WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES BISHOP, ***Applicant,*** **vs.** **SCHINDLER ELEVATOR COMPANY; ZURICH INSURANCE COMPANY,** ***Defendant(s).***	**Case No. ADJ1768236 (VNO 0353137)** **ADJ4711027 (VNO 0353138)** **OPINION AND DECISION AFTER RECONSIDERATION**

On June 14, 2010, we granted defendant's Petition for Reconsideration of the March 22, 2010 Supplemental Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ made the following findings:

> "(1) The applicant's motion to further allege he has sustained injury to 'hypertension and sleep disorder for which he needs medical treatment' is denied without prejudice as to the hypertension claim, but is granted as to the sleep disorder claim, but only as they relate to the issue of enforcement of the future medical award under this board's continuing jurisdiction. Because it is well beyond the five-year jurisdictional period from the 1996 industrial injuries to amend or modify the findings and award of 3/27/06, this board cannot disturb the original findings and award as to the parts-of-body injured.
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> "(3) The applicant's need for sleep disorder evaluation, internal medical evaluation for both abdominal pain and circulatory problems, including for evaluation of gastroesophageal reflux, housekeeping assistance 4-hours per day, 3-days per week for an indefinite period of time, pool man once a week, gardener once a week, a raised toilet seat and grab bars, and a Weight Watchers weight loss program, is reasonable and necessary medical treatment within the scope of the future medical award.
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"(5) The defendant did unreasonably delay and/or fail to authorize the post-award medical treatment recommendations of the PTP in the form of sleep disorder evaluation, internal medical evaluation for both abdominal pain and circulatory problems, including for evaluation of gastroesophageal reflux, housekeeping assistance 4-hours per day, 3-hours per week for an indefinite period of time, pool man once a week, gardener once a week, and a raised toilet seat and grab bars, entitling the applicant to increased compensation under Labor Code section 5814 in the sum of 25% of the value of each said post-award medical treatment services delayed or refused in an amount to be determined by the parties (not to exceed $10,000 each), payable to applicant, James Bishop, by defendant, Zurich Insurance Company, plus a reasonable attorney's fee under Labor Code section 5814.5 payable by defendant to Law Offices of Dennis Hershewe in the sum of $10,000.00." (Supplemental Findings and Award, 3/22/10, at pp. 1-2.)

Previously, a March 27, 2006 Joint Findings and Award issued providing that applicant sustained cumulative trauma from March 1970 to November 27, 1996 (Case No. VNO353137) and specific injury on September 24, 1996 (VNO0353138) to his back, both knees, and gastrointestinal system causing 77% permanent disability after apportionment and need for further medical treatment. We granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

In its Petition for Reconsideration, defendant contends that the WCJ erred in finding that housekeeping services, pool services, and gardening services consist of medical treatment that is reasonable and necessary to cure or relieve applicant from the effects of his injury. Defendant further contends that the WCJ erred in awarding Labor Code[1] section 5814 penalties consisting of 25% of the value of delayed medical treatment and that the WCJ erred in awarding multiple penalties for the same medical treatment delayed or denied. Defendant argues that the sleep disorder evaluation and the internal medicine examinations were timely authorized; that the housekeeping, pool, and gardening services are not medical treatment pursuant to Administrative Director Rule 9792.6(o); and that the "raised toilet seat and grab bar" were authorized and provided to applicant. Next, defendant contends that the WCJ erred in awarding a Weight

[1] All further statutory references are to the Labor Code, unless otherwise noted.

Watchers' weight loss Program and treatment for applicant's sleep disorder arguing that the award of these modalities is not based on substantial medical evidence. Finally, defendant contends that the WCJ erred in awarding $10,000.00 in attorney fees pursuant to section 5814.5.

Applicant filed an Answer. The WCJ issued a Report of Workers' Compensation Judge on Petition for Reconsideration (Report) recommending that we deny reconsideration. On May 12, 2010, defendant filed Defendant's Request to Submit Supplemental Petition and/or Reply Pursuant to WCAB Rule 10848 (Reply) responding to the WCJ's Report. Pursuant to our authority, we allow defendant's Reply. (Cal. Code of Regs., tit. 8, § 10848.)

I.

Based on our review of the record and for the reasons discussed by the WCJ in his Report, which we adopt and incorporate herein, only to the extent it addresses the award of the a Weight Watchers' Program and treatment for applicant's sleep disorder, we will affirm the WCJ's award of those treatment modalities. Based on the reasons discussed below, we will amend the WCJ's decision to defer the issue of penalties and section 5814.5 attorney fees and to find that applicant is not entitled to housekeeping services, pool services, and gardening services as part of the March 27, 2006 Award for medical treatment. We will otherwise affirm the March 22, 2010 Supplemental Findings and Award.

II.

We adopt the following general recitation of facts in the WCJ's Report:

> "By Joint Findings and Award dated March 27, 2006 [] it was found the applicant, James Bishop, while employed by defendant, Schindler Elevator Corporation, insured by Zurich Insurance Company, sustained industrial cumulative trauma injury from 3/70 to 11/27/96 (VNO 353137) and specific injury on 9/24/96 (VNO 353138) to the back, both knees and gastrointestinal system. The applicant was awarded, among other things, permanent disability of 77:0%, after apportionment, and future medical care. He underwent a laminectomy in 1993. Post-award, he had a right total knee replacement in June of 2007, and six-months later, underwent a left total knee replacement. He also had a left total hip replacement in October of 2006. Later, as a compensable consequence of the industrial injuries, he underwent a left shoulder surgery on May 14, 2008.
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> "The matter came on the trial calendar on 2/14/08 before WCJ John Mah to

adjudicate the issue of enforcement of the above-noted findings and award of future medical care, and attorney fees pursuant to Labor Code section 5814.5. As noted in the Minutes of Hearing at page 3:9, the issue of applicant's claim for penalties was deferred. As further noted in the Minutes of Hearing at page 2:19-22, it is stipulated that at a Mandatory Settlement Conference held on 9/19/ 07, the parties "stipulated that the following parts of body were injured in these cases: 'both lower extremities, low back, spine, strain, both hips, and left shoulder.' At the hearing held on 2/14/08, they further stipulated, 'the parties agreed to strike 'strain' as a part of body injured' as set forth at page 2 of said Minutes of Hearing.

"In framing the issue of enforcement of the future medical award, the Minutes of Hearing dated 2/14/08, at page 3:1-9, the WCJ noted as follows:

> "'A. Enforcement of the March 27, 2006 award of future medical treatment for Applicant to be provided with the following forms of treatment which he contends was found to be necessary by AME Dr. Seymour Alban;
> 1) Twice a week housekeeping services for 4 hours each time.
> 2) Gardening services once a week.
> 3) Weekly service of his swimming pool.
> 4) A 'life care plan' regarding Applicant's medical needs prepared by a life care planner selected by him.
> 5) Modifications to applicant's home to accommodate his permanent disability, including but not limited to handrails, guardrails and steps.
> 6) A gym membership.'

"Relying upon the supplemental AME opinion of Dr. Seymour Alban dated 8/27/07 [] and selected portions of the deposition taken of the AME on 11/7/07 [], a Findings and Order issued on 3/7/08 finding the applicant's need for elevated toilet seat, hand bars above the toilet and shower or bathtub is within the scope of the award of future medical treatment. The WCJ determined the record was in need of development as to all other issues framed at the hearing held on 2/14/08.

"The defendant timely filed a petition for reconsideration, and the WCAB granted reconsideration by its Opinion And Order Granting Reconsideration And Decision After Reconsideration dated 6/2/08, deferring all issues and remanding the matter to the trial level so that the WCJ could develop the record with a supplemental AME examination of the applicant and report, and receiving in evidence the entirety of the AME's deposition dated 11/7/07.

"Following the trial WCJ's retirement, the matter was reassigned to the undersigned WCJ, and hearings were held on 4/27/09, 6/11/09, and 11/24/09. As set forth in the Minutes of Hearing dated 4/27/09, 6/11/09, and 11/24/09, a multitude of medical reports and documents, including but not limited to

reports of Dr. Steven Nagelberg, Dr. Andrew Rah, multiple correspondence from applicant's attorney and defense attorney, and utilization review documents, were received in evidence. The testimony of the applicant and claims adjuster, Jeff McHale, and claims supervisor, Karen Binion, was taken as summarized in the Minutes of Hearing.

"As noted in the Minutes of Hearing dated 4/27/09, at page 5:6-12, the applicant's Labor Code section 5814 penalty claims as against indemnity benefits and petitions to enforce the indemnity award was deferred. In support of his pending post-award medical treatment penalty claims, the applicant filed various petitions for Labor Code section 5814 penalties and attorney fees. The defendant filed written opposition to the applicant's multiple petitions for penalties as noted in the Minutes of Hearing dated 4/27/ 09 at page 5:17-6:6.

"As noted in the Minutes of Hearing dated 4/27/09 at page 4:8-17, also placed in issue is the defendant's petition dated 3/2/09 to withdraw from the above-noted stipulation to compensable consequence injuries entered into at the hearing held on 2/14/08. The applicant opposed the defendant's motion to withdraw from said stipulation. The applicant sought leave to further allege as a compensable consequence of the industrial injuries he has sustained injury to 'hypertension and sleep disorder for which he needs medical treatment.'" (Report, 5/10/10, at pp. 3-5.)

III.

A. APPLICANT'S ENTITLEMENT TO HOUSEKEEPING SERVICES, POOL SERVICES, AND GARDENING SERVICES

In awarding the housekeeping, pool, and gardening services as medical treatment, the WCJ relied on the medical reports of applicant's primary treating physician, Steven Nagelberg M.D., and the reports of agreed medical examiner (AME) Seymour Alban, M.D. He also based the award on defendant's alleged failure to conduct timely utilization reviews of the requests for those modalities.

In his Report, the WCJ noted that:

"Dr. Nagelberg issued a PTP PR-2 report dated 9/25/08. He noted the applicant's subjective complaints. He continued having aching pain in the left shoulder, but was better than he had been when the PTP last saw him. He noted the applicant continued having difficulty caring for himself and the applicant noted difficulty sleeping at night and was having abdominal pain. Under the heading "Treatment Plan and Authorization Request,["] the PTP reported as follows:

"'At this point, the patient is in need of additional care. [¶] I will

> refer him for a sleep disorder evaluation as well as an internal medical evaluation, both for his abdominal pain and circulatory problems. [¶] The patient requires housekeeping assistance 4 hours per day, 3 days per week for an indefinite period of time. [¶] The patient also requires pool man one time a week and gardening one time a week. [¶] He has purchased a raised toilet seat, which I previously requested on an industrial basis. He should be reimbursed for this. Grab bars should also be provided to him. [¶] I continue to feel he would benefit from Weight Watchers weight loss program.'

"The applicant's attorney served the PR-2 report of Dr. Nagelberg dated 9/25/08 upon defense counsel by mail on 10/22/08.

"On 10/30/08, the defendant issued a UR denial of authorization for the Weight Watchers weight loss program treatment plan recommended by Dr. Nagelberg. Allowing five days for mailing, it is presumed the defendant received the treatment request on 10/27/08. Because the UR as to the weight loss portion of the treatment plan was done on 10/30/08, within five days as required by Labor Code section 4610(g), it is timely. But because the UR is silent as to the other treatment plan requests set forth in the PTP's PR-2 report dated 9/25/08, i.e., as to sleep disorder evaluation as well as internal medical evaluation for both the abdominal pain and circulatory problems, the housekeeping assistance 4 hours per day, 3 days per week for an indefinite period, the purchase of a raised toilet seat, provision of grab bars, the defendant failed to timely conduct a utilization of review of said treatment requests. In accordance with *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 (73 Cal. Comp. Cases 981), the undersigned WCJ correctly found the applicant is entitled to the sleep disorder evaluation, internal medical evaluation for both the abdominal pain and circulatory problems, the housekeeping assistance 4 hours per day, 3 days per week for an indefinite period, the purchase of a raised toilet seat, provision of grab bars. The UR denying the request for the weight loss program was found timely, and the defendant's denial of said treatment request was correctly found reasonable per Labor Code § 4616." (Report, at pp. 11-12.)

* * *

"By his AME report dated 7/8/08, the AME [Seymour Alban, M.D.,] also addressed the applicant's medical treatment needs, and opined at page 19, in pertinent part, as follows:

> "'He should continue with physical therapy as necessary until his shoulder plateaus, which may take periodic reinforcement by a trained therapist until he becomes permanent and stationary. [¶] The patient at this time does not need home care since his wife, who has plantar fascitits, but is able to do some cooking and house

> cleaning, is able to function as a partial caretaker. However, she indicates she has some disability for standing and walking. If she is no longer able to help in the household, he will need a household helper approximately once per week for at least four hours. [¶] He also indicates that he has a small garden and does employ a gardener once per week for an hour to two hours, since he surely cannot do any heavy gardening except for occasional sprinkling. He cannot do bending, stooping, kneeling, or lifting from ground level more than an occasional two to three pounds. [¶] He has a swimming pool but indicates that the expense at heating it is a problem. Having a warm pool to exercise in would surely be advantageous and he is encouraged to perform general exercises for not only his recently operated left shoulder, but his hips and knees.'" (Report, at pp. 20-21.)

Pursuant to this record, we are not persuaded that there is a demonstrated medical need supported by substantial medical evidence for the award of housekeeping, gardening, and pool services as part of the continuing medical award.

The employer is required to provide medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury..." (Lab. Code §4600.) Section 4600 defines medical treatment as:

> "Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer." (Lab. Code, §4600(a).)

Moreover, while an applicant may be entitled to ancillary services as part of an award of medical treatment when there is a demonstrated medical need, the determination will depend upon the record in each case. (See *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454] (remanded to consider reimbursement under §4600 for housekeeping services).) Moreover, in *Jensen v. Workers' Com. Appeals Bd.* (1992) 57 Cal.Comp.Cases 19 (writ den.), the Appeals Board overturned a WCJ award of housekeeping services because the applicant failed to show that performing housekeeping duties would exacerbate her medical condition. (See also, *Brodd v. CEXI Co.* (2004) 69 Cal.Comp.Cases 597 (reimbursement of mortgage expenses as part of medical treatment award reversed).) A recent Appeals Board panel

decision noted that:

> "A conclusory recommendation by a physician is insufficient to justify recommended services. A medical prescription must be combined with an explanation of the direct relationship between the applicant's industrial condition and the activities in question. The recommending doctor must be specific as to the scope and duration of the services and why the services are reasonably necessary and required. Without a specific basis for the doctor's opinion, the opinion does not constitute substantial evidence on this issue
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> "The pool and lawn care services prescribed by Dr. Tepper 'so that [the applicant] does not sustain re-injury while performing these activities' resembles a prophylactic work restriction more than a prescription for services to cure or relieve the applicant from his injuries. It is not clear how or why Dr. Tepper and Dr. Shaw arrive at the conclusion that pool and yard care is necessary medical care from the premise that applicant cannot perform pool and yard care. Neither Dr. Tepper nor Dr. Shaw explains why pool and lawn care should be considered medical treatment or why it is medically necessary. It is conceivable that there are many activities that a 100% disabled applicant can no longer do, but it does not follow that defendants must pay someone to do every activity the applicant is precluded from doing. To the extent that Dr. Tepper's and Dr. Shaw's reports are based on an incorrect legal theory (i.e. confusion between permanent disability and medical treatment), they are not substantial medical evidence. In addition, the reports fail to offer analysis as to why these services are medically necessary including an analysis of how the applicant could potentially injure himself, how long the services will be required, why these services should be considered medical treatment, and the reasonableness of the services in light of applicant's medical treatment plan." (*Corniel v. Kasler Corporation*, (April 2, 2008) ADJ2463774 (AHM 0048021) (Appeals Board panel decision).)

Likewise here, we are not persuaded that housekeeping, gardening, and pool services fall under the definition of "medical treatment" subject to utilization review. Defendant argues compellingly in its Petition for Reconsideration that, while many things may directly or indirectly relieve or alleviate an injured worker's symptoms (such as gasoline that enables him to drive to the pharmacy to obtain a prescription related to his injury or a home that prevents him from being exposed to the elements), such items cannot reasonably be labeled medical treatment pursuant to section 4600 or be subject to utilization review pursuant to section 4610. In addition, we are not persuaded that Dr. Nagelberg's or Dr. Alban's opinions are substantial evidence that these services constitute medical treatment that is reasonable and necessary to cure or relieve applicant applicant's injury. It is not clear how or why Dr. Nagelberg or Dr. Alban arrived at the conclusion

that housekeeping, gardening and pool services are medical care or how and why these services are reasonable and necessary on an industrial basis. In addition, their reports fail to offer analysis as to whether applicant ever performed these activities prior to his injury, whether the activities in question are activities of daily living, whether performance of the activities would have serious or long term effects on the applicant's industrial condition, and the reasonableness of these services in light of the scope of medical treatment and its defined goals.

Therefore, we will reverse the WCJ to find that applicant is not entitled to housekeeping, gardening, or pool services on an industrial basis as part of the medical Award.

B. PENALTIES

Turing to the issue of penalties: we note that section 5814 provides in relevant part that:

> "(a) When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less. In any proceeding under this section, the appeals board shall use its discretion to accomplish a fair balance and substantial justice between the parties." (Lab. Code, §5814(a).)

In addition, section 5814.5 states that:

> "When the payment of compensation has been unreasonably delayed or refused subsequent to the issuance of an award by an employer that has secured the payment of compensation pursuant to Section 3700, the appeals board shall, in addition to increasing the order, decision, or award pursuant to Section 5814, award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded." (Lab. Code, §5814.5.)

We addressed the calculation of section 5814 penalties in our en banc decision in *Ramirez v. Drive Financial Services* (2008) 73 Cal.Comp.Cases 1324 (Appeals Board en banc). Therein, we noted that:

> "In light of the language of current section 5814(a), the WCJ correctly concluded that discretion is now required in setting the amount of a penalty and that an applicant is not necessarily 'entitled' to the maximum. Section 5814(a) provides that, when an unreasonable delay is found, the penalty shall be 'up to 25 percent or up to ten thousand dollars ($10,000), whichever is less' and that the Appeals Board 'shall use its discretion to accomplish a fair

balance and substantial justice between the parties.'" (*Ramirez, supra*, 73 Cal.Comp.Cases at p. 1328.)

In *Ramirez,* we enumerated several factors that a trier of fact should consider "to accomplish a fair balance and substantial justice between the parties," as required by section 5814(a). We also noted that, "[t]he attorney for an applicant seeking increased compensation under section 5814 is entitled to a reasonable fee under section 5814.5, based on a reasonable number of hours expended in enforcing the prior award of benefits and a reasonable hourly rate" and that it must be proportionate to the amount of benefits obtained. (*Ramirez, supra*, 73 Cal.Comp.Cases at pp. 1329-1330, 1336.)

Here, however, the WCJ did not provide any analysis as to why he calculated a 25% penalty on the delayed medical treatment as opposed to a lesser amount or why he allowed an attorney fee of $10,000.00. Therefore, we will amend the WCJ's decision to defer the issue of penalties and attorney fees and return this matter to the trial level for further proceedings as the WCJ deems necessary to issue a new decision on this issue. The WCJ should consider the issue of penalties in light of our finding that applicant is not entitled to housekeeping, gardening, and pool service as part of the medical award. The WCJ should also address defendant's contentions that multiple penalties were assessed for the same medical treatment delayed or denied, that the sleep disorder evaluation and the internal medicine examinations were timely authorized, and that the raised toilet seat and the grab bar were authorized and provided to applicant. When the WCJ issues a new decision on this issue, it should contain an adequate analysis of the reasons for the calculation of any penalty awarded and attorney fee allowed.

Accordingly, we will amend the WCJ's decision to find that applicant is not entitled to housekeeping services, pool services, and gardening services and to defer the issues of penalties and attorney fees. We will otherwise affirm the March 22, 2010 Supplemental Findings and Award.

For the foregoing reasons,

IT IS ORDERED as the Appeals Board's Decision After Reconsideration that the March 22, 2010 Supplemental Findings and Award is **AFFIRMED, EXCEPT** that paragraphs 3

and 5 Findings of Fact and the Award are **AMENDED** as provided below.

FINDINGS OF FACT

* * *

3. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein in the form of a sleep disorder evaluation, internal medical evaluation for both abdominal pain and circulatory problems, including for evaluation of gastroesophageal reflux, a raised toilet seat and grab bars, and a Weight Watchers weight loss program. Applicant is not entitled to housekeeping services, gardening services, or pool services as part of the Award for continuing medical treatment herein.

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5. The issues of penalties and attorney fees pursuant to section 5814.5 are deferred.

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AWARD

AWARD IS MADE in favor of **JAMES BISHOP** and against **ZURICH INSURANCE COMPANY** payable as follows:

(a) Medical treatment in accordance with Findings of Fact No. 3 above.

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

ALFONSO J. MORESI

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

JAMES C. CUNEO, COMMISSIONER

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
APR 22 2011

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

DENNIS HERSHEWE
KEGEL, TOBIN & TRUCE
JAMES BISHOP

PAG/csl

CONCURRING AND DISSENTING OPINION OF COMMISSIONER CUNEO

I concur in part and dissent in part. I concur with the majority on the issue of penalties. However, I dissent on the issue of applicant's entitlement to treatment in the form of housekeeping services, gardening services, and pool services and would affirm the WCJ in this regard.

Pursuant to section 4600, employers are required to provide medical treatment that is reasonably required to cure or relieve the injured worker from the effects of an industrial injury. Pursuant to section 4600(d)(5), the employer "may require prior authorization of any nonemergency treatment or diagnostic service and may conduct reasonably necessary utilization review [UR] pursuant to Section 4610."

In relevant part, section 4610(g) provides that:

> "In determining whether to approve, modify, delay, or deny requests by physicians prior to, retrospectively, or concurrent with the provisions of medical treatment services to employees all of the following requirements must be met:
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> "(1) Prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.
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> "(5) If the employer, insurer, or other entity cannot make a decision within the timeframes specified in paragraph (1) or (2) because the employer or other entity is not in receipt of all of the information reasonably necessary and requested, because the employer requires consultation by an expert reviewer, or because the employer has asked that an additional examination or test be performed upon the employee that is reasonable and consistent with good medical practice, the employer shall immediately notify the physician and the employee, in writing, that the employer cannot make a decision within the required timeframe, and specify the information requested but not received, the expert reviewer to be consulted, or the additional examinations or tests required. The employer shall also notify the physician and employee of the anticipated date on which a decision may be rendered. Upon receipt of all information reasonably necessary and requested by the employer, the employer shall approve, modify, or deny the request for authorization within the timeframes specified in paragraph (1) or (2)." (Lab. Code, § 4610(g), emphasis added.)

In *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*), the Supreme Court noted that:

> "Section 4610 requires that '[e]very employer . . . establish a utilization review process in compliance with this section' [citation omitted], defining utilization review as 'functions that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians . . .'" (*Sandhagen, supra*, 73 Cal.Comp.Cases at p. 985.)

Moreover, the *Sandhagen* Court stressed that, "[t]he statutory language indicates the Legislature intended for employers to use the utilization review process when reviewing and resolving **any and all requests** for medical treatment." (*Sandhagen, supra*, 73 Cal.Comp.Cases at p. 985, emphasis added.)

In a report dated September 25, 2008, Dr. Nagelberg requested authorization for a Weight Watchers weight loss program, housekeeping services, pool services, and gardening services, among other modalities. However, while defendant issued a timely utilization review denial as to the weight loss program, defendant failed to do so with regard to the housekeeping services, pool services, and gardening services. Moreover, defendant has not introduced any contrary evidence showing that these modalities are not reasonable and necessary to cure or relieve applicant from the effects of his injury.

In *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454], quoted by the majority, the Court of Appeal stated that:

> "We hold that the proper approach by the Board is to treat the question of reimbursement under section 4600 for housekeeping services as a factual question to be resolved in each case by lay and expert evidence. The test then is whether household services in the particular case before the Board are medically necessary and reasonable. If the claimant can produce evidence to answer this question in the affirmative, then the expenses for housekeeping are recoverable as a 'medical treatment' under section 4600." (Smyers, supra, 49 Cal.Comp.Cases at pp. 458-459.)

Thus, the *Smyers* Court acknowledged that "medical treatment" is a broad concept that may encompass housekeeping services depending on the opinion of a physician and what the physician believes is medically necessary to cure or relieve an injured worker from the effects of

his or her particular industrial injury. This is necessarily a question of fact and the only procedure for examining that question of fact presently available in workers' compensation law is the utilization review process. Defendant could have challenged the reasonableness and necessity of these modalities through the utilization review process but did not do so.

The Appeals Board panel in *Corniel v. Kasler Corporation*, (April 2, 2008) ADJ2463774 (AHM 0048021) (Appeals Board panel decision) did not hold that pool services and lawn care were not medical treatment. Instead, the *Corniel* panel stated that it was not clear from the record how the doctors concluded that those modalities were medical treatment and, if so, whether they were reasonable and necessary. Thus, the central issue of the case was whether the WCJ's decision was supported by substantial evidence. The matter was in fact returned to the trial level for further proceedings and decision.

Accordingly, I would amend the WCJ's decision to defer the issues of penalties and attorney fees and I would affirm the WCJ's decision in all other regards including applicant's entitlement to housekeeping services, gardening services, and pool services.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO, COMMISSIONER

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

APR 22 2011

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

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