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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. ADJ1866275 (VNO 0489175)

HEATHER REESE,

Applicant,

vs.

**ALL SAINTS HEALTH CARE; STATE
COMPENSATION INSURANCE FUND,**

Defendants.

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration of applicant's Petition for Reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant sought reconsideration of the Findings of Fact and Order (F&O) issued by a workers' compensation administrative law judge (WCJ) on March 25, 2014. The WCJ found that applicant sustained industrial injury to her lumbar spine, psychological system, central nervous system (in the form of a sleep disorder) and cardiovascular system (in the form of deep vein thrombophlebitis) and that applicant was not entitled to further medical treatment in the form of home health care services.

Applicant contended that the F&O should be rescinded because *Bishop v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 1192 (writ den.) does not exclude the prescribed home health care services as medical treatment under Labor Code¹ section 4600 as a matter of law and that if the evidence was insufficient to demonstrate that the services were reasonably required, the record should be further developed.

We did not receive an answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ in response to applicant's petition, which recommended that the Petition for Reconsideration be denied.

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

1 We have reviewed the record and have considered the allegations of the Petition for
2 Reconsideration and the contents of the Report, and we now issue our decision after reconsideration. For
3 the reasons discussed below, we will rescind the F&O and return the matter to the WCJ for further
4 proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved party may
5 timely seek reconsideration.

6 FACTUAL BACKGROUND

7 While employed as a licensed vocational nurse on June 16, 2002, applicant sustained industrial
8 injury to her lumbar spine, psychological system, central nervous system (in the form of a sleep disorder)
9 and cardiovascular system (in the form of deep vein thrombophlebitis). Stipulations with Request for
10 Award for 100% permanent disability were approved by a different WCJ on April 10, 2013. As relevant
11 here, the parties stipulated that:

12 This stip is based on & applicant's future medical treatment shall be
13 consistent with but not limited to the following AMEs – Mouradian,
14 O'Neill & Marusak. Future medical will be subject to UR. Future medical
15 treatment shall be consistent with applicable law. (Stipulations with
16 Request for Award, April 10, 2013, p. 7, ¶ 9.)

17 On August 26, 2013 applicant's primary treating physician Philip A. Sobol, M.D., evaluated
18 applicant. He stated that:

19 The patient also reports that she is unable to maintain her home or do
20 [basic] housework. She is currently assisted by her daughter, Alexandra
21 Reese and her fiancé, Jarold Schwartz, who work approximately 20 hours
22 per week for her performing mopping, vacuuming, dusting, making her
23 bed, cleaning the bathroom, sweeping, meal preparation, cooking, doing
24 dishes/laundry and grocery shopping. (Exhibit 1, Philip A. Sobol, M.D.,
25 August 26, 2013, p. 1.)

26 In his report, Dr. Sobol requested:

27 Authorization . . . for home care assistance at four hours per day, five days
per week for one year on an indefinite basis to aid in food preparation,
cooking and cleaning, laundry, sweeping, mopping, vacuuming, household
chores and grocery shopping due to the patient's permanent disability.
(Exhibit 1, p. 2.)

1 He issued a request for authorization (RFA) for an MRI of applicant's lumbar spine, aquatic therapy,
2 continued pain and medication management, and home care assistance at four hours per day, five days
3 per week for one year, and referred to his report (Exhibit 1). (Exhibit 2, Request for Authorization for
4 Medical Treatment, August 26, 2013.) He also issued a prescription note recommending:

5 Home care 4 hours per day, 5 days per week for 1 year and probably on an
6 indefinite basis to aide food prep, cooking, cleaning, laundry, sweep, mop,
7 vacuum, household chores, grocery shop, yard work. (Exhibit 3,
8 Prescription by Philip A. Sobol, M.D., August 26, 2013.)

8 On October 25, 2013, Dr. Sobol issued another report and an RFA, including for home health
9 care services of four hours per day, five days per week. (Exhibit 7, Philip A. Sobol, M.D., October 25,
10 2013; Exhibit 2, Request for Authorization for Medical Treatment, October 25, 2013.)

11 On November 7, 2013, defendant's adjuster Irma P. Rogers wrote to Dr. Sobol, denying the
12 request for a dental consultation and home care assistance. (Exhibit A, Letter from State Compensation
13 Insurance Fund to Philip A. Sobol, M.D., November 7, 2013.) Although applicant was served with the
14 letter, applicant's attorney was not.

15 On February 10, 2014, Dr. Sobol examined applicant and issued a supplemental report. (Exhibit
16 5, Philip A. Sobol, M.D., February 11, 2014.) He requested an authorization for a pain management
17 consultation for lumbar spine facet blocks at L4-L5 and L5-S1; he noted that the MRI scan of September
18 21, 2013 of applicant's lumbar spine "showed evidence of mild to moderate facet degenerative joint
19 disease at L4-L5 and L5-S1, multilevel disc degeneration with posterior annular fissure at L4-L5 and L5-
20 S1 and small right-sided ligamentum flavum cyst at L3-L4. (Exhibit 5, p. 1.) With respect to home
21 health care services, he again requested four hours per day, five days per week for one year (retroactive
22 to June 16, 2002) on an indefinite basis to aid in household chores, dressing, bathing, cooking and
23 cleaning" and referred to his August 27, 2013 report (Exhibit 1). (Exhibit 5, p. 2.) He issued a
24 prescription note for "cont. Home care 4 hours/day, 5 days/week for 1 year (indefinite) basis to aid
25 household chores, bath, dress, cook, clean. Please refer rep. 8/27/13." (Exhibit 4, Prescription by Philip
26 A. Sobol, M.D., February 10, 2014.) He also issued another RFA. (Exhibit 6, Request for Authorization
27 for Medical Treatment, February 11, 2014.)

1 On March 19, 2014, the parties proceeded to an expedited hearing on the issue of applicant's need
2 for further medical treatment in the form of home health care services.

3 On March 25, 2014, the WCJ issued the F&O, finding that applicant was not entitled to further
4 medical treatment in the form of home health care services. In his Opinion, he pointed out that defendant
5 did not offer a utilization review denial of the August 26, 2013 RFA (Exhibit 2) and that the utilization
6 review denial of the October 25, 2013 RFA (Exhibit 8) was untimely rendering it invalid. Therefore,
7 applicant had the burden to show that the requested treatment was reasonable and necessary. He found
8 that the request for assistance for food preparation, cooking and cleaning, laundry, sweeping, mopping,
9 vacuuming, household chores and grocery shopping was not considered medical treatment based on
10 *Bishop v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 1192 (writ den.) (*Bishop*). With
11 respect to the request for assistance with dressing and bathing, he found that Dr. Sobol had not provided
12 sufficient rationale for the necessity of the services, so that his opinion was not substantial evidence of
13 the need for the services.

14 DISCUSSION

15 Here, the WCJ found that defendant's UR was untimely. On October 6, 2014, we issued a new
16 en banc decision in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board
17 en banc) (*Dubon II*). In *Dubon II*, we rescinded our previous en banc decision of February 27, 2014 in
18 *Dubon v. World Restoration, Inc.*, (2014) 79 Cal.Comp.Cases 313 (Appeals Board en banc) (*Dubon I*).
19 In *Dubon II*, we held that a UR decision is invalid only if it is untimely. *Dubon II* is binding on all
20 Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341.) Since the basis for the WCJ's
21 decision was that defendant did not submit the August 26, 2013 RFA to utilization review and that the
22 utilization review of the October 25, 2013 RFA was untimely, we continue to find that the WCJ properly
23 considered whether applicant was entitled to medical treatment in the form of home health care services.
24 (See *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73
25 Cal.Comp.Cases 981].) We also observe that neither party challenged that part of the WCJ's decision.

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1 Here, the WCJ relied on *Bishop, supra*, a writ denied² case, to find that applicant was not entitled
2 to housekeeping services as a matter of law. However, in *Smyers v. Workers' Comp. Appeals Bd.* (1984)
3 157 Cal.App.3d 36 [49 Cal. Comp. Cases 454] (*Smyers*), the Court of Appeal stated that:

4 Our holding in the instant case extends coverage to recipients of
5 housekeeping services when there is a demonstrated medical need. In
6 contrast, the *Keil* [*Keil v. State of California* (1981) 46 Cal.Comp.Cases
7 696 (Appeals Board en banc)] rule, through the application of a per se
8 exclusion of solitary housekeeping services, forecloses and restricts
9 coverage. The rule we enunciate is more in harmony with the purposes of
10 the act. [fn 3 omitted.]

11 Finally, the application of the *Keil* rule leads to confusion. 'Attendant' and
12 'nursing' services are compensable. [Citations.] So also is 'practical
13 nursing' which includes housekeeping. [*Henson v. Workmen's Comp.*
14 *Appeals Bd.* (1972) 27 Cal.App.3d 452, 458 [37 Cal.Comp.Cases 564].]
15 Therefore, an injured person may be compensated for the services of an
16 'attendant' to help him dress or do personal chores, or, may be reimbursed
17 for the services of a practical nurse who performs housekeeping services.
18 Yet, the same injured claimant, according to *Keil*, could not be
19 compensated for pure housekeeping services without the magical
20 'attendant' or 'practical nurse' label.

21 We hold that the proper approach by the Board is to treat the question of
22 reimbursement under section 4600 for housekeeping services as a factual
23 question to be resolved in each case by lay and expert evidence. The test
24 then is whether household services in the particular case before the Board
25 are medically necessary and reasonable. If the claimant can produce
26 evidence to answer this question in the affirmative, then the expenses for
27 housekeeping are recoverable as a "medical treatment" under section
4600. (*Id.*, at pp. 42-44.)

28 Thus, under *Smyers*, applicant's request for housekeeping services was not precluded.

29 Here, the F&A issued on March 25, 2014, and on June 12, 2014, we issued *Neri Hernandez v.*
30 *Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board
31 en banc) (*Neri Hernandez*) concerning home health care services. Sections 4600(h), 4603.2(b)(1), and

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² Writ-denied summaries published in California Compensation Cases may be cited in published decisions. (See, e.g., *Robertson v. Workers' Comp. Appeals Bd.* (2003) 112 Cal.App.4th 893, 899 [68 Cal. Comp. Cases 1567].) *Bishop, supra*, is a writ-denied summary of a decision by the Appeals Board, and consequently, it has no stare decisis effect.

1 5307.8 were enacted as of January 1, 2013. Although the evidence submitted at trial concerned treatment
2 requests of August 26, 2013 and October 25, 2013, applicant's claim for home health care services
3 apparently arose before the enactment of the statutes, and the F&O issued on March 25, 2014 after the
4 statutes took effect. In *Neri Hernandez, supra*, we concluded that sections 4600(h), 4603.2(b)(1), and
5 5307.8 "apply to all requests for home health care services and for payment thereof where no final
6 decision on the request had issued by January 1, 2013." (79 Cal.Comp.Cases at p. 688.) Consequently,
7 sections 4600(h), 4603.2(b)(1), and 5307.8 apply to applicant's claim for home health care services.

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

9 Section 4600(h) makes clear that home health care services are included in
10 the definition of 'medical treatment,' but it also limits an employer's duty
11 to provide that treatment by imposing two additional conditions which are
12 part of an injured worker's burden of proof. The first condition requires
13 that home health care services be prescribed by a physician, and an
14 employer may become liable for home health care services provided 14
15 days prior to receipt of a prescription. The second condition requires that
16 an employer's liability for home health care services is subject to either
17 section 5307.1 or section 5307.8. (*Id.* at pp. 688-689.)

18 Here, when the parties prepared for trial and tried the issue of home health care services, we had
19 not issued *Neri Hernandez*. The Appeals Board has the discretionary authority to develop the record
20 when the record does not contain substantial evidence or when appropriate to provide due process or
21 fully adjudicate the issues. (§§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th
22 389, 394 [62 Cal.Comp.Cases 924] ["The principle of allowing full development of the evidentiary
23 record to enable a complete adjudication of the issues is consistent with due process in connection with
24 workers' compensation claims. (citations)"]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62
25 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) As explained above, applicant's request for housekeeping
26 services was not precluded under *Smyers, supra*. Although we agree with the WCJ that Dr. Sobol's
27 opinions were not sufficient to support an award of home health care services, we believe that the record
requires further evidence in light of the application of *Neri Hernandez* and *Smyers*, and we will rescind
the F&O. The WCJ has jurisdiction to allow development of the record as appropriate.

///

1 Accordingly, we rescind the F&O and return the matter to the WCJ for further proceedings
2 consistent with this opinion. When the WCJ issues a new decision, any aggrieved party may timely seek
3 reconsideration.

4 For the foregoing reasons,

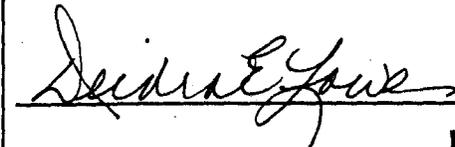
5 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
6 Board, that the Findings of Fact and Order issued by the WCJ on March 25, 2014 is **RESCINDED** and
7 the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion and a new
8 decision from which any aggrieved party may timely seek reconsideration.

9 **WORKERS' COMPENSATION APPEALS BOARD**

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12 _____
13 **KATHERINE ZALEWSKI**

14 **I CONCUR,**

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16 _____
17 **MARGUERITE SWEENEY**

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19 _____
20 **DEIDRA E. LOWE**



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

22 **SEP 22 2015**

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

25 **HEATHER REESE**
26 **GLAUBER BERENSON, ATTN: JAMIE L. BERENSON**
27 **STATE COMPENSATION INSURANCE FUND, ATTN: PHILIP LANDSMAN**

AS/bea