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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DELMY PACAS,

Applicant,

vs.

**THE MAILING HOUSE; STATE
COMPENSATION INSURANCE FUND,**

Defendants.

Case No. ADJ258484 (LAO 0813327)

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant sought reconsideration of the Findings of Fact, Award and Order issued by a workers' compensation administrative law judge (WCJ) on July 29, 2016. In that decision, the WCJ found that applicant needs home health care 24 hours a day, seven days a week and that the deposition testimony of the agreed medical evaluator (AME), Lawrence Richman, M.D., was a prescription for home health care. The WCJ also found that there was a denial of care and that defendant is liable for home health care commencing April 18, 2016 and continuing. The WCJ ordered that the notice of taking deposition of the AME for the second time be quashed. Previously, on May 17, 2011, Judge Watkins found, based on the parties' stipulations, that applicant, while employed as a mailroom clerk from July 26, 2001 through July 26, 2002, sustained industrial injury to her neck, back, upper extremities, shoulders, wrists, psyche and internal, causing 100% permanent disability, and a need for further medical treatment. The 2011 stipulated Award deferred the issue of home health care to the agreed medical examiner (AME).

Defendant contended that the opinion of the AME, expressed at his deposition, does not meet the requirements of a prescription pursuant to Labor Code¹ section 4600(h). Defendant also contended that

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

1 the AME's opinion does not constitute substantial evidence, and that he could not prescribe home health
2 care because it is medical treatment and he is not a treating physician. Defendant further contended that it
3 was denied due process when the WCJ quashed its deposition notice of the AME, arguing that the parties
4 agreed to a further deposition.

5 Applicant filed an answer. We received a Report and Recommendation on Petition for
6 Reconsideration (Report) from the WCJ in response to defendant's Petition for Reconsideration, which
7 recommended that the petition be denied.

8 We have reviewed the record and have considered the allegations of the Petition for
9 Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record,
10 for the reasons discussed below, and for the reasons stated in the Report, we will affirm the July 29, 2016
11 decision.

12 I.

13 On May 17, 2011, applicant's claim for industrial injury to her neck, back, upper extremities,
14 shoulders, wrists, psyche and internal, while employed as a mailroom clerk from July 26, 2001 through
15 July 26, 2002, was resolved by Stipulated Award. In that Award, the parties stipulated that applicant's
16 injury caused 100% permanent disability, and a need for further medical treatment. The parties also
17 stipulated that the issues of home health care and transportation would be deferred to the AME.
18 (Applicant's Ex. 1.)

19 Applicant's counsel set the deposition of Dr. Richman for April 18, 2016, and served notice.
20 (Applicant's Ex. 3.) On the day of the deposition, defense counsel was unable to attend and so advised
21 applicant's counsel by telephone. He gave permission for the deposition to proceed in his absence.

22 Applicant's attorney stated on the record as follows:

23 Let the record reflect that it is 3:27, and I just received a call from defense
24 counsel, Mr. Joseph Csapo, C-s-a-p-o, who advises me that he will not be able to attend
25 today's deposition, and that he has given me express permission to proceed with the
deposition in his absence.

26 His request is that at the conclusion of the proceedings, he be provided with a
27 certified copy, so Madam Court Reporter, please make sure that happens in case I
forget. (Applicant's Ex. 3, 5: 13-22.)

1 In the deposition, Dr. Richman testified that he concurred with Dr. Berman that applicant is 100%
2 disabled and unable to compete in the open labor market. He stated that as of February 27, 2013,
3 applicant required ongoing home health care and transportation. (*Id.*, 14: 1-6.) Dr. Richman opined that,
4 based on his last evaluation of applicant on April 14, 2015, and his review of medical records, applicant
5 continued to require home health care. (*Id.*, 10: 4-7, 8-12.) He stated that, "she reported difficulty with
6 almost every aspect of her activities of daily living, everything from being able to perform self-hygiene,
7 including brushing her teeth, combing her hair, bathing, dressing herself, eating, swallowing, gripping,
8 grasping, lifting, riding, driving, seeing, tasting, standing, sitting, reclining, walking, et cetera, . . ." (*Id.*,
9 7: 11-17.) Dr. Richman concluded applicant requires an LVN from 8:00 a.m. to 10:00 p.m. for
10 medication management, and a CNA after that. Dr. Richman found that applicant's condition is
11 progressive and will worsen over time necessitating a higher level of care. (*Id.*, 20: 19-25.)

12 At the conclusion of the deposition, Dr. Richman waived signature. Applicant's attorney stated:
13 "Madam Court Reporter, you're relieved of your duties under the Code once you send a copy of the
14 transcript to Mr. Csapo, a condensed copy to Dr. Richman for his file in the event State Compensation
15 Insurance Fund decides to appear at some time in the future, for his reference . . ." (*Id.*, 22: 24-25, 23:
16 1-4.)

17 After completion of the deposition, the court reporter forwarded a copy of the transcript to the
18 attorneys for applicant and defendant.

19 Applicant's counsel wrote to defendant on April 27, 2016, including with the correspondence a
20 copy of the deposition transcript and a demand for the provision of home health care based on
21 Dr. Richman's deposition testimony. (Applicant's Ex. 2, 3.)

22 On June 10, 2016, defendant's counsel scheduled a deposition of the AME for August 29, 2016.
23 (Defendant's Ex. A.)

24 On June 20, 2016, applicant's counsel filed a Declaration of Readiness to Proceed to an expedited
25 hearing.

26 On July 18, 2016, the matter proceeded to an expedited hearing on the issue of home health care.
27 Applicant made a motion to quash the June 10, 2016 notice of taking deposition of the AME. Stipulations

1 were read into the record, including the following: "Pursuant to the Stipulated Findings and Award, home
2 health care was deferred to the Agreed Medical Examiner." (Stipulation 3.) The issues were framed as
3 follows:

- 4 1. Is there a need for prospective home health care? And, if so, the basis for same.
- 5 2. If awarded, what are the appropriate days per week and hours per day required
6 for home health care?
- 7 3. Was there a denial of care?.
- 8 4. Was there a prescription for home health care?

9 Applicant offered documentary evidence, including the May 17, 2011 Stipulated Findings and
10 Award (Applicant's Ex. 1), correspondence from applicant's counsel to defendant's counsel dated
11 April 27, 2016 (Applicant's Ex. 2), the April 18, 2016 deposition of Dr. Richman (Applicant's Ex. 3),
12 Dr. Richman's AME reports, dated 4/14/15 (Applicant's Ex. 4) and 1/15/09 (Applicant's Ex. 5), Dr. Ali
13 Sabbaghi reports (Applicant's Ex. 6, 7), and a Dr. Gil Tepper report (Applicant's Ex. 8).

14 Defendant submitted the August 29, 2016 Notice of Deposition for Dr. Richman (Defendant's
15 Ex. A), and the June 20, 2016 Declaration of Readiness to Proceed.

16 The record reflected that applicant's Motion to Quash the deposition of Dr. Richman scheduled
17 for August 29, 2016 was taken under advisement by the court with a determination to be made at a later
18 date.

19 On July 29, 2016, the WCJ issued the disputed Findings of Fact, Award and Order. Defendant
20 sought reconsideration.

21 II.

22 A. The AME's Deposition Testimony Constitutes an Oral Prescription for Home 23 Health Care.

24 With respect to the issue of a prescription under section 4600(h), in our en banc decision, *Neri*
25 *Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682,
26 691 (Appeals Board en banc) (*Neri Hernandez*), we discussed the requirement in section 4600(h) that
27 home health care services must be prescribed by a "physician" licensed pursuant to Business and

1 Professions Code *section 2000 et seq.* We concluded that for “the purposes of home health care services,
2 the prescription must be by a practitioner who is licensed by the Medical Board or Osteopathic Medical
3 Board.” (*Id.*, p. 692.)

4 The specific prescription requirements for home health care are set forth in sections 4600(h),
5 4603.2(b)(1), and 5307.8, and our decision in *Neri Hernandez*, wherein we summarized the impact of
6 section 4600(h):

7 Section 4600(h) makes clear that home health care services are included in
8 the definition of “medical treatment,” but it also limits an employer’s duty
9 to provide that treatment by imposing two additional conditions which are
10 part of an injured worker’s burden of proof. The first condition requires that
11 home health care services be prescribed by a physician, and an employer
12 may become liable for home health care services provided 14 days prior to
13 receipt of a prescription. The second condition requires that an employer’s
14 liability for home health care services is subject to either section 5307.1 or
15 section 5307.8. . . . When the type of services sought is not covered by an
16 official medical fee schedule or Medicare schedule, section 5307.8 applies.
17 (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at pp. 688–689.)

18 In *Neri Hernandez*, we stated:

19 When seeking home health care services, an injured worker must show
20 that a prescription, as defined above, exists. This prescription requirement
21 is a limit on the employer’s duty to provide medical treatment. Separately,
22 an injured worker must prove that the prescription was received by the
23 employer and the date on which it was received. This receipt requirement
24 narrows an employer’s duty to pay for medical treatment because an
25 employer’s liability is limited to 14 days before the date that the
26 prescription was received. Liability is not based on the date that the need
27 for services may have begun. (*Id.* at pp. 692-693.)

Because the clock begins to run 14 days before receipt, the limit is akin to a statute of limitations
or other filing deadline, and an injured worker must show the date of receipt in order to prove when the
liability period began. Once an injured worker can demonstrate receipt of a prescription, he or she has
met that burden for the purposes of section 4600(h).

In *Neri Hernandez*, we held that:

[T]he 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

1 agent; or, a signed and dated written referral, recommendation or order by
2 a physician for home health care services for an injured worker.

3 ***

4 [A]n oral or written communication which meets the minimum
5 requirements is sufficient to meet the condition in section 4600(h) that
6 home health care services be prescribed. (*Id.* at p. 693.)

7 As set forth in *Neri Hernandez*, the definition of a physician in section 4600(h) includes a
8 licensed physician. (*Id.* at pp. 692.) Dr. Richman is a licensed physician. His April 18, 2016 deposition
9 testimony is an “oral referral, recommendation or order for home health care services for an injured
10 worker” as set forth in section 4600(h). It is the testimony itself that constitutes the oral prescription. The
11 lack of a signature on the transcript is irrelevant to the oral prescription.

12 Additionally, the “injured worker must prove that the prescription was received by the employer
13 and the date on which it was received.” (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at pp. 692-693.)
14 Applicant established that defendant received the deposition transcript by a certified letter from
15 applicant’s counsel dated April 27, 2016, and, in its Petition, defendant admits it received the transcript
16 on May 2, 2016. (Petition for Reconsideration, 2: 15.) Thus, the need for home health care was
17 “communicated directly by a physician to an employer and/or its agent” as required by section 4600(h).
18 (See, *Banuelos v. Nupla Corp.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 485.) We conclude that
19 Dr. Richman’s April 27, 2016 deposition testimony fulfills the requirements of a prescription within the
20 meaning of section 4600(h).

21 B. The AME May Comment on Further Medical Treatment Including Home Health Care

22 Section 5702 provides in pertinent part, “The parties to a controversy may stipulate the facts
23 relative thereto in writing and file such stipulation with the appeals board. The appeals board may
24 thereupon make its findings and award based upon such stipulation. . . .” WCAB Rule 10496 (Cal. Code
25 Regs., tit. 8, § 10496), provides, “Awards and orders may be based upon stipulations of parties in open
26 court or upon stipulations signed by the parties.” Here, as noted above, the parties stipulated to defer
27 home health care to the AME.

1 Once a stipulation has been accepted and a decision based on it, the Workers' Compensation
2 Appeals Board (WCAB) must determine if good cause exists before setting the stipulation aside.
3 (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65
4 Cal.Comp.Cases 1].) In *Weatherall*, the Court of Appeals reversed the WCAB action setting aside a
5 stipulation because it was not based on evidence, and held that a stipulation could not be set aside absent
6 good cause. Petitioner has made no showing of good cause as to why it should be relieved of its
7 stipulation. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases
8 798].)

9 Defendant's assertion that SB 863 "trumps the stipulation" deferring home health care to the
10 AME is incorrect. SB 863 expressly provides that it "shall not be a basis to rescind, alter, amend, or
11 reopen any final Award of Workers' Compensation benefits." (SB 863, Stats. 2012 Ch. 363 § 84.) The
12 May 17, 2011 stipulated Award is a final order, and defendant remains bound by its stipulation deferring
13 home health care to the AME.

14 C. The AME's Opinion With Respect to Home Health Care Constitutes Substantial Medical
15 Evidence

16 As the parties are bound by their stipulation to defer the issue of home health care to the AME,
17 there was no need for an RFA from the treating doctor to raise the issue. Dr. Richman's April 18, 2016
18 testimony regarding home health care addressed the issue of further medical treatment and clearly
19 outlined the basis for the need for this care because of applicant's industrial injury.

20 In the WCJ's Report, he writes that he gave great weight to the opinion of the AME. (*Williams v.*
21 *Montgomery Elevator*, 2016 Cal. Work Comp. P.D. LEXIS 362.) The opinions of an AME are entitled to
22 substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or
23 are otherwise unpersuasive in light of the entire record. (See, *Powers v. Workers' Comp. Appeals Bd.*
24 (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995)
25 60 Cal.Comp.Cases 150 (writ den.).)

26 In this matter, Dr. Richman detailed the basis for his medical opinions, including his April 4,
27 2015 evaluation of applicant and his review of the medical records. He was consistent in his opinion that

1 applicant is 100% disabled, unable to compete in the open labor market, and requires home health care.
2 He also found that applicant's condition is progressive, will deteriorate over time, and will necessitate a
3 higher level of care. Therefore, we find that the WCJ's reliance on the AME's opinion is justified.

4 D. Defendant Has Not Been Denied Due Process.

5 On April 18 2016, at the properly noticed deposition of the AME, defendant's counsel did not
6 appear. Applicant's attorney made a record that defendant's counsel gave express permission for
7 applicant's counsel to proceed with the deposition and that he requested a certified copy of the deposition
8 transcript. In its verified Petition, defendant states that it received the deposition transcript on May 2,
9 2016. (Petition for Reconsideration, 4: 17-20.) Defendant's counsel did not make any objection to the
10 facts as set forth in the record by applicant's counsel, nor does the record reflect any confirming letter
11 sent regarding the alleged agreement for another deposition date. Thus, there is no timely record of any
12 agreement between defendant's and applicant's counsels to set a second session of the AME's
13 deposition. Moreover, in applicant's verified Answer, applicant's counsel states that there was no
14 agreement for a second deposition. (Answer, 4: 4-7.)

15 Here, Dr. Richman has not issued any supplemental reporting after his deposition, and good cause
16 has not been established for additional cross-examination after his deposition was completed. On this
17 record, we agree with the WCJ that defendant's due process rights have not been violated. If applicant's
18 medical condition changes in the future, either party may bring a motion to initiate discovery.

19 Accordingly, we affirm the July 29, 2016 Findings of Fact, Award and Order.

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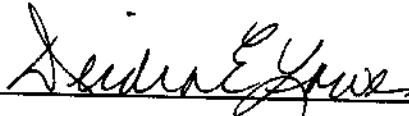
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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings of Fact, Award and Order issued by the WCJ on July 29, 2016 is **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 DEIDRA E. LOWE

9 I CONCUR,

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11 
12 _____
13 **MARGUERITE SWEENEY**

14 CONCURRING, BUT NOT SIGNING

15 _____
16 **FRANK M. BRASS**



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

19 **JAN 1 2 2018**

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

23 **DELMY PACAS**
24 **GRAIWER & KAPLAN**
25 **STATE COMPENSATION INSURANCE FUND**



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27 **MG/abs**

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WORKERS' COMPENSATION APPEALS BOARD

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**THE MAILING HOUSE; STATE
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**OPINION AND DECISION
AFTER
RECONSIDERATION**

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant sought reconsideration of the Findings of Fact, Award and Order issued by a workers' compensation administrative law judge (WCJ) on July 29, 2016. In that decision, the WCJ found that applicant needs home health care 24 hours a day, seven days a week and that the deposition testimony of the agreed medical evaluator (AME), Lawrence Richman, M.D., was a prescription for home health care. The WCJ also found that there was a denial of care and that defendant is liable for home health care commencing April 18, 2016 and continuing. The WCJ ordered that the notice of taking deposition of the AME for the second time be quashed. Previously, on May 17, 2011, Judge Watkins found, based on the parties' stipulations, that applicant, while employed as a mailroom clerk from July 26, 2001 through July 26, 2002, sustained industrial injury to her neck, back, upper extremities, shoulders, wrists, psyche and internal, causing 100% permanent disability, and a need for further medical treatment. The 2011 stipulated Award deferred the issue of home health care to the agreed medical examiner (AME).

Defendant contended that the opinion of the AME, expressed at his deposition, does not meet the requirements of a prescription pursuant to Labor Code¹ section 4600(h). Defendant also contended that

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

1 the AME's opinion does not constitute substantial evidence, and that he could not prescribe home health
2 care because it is medical treatment and he is not a treating physician. Defendant further contended that it
3 was denied due process when the WCJ quashed its deposition notice of the AME, arguing that the parties
4 agreed to a further deposition.

5 Applicant filed an answer. We received a Report and Recommendation on Petition for
6 Reconsideration (Report) from the WCJ in response to defendant's Petition for Reconsideration, which
7 recommended that the petition be denied.

8 We have reviewed the record and have considered the allegations of the Petition for
9 Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record,
10 for the reasons discussed below, and for the reasons stated in the Report, we will affirm the July 29, 2016
11 decision.

12 I.

13 On May 17, 2011, applicant's claim for industrial injury to her neck, back, upper extremities,
14 shoulders, wrists, psyche and internal, while employed as a mailroom clerk from July 26, 2001 through
15 July 26, 2002, was resolved by Stipulated Award. In that Award, the parties stipulated that applicant's
16 injury caused 100% permanent disability, and a need for further medical treatment. The parties also
17 stipulated that the issues of home health care and transportation would be deferred to the AME.
18 (Applicant's Ex. 1.)

19 Applicant's counsel set the deposition of Dr. Richman for April 18, 2016, and served notice.
20 (Applicant's Ex. 3.) On the day of the deposition, defense counsel was unable to attend and so advised
21 applicant's counsel by telephone. He gave permission for the deposition to proceed in his absence.

22 Applicant's attorney stated on the record as follows:

23 Let the record reflect that it is 3:27, and I just received a call from defense
24 counsel, Mr. Joseph Csapo, C-s-a-p-o, who advises me that he will not be able to attend
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26 His request is that at the conclusion of the proceedings, he be provided with a
27 certified copy, so Madam Court Reporter, please make sure that happens in case I
forget. (Applicant's Ex. 3, 5: 13-22.)

1 In the deposition, Dr. Richman testified that he concurred with Dr. Berman that applicant is 100%
2 disabled and unable to compete in the open labor market. He stated that as of February 27, 2013,
3 applicant required ongoing home health care and transportation. (*Id.*, 14: 1-6.) Dr. Richman opined that,
4 based on his last evaluation of applicant on April 14, 2015, and his review of medical records, applicant
5 continued to require home health care. (*Id.*, 10: 4-7, 8-12.) He stated that, "she reported difficulty with
6 almost every aspect of her activities of daily living, everything from being able to perform self-hygiene,
7 including brushing her teeth, combing her hair, bathing, dressing herself, eating, swallowing, gripping,
8 grasping, lifting, riding, driving, seeing, tasting, standing, sitting, reclining, walking, et cetera, . . ." (*Id.*,
9 7: 11-17.) Dr. Richman concluded applicant requires an LVN from 8:00 a.m. to 10:00 p.m. for
10 medication management, and a CNA after that. Dr. Richman found that applicant's condition is
11 progressive and will worsen over time necessitating a higher level of care. (*Id.*, 20: 19-25.)

12 At the conclusion of the deposition, Dr. Richman waived signature. Applicant's attorney stated:
13 "Madam Court Reporter, you're relieved of your duties under the Code once you send a copy of the
14 transcript to Mr. Csapo, a condensed copy to Dr. Richman for his file in the event State Compensation
15 Insurance Fund decides to appear at some time in the future, for his reference . . ." (*Id.*, 22: 24-25, 23:
16 1-4.)

17 After completion of the deposition, the court reporter forwarded a copy of the transcript to the
18 attorneys for applicant and defendant.

19 Applicant's counsel wrote to defendant on April 27, 2016, including with the correspondence a
20 copy of the deposition transcript and a demand for the provision of home health care based on
21 Dr. Richman's deposition testimony. (Applicant's Ex. 2, 3.)

22 On June 10, 2016, defendant's counsel scheduled a deposition of the AME for August 29, 2016.
23 (Defendant's Ex. A.)

24 On June 20, 2016, applicant's counsel filed a Declaration of Readiness to Proceed to an expedited
25 hearing.

26 On July 18, 2016, the matter proceeded to an expedited hearing on the issue of home health care.
27 Applicant made a motion to quash the June 10, 2016 notice of taking deposition of the AME. Stipulations

1 were read into the record, including the following: "Pursuant to the Stipulated Findings and Award, home
2 health care was deferred to the Agreed Medical Examiner." (Stipulation 3.) The issues were framed as
3 follows:

- 4 1. Is there a need for prospective home health care? And, if so, the basis for same.
- 5 2. If awarded, what are the appropriate days per week and hours per day required
6 for home health care?
- 7 3. Was there a denial of care?.
- 8 4. Was there a prescription for home health care?

9 Applicant offered documentary evidence, including the May 17, 2011 Stipulated Findings and
10 Award (Applicant's Ex. 1), correspondence from applicant's counsel to defendant's counsel dated
11 April 27, 2016 (Applicant's Ex. 2), the April 18, 2016 deposition of Dr. Richman (Applicant's Ex. 3),
12 Dr. Richman's AME reports, dated 4/14/15 (Applicant's Ex. 4) and 1/15/09 (Applicant's Ex. 5), Dr. Ali
13 Sabbaghi reports (Applicant's Ex. 6, 7), and a Dr. Gil Tepper report (Applicant's Ex. 8).

14 Defendant submitted the August 29, 2016 Notice of Deposition for Dr. Richman (Defendant's
15 Ex. A), and the June 20, 2016 Declaration of Readiness to Proceed.

16 The record reflected that applicant's Motion to Quash the deposition of Dr. Richman scheduled
17 for August 29, 2016 was taken under advisement by the court with a determination to be made at a later
18 date.

19 On July 29, 2016, the WCJ issued the disputed Findings of Fact, Award and Order. Defendant
20 sought reconsideration.

21 II.

22 A. The AME's Deposition Testimony Constitutes an Oral Prescription for Home 23 Health Care.

24 With respect to the issue of a prescription under section 4600(h), in our en banc decision, *Neri*
25 *Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682,
26 691 (Appeals Board en banc) (*Neri Hernandez*), we discussed the requirement in section 4600(h) that
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1 Professions Code *section 2000 et seq.* We concluded that for “the purposes of home health care services,
2 the prescription must be by a practitioner who is licensed by the Medical Board or Osteopathic Medical
3 Board.” (*Id.*, p. 692.)

4 The specific prescription requirements for home health care are set forth in sections 4600(h),
5 4603.2(b)(1), and 5307.8, and our decision in *Neri Hernandez*, wherein we summarized the impact of
6 section 4600(h):

7 Section 4600(h) makes clear that home health care services are included in
8 the definition of “medical treatment,” but it also limits an employer's duty
9 to provide that treatment by imposing two additional conditions which are
10 part of an injured worker's burden of proof. The first condition requires that
11 home health care services be prescribed by a physician, and an employer
12 may become liable for home health care services provided 14 days prior to
13 receipt of a prescription. The second condition requires that an employer's
14 liability for home health care services is subject to either section 5307.1 or
15 section 5307.8. . . . When the type of services sought is not covered by an
16 official medical fee schedule or Medicare schedule, section 5307.8 applies.
17 (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at pp. 688–689.)

18 In *Neri Hernandez*, we stated:

19 When seeking home health care services, an injured worker must show
20 that a prescription, as defined above, exists. This prescription requirement
21 is a limit on the employer's duty to provide medical treatment. Separately,
22 an injured worker must prove that the prescription was received by the
23 employer and the date on which it was received. This receipt requirement
24 narrows an employer's duty to pay for medical treatment because an
25 employer's liability is limited to 14 days before the date that the
26 prescription was received. Liability is not based on the date that the need
27 for services may have begun. (*Id.* at pp. 692-693.)

Because the clock begins to run 14 days before receipt, the limit is akin to a statute of limitations
or other filing deadline, and an injured worker must show the date of receipt in order to prove when the
liability period began. Once an injured worker can demonstrate receipt of a prescription, he or she has
met that burden for the purposes of section 4600(h).

In *Neri Hernandez*, we held that:

[T]he prescription required by section 4600(h) is either an oral referral,
recommendation or order for home health care services for an injured
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1 agent; or, a signed and dated written referral, recommendation or order by
2 a physician for home health care services for an injured worker.

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4 [A]n oral or written communication which meets the minimum
5 requirements is sufficient to meet the condition in section 4600(h) that
6 home health care services be prescribed. (*Id.* at p. 693.)

7 As set forth in *Neri Hernandez*, the definition of a physician in section 4600(h) includes a
8 licensed physician. (*Id.* at pp. 692.) Dr. Richman is a licensed physician. His April 18, 2016 deposition
9 testimony is an “oral referral, recommendation or order for home health care services for an injured
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11 lack of a signature on the transcript is irrelevant to the oral prescription.

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13 and the date on which it was received.” (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at pp. 692-693.)
14 Applicant established that defendant received the deposition transcript by a certified letter from
15 applicant’s counsel dated April 27, 2016, and, in its Petition, defendant admits it received the transcript
16 on May 2, 2016. (Petition for Reconsideration, 2: 15.) Thus, the need for home health care was
17 “communicated directly by a physician to an employer and/or its agent” as required by section 4600(h).
18 (See, *Banuelos v. Nupla Corp.*, 2014 Cal. Wrk. Comp. P.D. LEXIS 485.) We conclude that
19 Dr. Richman’s April 27, 2016 deposition testimony fulfills the requirements of a prescription within the
20 meaning of section 4600(h).

21 B. The AME May Comment on Further Medical Treatment Including Home Health Care

22 Section 5702 provides in pertinent part, “The parties to a controversy may stipulate the facts
23 relative thereto in writing and file such stipulation with the appeals board. The appeals board may
24 thereupon make its findings and award based upon such stipulation. . . .” WCAB Rule 10496 (Cal. Code
25 Regs., tit. 8, § 10496), provides, “Awards and orders may be based upon stipulations of parties in open
26 court or upon stipulations signed by the parties.” Here, as noted above, the parties stipulated to defer
27 home health care to the AME.

1 Once a stipulation has been accepted and a decision based on it, the Workers' Compensation
2 Appeals Board (WCAB) must determine if good cause exists before setting the stipulation aside.
3 (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65
4 Cal.Comp.Cases 1].) In *Weatherall*, the Court of Appeals reversed the WCAB action setting aside a
5 stipulation because it was not based on evidence, and held that a stipulation could not be set aside absent
6 good cause. Petitioner has made no showing of good cause as to why it should be relieved of its
7 stipulation. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856 [44 Cal.Comp.Cases
8 798].)

9 Defendant's assertion that SB 863 "trumps the stipulation" deferring home health care to the
10 AME is incorrect. SB 863 expressly provides that it "shall not be a basis to rescind, alter, amend, or
11 reopen any final Award of Workers' Compensation benefits." (SB 863, Stats. 2012 Ch. 363 § 84.) The
12 May 17, 2011 stipulated Award is a final order, and defendant remains bound by its stipulation deferring
13 home health care to the AME.

14 C. The AME's Opinion With Respect to Home Health Care Constitutes Substantial Medical
15 Evidence

16 As the parties are bound by their stipulation to defer the issue of home health care to the AME,
17 there was no need for an RFA from the treating doctor to raise the issue. Dr. Richman's April 18, 2016
18 testimony regarding home health care addressed the issue of further medical treatment and clearly
19 outlined the basis for the need for this care because of applicant's industrial injury.

20 In the WCJ's Report, he writes that he gave great weight to the opinion of the AME. (*Williams v.*
21 *Montgomery Elevator*, 2016 Cal. Work Comp. P.D. LEXIS 362.) The opinions of an AME are entitled to
22 substantial weight absent a showing that they are based on an incorrect factual history or legal theory, or
23 are otherwise unpersuasive in light of the entire record. (See, *Powers v. Workers' Comp. Appeals Bd.*
24 (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueiros v. Workers' Comp. Appeals Bd.* (1995)
25 60 Cal.Comp.Cases 150 (writ den.).)

26 In this matter, Dr. Richman detailed the basis for his medical opinions, including his April 4,
27 2015 evaluation of applicant and his review of the medical records. He was consistent in his opinion that

1 applicant is 100% disabled, unable to compete in the open labor market, and requires home health care.
2 He also found that applicant's condition is progressive, will deteriorate over time, and will necessitate a
3 higher level of care. Therefore, we find that the WCJ's reliance on the AME's opinion is justified.

4 D. Defendant Has Not Been Denied Due Process.

5 On April 18 2016, at the properly noticed deposition of the AME, defendant's counsel did not
6 appear. Applicant's attorney made a record that defendant's counsel gave express permission for
7 applicant's counsel to proceed with the deposition and that he requested a certified copy of the deposition
8 transcript. In its verified Petition, defendant states that it received the deposition transcript on May 2,
9 2016. (Petition for Reconsideration, 4: 17-20.) Defendant's counsel did not make any objection to the
10 facts as set forth in the record by applicant's counsel, nor does the record reflect any confirming letter
11 sent regarding the alleged agreement for another deposition date. Thus, there is no timely record of any
12 agreement between defendant's and applicant's counsels to set a second session of the AME's
13 deposition. Moreover, in applicant's verified Answer, applicant's counsel states that there was no
14 agreement for a second deposition. (Answer, 4: 4-7.)

15 Here, Dr. Richman has not issued any supplemental reporting after his deposition, and good cause
16 has not been established for additional cross-examination after his deposition was completed. On this
17 record, we agree with the WCJ that defendant's due process rights have not been violated. If applicant's
18 medical condition changes in the future, either party may bring a motion to initiate discovery.

19 Accordingly, we affirm the July 29, 2016 Findings of Fact, Award and Order.

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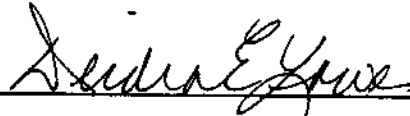
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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings of Fact, Award and Order issued by the WCJ on July 29, 2016 is **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 DEIDRA E. LOWE

9 I CONCUR,

10
11 
12 _____
13 **MARGUERITE SWEENEY**

14 **CONCURRING, BUT NOT SIGNING**

15 _____
16 **FRANK M. BRASS**



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

19 **JAN 12 2018**

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

23 **DELMY PACAS**
24 **GRAIWER & KAPLAN**
25 **STATE COMPENSATION INSURANCE FUND**



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27 **MG/abs**

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. ADJ258484 (LAO 0813327)

DELMY PACAS,

Applicant,

vs.

**THE MAILING HOUSE, INC; STATE
COMPENSATION INSURANCE FUND,**

Defendants.

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to the decision filed on July 29, 2016.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications *relating to the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to the district office from which the WCJ's decision issued or to any other district office of the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication

1 Management System (EAMS). Any documents relating to the petition for reconsideration lodged in
2 violation of this order shall neither be accepted for filing nor deemed filed.

3 All trial level documents not related to the petition for reconsideration shall continue to be e-filed
4 through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper
5 form.¹ If, however, a proposed settlement is being filed, the petitioner for reconsideration should
6 promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending
7 before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

8
9 **WORKERS' COMPENSATION APPEALS BOARD**

10 *F. M. Brass*

11 **I CONCUR,**

12 **FRANK M. BRASS**

13 *Deidra E. Lowe*

14 **DEIDRA E. LOWE**

15
16 **CONCURRING, BUT NOT SIGNING**

17 **MARGUERITE SWEENEY**



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

19 **OCT 21 2016**

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

22 **DELMY PACAS**
23 **GRAIWER KAPLAN**
24 **STATE COMPENSATION INSURANCE FUND**

25 **oo**

[Handwritten signature]

26 ¹ Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g.,
27 petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements,
etc.)

**STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD
LOS ANGELES DISTRICT OFFICE**

WCAB Case No. ADJ258484

**Delmy Pacas vs. The Mailing House, Inc.; State
Compensation Insurance Fund**

WORKERS' COMPENSATION JUDGE: GEORGE A. SCHULMAN

DATE OF INJURY: July 26, 2001 through July 26, 2002

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

1. Finding & Award
& Order issued: July 29, 2016
2. Identity of Petitioner: Defendant
3. Verification: The petition is verified
4. Timeliness: The petition is timely
5. Date Petition for
Reconsideration filed: August 22, 2016

Petitioner/Defendant contends:

A. The Workers' Compensation Judge (WCJ) denied the petitioner due process of law by quashing the deposition of the Agreed Medical Examiner.

B. The Agreed Medical Examiner functions as a medical-legal doctor and cannot prescribe medical treatment (i.e. home healthcare).

C. The opinion of the Agreed Medical Examiner does not constitute substantial evidence regarding the necessity of home healthcare.

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D. The opinion of the Agreed Medical Examiner is not a prescription pursuant to Labor Code §4600 (H).

II.

FACTS

This matter proceeded to Expedited Hearing on the issue of prospective home healthcare. Applicant, Delmy Pacas, received a stipulated award of 100% permanent disability plus provision for future medical care. The stipulated award addresses the issue of home healthcare. The award states that the issue of home healthcare is deferred to the agreed medical examiner, Dr. Lawrence Richman. This fact is relevant to petitioner's argument that the opinion of the AME does not constitute substantial evidence regarding the necessity for home healthcare.

This matter proceeded to trial on July 18, 2016. Stipulations and issues were read into the record and included a stipulation that home healthcare was deferred to the agreed medical examiner.

The issues were framed and are as follows:

1. Is the applicant in need of prospective home healthcare and, if so, the basis for same.
2. If home healthcare is awarded, what are the appropriate days per week and hours per day required.
3. Was there a denial of care.
4. Was there a prescription for home healthcare.

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This Court found that the applicant was in need of prospective home healthcare. The Court relied upon the medical reports/deposition testimony of Agreed Medical Examiner Dr. Lawrence Richman as the basis for this finding.

This Court found that applicant requires attendant care 24 hours per day, seven days per week pursuant to the reporting/testimony of AME Dr. Lawrence Richman.

This Court found that there was a denial of care. Defendant was on notice of need for home health care and took no action.

This Court found that petitioner's obligation to provide home healthcare services commenced April 18, 2016 and continuing.

This Court found that home health care would be required 24 hours per day, seven days per week. The care required would be skilled care via LVN from 8 AM to 10 PM, and CNA assistance from 10 PM to 8 AM.

This Court also took judicial notice of the fact that petitioner had rescheduled the AME deposition for August 29, 2016. Based upon applicant's motion, the rescheduled deposition of this doctor was quashed.

III.

DISCUSSION

The deposition of Agreed Medical Examiner Lawrence Richman took place on April 18, 2016. Defendant had notice of the deposition. Defendant did not appear for the deposition. Defendant's representative was contacted and advised applicant's counsel that the deposition of the AME could proceed without

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the presence of defense counsel. This agreement is memorialized in the deposition transcript.

However, on June 10, 2016, counsel for defendant scheduled the deposition of Dr. Richman for August 29, 2016 (see Exhibit A). Applicant asserted that it is aggrieved by this action. On the date of trial, July 18, 2016, applicant made a motion to quash the notice of taking deposition dated, and served, June 10, 2016.

It is the opinion of this Court that there was no denial of due process. Defendant had notice of the originally scheduled deposition of the AME. The defendant had the opportunity to attend the deposition of Dr. Richman on April 18, 2016. It did not do so. It remains the opinion of this court that there was no denial of due process. Defendant had notice of the originally scheduled AME deposition. Defendant had the opportunity to attend that deposition. Defendant declined to do so.

Petitioner cites Title 8 CCR §35.5 (g) (2) for the proposition that an agreed medical evaluator shall not provide an opinion on any disputed medical treatment issue, but shall provide an opinion about whether the injured worker will need future medical care. Petitioner argues that the AME cannot express an opinion regarding specific medical treatment.

However, in the instant case, the Stipulated Award dated May 17, 2011 (Exhibit 1) states on page 7 that "home care... (retro and prospective) not addressed & to be deferred to AME." The parties herein entered into a stipulation. Issues regarding home healthcare are to be addressed by the agreed

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medical examiner. Home healthcare issues were so addressed. Now, petitioner is attempting to circumvent the manner in which home healthcare is addressed as outlined in the stipulated award.

The documentary evidence was reviewed by this trial judge. Specifically, AME Dr. Richman was cross examined on April 18, 2016 (see applicant's Exhibit 3)

In the deposition of the AME, the transcript states that applicant requires home healthcare. Dr. Richman states that he would concur with Dr. Berman that applicant is 100% disabled and unable to compete in the open labor market (page 10, lines 4 – 7). The AME agrees, based upon his last evaluation of the applicant and review of medical records, that applicant requires home healthcare (page 10, lines 8 – 12). The AME states that, as of February 27, 2013, applicant required home healthcare and transportation ongoing (page14, lines 1 - 6).

At page 17 of his deposition, Dr. Richman states that, as of the date of his last examination, April 14, 2015, applicant continued to require homecare. He states that applicant would require an LVN during waking hours. The doctor clarifies stating that an LVN would be required from 8 AM to 10 PM (page 20, line 2 - 8) and a CNA (certified nursing assistant) "after that". Dr. Richman states that applicant's condition will worsen. That is, his condition is progressive and will worsen over time necessitating a higher level of care (page 20, line 19 – 25).

The information contained in Dr. Richman's deposition transcript was communicated to defendant by certified letter dated April 27, 2016 (Exhibit 2) with a demand for home healthcare. The letter states that defendant should

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consider the demand to be a Request for Authorization (RFA). Petitioner was placed on notice.

In response, petitioner scheduled the deposition of the AME for August 29, 2016. Applicant filed a Declaration of Readiness to Proceed on June 20, 2016. This document (Defense Exhibit B) states that defendant has failed to provide home care pursuant to the recommendation of Dr. Richman. In addition, the declaration states that there was no response to demand letters dated April 27, 2016 and May 2, 2016 and that this matter was not referred for utilization review.

Petitioner asserts that the opinion of the Agreed Medical Examiner does not constitute substantial evidence regarding the necessity of home healthcare. On the contrary, this Court gives the opinion of the agreed medical examiner great weight. This physician has been chosen by the parties to provide an independent evaluation. Therefore, the opinions of the AME are germane, based on accurate medical histories and/or examinations and do not involve mere speculation.

Petitioner argues that the opinions expressed by Dr. Richman are stale because they are based on medical records generated in 2011 and a medical evaluation from 2015. On the contrary, the date of injury is 2002. The stipulated award was entered into in 2011. The last examination of the applicant by Dr. Richman was on April 14, 2015 (Exhibit 4). Applicant is not currently under active medical care. Relatively speaking, the 2015 evaluation of the applicant is current.

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Petitioner states that due process demands that defendant be given the opportunity to depose Dr. Richman. It remains the opinion of this trial judge that petitioner has already had that opportunity. Petitioner has not stated in the Petition for Reconsideration why no appearance was made at the deposition of April 18, 2016.

Petitioner asserts that the opinion of an AME regarding home healthcare is not a *formal prescription* as required under Labor Code §4600 (h). Home healthcare is part of future medical care (see Labor Code §4600 (h)). The above captioned case is analogous to the *en banc* decision in the Neri Hernandez case (ADJ 7995806).

Based upon the Hernandez case, home healthcare must be reasonably required and *prescribed* by a physician or surgeon. The word "prescription" is broadly defined in the Hernandez case and means either an *oral order* communicated to the employer or the employer's representative, or a *written order* signed by the prescribing physician and directed to the employer or its representative.

Applicant asserts that, for purposes of home healthcare, the request need not be a formal one with a request for authorization (RFA). This Court agrees. No
An injured worker must prove that the prescription was received by the employer and the date upon which it was received. In the instant case, this is a given: a recommendation/prescription by an agreed medical examiner and served on the parties.

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Pursuant to the Hernandez case, liability is limited to 14 days before the date that the prescription was delivered. Liability is not based on the date that the need for services began.

Notice triggers liability. In the instant case, notice was received by the insurance carrier (see Exhibit 2).

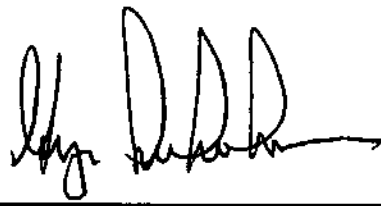
It remains the opinion of this Court that the applicant is in need of prospective home healthcare; requires attendant care 24 hours per day, seven days per week; that there has been a denial of care; and that petitioner's obligation to provide home healthcare services commenced April 18, 2016.

IV.

RECOMMENDATIONS

Based upon the analysis above, it is recommended that the Workers' Compensation Appeals Board deny reconsideration.

Date: August 29, 2016

A handwritten signature in black ink, appearing to read "George A. Schulman", written over a horizontal line.

George A. Schulman
Workers' Compensation Administrative Law Judge