

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **ROQUE NERI HERNANDEZ,**

5 *Applicant,*

6 **vs.**

7
8 **GENEVA STAFFING, INC. dba**
9 **WORKFORCE OUTSOURCING, INC.;**
10 **TOWER POINT NATIONAL INSURANCE**
11 **COMPANY, administered by TOWER**
12 **SELECT INSURANCE,**

13 *Defendants.*

Case No. ADJ7995806
(Stockton District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION
(En Banc)

14 On August 16, 2013, an Appeals Board panel granted reconsideration on its own motion of its
15 previous Opinion and Order of August 12, 2013 to further study the factual and legal issues.¹ Thereafter,
16 to secure uniformity of decision in the future, the Chairwoman of the Appeals Board, upon a majority vote
17 of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code,
18 § 115.)²

19 On May 30, 2013, a workers' compensation administrative law judge (WCJ) issued a Findings
20 and Award (F&A), which found that applicant was entitled to medical treatment in the form of home
21 health care services beginning on August 3, 2011 and continuing and awarded applicant payment for
22

23 ¹ Commissioner Moresi, who was on the Appeals Board panel that issued the August 12, 2013 and August 16, 2013
24 orders no longer serves on the Appeals Board.

25 ² En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code
26 Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70
27 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418 [67 Cal.Comp.Cases 236]; see also
Gov. Code, § 11425.60(b).) In addition to being adopted as a precedent decision in accordance with Labor Code section 115
and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with
Government Code section 11425.60(b).

1 self-procured home health care services. Defendant sought reconsideration and contended that newly
2 enacted Labor Code sections 4600(h) and 4603.2(b)(1) applied.³

3 Based upon our review of the relevant statutes and case law, we hold that:

4 (1) Sections 4600(h), 4603.2(b)(1), and 5307.8⁴ apply to requests for home health care
5 services in all cases which are not final regardless of date of injury or dates of service.

6 (2) The prescription required by section 4600(h) is either an oral referral,
7 recommendation or order for home health care services for an injured worker
8 communicated directly by a physician to an employer and/or its agent; or, a signed and
9 dated written referral, recommendation or order by a physician for home health care
10 services for an injured worker.

11 (3) Under section 4600(h), home health care services are subject to either section
12 5307.1 or section 5307.8. Section 5307.1 applies where an official medical fee schedule
13 or Medicare schedule covers the type of home health care services sought. Otherwise,
14 section 5307.8 applies.

15 In light of these holdings, we rescind the F&A and return the matter to the WCJ for further
16 proceedings and a new decision from which any aggrieved party may timely seek reconsideration.

17 **BACKGROUND**

18 While employed as a machine operator for defendant, applicant sustained a severe crush injury to
19 his right dominant hand on July 11, 2011. For more than three weeks after his injury, applicant was
20 hospitalized at St. Mary's Medical Center and was treated there by hand surgeon Charles Lee, M.D.
21 Applicant continued to treat with Dr. Lee and at St. Mary's for almost a year.

22 During his initial hospitalization, applicant had three surgeries on his hand. Once he was home,
23

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

25 ⁴ Section 4600(h) states that home health care services are "subject to [s]ection . . . 5703.8." The reference to 5703.8
26 must be a clerical error since section 5703.8 does not exist. Section 5307.8 concerns home health care services and we will
27 consider that the phrase was intended to read that home health care services are "subject to [s]ection . . . 5307.8." (Cf. *In re*
Thierry S. (1977) 19 Cal.3d 727, 741, fn. 13 ["obvious mistake" in statute's cross-reference to another statute]; *Gray Cary*
Ware & Freidenrich v. Vigilant Ins. Co. (2004) 114 Cal.App.4th 1185, 1193-1194 [courts may "correct an obvious and minor
drafting error where necessary to effectuate the intent of the Legislature"].)

1 he developed a serious infection in his hand, which necessitated a fourth surgery on September 19, 2011.
2 Then, on December 20, 2011, he had a fifth surgery. Further surgery on applicant's right hand has been
3 recommended.

4 Hand surgeon Leonard Gordon, M.D., acted as the Agreed Medical Evaluator.⁵ With respect to
5 the condition of applicant's hand, Dr. Gordon concluded that:

6 "It is evident that Mr. Neri-Hernandez has had a devastating injury to his
7 right hand with a severe crush injury, and he has extremely severe pain and
essentially no function.

8 "He is not able to flex any of the fingers without extreme pain. He is not
9 able to move the thumb away from the index finger so that he has no
ability to pinch, grip, manipulate, or use the hand.

10 "Combined with this, he has extremely severe pain when trying to move
11 the hand in any way at all.

12 ***

13 "As it stands at this point, Mr. Neri-Hernandez has essentially lost all use
of the right upper extremity."⁶

14 Applicant was cared for at his home by his spouse. A handwritten note on St. Mary's Medical
15 Center letterhead dated November 11, 2011 states in its entirety that:

16 "To Whom it may Concern,

17 "This is to notify that Neri Hernandez Roque has been under the care of
18 Dr. Charles K. Lee for severe injury to his right hand since 7-11-11 at
which time he has needed constant care from his wife Adrianna Bayona.

19 "Mr. Neri Hernandez will need continuous care as his ongoing treatment
20 goes on. [sic]

21 "If you have any questions please call our office at Pros at (415)750-55-88.
[sic]

22 "Sincere, [sic]
23 Dr. Charles K. Lee"

24
25 ⁵ Dr. Gordon prepared reports on September 17, October 1, and November 5, 2012. Medical records from St. Mary's
26 and from applicant's treating physician Mark Diaz, M.D., are not in evidence. Dr. Gordon commented in his September 17,
2012 report that he had reviewed four volumes of records from St. Mary's, and he briefly summarized those medical records.
He also reviewed and briefly summarized medical records from Dr. Diaz.

27 ⁶ This summary by Dr. Gordon is contained in his Report of September 17, 2012.

1 What appears to be a signature for Dr. Lee is scrawled on the bottom of the letter.

2 On November 28, 2011, applicant's counsel wrote to defendant and enclosed the handwritten note
3 by Dr. Lee.⁷ The letter stated in its entirety that:

4 "Attached please find Dr. Charles Lee correspondence dated November
5 11, 2011. Please allow this letter to serve as my formal request that you
6 authorize the applicant's wife, Adrianna Bayona to provide in-home [sic]
7 for the applicant.

8 "If I have not received written confirmation of your authorization for the
9 above requested treatment within 5 days, I will file for an Expedited
10 Hearing on this matter."

11 In his November 5, 2012 report, Dr. Gordon opined that:

12 "As far as the second question which relates to an attendant, I do feel that
13 it is reasonable for the patient to have support, transportation, and
14 attendant care at the rate of six hours per day. There does not appear to be
15 any particular need for skilled nursing as at this time there are no bandages
16 or unusual care that is needed, and this would be at the unskilled level."

17 On March 5, 2013, the parties appeared for an expedited hearing on the issue of home health care
18 services. Applicant sought an order for home health care services provided by his spouse; an award "for
19 retroactive payment . . . to the date of injury payable to the applicant as a medical benefit;" and attorney's
20 fees. Applicant contended that his spouse's testimony was an adequate basis to determine the hourly rate
21 of reimbursement. Defendant contended that the November 11, 2011 report by Dr. Lee was not a valid
22 prescription for home health care services as it did not specify the type of care or number of hours of care
23 required; that neither Dr. Lee's nor Dr. Gordon's report was sufficient to determine the type of care
24 required; and that Senate Bill [SB] 863 controlled.

25 Applicant's spouse testified as follows:

26 They have been married for nine years. Up to the time of applicant's injury, she had worked
27 fulltime as a teacher's assistant at a daycare center for fifteen years. Before applicant's injury, she took
28 care of the house on weekends. Although she sometimes made dinner, he did the cooking. He took care
29 of the yard, worked on the cars, did his own laundry, and did grocery shopping. After the injury, she was

⁷ In its Petition for Reconsideration, defendant admits that it received this letter, but there is no evidence of when defendant received it.

1 laid off for missing time from work “because her husband needed her.” She drew unemployment
2 insurance from September 2011 to February 2013. Her last full year worked was 2010, and she has not
3 worked outside the home since the injury.

4 Applicant was in the hospital for twenty-two days “and she stayed there to help and to take
5 instructions from the doctors.” She speaks some English but her husband does not, and there were no
6 interpreters present. After he was released she took care of him at home, and she “was required to spend
7 all day long with the applicant back then.” She bathed him, gave him medicines, fed him and dressed
8 him. She also went with him to San Francisco for his doctor’s appointments and treatment. Applicant
9 developed an infection in his hand, and when they saw Dr. Lee for the infection, he told her that she “had
10 to clean the applicant up as they could not get a nurse.” Dr. Lee gave her a letter in “November.”

11 Currently, she spends less time taking care of applicant than before; she spends about six to eight
12 hours a day doing so. She helps him with his medications three times per day and with applying his pain
13 patches, opens his water bottles, shaves him, trims his moustache and nails, scrubs him, washes his head,
14 helps him bathe and helps him to dress including changing from his pajamas and tying his shoes, and
15 putting on his belt, pants, and jacket. He showers daily, and the showers take forty-five minutes to an
16 hour. She drives him, takes care of the yard and the cars, prepares meals, and does his laundry. She last
17 assisted him with the toilet about a year and a half ago.

18 On May 30, 2013, the WCJ issued the F&A. He found that applicant was entitled to payment
19 “for self-procured medical care” beginning on August 3, 2011. He awarded services for 24 hours per
20 day, 7 days per week from August 3, 2011 to November 4, 2012, and for 6 hours per day, 7 days per
21 week from November 5, 2012 and continuing, and attorney’s fees of 15%. He awarded payment based
22 on applicant’s spouse’s regular hourly rate of pay at the day care center.

23 Thereafter, defendant sought reconsideration. Defendant contended that: (1) there was no
24 substantial medical evidence to support the award of home health care services; (2) applicant did not
25 have a prescription within the meaning of section 4600(h); (3) payment should not have been awarded
26 directly to applicant because there was no evidence that applicant had incurred the expense; and (4)
27 applicant’s spouse did not submit an itemization of services pursuant to section 4603.2(b)(1).

1 We received an Answer from applicant. The WCJ prepared a Report and Recommendation on
2 Petition for Reconsideration (Report) recommending that reconsideration be denied.

3 On August 12, 2013, an Appeals Board panel granted defendant's Petition for Reconsideration,
4 rescinded the F&A and returned the matter to the WCJ. However, on August 16, 2013, the panel granted
5 reconsideration of its August 12, 2013 Opinion in order to further review the case.

6 **DISCUSSION**

7 **I. INTRODUCTION AND SUMMARY**

8 Section 4600(h) states that:

9 Home health care services shall be provided as medical treatment only if
10 reasonably required to cure or relieve the injured employee from the
11 effects of his or her injury and prescribed by a physician and surgeon
12 licensed pursuant to Chapter 5 (commencing with Section 2000) of
13 Division 2 of the Business and Professions Code, and subject to Section
14 5307.1 or [5307.8]. The employer shall not be liable for home health care
15 services that are provided more than 14 days prior to the date of the
16 employer's receipt of the physician's prescription.

17 Section 5307.8 states that:

18 Notwithstanding Section 5307.1, on or before July 1, 2013, the
19 administrative director shall adopt, after public hearings, a schedule for
20 payment of home health care services provided in accordance with Section
21 4600 that are not covered by a Medicare fee schedule and are not otherwise
22 covered by the official medical fee schedule adopted pursuant to Section
23 5307.1. The schedule shall set forth fees and requirements for service
24 providers, and shall be based on the maximum service hours and fees as set
25 forth in regulations adopted pursuant to Article 7 (commencing with
26 Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and
27 Institutions Code. No fees shall be provided for any services, including
any services provided by a member of the employee's household, to the
extent the services had been regularly performed in the same manner and to
the same degree prior to the date of injury. If appropriate, an attorney's fee
for recovery of home health care fees under this section may be awarded in
accordance with Section 4906 and any applicable rules or regulations.

Section 4603.2(b)(1) states that:

Any provider of services provided pursuant to Section 4600, including, but
not limited to, physicians, hospitals, pharmacies, interpreters, copy
services, transportation services, and home health care services, shall
submit its request for payment with an itemization of services provided
and the charge for each service, a copy of all reports showing the services
performed, the prescription or referral from the primary treating physician

1 if the services were performed by a person other than the primary treating
2 physician, and any evidence of authorization for the services that may have
3 been received. Nothing in this section shall prohibit an employer, insurer,
4 or third-party claims administrator from establishing, through written
agreement, an alternative manual or electronic request for payment with
providers for services provided pursuant to Section 4600.

5 Sections 4600(h), 4603.2(b)(1), and 5307.8 were enacted by SB 863 [Stats. 2012, ch. 363, § 35,
6 36, 76] and, as explained below, apply to all requests for home health care services and for payment
7 thereof where no final decision on the request had issued by January 1, 2013.

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

17
18 ⁸ Section 4600(a), (h) [employer must provide an injured worker with all medical treatment reasonably required to
19 “cure or relieve” the injured worker from “the effects of his or her injury”]; section 4600(b) [defining reasonably required
20 treatment]; see *Henson v. Workmen’s Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452, 457 [37 Cal.Comp.Cases 564] [employer
has affirmative statutory duty to provide medical treatment].

21 ⁹ Section 5307.1(a)(1) requires that an official medical fee schedule be adopted and that “[e]xcept for physician
22 services, all fees shall be in accordance with the fee-related structure and rules of the relevant Medicare and Medi-Cal
23 payment systems.” Section 5307.1(a)(2)(C) provides that after January 1, 2014 and until new official medical fee schedules
are adopted, “nonphysician practitioner services, including, but not limited to, nursing physician assistant, nurse practitioner,
and physical therapist services shall be in accordance with the fee-related structure and rules of the Medicare payment system
for. . . nonphysician practitioner services.”

24 Here, the home health care services at issue were provided by applicant’s spouse, and based on her testimony, it
25 appears that the type of services she provided were not the type of services that are covered by an official medical fee schedule
26 or a Medicare schedule. Thus, we will not address circumstances where section 5307.1 services are provided, except that we
27 note that the prescription requirement and the duty to pay for services provided 14 days prior to receipt of a prescription also
apply to section 5307.1 services. However, once the record is developed, it may be that there is evidence that applicant was
actually provided the type of services that are covered by an official medical fee schedule or a Medicare schedule, and
applicant would be entitled to pursue reimbursement as appropriate for those services.

1 Section 5307.8 requires adoption of a fee schedule based on regulations adopted under the
2 Welfare and Institutions Code. To date, no schedule has been adopted. Consequently, in order to meet
3 the burden on the issues of the number of hours and the rate of reimbursement an injured worker must
4 submit substantial evidence of the reasonably required number of hours and a reasonable rate of
5 reimbursement.¹⁰ However, the two other provisions of section 5307.8 still apply. An injured worker
6 must show that the home health care services at issue had not been “regularly performed in the same
7 manner and to the same degree prior to the date of injury.” An injured worker may seek reimbursement
8 for home health care services and attorney’s fees and/or an award of future medical care in the form of
9 home health care services as part of an injured worker’s case-in-chief.

10 II. HOLDINGS

11 A. Sections 4600(h), 4603.2(b)(1), and 5307.8 apply to requests for home health care services in 12 all cases that are not final regardless of date of injury or dates of service.

13 “A fundamental rule of statutory construction is that a court should ascertain the intent of the
14 Legislature so as to effectuate the purpose of the law.” (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5
15 Cal.4th 382, 387 [58 Cal.Comp.Cases 286] (*DuBois*); *Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991)
16 54 Cal.3d 288, 294 [56 Cal.Comp.Cases 476].) “In construing a statute, our first task is to look to the
17 language of the statute itself. (Citation.) When the language is clear and there is no uncertainty as to the
18 legislative intent, we look no further and simply enforce the statute according to its terms.” (*DuBois*,
19 *supra*, 5 Cal.4th at p. 387; accord, *Atlantic Richfield Co. v. Workers’ Comp. Appeals Bd. (Arvizu)* (1982)
20 31 Cal.3d 715, 726 [47 Cal. Comp. Cases 500].)

21 Sections 4600(h), 4603.2(b)(1), and 5307.8 were enacted by SB 863, which became effective on
22 January 1, 2013. Uncodified section 84 of SB 863 provides that: “This act shall apply to all pending
23

24 ¹⁰ Sections 3202.5, 5705; 5952(d); see e.g., *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Sandhagen)* (2008)
25 44 Cal.4th 230, 242 [73 Cal.Comp.Cases 981] [injured worker bears the burden of proof to show that medical treatment is
reasonably required].

26 Here, there is no evidence that defendant submitted applicant’s request for home health care services to Utilization
27 Review (UR). Therefore, we will not address circumstances where a request has been submitted to UR, and since no decision
issued from UR, we will not address circumstances where Independent Medical Review (IMR) might apply. (See §§ 4610,
4610.5; see also § 4062.)

1 matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a basis to
2 rescind, alter, amend, or reopen any final award of workers' compensation benefits." Sections 4600(h),
3 4603.2(b)(1), and 5307.8 do not specify that they only apply to dates of injury on or after January 1,
4 2013. The language of section 84 of SB 863 is nearly identical to the language of uncodified section 47
5 of SB 899, which became effective in 2004. The appellate cases that interpreted section 47 found that
6 the newly enacted and amended sections which were part of SB 899 were applicable to any pending case,
7 except cases that were "final" subject only to the Appeals Board's continuing jurisdiction under sections
8 5803 and 5804. (E.g., *Sierra Pacific Industries v. Workers' Comp. Appeals Bd. (Chatham)* (2006) 140
9 Cal.App.4th 1498, 1506-1509 [71 Cal.Comp.Cases 714] [SB 899's amendment of section 4600(b)
10 requiring application of the ACOEM guidelines to determine whether medical treatment was reasonably
11 required was applicable to all pending cases regardless of date of injury]; *E & J Gallo Winery v.*
12 *Workers' Comp. Appeals Bd. (Dykes)* (2005) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]
13 [apportionment provisions in SB 899's new sections 4663 and 4664 were applicable to all non-final cases
14 regardless of date of injury].) Therefore, based on the nearly identical language in section 84 of SB 863,
15 as of January 1, 2013, the provisions of sections 4600(h), 4603.2(b)(1), and 5307.8 became applicable to
16 any pending case, except cases that were "final" subject only to the Appeals Board's continuing
17 jurisdiction under sections 5803 and 5804.

18 This conclusion is also mandated by the well-established principle that the right to receive
19 workers' compensation benefits is "wholly statutory." (*DuBois, supra*, 5 Cal.4th at p. 388;¹¹ *Beverly*
20 *Hilton Hotel v. Workers' Comp. Appeals Bd. (Boganim)* (2009) 176 Cal.App.4th 1597, 1604 [74
21 Cal.Comp.Cases 927].) Furthermore, where a right is created solely by a statute, and the right has not
22

23 ¹¹ California's workers' compensation system is founded upon, and circumscribed by, the state Constitution, article
24 XIV, section 4. In *DuBois*, the Supreme Court stated that:

25 "Pursuant to the 'plenary power' the Constitution has granted to the Legislature 'to create,
26 and enforce a complete system of workers' compensation' (Cal. Const., art. XIV, § 4), the
27 Legislature has created a statutory scheme requiring all employers to secure the payment
of workers' compensation to injured workers, either by obtaining insurance coverage of
their liability or by obtaining a certificate of consent to self-insure issued by the Director
of Industrial Relations. (§ 3700 et seq.) The right to workers' compensation benefits is
wholly statutory and is not derived from common law. (Citation.)"

1 been perfected by a final decision, the right is not vested but merely inchoate and may be modified or
2 even entirely abolished by the Legislature at any time. (*Boganim*, 176 Cal.App.4th at pp. 1605-1607;
3 *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1006–1007 [51 Cal.Comp.Cases
4 408]; see e.g., Gov. Code, § 9606.)

5 Finally, in *Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1237, 1240 [78
6 Cal.Comp.Cases 1209], the Supreme Court discussed newly amended section 4605, and referred to
7 newly amended sections 4061 and 4062 and newly enacted section 4603.2(a). Based on the language of
8 section 84 of SB 863, the Supreme Court concluded that: “The changes made by Senate Bill 863 apply
9 generally to proceedings that have not resulted in a final award.” (57 Cal.4th at p. 1238.)

10 Thus, sections 4600(h), 4603.2(b)(1), and 5307.8 apply to any requests for home health care
11 services or for payment thereof where no final decision on the request had issued before January 1, 2013.

12 **B. The prescription required by section 4600(h) is either an oral referral, recommendation or**
13 **order for home health care services for an injured worker communicated directly by a**
14 **physician to an employer and/or its agent; or, a signed and dated written referral,**
15 **recommendation or order by a physician for home health care services for an injured worker.**

16 Section 4600(h) requires that home health care services be prescribed by a “physician” licensed
17 pursuant to Business and Professions Code section 2000 et seq. Business and Professions Code section
18 2050 specifies that there is only one form of licensure for medical doctors “which shall be designated as
19 [a] ‘physician’s and surgeon’s certificate.’” Under Business and Professions Code section 4039, a
20 “physician” “includes any person holding a valid and unrevoked physician’s and surgeon’s certificate or
21 certificate to practice medicine and surgery, issued by the Medical Board of California or the Osteopathic
22 Medical Board of California.” In sum, for the purposes of home health care services, the prescription
23 must be by a practitioner who is licensed by the Medical Board or Osteopathic Medical Board.¹²

24
25 ¹² Section 3209.3(a) defines “physicians” as “physicians holding an M.D. or D.O. degree, psychologists, acupuncturists,
26 optometrists, dentists, podiatrists, and chiropractic practitioners.” Section 4600(h) only allows prescriptions for home health
27 care services by a licensed physician or licensed osteopath, so that a prescription by any other practitioner as defined by
section 3209.3(a) would not meet the requirements of section 4600(h) unless adopted and incorporated by a licensed physician
or licensed osteopath.

1 Section 4600(h) and the related statutes do not define the meaning of “prescribed” and the Labor
2 Code does not contain a definition of a “prescription.” Accordingly, since the applicable definition of a
3 physician is contained in the Business and Professions Code, we consider the definition of a prescription
4 in the Business and Professions Code.¹³ Business and Professions Code section 4040 states in pertinent
5 part that: “(a) ‘Prescription’ means an oral [or] written . . . order that is **both** of the following: (1) ***Given***
6 ***individually for the person*** or persons for whom ordered that includes all of the following: (A) The name
7 or names and address of the patient or patients; . . . (C) The date of issue; (D) Either rubber stamped,
8 typed, or printed by hand or typeset, the name, address, and telephone number of the prescriber, his or
9 her license classification . . . (F) If in writing, signed by the prescriber issuing the order . . . [and] (2)
10 ***Issued by a physician*** . . . ” (Italics and bolding added.)¹⁴ Based on this definition, in the context of
11 home health care services a prescription is issued by a physician (i.e., an M.D. or a D.O.) and is an oral
12 order for a patient or, a written order identifying the patient, with the date, the name and address of the
13 prescriber, and the signature of the physician.

14 The definition does not require that a prescription be labelled or written on a particular form and
15 does not require a detailed description of the recommended services. But, by itself, a prescription is not
16 “proof” of what are reasonable and necessary home health care services. Injured workers bear the burden
17 to prove that the services are reasonably required. Injured workers and their physicians are required to
18 comply with the applicable rules and statutes when seeking services. Hence, an oral or written
19 communication which meets the minimum requirements is sufficient to meet the condition in section
20

21 _____
22 ¹³ The only other definition of prescription is found in the Health and Safety Code. Health and Safety Code section
23 110010 states that:

24 “Prescription” means an oral order given individually for the patient for whom prescribed
25 directly from the prescriber to the furnisher or indirectly by means of a written order
signed by the prescriber that bears the name and address of the prescriber, the license
classification of the prescriber, the name and address of the patient, the name and quantity
of drug or device prescribed, the directions for use, and the date of issue.

26 ¹⁴ Business and Professions Code section 4040 contains a number of provisions that apply to drugs or devices, and for
27 clarity, we have omitted all of those portions. Specifically, “directions for use” or “the condition or purpose” for the order is
only required to be included in the prescription when it is for drugs or a device. (See Bus. & Prof. Code, § 4040(a)(1)(B)(E).)
This definition also allows prescriptions by providers other than physicians, and for clarity, we have omitted those references.

1 4600(h) that home health care services be prescribed. *Thus, we hold that the prescription required by*
2 *section 4600(h) is either an oral referral, recommendation or order for home health care services for an*
3 *injured worker communicated directly by a physician to an employer and/or its agent; or, a signed and*
4 *dated written referral, recommendation or order by a physician for home health care services for an*
5 *injured worker.*

6 When seeking home health care services, an injured worker must show that a prescription, as
7 defined above, exists. This prescription requirement is a limit on the employer’s duty to provide medical
8 treatment. Separately, an injured worker must prove that the prescription was received by the employer
9 and the date on which it was received. This receipt requirement narrows an employer’s duty to pay for
10 medical treatment because an employer’s liability is limited to 14 days before the date that the
11 prescription was received. Liability is not based on the date that the need for services may have begun.

12 Section 4600(h) does not specify *how* an employer must receive the prescription before it may
13 become liable for care and does not require that the prescription be submitted by an injured worker. With
14 respect to an oral prescription, in order for an employer to “receive” the communication, it can only be
15 made directly to the employer or the employer’s agent. In contrast, while a written prescription may be
16 received by an employer directly from a physician, so long as it meets the definition of a prescription, it
17 may also be received from another source, including from the injured worker, an injured worker’s agent,
18 a third person, or another provider. For example, an employer may “receive a prescription” in the form
19 of a request for authorization by a physician, a medical report, or a medical record.¹⁵

20
21 ¹⁵ AD Rule 9792.6(q) states that:

22 “Request for authorization” means a written confirmation of an oral request for a specific
23 course of proposed medical treatment pursuant to Labor Code section 4610(h) or a written
24 request for a specific course of proposed medical treatment. An oral request for
25 authorization must be followed by a written confirmation of the request within seventy-
26 two (72) hours. Both the written confirmation of an oral request and the written request
27 must be set forth on the “Doctor’s First Report of Occupational Injury or Illness,” Form
DLSR 5021, section 14006, or on the Primary Treating Physician Progress Report, DWC
Form PR-2, as contained in section 9785.2, or in narrative form containing the same
information required in the PR-2 form. If a narrative format is used, the document shall
be clearly marked at the top that it is a request for authorization. (Cal. Code Regs., tit. 8,
§ 9792.6(q).)

1 Under some circumstances, an employer may receive an oral communication or a document
2 which is ambiguous, so that it is not clear whether the oral communication or the document was actually
3 a “prescription” sufficient to trigger the liability period. In that case, or under other circumstances when
4 an employer receives other notice that home health care services may be needed or are being provided,
5 an employer has a duty under section 4600 to investigate. (See *Braewood Convalescent Hosp. v.*
6 *Workers’ Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 165 [48 Cal.Comp.Cases 566].) In addition
7 to the judicially announced obligation to do more than passively sit by, an employer also has a regulatory
8 duty to conduct a reasonable and good faith investigation to determine whether benefits are due. (See
9 Cal. Code Regs., tit. 8, § 10109.)

10 **C. Under section 4600(h), home health care services are subject to either section 5307.1 or section**
11 **5307.8. Section 5307.1 applies where an official medical fee schedule or Medicare schedule**
covers the type of home health care services sought. Otherwise, section 5307.8 applies.

12 The second condition in section 4600(h) provides that an employer’s liability for home health
13 care services is subject to section 5307.1 or section 5307.8. As set forth above, where no official medical
14 fee schedule or Medicare schedule covers the type of services sought, then section 5307.8 applies.
15 Section 5307.8 contains three provisions, which by definition only apply to that type of services and
16 those three provisions are part of an injured worker’s burden of proof.

17 The first provision of section 5307.8 requires that “the administrative director shall adopt ... a
18 schedule for payment of home health care services” and that this schedule, when adopted, “shall be based
19 on the maximum hours and fees as set forth in regulations adopted pursuant to . . . [s]ection 12300 [et
20 seq.] of the Welfare and Institutions Code” relating to In-Home Supportive Services (IHSS). As of the
21 date of this opinion, no schedule has been adopted. (See AD Rule 9789.90, which is reserved for home
22 health care services. (Cal. Code Regs., tit. 8, § 9789.90.)) Although section 5307.8 requires a schedule
23 based on those IHSS regulations, neither the provisions of Welfare and Institutions Code section 12300
24 et seq. nor the IHSS regulations govern home health care services under section 4600(h).¹⁶ As a result,
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27 ¹⁶ For example, Welfare and Institutions Code section 12300(h)(3), which provides that payment is limited to 283 hours per month or up to 9 hours per day does not apply to home health care services under section 4600(h).

1 an injured worker continues to bear the burden to demonstrate a reasonable hourly rate for the type of
2 services provided and the number of reasonably required hours based on substantial evidence.

3 The second provision states that: “No fees shall be provided for any services, *including* any
4 services provided by a member of the employee’s household, to the extent the services had been
5 regularly performed in the same manner and to the same degree prior to the date of injury.” (Italics
6 added.) Of note, because section 5307.8 uses the phrase “including” with respect to services provided by
7 a household member, this provision applies to all previously provided services and not just those that
8 were provided by a household member. (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 774 [the word
9 “includes” is “ordinarily a term of enlargement rather than limitation”]; accord, *Kight v. CashCall, Inc.*
10 (2011) 200 Cal.App.4th 1377, 1391.)

11 The third provision allows “an attorney’s fee for recovery of home health care fees *under this*
12 *section . . . in accordance with [s]ection 4906 and any applicable rules or regulations.*” (Italics added.)
13 Section 4906(a) refers to a lien under section 4903(a), which is a lien against an injured worker’s
14 compensation by an applicant’s attorney for attorney’s fees, and section 4906(b) refers to attorney’s fees
15 from “an employee.” Section 4906(d) states that: “In establishing a reasonable attorney’s fee,
16 consideration shall be given to the responsibility assumed by the attorney, the care exercised in
17 representing the applicant, the time involved, and the results obtained.” (See also Cal. Code Regs., tit. 8,
18 §§ 10775, 10776, 10778.) Hence, a reasonable attorney’s fee based on the recovery of section 5307.8
19 home health care services may be sought by an applicant’s attorney.

20 Like other forms of medical treatment, nothing in sections 4600(h) and 5307.8 requires an injured
21 worker to actually incur the cost of services before seeking home health care services.¹⁷ Neither section
22 identifies the payment recipient or requires that the recipient be an injured worker or a provider, although
23 by allowing attorney’s fees, section 5307.8 implies that reimbursement for this type of services is to an
24 injured worker. Consequently, an injured worker may seek reimbursement for home health care services
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27 ¹⁷ See section 4600(a) [employer is liable for “reasonable expense incurred by or on behalf of the employee” when there is a neglect or refusal to provide reasonably required medical treatment].

1 or an award of future medical treatment in the form of home health care services for an injured worker or
2 a provider, and reasonable attorney's fees, in the case-in-chief.

3 In its Petition, defendant contended that an award of home health care services should be denied
4 because applicant's spouse did not submit an itemization of services pursuant to section 4603.2(b)(1).
5 Under section 4603.2(b)(1), a provider must submit documentation to an employer before an employer is
6 required to pay. This includes an itemization of services and charges, copies of all reports showing
7 services performed, a prescription or referral by the primary treating physician, and any evidence of
8 authorization.¹⁸ However, as discussed above, section 5307.8 requires an injured worker to produce
9 evidence describing the hours of services required and provided, evidence explaining which services may
10 have been provided before an industrial injury, and evidence of a reasonable hourly rate. While this
11 evidence may also be considered an itemization of services and charges, the converse is not true. Section
12 4603.2(b)(1) is not part of an injured worker's burden of proof under sections 4600(h) and 5307.8.
13 Instead, section 4603.2(b)(1) concerns payment.

14 Section 4603.2(b)(1) does not specify when the itemized description and billing must be
15 submitted and no other statute refers to an itemized description and billing with respect to section 5307.8
16 services. Accordingly, setting aside any other statutory time lines, documentation under section
17 4603.2(b)(1) may be submitted to an employer as appropriate. Moreover, section 4603.2(b)(1) also states
18 that: "Nothing in this section shall prohibit an employer, insurer, or third-party claims administrator
19 from establishing, through written agreement, an alternative manual or electronic request for payment
20 with providers for services provided pursuant to Section 4600." Thus, while a provider of home health
21 care services must comply with section 4603.2(b)(1) in order to be paid, an employer may also choose to
22 pay for home health care services without the required documentation, including a "prescription."

23 Of note, under section 4603.2(b)(1), the prescription requirement is met by submitting a
24 prescription by a primary treating physician when a primary treating physician provides the services, or a
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26 ¹⁸ In contrast, section 4603.2(b)(2) sets forth a procedure for payment and provides for various notifications by the
27 employer and time limits for payment. Since section 4603.2(b)(2) specifically refers to section 5307.1, and not to section
5307.8, the guidelines for payment by an employer under section 4603.2(b)(2) do not apply to providers under section 5307.8.

1 referral by a primary treating physician if another person provides the services. This means that even if a
2 prescription from another physician meets the requirements of section 4600(h), section 4603.2(b)(1)
3 requires a referral by a primary treating physician. At the same time, a report or a request for
4 authorization that is signed by a primary treating physician who is a physician as defined above under
5 section 4600(h) can be a prescription under both section 4600(h) and section 4603.2(b)(1). Additionally,
6 section 4603.2(b)(1) requires “copies of reports” and “any evidence of” authorization. Consequently,
7 section 4603.2(b)(1) does not impose a separate reporting requirement or a separate procedure for
8 obtaining authorization, but merely shifts the duty to the provider who is seeking payment to include
9 those documents as appropriate.

10 **III. APPLICANT’S CASE**

11 Dr. Gordon’s September 17, 2012 and November 5, 2012 reports reflect that applicant sustained a
12 severe injury to his dominant hand when it was crushed in a power press machine resulting in its “near-
13 amputation.” Dr. Gordon’s September 17, 2012 report states that applicant had five surgeries after his
14 injury of July 11, 2011 and that more than one year later applicant had essentially lost all use of his hand
15 and continued to have “extremely severe pain when trying to move the hand in any way at all.” Dr.
16 Lee’s November 11, 2011 note is evidence of his opinion that applicant needed assistance from his
17 spouse. Moreover, applicant’s spouse’s un rebutted and unimpeached trial testimony established that she
18 performed home health care services for applicant. Thus, with respect to defendant’s first contention that
19 applicant’s award of home health care services was not supported by substantial medical evidence,
20 without considering any other issues, the WCJ could properly find that the evidence before him showed
21 that applicant was and is in need of home health care services.

22 However, as set forth above, in order to obtain an award of home health care services, section
23 4600(h) requires applicant to show that he had a prescription, that it was received by defendant, and that
24 he met the requirements of section 5307.8. Section 5307.8 requires an injured worker to produce
25 evidence describing the hours of services required and provided, evidence explaining which services may
26 have been provided before an industrial injury, and evidence of a reasonable hourly rate.

1 With respect to the requirement of a prescription, the November 11, 2011 note from Dr. Lee
2 states that applicant has been under the care of Dr. Lee “for severe injury to his RT. hand since 7-11-11
3 at which time he has needed constant care from his wife Adriana Bayona.” The note is dated, is in
4 writing and is signed. It identifies applicant and his treating physician, and it states that applicant needs
5 care by his spouse. We conclude that this note is a prescription for home health care services within the
6 meaning of section 4600(h).

7 The letter from applicant’s counsel to defendant’s counsel reflects that Dr. Lee’s November 11,
8 2011 prescription was sent to defendant by applicant on November 28, 2011. In that letter, applicant’s
9 counsel stated: “Please allow this letter to serve as my formal request that you authorize the applicant’s
10 wife, Adrianna Bayona to provide in-home [sic] for the applicant,” and defendant admitted receipt of the
11 letter and the attachment. Thus, even though the date of receipt is not clear and defendant disputed that it
12 was a “prescription,” defendant “received a prescription” as required by section 4600(h) and at a
13 minimum, defendant’s potential liability period began 14 days prior to the date it received the letter and
14 the prescription.

15 Dr. Lee’s prescription refers to the period from the date of applicant’s injury to November 11,
16 2011. Applicant suffered a severe injury, and it appears that he was in need of home health care services
17 and that his spouse was caring for him from the time of his release from the hospital, if not before.
18 Specifically, applicant’s spouse testified that she was “required to spend all day long” with applicant
19 following his release from the hospital, that she discussed her care of his hand after it became infected in
20 September 2011 with Dr. Lee, and that Dr. Lee told her that she “had to clean the applicant up as they
21 could not get a nurse.” It may be that defendant received medical records from the hospital from before
22 November 11, 2011 containing a referral or recommendation for home health care services or providing
23 notice of applicant’s need for home health care services. Applicant’s spouse’s testimony suggests that
24 Dr. Lee may have communicated with defendant about applicant’s need for home health services and at a
25 minimum, raises an inference that defendant may have received notice of the need for home health care
26 services such that it should have investigated. Thus, we are unable to determine based on the evidence in
27 the record before us whether the liability period may have begun at an earlier time.

1 Here, the WCJ awarded payment to applicant's spouse at her previous earnings rate based on
2 what he assumed were the number of hours recommended by Dr. Lee and Dr. Gordon retroactive to
3 August 3, 2011. In addition to the issues raised by the prescription requirement as set forth above, the
4 record lacks detailed evidence of what services were actually needed and what services applicant's
5 spouse actually performed before and after the injury. Moreover, any award of reimbursement would be
6 based on an appropriate rate for a similar caregiver and would not be based on a spouse's loss of earnings
7 from previous employment. Thus, we must rescind the Findings and Award.

8 The Appeals Board has the discretionary authority to develop the record when the record does not
9 contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues.
10 (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62
11 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary record to enable a
12 complete adjudication of the issues is consistent with due process in connection with workers'
13 compensation claims."]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63
14 Cal.Comp.Cases 261].) For the reasons explained above, we conclude that the record requires further
15 development.

16 Thus, as our decision after reconsideration, we rescind the Findings and Award and return the
17 matter to the WCJ for further development of the record consistent with this opinion and a new decision.
18 When the WCJ issues a new decision, any aggrieved party may timely seek reconsideration.

19 For the foregoing reasons,

20 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
21 Board (En Banc) that the Opinion and Order Granting Petition for Reconsideration and Decision After
22 Reconsideration issued by an Appeals Board panel on August 12, 2013 is **RESCINDED**.

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1 **IT IS FURTHER ORDERED** that the Findings and Award issued by the workers'
2 compensation administrative law judge on May 30, 2013 is **RESCINDED** and the matter is
3 **RETURNED** to the workers' compensation administrative law judge for further proceedings consistent
4 with this opinion and a new decision from which any aggrieved party may timely seek reconsideration.

5 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

6 **/s/ Ronnie G. Caplane**
7 **RONNIE G. CAPLANE**, Chairwoman

8
9 **/s/ Frank M. Brass**
10 **FRANK M. BRASS**, Commissioner

11
12 **/s/ Deidra E. Lowe**
13 **DEIDRA E. LOWE**, Commissioner

14
15 **/s/ Marguerite Sweeney**
16 **MARGUERITE SWEENEY**, Commissioner

17
18 **/s/ Katherine A. Zalewski**
19 **KATHERINE A. ZALEWSKI**, Commissioner

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

21 06/12/2014

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

24 **ROQUE NERI HERNANDEZ**
25 **RANCANO & RANCANO**
26 **SAMUELSEN, GONZALEZ, VALENZUELA & BROWN, LLP, ATTN: BRIAN ISHIMOTO**
27 **ADELSON, TESTAN, BRUNDO, NOVELL & JIMINEZ**

AS/jp