WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARGARITO GONZALEZ, *Applicant,* vs. CONSOLIDATED DISPOSAL SERVICES/REPUBLIC SERVICES, permissibly self-insured, administered by CANNON COCHRAN MANAGEMENT SYSTEMS, INC., (CCMSI), *Defendants.*	Case No. ADJ2721412 (VNO 0526008) (Pomona District Office) OPINION AND DECISION AFTER RECONSIDERATION

We granted defendant's Petition for Reconsideration on September 16, 2013 to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.[2]

Defendant sought reconsideration of the Supplemental Findings and Award, Order (F&A) issued by a workers' compensation administrative law judge (WCJ) on June 28, 2013. In that F&A, the WCJ found in pertinent part that applicant had been in need of home health care services, 24 hours per day for 7 days a week since January 20, 2012 and continuing as reasonable and necessary medical treatment; that defendant unreasonably delayed payment of temporary disability indemnity and medical treatment and

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[1] Commissioner Moresi, who was on the Appeals Board panel that issued the orders of April 13, 2010, October 14, 2011, October 31, 2011, February 14, 2012, and September 16, 2013, no longer serves on the Appeals Board. Another panel member was assigned to take his place.

[2] **Both parties are strongly admonished that they are required to comply with WCAB Rule 10848. WCAB Rule 10848 states that:**

> **"When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party." (Cal. Code Regs., tit. 8, § 10848.)**

was liable for penalties; that defendant was not entitled to an order compelling applicant to return to the Agreed Medical Evaluators (AMEs) to determine the need for home health care services; and that jurisdiction was reserved over applicant's claim for self-procured treatment expenses.

Defendant contended that newly enacted Labor Code[3] sections 4600(h) and 5307.8 applied to limit the amount of home health care services that could be awarded; that no substantial evidence existed to support the award of home health care services; that it never received a proper request for authorization for home health care services; that applicant failed to object to the Utilization Review (UR) decision so that it was final; that the WCJ should have ordered applicant to return to the AMEs on the issue of home health care services; that penalties were not appropriate because defendants had a good faith belief that applicant's need for home health care services was not caused by his industrial injury; that if penalties were appropriate, the amount of the penalties should be capped at $10,000.00 as required by section 5814; that no award existed so that applicant's attorneys were not entitled to section 5814.5 attorney's fees for enforcement of an award; that the lien by applicant's home health care services providers was not compensable because they did not comply with section 4603.2(b)(1) and WCAB Rule 10770 (Cal. Code Regs., tit. 8, § 10770); that applicant did not meet his burden on the issues of self-procured medical treatment and the WCJ should not have ordered the parties to adjust the issue; that defendant was entitled to sanctions and attorney's fees; and that bills showing applicant's attorney's fees should not have been admitted into evidence.

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 for reconsideration, which recommended that the petition be granted regarding the cap on penalty awards under section 5814 and the potential caps on home health care services under sections 4600(h) and 5703.8, and otherwise that the F&A be affirmed.

We have reviewed the record and have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report, and we now issue our decision after

[3] Unless otherwise stated, all further statutory references are to the Labor Code.

reconsideration. Here, the F&A issued on June 28, 2013, and on June 12, 2014, we issued *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*) concerning home health care services. As set forth in our opinion below, we have considered *Neri Hernandez* in reaching our decision. Thus, for the reasons discussed below, and for the reasons stated in the Report which we adopt and incorporate except as to the recommendation regarding potential caps on home health care services under sections 4600(h) and 5703.8 (Report, p. 16), as our decision after reconsideration, we will rescind the F&A, substitute a new F&A, and return the matter to the WCJ for further proceedings consistent with this opinion, including development of the record as ordered by the WCJ and in light of *Neri Hernandez*.

I.

Procedural Background at the Appeals Board

On January 28, 2010, the WCJ issued a Findings and Award, finding in pertinent part that applicant sustained industrial injury to his respiratory system, psyche, back, hips, and knees. On April 13, 2010, we granted reconsideration and issued our decision rescinding the January 28, 2010 Findings and Award. We stated that we did not disagree with the WCJ's finding that applicant sustained an industrial cumulative trauma injury to his respiratory system in the form of cryptococcal and pneumococcal pneumonia while employed as a trash bin repairman, and that the finding of injury was based on substantial evidence. (Order of April 13, 2010, p. 2, lines 5-15, 20-23.) However, as to the finding of applicant's permanent disability, we returned the matter to the WCJ so that the WCJ could "obtain a supplemental report from the AME to address whether Table 17-5 [of the AMA Guides] should be used to calculate applicant's WPI." (Order of April 13, 2010, p. 4, lines 12-14.) On October 22, 2010, Court of Appeal denied the writ of review sought by defendant.

On August 4, 2011, the WCJ issued a new Findings and Award, again finding in pertinent part that applicant sustained industrial injury to his respiratory system, psyche, back, hips, and knees. Both parties sought reconsideration. On October 14, 2011, we granted reconsideration, and on October 31, 2011, we issued our decision rescinding the August 4, 2011 Findings and Award. We stated that we did so "to permit the WCJ to further develop the medical record to provide an adequate basis for making a

determination as to whether there should be apportionment of applicant's respiratory disability to non-industrial factors." (Order of October 14, 2011, p. 6, lines 5-7.) On April 24, 2012, the Court of Appeal denied the writ of review sought by applicant.

On January 9, 2012, defendant sought removal in response to an order issued on December 20, 2011, setting the matter for a mandatory settlement conference (MSC). On February 14, 2012, we issued our decision denying removal.

II.

Factual Background

Applicant was employed by defendant as a trash bin repairman and claimed cumulative injury from 1993 through to March 15, 2005 to his respiratory system, psyche, back, hips, and knees, and causing fatigue, dizziness, and a loss of balance. Applicant has had five months of formal education and does not read or write Spanish or English. As described in the WCJ's Report, at the time of applicant's evaluation by defendant's expert nurse in 2013, applicant weighed 114 pounds, needed a wheelchair and / or walker in order to ambulate, and required home health care services. (Report, July 2013, p. 3.)

Previously, the WCJ summarized applicant's work environment and industrial exposure based on the testimony presented at trial as follows:

> "The employer collects trash from restaurants, offices, buildings, farms, and ranches. The trash included food and sod. The applicant's job was to clean, repair, weld, and paint trash bins (dumpsters). He would stand and walk his entire shift. There was no bench or table work. He described his work as being very difficult work pulling trash bins from one side to another side of the yard over cracks and holes. The trash bins needing repair could be one-third to one-half full of trash. It would take him 20 to 30 minutes to remove the trash by hand. He would work inside the trash bin up to 20 to 30 minutes using a metal spatula to scrape the stuck items off the trash bin. He would weld rusted leaking parts from within the trash bin. He put his hands in trash every day. There would be dust in his face and he would breathe in the dust. . . .Pursuant to the credible testimony of the applicant and the witnesses Alberto Gonzalez and Gilberto Estrada, there were pigeons at the job site which contains trash. There would be about 200 bins at the work site. There are about 3,000 bins in service. Trash would at times be dumped in the middle of the lot. The pigeons would be eating from the trash." (Report, March 4, 2010, pp. 2-3.)

He also set forth the evidence supporting applicant's industrial injury, including the conclusions of the AMEs. (Report, March 4, 2010.) In 2005, applicant developed a life-threatening lung infection, and

AME Dr. Noble found that the applicant developed an industrial cryptococcal infection. Applicant is required to take the anti-fungal medication Fluconazole for the remainder of his life to prevent a reoccurrence of infection, and the side effects of the medication include a lack of energy, loss of appetite, and fatigue. Orthopedic AME Dr. Masserman opined that there was a continuous trauma to applicant's back, hips, and knees and that the lung disease accelerated the need for applicant's bilateral hip replacement surgery. AME Dr. Noble found that the applicant developed an industrial psyche condition in the form of depression based on the respiratory system injury.

On March 18, 2009, applicant testified in pertinent part that:

> "He lives with his wife and his son and son's wife. He does not perform the grocery shopping or preparing for meals. His wife will drive him to the medical appointments and the pharmacy. His son or wife will help to bathe him. If a steak is being served, someone else will cut the meat." (MOH, March 18, 2009, p. 4, lines 4-7.)

On July 14, 2009, the parties stipulated that applicant's son Alberto Gonzalez would testify that: He drives applicant to Kaiser for medical treatment; he has to open doors for applicant; he and his mom and sister do grocery shopping, meal preparation, serve meals to applicant and cut his meat; the family does applicant's laundry; he helps applicant use the bathroom and bathe, including soap, shower, rinse and dry; he puts applicant in bed, assists him in the middle of the night to use the bathroom; and helps him out of bed in the morning; he helps dress and undress applicant; he clips applicant's toe nails; he helps applicant in and out of the car; and he helps applicant up if he falls. (MOH, July 14, 2009, p. 2, lines 9-24.) Applicant testified in pertinent part that:

> "His family helps him with his activities of daily living. His son, Alberto, helps him in the bathroom. The son puts him into bed at night. The son holds him up in the shower. The family will open doors so that he may move from room to room. The family does the grocery shopping. His wife prepares the meals. His wife, son, or son's wife cuts up his food. His daughter-in-law washes the clothes. The family helps him get dressed and undressed. His family will drive him to his medical appointments and lab work. The family never leaves him alone at home. His wife sets out his medication." (MOH, July 14, 2009, p. 5, lines 16-21.)

On July 15, 2009, applicant's spouse, Leocadia Cervantes, testified in pertinent part that:

> "She or her son will perform the grocery shopping. [Applicant] cannot be left alone. He needs care at all hours. She will serve him meals and clean. He does not sweep the floor or vacuum. . . .The son Alberto helps him go to the bathroom. . . ." (MOH, July 15, 2009, p. 3, lines 4-8.)

On March 29, 2010, applicant's treating physician Jose M. Garcia, M.D., issued a report on his letterhead regarding "[h]ome attendant care." Dr. Garcia stated as follows:

> "To Whom It May Concern:
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> "I have served as Primary Care Physician for Mr. Margarito Gonzalez since 2003.
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> "Mr. Gonzalez required prolonged intubation and hospitalization in 2005 for a severe lung infection, including cryptococcal pneumonia. He has required 24 hour Home Attendant Care since March 2005 through the present.
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> "The tasks for which he requires attendant care include, but are not limited to:
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> - Grocery shopping and food preparation
> - Hygiene-bathing, going to the bathroom, grooming. I understand that his son holds him upright in the shower
> - Transportation to medical and other appointments
> - Dressing
> - Washing of his clothing
> - Ambulation assistance, he uses a walker and/or wheelchair
> - Medication management
> - Assistance getting in and out of bed
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> "I have come to know several family members. His wife and family have done an admirable job of providing Home Attendant Care for Mr. Gonzalez to date.
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> "Without this care, I do not believe Mr. Gonzalez is safe. He should not be left alone.
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> "Sincerely, [signature of Dr. Garcia]" (Exhibit J3, Jose M. Garcia, M.D., March 29, 2010.)

On May 10, 2010, the parties entered into a Stipulation, and the WCJ issued an order approving. As relevant herein, the parties stipulated as follows: "The defendant does herein stipulate to injury AOE/COE to the orthopedic aspects of the c.t. claim including hips, knees, and back. Applicant is entitled to future medical care to these parts of body, per AME Masserman." As to temporary disability,

they stipulated that defendant would make payment of 52 weeks of temporary total disability indemnity plus interest from January 29, 2010 to May 13, 2010. As to permanent disability, they stipulated to "orthopedic PD of 45% (+15%);" that defendant would commence permanent disability advances as of December 19, 2007; and that if applicant prevailed on "the present 100% p.d. award on the internal/pulmonary claim, then defendant . . . shall not be entitled to reduce the 100% internal p.d. under a *Benson*[4] theory."

On May 18, 2010, as set forth on the proof of service, applicant served Dr. Garcia's March 29, 2010 letter on defendant's attorney and e-filed the letter at the district office. (Exhibit J3, Jose M. Garcia, M.D., March 29, 2010.)

On January 5, 2011, applicant's spouse and son filed a lien for home health care. Defendant objected on February 17, 2011.

On July 12, 2011, applicant's son Alberto Gonzalez Cervantes was deposed; according to the index, a copy of the letter of March 29, 2010 by Dr. Garcia was attached to the transcript as an exhibit. (Exhibit J10, Deposition of Alberto Gonzalez Cervantes, July 12, 2011, p. 4, lines 10-11.)

On September 16, 2011, defendant filed a verified "Petition to Compel Re-evaluations with Agreed Medical Examiners In Order to Resolve New Medical Issue" (Petition to Compel). Defendant sought to have applicant reevaluated on the issue of home health care services. Defendant alleged that applicant had served it with a copy of Dr. Garcia's March 29, 2010; that it had "objected to this letter;" and that "attached hereto as Exhibit E [is] a true and correct copy of defendant's objection letter." (Petition to Compel, p. 3, lines 7-12.) Exhibit E contains a letter dated September 14, 2011 from defendant's attorney to applicant's attorney.

On December 28, 2011, applicant's spouse Leocadia Cervantes was deposed. (Exhibit J9, Deposition of Leocadia Cervantes, December 28, 2011.)

On January 18, 2012, Dr. Garcia executed a Doctor's Disclosure and Declaration for his March 29, 2010 report, and applicant served it. (Exhibit J4, Jose M. Garcia, M.D., January 18, 2010.)

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[4] *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.1535 [74 Cal.Comp.Cases 113] [holding that the statutory scheme requires apportionment of permanent disability between industrial injuries].)

On January 20, 2012, defendant sent two letters to applicant. (Exhibit M1, Defendant's Letters, January 20, 2012.) In both letters it admitted receipt of the Declaration and that Dr. Garcia's March 29, 2010 letter was "previously sent to defendant." In the first letter, it stated that:

> "Since the report would now be considered complete in light of this late signed Declaration, arguably it has now been brought into compliance with the Labor Code.
>
> "Therefore, defendant is objecting to the [March 29, 2010] report pursuant to Labor Code [s]ection 4062." (Exhibit M1, p. 1.)

In the second letter, it stated that:

> "Defendant is objecting to the conclusions and recommendations provided by Dr. Jose Garcia in his [March 29, 2010] report pursuant to Labor Code [s]ection 4062.
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> "Defendant contends that there has been no resolution regarding whether the industrial injury is causing the need for the recommendation listed by Dr. Garcia." (Exhibit M1, p. 3.)

On January 24, 2012, defendant's UR company Genex issued an Outpatient Delay Notification. (Exhibit R1, Genex, January 24, 2012.)

On January 30, 2012, Genex issued a "Non-Certification Recommendation." (Exhibits 29, S1, Genex, January 30, 2012.)[5]

On May 17, 2012, the parties appeared for an MSC and completed a pre-trial conference statement. On the statement, the parties stipulated that applicant sustained industrial injury to his hips, knees, back, respiratory system, and psyche. They also stipulated that: "Parties agree to allow each other the right to amend these Stipulations upon proper notice to the opponent within 20 days of trial."[6] (Statement, May 17, 2012, p. 2.) The statement is signed by the attorneys for each party. Among applicant's issues were retroactive and further home health care services in accord with the opinion of Dr. Garcia of March 29, 2010; and penalties for defendant's failure to object to the report until "late 2011." (Applicant's Addendum A, pp. 3a-3b.) Among defendant's issues were: "Is the question of whether applicant's industrial injuries [were] causing, in whole or in part, his potential or alleged need

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[5] An "Appeal Decision Non-Certification CA" issued on March 16, 2012, and took into account a letter from Dr. Garcia of February 2, 2012 (Exhibit J5). (Exhibits 30, T1, Genex Appeal Decision, March 16, 2012.)

[6] There is no evidence that the parties amended the stipulations.

for home attendant care set forth in Dr. Garcia's [March 29, 2010] letter a 'new medical issue' subject to Labor Code section 4062.3(j)"; "When the issue regarding the need for home attendant care is in dispute, is the issue of industrial causation subject to utilization review"; and "Does Labor Code section 4062.3(j) take precedence over utilization review when a new medical issue regarding the cause for home attendant care is in dispute." (Defense Issues, p. 1.)

On July 18, 2012, September 5, 2012, November 21, 2012, January 8, 2013, February 13, 2013, April 22, 2013, and April 23, 2013, the parties appeared for trial. The MOH for July 18, 2012 list the issues for trial, but do not contain any stipulations. Applicant's spouse, Leocadia Cervantes, testified on April 22 and 23, 2013 and described the home care that she and her son provided and continue to provide to applicant.

On June 28, 2013, the WCJ issued the F&A.

In its verified Petition for Reconsideration, defendant alleged that "[t]he potential need for home attendant care first surfaced in a March 29, 2010 letter [by Dr. Garcia]. Defendants repeatedly urged prior to the instant trial that Gonzalez return to the Agreed Medical Examiners for evaluation of the causation, reasonableness and necessity of the requested home care." (Petition for Reconsideration, July 19, 2013, p. 3, lines 22-25.) It further alleged that "[i]t has been and continues to be defendants' position that home attendant care should have been resolved by the Agreed Medical Examiners long ago." (*Id.* at p. 4, lines 7-8.) It again alleged that "[t]he first mention of any need for home attendant care is contained in the March 29, 2010 letter" by Dr. Garcia. (*Id.*, at p. 10, lines 14-15.) It admitted that the "letter issued two months after the January 28, 2010 Findings and Award" and that applicant served the letter on May 18, 2010. (*Id.* at p. 10, lines 14-17, 20.) It also admitted that the letter "did not trigger any response from defendants," that the letter was not in response to a request for further information, and that the claim administrator never made a request for "further information from Dr. Garcia before Dr. Garcia issued the letter. (*Id.*, at p. 10, line 25, 28 – p. 11, line 2.) It did not state when it actually received the letter.

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DISCUSSION

I. Industrial Injury

Preliminarily, we address the issue of industrial injury. On May 10, 2010, the parties stipulated that applicant sustained industrial injury to his hips, knees and back, and an order approving issued that day. On May 17, 2012, the parties stipulated on the pre-trial conference statement that applicant sustained industrial injury to his hips, knees, back, respiratory system, and psyche. This stipulation is supported by the evidence in the record, including the opinions of AME Noble and AME Masserman. Under section 5702, the Appeals Board may make a findings and award based on a stipulation. Accordingly, we find that applicant sustained industrial injury to his hips, knees, back, respiratory system, and psyche.

II. Home Health Care Services

As set forth in the WCJ's Report, applicant proved that medical treatment, including in the form of home health care services, was reasonably required. (§ 4600(a)(h); *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal. Comp. Cases 981]; *Dubon v. World Restoration, Inc.*, (2014) 79 Cal. Comp. Cases 313.) Applicant also proved that his need for medical treatment, including in the form of home health care services, was caused by his industrial injury. (§ 3600(a)(3); *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 417-418 [33 Cal.Comp.Cases 660]; *Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692 [58 Cal.Comp.Cases 313].) We conclude that the WCJ's findings as to medical treatment are based on substantial evidence, and we will not disturb them. (§§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].)

However, applicant's claim for home health care services arose before the enactment of sections 4600(h), 4603.2(b)(1), and 5307.8, and the F&A issued on June 28, 2013 after the statutes took effect. In *Neri Hernandez*, we concluded that sections 4600(h), 4603.2(b)(1), and 5307.8 "apply to all requests for home health care services and for payment thereof where no final decision on the request had issued by

January 1, 2013." (79 Cal.Comp.Cases at p. 688.) Consequently, we apply sections 4600(h), 4603.2(b)(1), and 5307.8 to applicant's claim for home health care services.

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

> "Section 4600(h) makes clear that home health care services are included in the definition of 'medical treatment,' but it also limits an employer's duty to provide that treatment by imposing two additional conditions which are part of an injured worker's burden of proof. The first condition requires that home health care services be prescribed by a physician, and an employer may become liable for home health care services provided 14 days prior to receipt of a prescription. The second condition requires that an employer's liability for home health care services is subject to either 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.)

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

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

Here, Dr. Garcia's March 29, 2010 letter is dated, is in writing and is signed. It identifies applicant and his physician and it states that applicant needs care by his spouse and his family. We find that this letter is a prescription for home health care services within the meaning of section 4600(h).

With respect to when defendant's liability for home health care services began, section 4600(h) provides that an employer's liability is limited to 14 days before the date that the prescription was received. Here, the proof of service by applicant is dated May 18, 2010. Although it is likely that defendant received the letter long before, defendant had the letter in its possession at the deposition of applicant's son Alberto Gonzalez Cervantes on July 12, 2011. Furthermore, in its verified Petition to Compel and its verified Petition for Reconsideration, defendant admitted receipt of the letter and admitted that it was served by applicant. Thus, even though the date of receipt is not clear and defendant disputed that it was a "prescription," defendant "received a prescription" as required by section 4600(h) and at a minimum, defendant's potential liability period began 14 days prior to the date it received the

letter. However, in order to determine when the liability period began, applicant must not only prove receipt of the prescription, *but must also show the **date** of actual receipt.*

Therefore, we will find that applicant is entitled to home health care services and that defendant's liability for home health care services began ***at least*** 14 days prior to the date that defendant received Dr. Garcia's March 29, 2010 prescription. If the parties cannot successfully adjust the issue informally, the WCJ has jurisdiction to develop the record as to the date that defendant received Dr. Garcia's March 29, 2010 letter.

Additionally, despite defendant's sworn statement in its Petition for Reconsideration that the first notice it received was in the March 29, 2010 letter, defendant had notice of applicant's need for home health care services well before then. Applicant testified at trial on March 18, 2009 that his family provided him with help. On July 14, 2009, the parties stipulated to applicant's son's testimony about help he provided, and on July 15, 2009, applicant's spouse testified about help she provided. It is apparent that defendant had notice from at least 2009, and well before the March 29, 2010 letter, of applicant's need for home health care services. Moreover, even before that, the evidence shows that applicant had bilateral hip replacements, which also suggests a need for home health care services at an earlier time. Yet, defendant admitted in its Petition for Reconsideration that its claims adjuster never made a request for further information before it received the March 29, 2010 letter.[7] Therefore, the WCJ also has jurisdiction to develop the record and render a decision on whether defendant received another "prescription" at an earlier date.

Turning to the amount of services that applicant was and is entitled to, since a section 5307.8 schedule has not been enacted, "an injured worker continues to bear the burden to demonstrate a reasonable hourly rate for the type of services provided and the number of reasonably required hours based on substantial evidence." (*Neri Hernandez, supra,* 79 Cal.Comp.Cases at p. 694.) Here, the WCJ

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[7] As discussed subsequently, where an employer has actual notice of an injured worker's need for medical treatment, the employer has a duty to investigate. (*Neri Hernandez, supra,* 79 Cal.Comp.Cases at p. 695; see *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566] (*Braewood Convalescent Hosp.*); Cal. Code Regs., tit. 8, § 10109.)

found that applicant was entitled to home health care services twenty four hours per day, seven days a week at the rate of $9.00. As set forth above, we agree with the WCJ that applicant met his burden.

Nonetheless, under section 5307.8, a defendant is not liable for services which were "regularly performed" and provided to an applicant before the industrial injury. Here, applicant's spouse and son testified broadly and on several occasions about services provided before and after applicant's injury. However, in order to determine which services a defendant is actually liable for, an applicant must set forth with particularity the services performed, and explain which services occurred before, if any, and which occurred after the injury. Where the medical evidence supports a finding that an applicant is in need of twenty four hour supervision, or any part thereof, as a result of an industrial injury, and there is no evidence that the need pre-existed the industrial injury, an award of hours of supervision may be made even where there is no clear evidence of post-injury tasks. Accordingly, while we continue to find that applicant was entitled to fulltime care, applicant shall provide specific descriptions of tasks performed before, if any, and after the injury, and his need for supervision, and defendant shall not be liable for tasks regularly performed before the injury. If the parties cannot successfully adjust the issue informally, the WCJ has jurisdiction to develop the record and render a decision.

Section 5307.8 does not address whether payment is to be made to an applicant or to a services provider, although it allows applicant's attorney's fees and refers to section 4906, thereby contemplating payment directly to an applicant. (*Neri Hernandez, supra,* 79 Cal.Comp.Cases at p. 695.) In contrast, while we do not address the issue here, if the type of services provided is subject to an official fee schedule and falls under section 5307.1, it is likely that the provider would be subject to the lien provisions. (§ 5307.1; see §§ 4603.2(b)(2), 4603.3, 4603.6, 4902–4906.) As explained above, under section 5307.8, once it is found that home health care services are reasonable and necessary, the applicant's burden is to produce a description of tasks before and after the injury. Because home health care services are medical treatment, an applicant is entitled to an award in the case in chief and is entitled to the same remedies as are allowed when seeking enforcement of an award of medical treatment. Once an applicant or a provider under section 5307.8 is seeking payment, a defendant is entitled to receive the documentation specified in section 4603.2(b)(1) before issuing payment, including an itemization of

services and charges, copies of all reports showing services performed, a prescription or referral by the primary treating physician, and any evidence of authorization. (*Neri Hernandez, supra,* at pp. 695-696.)

Here, applicant's family members have filed liens, but the issue of home health care services was adjudicated as part of applicant's case in chief, and not by a lien trial. Thus, once the parties have determined what defendant's net liability is for past home health care services, payment to applicant or to applicant's spouse and son is appropriate. With respect to future services, the parties shall determine whether payment is to continue to applicant's spouse and son or is to be made to applicant.

Additionally, we find that applicant's attorney is entitled to attorney's fees on the net award of past home health care services.

We note that nothing in section 4600(h) precludes a claim for home health care services under both section 5307.1 and 5307.8, and we do not address whether applicant may be entitled to services under section 5307.1.

III. Defendant's Petition to Compel

Next, we address defendant's contention that the WCJ should have ordered applicant to return to the AMEs on the issue of home health care services. We agree with the WCJ's finding as to the AMEs, but we emphasize the following.

Defendant makes clear in its Petition that it disputed liability for applicant's home health care services on the grounds that the need was not ***caused by*** his industrial injury. It cites to *Simmons v. State of California, Department of Mental Health* (2005) 70 Cal.Comp.Cases 866 (Appeals Board en banc) (*Simmons*) as support for its position.

In our en banc decision in *Simmons*, we stated that:

> "[U]tilization review can be undertaken to determine the medical necessity of a treatment, but it cannot be undertaken to determine whether an employee's injury has caused or contributed to the need for that treatment. Therefore, when a defendant's decision to deny treatment has been made based on an issue of industrial causation. . .the decision is *not* 'made pursuant to Section 4610' within the meaning of section 4062(a). . . . In essence, the defendant is objecting to the treating physician's explicit or implicit determination that the need for the prescribed treatment was caused, in whole or in part, by the industrial injury. Such an issue of causation is outside the scope of utilization review. . . .[I]t is the defendant's duty to object to the treating physician's causation

> determination and to initiate the AME/QME procedure under section 4062(a).
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> "[I]f a defendant believes at the time a treating physician prescribes treatment that there is or may be an issue of whether the proposed treatment for an admitted body part is causally related to the industrial injury, the defendant may elect to bypass utilization review and, instead, ***timely*** initiate the AME/QME procedures of section 4062(a).
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> ***
>
> "[I]f a treating physician prescribes treatment for a disputed body part, then the defendant must ***timely*** initiate the AME/QME procedure in accordance with section 4062(a), if it has not already done so or ***if the time deadlines of section 4062(a) have not already elapsed***." (Italics and bolding added.) (70 Cal.Comp.Cases at pp. 875-878.)

Here, defendant filed a Petition to Compel applicant to return to the AMEs, thereby electing to bypass utilization review and to initiate the AME/QME procedures. Section 4062(a) provides that if either the represented applicant or the defendant "objects to a medical determination made by the treating physician concerning any medical issues . . . not subject to Section 4610," i.e., on the grounds of causation, the objecting party must object within 20 days of receipt of the report. In *Simmons*, the issue of whether UR was appropriate arose *after* defendant submitted the issue to UR and the UR physician questioned whether the industrial injury caused the need for treatment. Here, defendant filed its Petition to Compel based on Dr. Garcia's March 29, 2010 letter more than five months *before* it submitted the issue to UR. And, even in its Petition for Reconsideration, defendant continued to dispute under penalty of perjury that applicant's industrial injury caused the need for home health care services. Rather than supporting defendant's position, *Simmons* supports the findings by the WCJ.

As discussed above, while it is not clear from the record when defendant received Dr. Garcia's March 29, 2010 letter, defendant clearly had received the letter by July 12, 2011, when applicant's son Alberto Gonzalez Cervantes was deposed. In its verified Petition to Compel, defendant alleged that the letter attached as Exhibit E was its objection letter. While we do not consider the substance of the letter on the merits, we take note that the date of the letter is September 14, 2011. Even if July 12, 2011 was the first day that defendant received Dr. Garcia's March 29, 2010 letter, and it was not, the twenty day

period had long expired by September 14, 2011. Accordingly, defendant waived its objection to the recommendation of the treating physician, and applicant was entitled to submit the issue to the WCAB.

IV. Penalties

Finally, we consider defendant's contention that penalties were not appropriate because defendants had a "good faith" belief that applicant's need for home health care services was not caused by his industrial injury. Defendant's contention only highlights defendant's disregard not only for the statutory rules and procedures governing workers' compensation proceedings, but also for applicant's welfare.

As quoted by the WCJ in part in his Report, in *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227, 234 [35 Cal.Comp.Cases 383], the Court said:

> "Upon notice or knowledge of a claimed industrial injury an employer has both the right and *duty to investigate the facts* in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he *take the initiative in providing benefits*. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury...[Italics added]." (Accord, *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 366–367 [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].)

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

> "Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury....[¶] The duty imposed upon an employer who has notice of an injury to an employee is *not...the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary* to determine the extent of his obligation and the needs of the employee. [Italics added]."

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., supra,* 34 Cal.3d at p. 165 [48 Cal.Comp.Cases 566].)

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

> "(a)...[A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
>
> "(b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.
>
> "(1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information . . . . The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.
>
> "(2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.
>
> "(c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
>
> * * *
>
> "(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.)

Here, applicant became ill in 2005, almost nine years ago, and had bilateral hip replacements in 2006 and 2007, more than seven years ago. As summarized by the WCJ in his Report, applicant suffered a major, life-threatening respiratory illness in 2005 due to cryptococcal pneumonia, and to prevent re-infection, will continue to take Fluconazole for the rest of his life. Because his illness is so severe, applicant has lost a great deal of weight, strength and stamina, and due to the effects of Fluconazole he suffers from dizziness, loss of appetite, and weakness. Applicant needs basic home services for food and hygiene and survival, is unable to care for himself without the aid of his family, and *would die if not provided assistance*. Applicant's family is providing medically necessary services to keep the claimant clean, safe, and *alive*. Moreover, as pointed out by the WCJ in his Report, *defendant's own expert testified as to applicant's need for care*.

Under section 5814(a), when payment of compensation either prior to or subsequent to an award has been unreasonably delayed or refused, the part of the payment that has been delayed or refused shall be increased up to twenty five percent (25%) or $10,000.00, whichever is less. In determining whether compensation has been "unreasonably delayed," "the only satisfactory excuse for delay in payment of disability benefits, whether prior to or subsequent to an award, is *genuine doubt* from a medical or legal standpoint as to liability for benefits." (Italics added.) (*Kerley v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 233, 230 [36 Cal.Comp.Cases 152]; accord, *State Comp. Ins. Fund. v. Workers' Comp. Appeals Bd. (Stuart)* (1998) 18 Cal.4th 1209, 1220 [63 Cal.Comp.Cases 916].) "[T]he burden is on the employer or [its] carrier to present substantial evidence upon which a finding of such doubt may be based." (*Kerley, supra,* 4 Cal.3d at p. 230.)

Here, defendant admitted *under oath* that Dr. Garcia's letter of March 29, 2010 "did not trigger any response from defendants" and that the claim administrator never made a request for "further information from Dr. Garcia before Dr. Garcia issued the letter." Plainly, defendant had notice of applicant's need for home health care services well before it received Dr. Garcia's letter and should have commenced its investigation far sooner. Moreover, defendant's contention that the letter did not require a response until it received the Declaration by Dr. Garcia of January 18, 2012 allegedly "curing the defect" is without merit and implausible in light of its Petition to Compel of September 16, 2011. Despite its clear failure to timely object, and despite overwhelming evidence of applicant's need for medical treatment, defendant has steadfastly maintained, even in its Petition for Reconsideration, that it had a right to demand that applicant be reevaluated by the AMEs and that applicant was not entitled to care. In short, we find that defendant did not have a "good faith" belief, and in fact, defendant has failed to comply with its statutory and regulatory obligations to investigate and to offer medical treatment.

Unfortunately, we are constrained by the limits of section 5814(a), and so we find that defendant is liable for the maximum $10,000.00 penalty for its unreasonable delays and refusal to provide appropriate and reasonably necessary medical treatment. We admonish defendant that a bad-faith or frivolous delay in providing or a failure to provide medical treatment may result in a sanction for each bad-faith or frivolous act or failure to act (§ 5813; Cal. Code Regs., tit. 8, § 10561), and a defendant's

breach of its duties under Rule 10109 may result in audit penalties. (Cal. Code Regs., tit. 8, §§ 10111.1(c)(6) & (d)(1), 10111.2(b)(1) & (2); see *Romano v. The Kroger Co. dba Ralph's Grocery, Co.* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 215.)

Under section 5814.5, when an award of compensation is increased, "reasonable attorneys' fees incurred in enforcing the payment of compensation awarded" shall be awarded in addition to the increased award. In its Petition for Reconsideration, defendant contends that no award existed. This is incorrect. Here, awards of temporary disability and future medical treatment as to the "orthopedic aspects of the c.t. claim including hips, knees, and back" issued on May 10, 2010, so that the issue of section 5814.5 attorney's fees was properly before the WCJ. As discussed further below, the WCJ may also impose payment of reasonable attorney's fees and costs under section 5813.

V. Further Proceedings

It is constitutionally required that workers' compensation proceedings be expeditious. (Cal.Const., art. XIV, § 4.) Consequently, parties are expected to adjust issues among themselves, to stipulate to issues where possible, and to only submit issues for decision where a genuine dispute exists.

Section 5813 allows imposition of reasonable expenses, including attorney's fees and costs, and imposition of sanctions to be paid to the General Fund against a party, a party's attorney or both as a result of "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." WCAB Rule 10561(b) provides that: "Bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay include actions or tactics that result from a willful failure to comply with a statutory or regulatory obligation, that result from a willful intent to delay or disrupt the proceedings of the [Appeals Board], or that are done for an improper motive or are indisputably without merit." (Cal. Code Regs., tit. 8, § 10561(b).)

Subdivision (b) includes the following provisions as violations of section 5813: "(b)(2) Filing a pleading, petition or legal document unless there is some reasonable justification for filing the document.; (b)(4) Failing to comply with the [Appeals Board's Rules]. . .or with any award or order of the [Appeals Board]. . .; (b)(5) Executing a declaration or verification to any petition, pleading, or other document filed with the [Appeals Board]: (A) that: (i) contains false or substantially false statements of

fact; (ii) contains statements of fact that are substantially misleading; (iii) contains substantial misrepresentations of fact; (iv) contains statements of fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity; (v) contains statements of fact that are literally true, but are intentionally presented in a manner reasonably calculated to deceive; and/or (vi) conceals or substantially conceals material facts. . .; (b)(6) Bringing a claim, conducting a defense, or asserting a position: (A) that is: (i) indisputably without merit, (ii) done solely or primarily for the purpose of harassing or maliciously injuring any person, and/or (iii) done solely or primarily for the purpose of causing unnecessary delay or a needless increase in the cost of litigation; . . .; (b)(7) Presenting a claim or a defense, or raising an issue or argument, that is not warranted under existing law. . .; (b)(8) Asserting a position that misstates or substantially misstates the law. . ." (Cal. Code Regs., tit. 8, § 10561(b) (2), (4), (5), (6), (7), (8).)

In the new F&A, we have ordered the parties to adjust a number of deferred issues *expeditiously* and *in good faith*, with jurisdiction reserved to the WCJ, including the issue of the number of hours of services that were regularly performed in the same manner and to the same degree prior to the date of injury, if any; the issue of when defendant's liability for home health care services began; and the issue of applicant's claim for reimbursement of out-of-pocket self-procured medical treatment expenses. If either party fails to comply expeditiously and in good faith, we recommend that the WCJ consider and impose sanctions and payment of attorney's fees and costs. In the interim, defendant shall make payment as soon as possible on the medical treatment expenses for which it has liability or face further penalties. Defendant is reminded that it shall not delay payment unless it has a reasonable and genuine question as to liability or amount and it shall only refuse to pay that portion for which it has a reasonable and genuine belief that benefits are not owed. Finally, we admonish the parties to proceed forthwith expeditiously and in good faith to conclude the issues still outstanding from our October 13, 2011 decision.

Accordingly, as our decision after reconsideration, we rescind the F&A, substitute a new F&A, and return the matter to the WCJ for further proceedings.

We recommend that a status conference be set at the earliest opportunity to avoid further delay.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Supplemental Findings and Award, Order and Notice of Conference issued by a WCJ on June 28, 2013 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. MARGARITO GONZALEZ born on October 16, 1940 while employed during the period 1993 through March 15, 2005 as a trash bin repairman occupational group 460 at Chatsworth, California, by CONSOLIDATED DISPOSAL SERVICE permissibly self-insured sustained injury arising out of and occurring in the course of employment to his respiratory system, psyche, back, hips, and knees.

2. Exhibits Y2, 10, 14, 15, 16, 18, 19, 20, 21, 22, 26, 27, 28, and 31 are admitted into evidence. Exhibits 23, V, A1, B1, C1, D1 and B3 are not admitted into evidence.

3. Applicant will require further medical treatment to cure or relieve from the effects of the injury.

4. Applicant is in need of home health care services as reasonable and necessary medical treatment. Applicant is entitled to home health care services at a twenty four (4) hours per day, seven (7) days a week at the rate of $9.00 per hour, less hours for services that were regularly performed in the same manner and to the same degree prior to the date of injury, if any, pursuant to Labor Code section 5307.8, less applicant's attorney's fees pursuant to Labor Code section 5307.8.

The issue of the number of hours of services that were regularly performed in the same manner and to the same degree prior to the date of injury, if any, shall be adjusted between the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ.

5. Dr. Garcia's letter of March 29, 2010 (Exhibit J3, Jose M. Garcia, M.D., March 29, 2010) is a prescription under Labor Code section 4600(h). Defendant is liable for home health care services from at least fourteen (14) days prior to the date it received Dr. Garcia's March 29, 2010 prescription and continuing for an indefinite period of time.

The issue of when defendant's liability for home health care services began shall be adjusted between the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ.

6. Defendant is to pay the applicant the sum of $57.25 for the March 23, 2013 Fluconazole prescription (Exhibit 24) as a self-procured medical expense.

7. Applicant timely raised the issues of penalties, sanctions, costs, and interest.

8. On May 10, 2010, an order issued pursuant to the parties' stipulation. The parties stipulated that defendant would pay temporary disability indemnity. Defendant (by Cindy Sortino) did not make payment on the remaining $7,425.98 in retroactive temporary disability until December 22, 2011. (Exhibits, 17, L1.) Defendant unreasonably delayed payment of temporary disability indemnity and is liable for a penalty in the amount of $1,856.50 for the late payment of temporary disability.

10. Defendant unreasonably delayed medical treatment in the form of home health care services and is liable for the maximum penalty under Labor Code section 5814 in the amount of $10,000.00 for the delay.

11. Defendant failed to timely object under Labor Code section 4062(a) and is not entitled to an order compelling the applicant to return to the Agreed Medical Examiners to determine the need for home health care services.

12. The issue of applicant's claim for reimbursement of out-of-pocket self-procured medical treatment expenses is deferred and shall be adjusted between the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ.

AWARD

AWARD IS MADE in favor of MARGARITO GONZALEZ against CONSOLIDATED DISPOSAL SERVICE of:

a. Medical treatment in accordance with Findings 3, 4, 5, 6, and 12, including but not limited to $57.25 for self-procured medical expenses and home health care services twenty four (4) hours per day, seven (7) days a week at the rate of $9.00 per hour from at least fourteen (14) days prior to the date that defendant received Dr. Garcia's March 29, 2010 prescription and continuing for an indefinite period of time, less hours for services that were regularly performed in the same manner and to the same degree prior to the date of injury pursuant to Labor Code section 5307.8, less 15% attorney's fees on the net award of past home health care services payable to the Law Offices of Glazer & Blinder;

b. $1,856.50 for the late payment of temporary disability less 15% attorney's fees payable to the Law Offices of Glazer & Blinder; and

c. $10,000.00 for the late payment of medical treatment less 15% attorney's fees payable to the Law Offices of Glazer & Blinder.

ORDER

IT IS FURTHER ORDERED that the parties develop the record expeditiously and in good faith on the issues of medical mileage and parking, wheel chair and/or walker, Labor Code section 5814.5 attorney fees for the unreasonable delay in temporary disability and medical treatment, and costs for the expert witness Chris Ann Daniel. Jurisdiction of these issues is reserved to the WCJ. Jurisdiction to award sanctions and reasonable expenses under Labor Code section 5813 is reserved to the WCJ.

IT IS FURTHER ORDERED that defendant shall issue payment to Leocadia Cervantes and Alberto Gonzalez for home health care services previously provided, pursuant to Award, a, in an amount to be adjusted by the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ.

IT IS FURTHER ORDERED that the issue of the number of hours of services that were regularly performed in the same manner and to the same degree prior to the date of injury, if any, shall be adjusted between the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ. The issue of when defendant's liability for home health care services began shall be adjusted between the parties expeditiously and in good faith, with jurisdiction reserved to the WCJ. All other issues as to home health care services are deferred with jurisdiction reserved to the WCJ.

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

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

FRANK M. BRASS

PARTICIPATING, BUT NOT SIGNING

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 31 2014

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

MARGARITO GONZALEZ
LAW OFFICES OF GLAZER & BLINDER, ATTN: ROBERT D. BLINDER
FLOYD, SKEREN & KELLY, LLP, ATTN: PETER R. NELSON

AS/jp

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

CASE NUMBER: ADJ2721412

MARGARITO GONZALEZ **-vs.-** **CONSOLIDATED DISPOSAL SERVICE,**

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE: **Rodney Johnston**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

A Findings and Award issued on 01/28/2010 finding injury to the respiratory system, psyche, back, hips, and knees during the period 1993 through 03/15/2005. The award included further medical treatment. The applicant has a 20 WPI (before apportionment) to each hip due to hip replacements (Agreed Medical Examiner Dr. Richard Masserman's report dated 02/26/2008 at p. 13 (Exhibit Y, legacy file)). The applicant has a psyche GAF of 67 [5 Whole Person Impairment (WPI)] based on his depression (Agreed Medical Examiner Dr. Randolph Noble dated 05/12/2008 at p. 8 (Legacy file) (Exhibit X) The applicant has an 80 WPI disability to the respiratory system (also AME Dr. Noble dated 02/09/2011(Exhibit X3) and dated 05/05/2011 (Exhibit X4); formal rating instructions dated 06/14/2011; and the Findings and Award and the Opinion on Decision dated 08/04/2011). The Opinion and Decision After Reconsideration dated 10/31/2011 returned the case to the trial level on the issue of apportionment of the 80 WPI respiratory disability. The parties are still litigating this apportionment issue.

Petitioner is the defendant who filed a timely and verified petition. Applicant's attorney verified answer was filed on 07/30/2013.

The Supplemental Findings and Award, Order, and Notice of Conference dated 06/28/2013 found that there was a need for 24 hour per day home health care for an indefinite period of time beginning 01/20/2012 that was within the scope of the future medical treatment award, a valid lien for this treatment, a 25% penalty for the delay of paying temporary disability, 25% penalty for the delay in providing medical treatment for the home health care, and ordered the record to be developed on the issue of out of pocket expenses, sanctions, and attorney fees on the enforcement of the medical treatment award.

Defendant contends:

1. The finding of home health care is not supported by the facts or the law;
2. The need for the home health care was not caused by this injury;
3. The home health care was denied by utilization review;
4. There is no substantial evidence for the need for home health care;
5. The WCJ committed error in not returning the applicant to the Agreed Medical Examiners to determine the need for home health care;
6. Penalty on the medical treatment is inappropriate;
7. The lien for home attendant care is not compensable;
8. The applicant failed to meet his burden of proof at trial;
9. The applicant claim for self-procured medical treatment is not supported by substantial evidence;
10. Defendant seeks a ruling on their claim of sanctions against the applicant's attorney; and
11. The applicant's attorney billing exhibits should not have been admitted into evidence.

FACTS

The primary treating physician Dr. Jose Garcia's report dated 03/29/2010 (served by mail on 05/18/2010) requested home attendant care (Exhibit J3). This report was not on a "Primary Treating Physician's Progress Report" (PR-2 form). Dr. Garcia amended his 03/29/2010 report on 01/18/2012 by including a, "Doctor's Disclosure and Declaration" to be in compliance with Labor Code section 139.3 (Exhibit J4). Dr. Garcia's report (non PR-2) dated 02/12/2012 (served by mail on 02/14/2012) again requested home attendant care (Exhibit J5). Dr. Garcia report dated 10/30/2012 is a PR-2 report that requests home attendant care (Exhibit J6).

As noted in defendant's petition at 4:3, Barbara Greenfield R. N. testified for the defendant that the applicant required four hours a day of home health care. The cost of a LVN is $40.00 to $55.00 per hour (Minutes of Hearing and Summary of Evidence dated 02/13/2013 at 5:23) (4 x $40.00 = $160.00 to 4 x $55.00= $220.00 per day for the LVN portion). In addition, she testified that a registered nurse or a licensed vocational nurse would be required every two weeks and a registered nurse is needed on a monthly basis. (Minutes of Hearing and Summary of Evidence dated 01/08/2013 at 3:25-4:2). The applicant requires a shower chair with back, grab bar, a tub transfer bench, raised toilet seat, bedside commode, a tall stool with back, Sure Grip utensils, Dycem non-slip mat, and a light weight wheelchair (at 4:13-5:5). None of these devices have been authorized. At 5:3 she states, "The applicant requires a wheelchair for long distance ambulation. The applicant and his wife obtained a heavy and difficult-to-manage wheelchair at a garage sale or from a friend. She believes that wheelchair is inappropriate." At 8:18, "The applicant's weight in 2013 was 114 pounds, and this needs to be addressed. The applicant has needed the wheelchair/walker for the last eight

years. This is not a chronic pain situation." Defendant has not offered to provide any of this treatment.

Ms. Greenfield stated that she is not an expert in utilization review. In referencing defense Exhibit N3 the 11/08/2012 utilization review on portions of pages two and three that the diagnosis and surgery do not match. The applicant is not a chronic pain case. (Minutes of Hearing and Summary of Evidence dated 01/08/2013 at 9:17-9:21).

The applicant's registered nurse Chris Ann Daniel testified that the applicant requires attendant care of 22 hours of custodial care and two hours of skilled care (Minutes of Hearing and Summary of Evidence dated 09/05/2012 at 8:16-8:17). The applicant has issues of weakness, weight loss, malnutrition and deconditioning (at 10:11).

This WCJ did not consider the recommendations of the defense expert witness Kevin Daughtery to consider a lesser need than 24 hour care (defendant's petition at 7:17-7:22) to supply the applicant with a shower chair, raised toilet seat, and specialized eating utensils because these needed devices have not been provided to the applicant. The nurse testimony is that the applicant requires these devices; however, the defendant has not authorized these devices. If the defendant had authorized these devices, the primary treating physician may reconsider the applicant's level of care.

The applicant's wife testified that, "He presently weighs about 114 pounds. In 2004 up to the time of his illness in 2005, he weighed about 140 to 145 pounds."(Minutes of Hearing and Summary of Evidence dated 04/22/2009 at 4:9).

Defense Exhibit D1 was not admitted into evidence. Defendant contends that this exhibit should be admitted into evidence pursuant to Labor Code section 5703 (h). Defendant did not comply with this section by offering into evidence information regarding how the protocol was developed, and to what extent the protocol is evidenced-based, peer reviewed, and nationally

recognized. The first sentence of Exhibit D1 states, "Cryptococcosis is a global invasive mycosis associated with significant morbidity and mortality." The insert at the bottom right of the first page states, "It is important to realize that guidelines cannot always account for individual variation among patients. They are not intended to supplant physician judgment with respect to particular patients or special clinical situations. The infectious Diseases Society of America considers adherence to these guidelines to be voluntary, with the ultimate determination regarding their application to be made by the physician in the light of each patient's individual circumstances."

Defendant's petition at 15:1-15:17 regard the applicant's lifetime use of the medication Fluconazole in relation to the applicant's need for home attendant care. The Kaiser infectious disease specialist Dr. Jose Dryjanski stated in his 05/22/2012 deposition (Exhibit J11):

At 14:3, Yes. Most of the people in my field would never stop fluconazole on somebody like him, especially with all the other underlying issues that because he can reactivate very easy, and it will be fatal for him to get it again.

And the same applies to crypto. He had had a very severe form of cryptococcal disease, and the risk of reactivation is so high that it's not worth it. So even though he does not have HIV, his risk of reactivation and dissemination are so high with these two infections that he should be on fluconazole for life.

At 50:5, Like I said, I decided he needed to be on fluconazole because of the risk of reactivation of either or it will be fatal for the patient, so I cannot allow that to happen.

At 56:14, Well, I'm not going against the guidelines. The guidelines are there for us – you know, if people have questions or you don't know how to deal with the specific issue.

Again, I believe that, you know, Mr. Margarito Gonzalez has a severe pulmonary disease secondary to coinfection including crypto, and I'm not going to want him to reactivate because it would be fatal for him.

Question: So in terms if the guidelines suggested there's no need for lifelong use of fluconazole--

Answer: Like you said, the guidelines can suggest. But guidelines, again, are a document where we start from, but the patient doesn't read the guidelines. That's why they're guidelines; there can be variations. So again –

At 57:7, We have guidelines for almost every infection –how do you treat MRSA, crypto, this, that – so they are very good as a base document. For example, if you have infectious disease and you've never seen crypto, either you get on the phone and you talk to the expert or you go to the guidelines. So it's a base document, but it's not like the bible; it's not like the law that the guidelines should be followed like that.

The problem with guidelines is that, you know, they don't –what I said the art of medicine, and it's not just the science of medicine. So in my estimation, there are very good guidelines; and, yes, they say that if you have only pulmonary disease and you control it, you do not need to continue treatment because there is a low risk of reactivation.

But I think that Mr. Gonzales has a high risk of reactivation for all the reasons we said. Plus the guidelines for cocci, which are also for the IDSA, also say that if you have what I mentioned, he would need long-life treatment with…

At 59:12, I would agree that these guidelines are a baselines document; they are not the law; they are not the rules. And if you can see the guidelines have different strengths of recommendations, A, B, C.

Once again, that these guidelines says what you just said; but if my estimation, Mr. Margarito was at a very high risk of reactivation, and that's why --

At 63:2, So first of all, you have to read between the lines. When is says isolated pulmonary infection, what is the definition of isolated? Is it just one nodule? Is it multilobar? There is cavitation or no cavitation? So to say an isolated lung disease, that's not what Mr. Gonzalez had. He had multiple involvement of his lungs, bilateral lobar involvements. It was not just an isolated lung nodule.

Question: It was with both lungs?

Answer: Both lungs and several lobes, so it was multiple.

At 63:17, It was not an isolated pulmonary infection. It was a severe infection involving both right and left lung with cavitation.

At 64:14 Question: How does reactivation happen? Does the fungus grow in the lung? What's the concern as far as you know?

Answer: Let me explain it. Cryptococcus, like I mentioned has a capsule and it can hide – like I said it hides very well in two areas, the brain and in the prostate, and it can hide like, for example, in cavities in the lung, so it can be what I would call dormant. And these patients, we don't cure them, but we control the infection and we prevent complications.

So what happens is it can change your immune system such as getting a cold and stress or you get diabetes or other examples that can change your ability to fight an infection, then you cannot – then it flourishes gain, and it disseminates.

Question: So it flourishes. It's a fungus. It can grow in the body –

Answer: Exactly. And then it can go into the blood, the brain, et cetera. So if you have cocci or crypto, you can control it but you never cure it.

AME Dr. Noble stated in his 05/12/2008 report, "Mr. Weitzman [defense attorney] requests my opinion as regards the cryptococcal infection and Mr. Gonzalez' weight loss, fatigue, malnutrition and deconditioning. As stated previously, it is my opinion that Mr. Gonzalez malnutrition from anorexia is due to the chronic administration of Fluconazole which is an industrially required medication. (Exhibit X legacy file at p. 8, #29)

None of the AMEs, other doctors or the expert nurses describing the applicant as having a chronic pain condition.

Dr. Garcia's deposition dated 05/14/2012 stated that the applicant should walk a block or two with his walker (Exhibit J1 at 146:8). From 46:13-46:19, Answer: Well, he's walking with the assistance of the walker, so it's not his full power. Questions: So he was holding on to his four-wheel walker with you walking around your office when you would see him; is that generally what would occur? Answer: He would walk, but he looks like the wind would knock him over." This WCJ agrees with the last statement as the applicant is feeble looking.

Defendant's petition at 14:24-14:27 states, "The record is devoid of any indication that Dr. Garcia or Dr. Dryjiansky (sic) Dryjanski ever considered whether Gonzalez' progressive dementia, alone or in combination with his multiple other non-industrial conditions, with reasonable medical probability be entirely responsible for his home attendant care. The parties in taking PTP Dr. Garcia's two depositions consisting of 287 pages asked the doctor the causation of the applicant's weakness and need for home health care. The doctor responded that it was due to multiple causes. At 125:19, "Deconditioning, peripheral neuropathy, his age, depression. And we haven't talked about this at all, but I think both of his hip surgeries contributed as well."

Defendant's utilization reviews (UR) exhibits S1, T1, and N3 denial of treatment are based on a Chronic Pain Treatment Guidelines. Exhibit T1 notes on page two that:

"Letter of physician dated 02/02/12 states that the claimant suffered a major, life-threatening respiratory illness in 2005 due to cryptococcal pneumonia. The claimant has been taking the anti-fungal medication, fluconazole, since that time. To prevent re-infection, Dr. Dryjanski, the infectious disease specialist, continues to recommend life-long treatment with fluconazole. As a result of the severity of the illness, the claimant lost a great deal of weight, lost strength and lost stamina. In addition, the effects of fluconazole (dizziness, loss of appetite, weakness) have taken their toll on the claimant. Provider has recommended and continues to recommend 24-hour per day home attendant care services as outlined in the 3/29/10 report. The claimant needs these basic home services for food and hygiene and survival. The claimant is unable to care for oneself without the aid of family and would die if not provided assistance. The claimant is entirely dependent on family or the claimant would need to be placed in a long term facility. In summary, the claimant's current state of health stem from 2005 severe illness and the continued need to take fluconazole. The claimant's family is providing medically necessary services to keep the claimant clean, safe, and alive. The UR then completely ignores these facts and recites the denial based on chronic pain, but the applicant does not have chronic pain. These Guidelines are Regulation 9792.24.2 and is at http://www.dir.ca.gov/dwc/DWCPropRegs/MTUS_Regulations/MTUS_ChronicPainMedicalTreatmentGuidelines.pdf.

Dr. Garcia's 03/29/2010 report requesting home health care was served by mail on defendant on 05/18/2010. Defendant's Reply to Opposition to Petition to Compel Re-evaluation with Agreed Medical Examiners in Order to Resolve New Medical Issue is dated 12/09/2011 (Exhibit M3). This 12/09/2011 petition contends that the report is not substantial evidence and objects based on Labor

Code section 4628 (a) (2), 4628 (e), 5703 (a) (2) and Regulations 9785.2 and 9792.6 (o). For purposes of Labor Code section 4062, the defendant would have had the demand for home health care treatment by at least 12/09/2011 and most likely within five days after the report was served on 05/18/2010. The petition at 12:21 admits that their Labor Code section 4062 objection letter is dated 01/20/2012.

Both sides seek multiple sanctions against the other side. Defendant sought to cross-examine the applicant's attorney on the issue of his billing for a potential Labor Code section 5814.5 fee. Knowing that this cross-examination on the record could take the attorneys an extensive period of time and noting that the issue of the applicant's medical treatment determination was being delayed, the issue of the billing and sanctions was deferred until the 11/12/2013 conference. The defendant is to take the applicant's attorney deposition before the conference.

The lien of the applicant's wife Leocadia Cervantes and the applicant's son Alberto Gonzalez for home attendant care was allowed in part from 01/20/2012 to the present at $216.00 per day. The lien is dated 01/05/2011 and is exhibit G3. Defendant's objection is exhibit D3 dated 02/17/2011. The objection is based on the applicant's entitlement to 24 hour care; however, it does not object based on a failure to itemize a bill. The petition objected as an itemized bill was not provided pursuant to Regulation 10770 (b) (1) and Labor Code section 4603.2 (b) (1). The pre-trial conference statement was prepared at the 05/17/2012 mandatory settlement conference. The revised Regulation 10770 became effective subsequently on 05/21/2012. The issue of regulation 10770 (b) (1) was not raised when the issues were read into the record at the 07/18/2012 trial. Labor Code section 4603.2 (b) (1) as applicable to this case was not in effect at the time of the MSC. The section was amended by SB863.

The pre-trial conference statement did not list either Regulation 10770 (b) (1) or Labor Code section 4603.2 (b) (1). Defendant contends that it would be ludicrously complex to list all of these sections; however, defendant did list in the pre-trial conference statement Labor Code section 4610, 4062.3 (j), 4600, 4610, 5814, 5813,5811, 4554, 4555, 5814.5, 4903.2, and regulation 9792.6 (o). Also, defendant did not state on the pre-trial conference statement that the itemized bill was not attached. The wife testified in support of the lien is stated in the Minutes of Hearing and Summary of Evidence dated 04/22/2013 at 4:10-8:1 and at the 04/23/2013 trial at 5:4-5:21. The wife and son are available and provided the care required as stated by the PTP. Defendant's petition does not state what they consider to be a reasonable number of hours that the wife and son are available to attend to the applicant.

Defendant seeks a Labor Code section 5813 sanction against the applicant's attorney for proceeding to trial (petition at 21:23). The case proceeded to trial on multiple issues including penalty for the late payment of temporary disability. Defendant does not contest this penalty in the petition.

Defendant contends that the applicant's attorney did not list his billing as an exhibit in the pre-trial conference statement. This statement lists the applicant's proposed exhibits number 14 as the, "billing from the defense attorney from 8/08-3/11 on the issue of calculating reasonable AA fees;" however, no date is stated. The handwritten applicant's proposed exhibit after number 15 is, "AA billing." It appears that the defendant (in different handwriting) inserted that, "Defendant reserves its right to conduct discovery regarding AA billing." Defendant did not state that the applicant's attorney had not served his billing when the issues were read into the record at the 07/18/2012 trial. Applicant's billing which is exhibits 10, 18, and 31 were admitted into evidence. This issue is being raised for the first time on reconsideration,

DISCUSSION

The applicant is substantially disabled. He requires medication to keep him alive. A side effect of this medication is malnutrition and weakness. The applicant has an 80 WPI to his respiratory system and requires a four prong walker and at times a wheelchair. Both the applicant's and the defense nurses testified that the applicant requires home health care. The primary treating physician Dr. Jose Garcia has recommended home health care. The difficulty in this case has not been the substantial medical evidence of the need for the home health care, but rather determining when the defendant was officially put on notice for the home health care regarding Labor Code section 4602.

An applicant may challenge utilization review (UR) by Labor Code section 4062 route or by proceeding pursuant to Labor Code section 5502 (d). An applicant may file for an expedited trial or for an MSC and then trial. In this case, the applicant chose the latter approach. The applicant's attorney filed the Declaration of Readiness to Proceed on the medical treatment issue.

Regulation 9792.6 (o) is within Article 5.5.1 Utilization Review Standards. Requests for medical treatment are standardize so that the claims examiner may timely respond by performing UR. In this case the issue is not the timeliness of a Labor Code section 4610 utilization review.

Defendant had the burden of proof at trial that the utilization review (UR) was conducted properly. Defendant failed to provide all reasonable and necessary medical information to the UR physician and therefore the UR procedure was not properly conducted. Defendant did not meet its burden of proof. Defendant did not submit sufficient medical documentation to UR so that the UR doctor could attempt to comprehend the applicant's medical condition. It is noted that the new neuro AME Dr. David Scharf stated in his 12/03/2012 report that he spent 19.25 hours reviewing this file (Exhibit XXX at p.76). (See *Corona v. Los Aptos Christian Fellowship Childcare* (2012) 2012 Cal.

Wrk. Comp. P.D. Lexis 459, ADJ380850 and *Becerra v. Jack's Bindery, Inc.* (2012) 2012 Cal. Wrk. Comp. P.D. Lexis 451). Defendant's URs are dated 01/30/2012 (Exhibit S1), 03/16/2012 (Exhibit T1), and 11/08/2012 (Exhibit N3) the rationale for determination of the denial of the applicant's request for 24 hour home attendant care is based on a Chronic Pain Medical Treatment Guideline. None of the AMEs, other doctors or the expert nurses describing the applicant as having a chronic pain condition. A utilization review must be based on the applicant's actual medical condition. A UR doctor cannot ignore the applicant's actual medical condition and choose a denial based on a guideline that is irrelevant.

Defendant contends that the need for home health care was not caused by the industrial injury. It is the defendant's duty to object to the treating physician's causation determination and to initiate the AME/QME procedure under section 4062(a). If a defendant believes at the time a treating physician prescribes treatment that there is or may be an issue whether the proposed treatment for an admitted body part is causally related to the industrial injury, the defendant may elect to bypass utilization review and, instead timely initiate the AME/QME procedures of section 4062(a). Dr. Garcia's 03/29/2010 report was served by mail on defendant on 05/18/2010. Defendant had 20 + 5 days to object to this report pursuant to section 4062 (a). Even if this date was extended to 12/19/2011, it would still be late. Once defendant failed to timely object to this report they cannot invoke section 4062.3 (j) to return the applicant to AME Dr. Noble for a re-examination on the claimed new medical determination. Defendant did not timely object.

Labor Code section 4600 requires more than a passive willingness on the part of the employer to respond to a demand of request for a medical aid. This section requires some degree of active effort to bring to the injured employee necessary relief. *Braewood Convalescent Hosp. vs. WCAB (Bolton)* 1983) 34 Cal.4th 159, 48 CCC 567, 569

As explained in *Aliano vs. WCAB* (1979) 100 Cal. App.3d 341, 44 CCC 1156, after noting that an employer has a "duty to adequately and fairly investigate [an applicant's] claim," added "an employer has both the right and duty to investigate the facts in order to determine his liability...but he must act with expedition in order to comply with the statutory provisions...which require that he take the initiative in providing benefits.

When the payment of furnishing of any compensation benefit has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the applicant is entitled to seek increased compensation under the statute. The only satisfactory excuse for a delay in, or failure to make payment of, a benefit is that there exists genuine doubt from a medical or legal standpoint as to the defendant's liability for the same (Labor Code section 5814; *Kerley v. Workers Comp. Appeals Bd.* (1971) 4 Cal.3d 273, [36 Cal.Comp. Cases 152].)

Section 5814 was enacted as an inducement to prompt payment on the part of private employers and their insurers, which would otherwise have an economic incentive to delay or deny the payment of workers' compensation benefits." The Section 5814 penalty "is designed to help an employee obtain promptly the cure or relief he is entitled to under the law, and to compel his employer to provide this cure or relief in a timely fashion." (*Adams v. Workers' Comp. Appeals Bd.* (1976) 18 Cal.3d 226, 229, [41 Cal.Comp. Cases 680, 682].)

As explained by the appeals board in *Ramirez v. Drive Financial Services* (2008) 73 Cal. Comp. Cases 1324 (board en banc), "the overriding consideration in determining what penalty amount to assess should be whether the penalty imposed would serve 'the purposes sought to be accomplished' by section 5814. [citation omitted.] The purpose of section 5814 are both remedial and penal. [citation omitted.] Each of these purposes is 'equally important." [citation omitted.] As further explained in *Ramirez, supra*, at page 1329, "As stated by the Supreme Court, section 5814

penalty is designed to help an employee obtain promptly the cure or relief he is entitled to under the law, and to compel his employer to provide this cure or relief in timely fashion. [citations omitted.]" The appeals board enumerated various factors to be considered in determining the appropriate amount of a section 5814(a) penalty, including among other things, the amount of the payment delayed, whether it as inadvertent and promptly corrected, whether there is a history of delayed payments or instead whether the delay was a solitary instance of human error, whether the employee contributed to the delay.

Defendant's late attempt at objecting to Dr. Garcia's home health care pursuant to Labor Code section 4062 and inadequate utilization review required the provision of home health care in this case. Defendant's abdication of its affirmative responsibilities is a far cry from "genuine doubt." *Kereley, supra."* A 25% penalty up to $10,000.00 for the late payment of the home health care medical treatment is appropriate.

Applicant's Exhibits 10, 18, and 31 are the applicant's billing on the penalty issue. The billing for the enforcement of the medical treatment award per Labor Code section 5814.5 continued through the trial. The billing did not stop once the pre-trial conference statement was prepared at the mandatory settlement conference. The admission of this billing is only the applicant's attorney contention of his billing and does not yet prove the amount that should be billed. Defendant did not timely contend that the applicant's attorney had not served them with his Labor Code section 5814.5 billing.

RECOMMENDATION

IT IS RECOMMENDED that the petition for reconsideration be granted in part. The Findings and award should be amended that the unreasonable delay in providing medical treatment

is capped at $10,000.00 per Labor Code section 5814. In addition, the home health care is capped per Labor Code section 4600 (f) and 5703.8 and Welfare and Institution Code section 12300 for the year 2013.

DATE: 07/31/2013

Rodney Johnston
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 ***July 31, 2013*** I deposited in the United States mail at 732 Corporate Center Drive, Pomona, CA 91768, a sealed envelope containing a copy of ***REPORT AND RECOMMENDATON ON PETITION FOR RECONSIDERATION*** with postage fully paid, addressed to the parties listed below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

By: Laura G. Freedman

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