied at the time the report issued and the report does address the nature
23 and extent of applicant's injury, which was at issue. Thus, we do find that the report was a medical-legal
24 report as defined by section 4620. Defendant argues that the report must address the threshold issue of
25 causation in order to constitute a compensable medical-legal report; however, such an interpretation
26 would unfairly narrow the scope of services provided as medical-legal expenses to the point that it would
27 violate the constitutional mandate that a case proceed without incumbrance. (Cal. Const., art. XIV, § 4.)

1 Having found that lien claimant's report is a medical-legal expense, we must now determine
2 whether it is reimbursable. Section 4621 covers whether a medical-legal expense is reimbursable. It
3 states:

4 (a) In accordance with the rules of practice and procedure of the
5 appeals board, the employee, or the dependents of a deceased
6 employee, shall be reimbursed for his or her medical-legal expenses
and reasonably, actually, and necessarily incurred, *except as provided*
in Section 4064. . . (§ 4621(a), emphasis added.)

7 Where, as here, the medical-legal expense is a comprehensive medical-legal evaluation, section
8 4064 clearly limits the liability of the employer to only pay for evaluations obtained pursuant to sections
9 4060, 4061, and 4062. Section 4064 states:

10 (a) The employer shall be liable for the cost of each reasonable and
11 necessary comprehensive medical-legal evaluation obtained by the
employee pursuant to Sections 4060, 4061, and 4062. . .

12 (d) The employer shall not be liable for the cost of any comprehensive
13 medical evaluations obtained by the employee other than those
14 authorized pursuant to Sections 4060, 4061, and 4062. However, no
party is prohibited from obtaining any medical evaluation or
consultation at the party's own expense.

15 Lien claimant's evaluation was not procured through sections 4060, 4061, or 4062. Although the
16 QME indicated the need for a neuropsychological evaluation, the parties never proceeded to obtain that
17 evaluation through the QME process. The neuropsychological evaluation occurred as a referral from
18 applicant's primary treating doctor who had expressly declared that he was acting on applicant's
19 attorney's request and performing a comprehensive medical-legal evaluation in order to prove or
20 disprove a claim. (Exhibit 2, Jens Dimmick, M.D., December 7, 2010.) The neuropsychological
21 evaluation was part of a comprehensive medical-legal evaluation that was self-procured by applicant,
22 which pursuant to statute is done at applicant's own expense. Defendant is not liable for the lien.

23 Accordingly, we will grant defendant's Petition for Reconsideration of the Opinion and Decision
24 After Reconsideration issued on April 21, 2015, by the Appeals Board, rescind our prior Decision in its
25 entirety, rescind the WCJ's Joint Findings and Order issued on October 20, 2014, and substitute this new
26 decision disallowing the lien as a medical legal expense because such an expense is not allowable
27 pursuant to section 4064(d).

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Opinion and Decision
3 After Reconsideration issued on April 21, 2015, by the Appeals Board is **GRANTED**.

4 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
5 Compensation Appeals Board that the Opinion and Decision After Reconsideration issued on
6 April 21, 2015, by the Appeals Board is **RESCINDED** and the following Findings and Order is
7 **SUBSTITUTED** therefor:

8 **FINDINGS OF FACT**

9 1. The lien of Southern California Psychodiagnostics is not related to
10 treatment and is a lien for a comprehensive medical-legal evaluation,
which was self-procured by applicant.

11 2. Defendant is not entitled to attorney's fees for its claim that lien
12 claimant filed a frivolous Declaration of Readiness to Proceed.

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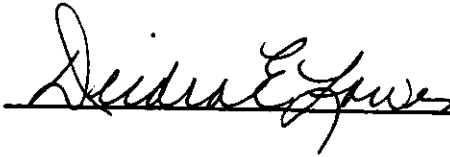
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1 **ORDER**

2 **IT IS HEREBY ORDERED** that the lien of Southern California
3 Psychodiagnostics is not allowed against defendant per Finding of Fact
4 #1 and Labor Code section 4064(d).

5 **IT IS FURTHER ORDERED** that the Defendant's claim for
6 attorney's fees is denied per Finding of Fact #2.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **DEIDRA E. LOWE**

10 **I CONCUR,**

11 **CONCURRING, BUT NOT SIGNING**

12 **KATHERINE ZALEWSKI**

13 **I CONCUR, (See attached concurring opinion)**



14 

15 **RONNIE G. CAPLANE**

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

17 **JUL 03 2015**

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

20
21 **SOUTHERN CALIFORNIA PSYCHODIAGNOSTICS**
22 **LAW OFFICES OF LYNN P. PETERSON**
23 **JOSHUA HUBBARD**
24 **LEVITON DIAZ & GINOCCHIO INC.**

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27 **EDL/sry** 

HUBBARD, Joshua

1 **CONCURRING OPINION OF CHAIRWOMAN CAPLANE**

2 I concur in the judgment. I write separately to note my dissent in the prior Decision issued on
3 April 21, 2015. Although I remain of the opinion that the report at issue here constituted medical
4 treatment, not medical-legal services, as detailed by the opinion, the result would be the same under
5 either analysis. Thus, I concur in the judgment that the lien in this case is not allowable against
6 defendant.



WORKERS' COMPENSATION APPEALS BOARD

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R. Caplane

Ronnie Caplane, Chairwoman

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

18 **JUL 03 2015**

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

21 **SOUTHERN CALIFORNIA PSYCHODIAGNOSTICS**
22 **LAW OFFICES OF LYNN P. PETERSON**
23 **JOSHUA HUBBARD**
24 **LEVITON DIAZ & GINOCCHIO INC.**

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EDL/sry *df*