

1 **WORKERS' COMPENSATION APPEALS BOARD**  
2 **STATE OF CALIFORNIA**  
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5 **CLIFFORD MULFORD,**  
6 *Applicant,*  
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8 **vs.**  
9 **EL TORO RV, INC.; THE HARTFORD,**  
10 **Administered By AMERICAN ALL-RISK**  
11 **LOSS ADMINISTRATION,**  
12 *Defendants.*

Case No. **ADJ7763946**  
(Anaheim District Office)

**OPINION AND ORDERS  
DENYING PETITION FOR  
RECONSIDERATION  
AND DISMISSING PETITION  
FOR REMOVAL**

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14 Applicant seeks reconsideration and/or removal of the February 22, 2013 Findings & Order,  
15 wherein the workers' compensation administrative law judge (WCJ) found that applicant, while  
16 employed as a service writer on March 8, 2011, sustained industrial injury to his head and brain. The  
17 WCJ found that defendant was not liable for home health care from October 23, 2012 to the present, and  
18 found that all other issues were moot.

19 Applicant contends that the WCJ erred in finding that defendant was not liable for home health  
20 care from October 23, 2012 to the present.

21 We have received defendant's Answer. The WCJ prepared a Report and Recommendation on  
22 Reconsideration/Removal (Report), recommending that the Petition for Removal be dismissed and the  
23 Petition for Reconsideration be denied.

24 We have considered the Petition, the Answer, and the contents of the Report, and we have  
25 reviewed the record in this matter. For the reasons expressed by the WCJ in his Report, which we adopt  
26 and incorporate, and for the reasons discussed below, we will dismiss applicant's Petition for Removal  
27 and deny applicant's Petition for Reconsideration.

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## FACTS

On March 8, 2011, applicant fell from a ladder while working for defendant as a service writer. He sustained a catastrophic brain injury as a result of his fall and spent several months in the hospital. At the time of his release from the hospital, he was experiencing residual left side weakness, decreased memory, fatigue, and seizures. (Petition, 2:3-15.)

The parties appeared for an expedited hearing on July 10, 2012, at which defendant agreed to pay for an occupational nurse to provide a home health care study within 30 days. (July 10, 2012 Minutes of Hearing/Court Order, Exh. ZZ, p. 2.) On July 31, 2012, the occupational nurse issued a report recommending that applicant be provided with home health care six hours per day, five days per week, for 12 weeks, to be reevaluated in November 2012. (July 30, 2012 Nurse Case Manager Report, Exh. XX, p. 1.)

Defendant agreed to allow applicant to hire his wife as his home health care provider at \$20.00 per hour and began making payments. (Defendant's Points and Authorities Regarding the Applicability of Newly Enacted Labor Code § 4600(h), 2:1-3.) On October 23, 2012, after paying for 12 weeks of home health care, defendant stopped making payments. (*Ibid.*; see also December 17, 2012 letter from applicant's counsel to WCJ Howard Lemberg, p.1.)

Applicant was evaluated by H. Richard Adams, M.D., a neurologist, on December 5, 2012. In his December 5, 2012 Report, Dr. Adams's treatment recommendations were as follows:

- “1. Continue his adaptive PE program.
2. Request authorization for EEG to rule out subclinical seizures. If negative and if neurologist agrees, feel the patient could stay at home during the time his wife would either be at work or involved in other activities with a lifeline put in place.
3. Request authorization for lifeline.
4. Follow up in 2 months.” (December 5, 2012 Primary Treating Physician Report, p. 3.)

The parties appeared for a second expedited hearing on January 15, 2013 on the issue of the provision of home health care. At the hearing, applicant presented the WCJ and defendant with a note from Dr. Adams, dated January 14, 2013, that reads, “Home health or or [*sic.*] case manager RN to eval for ongoing home health assistance.” (January 14, 2013 Prescription Note, Exh. YY, p. 1.) After the

1 hearing, the parties submitted briefs regarding the applicability of newly enacted Labor Code section  
2 4600(h).<sup>1</sup>

3 On February 22, 2013 the WCJ issued his Findings & Order, in which he found that defendant  
4 was not liable for home health care from October 23, 2012 to the present. In the accompanying Opinion  
5 on Decision, the WCJ explained that section 4600(h) applied retroactively to applicant's injury, and that  
6 applicant had not met his burden of showing that his doctor had prescribed home health care.

7 Applicant timely sought reconsideration, contending that the WCJ erred in finding that defendant  
8 was not liable for home health care from October 23, 2012 to the present. Applicant argues that section  
9 4600(h) does not apply to his case. Alternatively, applicant argues that if section 4600(h) does apply to  
10 his case, he has met his burden of proof under section 4600(h).

### 11 DISCUSSION

12 "When new legislation amends or adds statutory rights, the legislation is applied prospectively  
13 unless it is clear from the statutory language or extrinsic sources that the Legislature intended retroactive  
14 application. If the Legislature's intent is unclear, prospective application is mandated." (*Green v.*  
15 *Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1436 [70 Cal.Comp.Cases 294].)

16 Section 4600(h) was added to the Labor Code as part of Senate Bill 863, which became effective  
17 on January 1, 2013. (Stats. 2012, ch. 363.) It provides,

18 "Home health care services shall be provided as medical treatment only if reasonably  
19 required to cure or relieve the injured employee from the effects of his or her injury and  
20 prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing with  
21 Section 2000) of Division 2 of the Business and Professions Code, and subject to  
Section 5307.1 or 5703.8. The employer shall not be liable for home health care  
services that are provided more than 14 days prior to the date of the employer's receipt  
of the physician's prescription." (Lab. Code, § 4600(h).)

22 The notes following section 4600(h) read, in relevant part, "For legislative findings and declarations, and  
23 applicability of [Senate Bill 863], see the 2012 Note under Labor Code section 3700.1." In turn, the  
24 2012 notes following section 3700.1 read, in relevant part, "This act shall apply to all pending matters,  
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26 <sup>1</sup> Unless otherwise noted, all further statutory references are to the Labor Code.

1 regardless of the date of injury, unless otherwise specified in this act[.]” (Stats 2012, ch. 363, § 84.)

2 We agree with the WCJ that this language “clearly indicates that [section 4600(h)] applies to all  
3 pending cases prospectively from the date the statute became effective regardless of the date of injury[.]”  
4 (Report, p. 4.) Accordingly, it was applicant’s burden to prove that home health care services were  
5 “reasonably required to cure or relieve” applicant’s injury, and “prescribed by a physician and surgeon.”  
6 (Lab. Code, § 4600(h).) Applicant has not done so. Dr. Adams’s December 5, 2012 Report does not  
7 include a prescription for home health care services. To the contrary, it makes no mention of home  
8 health care. Similarly, Dr. Adams’s January 14, 2013 note does not prescribe home health care services.  
9 Instead, it prescribes an evaluation to determine whether home health care services should be provided.  
10 Accordingly, we will deny applicant’s Petition for Reconsideration.

11 Additionally, we agree with the WCJ that reconsideration is an adequate remedy here.  
12 Accordingly, we will dismiss applicant’s Petition for Removal. (Cal. Code Regs., tit. 8, § 10843(a).)

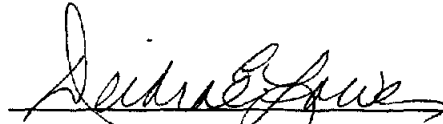
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1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Reconsideration of the February 22, 2013  
3 Findings & Order is **DENIED**.

4 **IT IS FURTHER ORDERED** that the applicant's Petition for Removal of the February 22,  
5 2013 Findings & Order is **DISMISSED**.

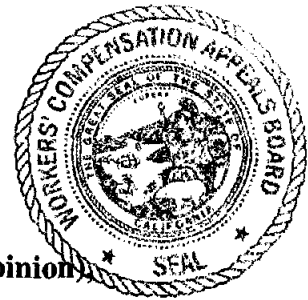
6 **WORKERS' COMPENSATION APPEALS BOARD**

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DEIDRA E. LOWE

9 I CONCUR,

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12 **ALFONSO J. MORESI**



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14 I CONCUR AND DISSENT (see attached concurring and dissenting opinion)

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18 **MARGUERITE SWEENEY, COMMISSIONER**

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

20 **MAY 06 2013**

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

23 **CLIFFORD MULFORD**  
24 **LAW OFFICES OF GLOW & KREIDA, APC**  
25 **TOBIN LUCKS LLP** *page*

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27 **RB/sye**

1           **CONCURRING AND DISSENTING OPINION OF COMMISSIONER SWEENEY**

2           I concur with the majority that the recently-enacted Labor Code section 4600(h) applies to this  
3 case. However, I would rescind the WCJ's finding and return the matter to the WCJ to develop the  
4 record and obtain a supplemental report from applicant's primary treating physician.

5           The Appeals Board has the discretionary authority to develop the record when the medical record  
6 is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues.  
7 (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62  
8 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63  
9 Cal.Comp.Cases 261].) As set forth in our en banc decision in *McDuffie v. Los Angeles County*  
10 *Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc) "Sections 5701  
11 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at  
12 any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . .  
13 . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient,  
14 for example, that they are inaccurate, inconsistent or incomplete. (citations)" (*McDuffie, supra*, at p.  
15 141.) "Where the medical record requires further development either after trial or submission of the case  
16 for decision," the medical record should first be supplemented by physicians who have already reported  
17 in the case. (*McDuffie, supra*, at pp. 139, 142.)

18           Under Labor Code section 4600(h), an applicant is entitled to home health care if he can show  
19 that a physician prescribed home health care. Here, it is unclear whether applicant has done so. At the  
20 July 10, 2012 expedited hearing, defendant agreed to pay for an occupational nurse to provide a home  
21 health care study for applicant, who remains 100% permanently disabled. The nurse recommended that  
22 applicant be provided with home health care six hours per day, five days per week. Defendant  
23 voluntarily provided home health care for a period of time, but then stopped on October 23, 2012,  
24 leading to the second expedited hearing. Thereafter, applicant's primary treating physician issued a  
25 report stating that applicant "requires 7-day support system." (December 5, 2012 Primary Treating  
26 Physician Report, Exh. YY, p. 2.)

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1           Accordingly, I would rescind the WCJ's Findings & Order and return this matter to the trial level  
2 to develop the record. I agree that Labor Code section 4600(h) prevents an award of home health care  
3 services from October 23, 2012 until 14 days prior to December 5, 2012; it is apparent from its plain  
4 language that Labor Code section 4600(h) excludes any liability "for home health care services that are  
5 provided more than 14 days prior to the date of the employer's receipt of the physician's prescription."  
6 Nonetheless, the record before us is not clear as to whether defendant is liable for home health care  
7 services after November 21, 2012. Accordingly, on return, I would recommend that the WCJ reopen  
8 discovery to obtain a supplemental report from applicant's primary treating physician to clarify his  
9 December 5, 2012 Report and January 14, 2013 prescription note. In light of applicant's condition  
10 during the period in question, and the parties' conduct, including defendant's voluntary provision of  
11 home health care until October 23, 2012, fairness warrants further discovery.

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1 For this reason, I would grant reconsideration and return the matter to the trial level for the WCJ  
2 to obtain a supplemental report from applicant's primary treating physician.  
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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **MARGUERITE SWEENEY, COMMISSIONER**

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

11 **MAY 06 2013**

12 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**  
13 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

14 **CLIFFORD MULFORD**  
15 **LAW OFFICES OF GLOW & KREIDA, APC**  
16 **TOBIN LUCKS LLP**

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22 **RB/sye**