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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 ORDER
DENYING RECONSIDERATION

Applicant, newly aggrieved, seeks reconsideration of our April 22, 2011 Opinion and Decision After Reconsideration (Decision). Therein, we granted¹ defendant's Petition for Reconsideration of the March 22, 2010 Supplemental Findings and Award issued by the workers' compensation administrative law judge (WCJ) where, as relevant here, the WCJ awarded "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." The WCJ also found that defendant delayed or refused authorization of medical treatment² entitling applicant to a 25% penalty pursuant to Labor Code section³ 5814 for each of the treatment modalities delayed or refused and attorney fees in the amount of \$10,000.00 pursuant to section 5814.5. In our April 22, 2011 Decision, we amended the WCJ's decision to defer the issue of penalties and section 5814.5 attorney fees and found that

¹ Although former Commissioner Cuneo participated in the April 22, 2011 Opinion and Decision After Reconsideration, he has since retired and another Commissioner has been assigned to the panel in this matter.

² The WCJ found that defendant delayed the following treatment modalities: "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."

³ All further statutory references are to the Labor Code, unless otherwise noted.

1 applicant is not entitled to housekeeping services, pool services, and gardening services as part of
2 the March 27, 2006 Award⁴ for medical treatment. We otherwise affirmed the WCJ's March 22,
3 2010 Supplemental Findings and Award.

4 Applicant contends that the Appeals Board erred in deferring the issue of penalties and
5 section 5814.5 attorney fees arguing that the WCJ's award was based on substantial evidence.
6 Applicant further contends that the WCJ erred in denying medical treatment in the form of
7 housekeeping services, pool services, and gardening services arguing that applicant is 100%
8 permanently disabled before apportionment, that defendant failed to perform a timely utilization
9 review of the treating physician's request of these treatment modalities, and that defendant failed
10 to present rebuttal medical evidence.

11 Defendant filed an Answer.

12 Based on our review of the record and for the reasons stated in our April 22, 2011 Opinion
13 and Decision After Reconsideration, which we incorporate herein, we will deny applicant's
14 Petition for Reconsideration.

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26 ⁴ Previously, a March 27, 2006 Joint Findings and Award issued providing that applicant sustained cumulative
27 trauma from March 1970 to November 27, 1996 (Case No. VNO353137) and specific injury on September 24, 1996
(Case No. VNO0353138) to his back, both knees, and gastrointestinal system causing 77% permanent disability after
apportionment and need for further medical treatment.


1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's Petition for Reconsideration of our April 22, 2011
3 Opinion and Decision After Reconsideration be, and the same hereby is, **DENIED**.


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5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **ALFONSO J. MORESI**

9 **I CONCUR,**

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11 **FRANK M. BRASS**

12 **I CONCUR IN PART AND I DISSENT IN PART.**
13 *(see attached concurring and dissenting opinion)*

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16 **RONNIE G. CAPLANE, COMMISSIONER**

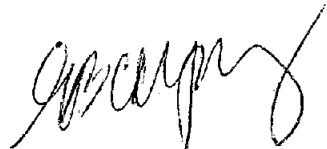


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19 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

20 **JUL 11 2011**

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

23 **DENNIS HERSHEWE**
24 **KEGEL, TOBIN & TRUCE**
25 **JAMES BISHOP**



26 **PAG/csl**

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

2 I concur in part and dissent in part. I concur with the majority on the issue of penalties.
3 However, I dissent on the issue of applicant's entitlement to treatment in the form of
4 housekeeping services, gardening services, and pool services. I would grant applicant's Petition
5 for Reconsideration on this issue, reverse the April 22, 2011 Opinion and Decision After
6 Reconsideration, and reinstate the WCJ's award in this regard.

7 In his dissent to the majority's April 22, 2011 Opinion and Decision After
8 Reconsideration, former Commissioner James C. Cuneo (now retired) stated that:

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

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

14 "In determining whether to approve, modify, delay, or deny requests by
15 physicians prior to, retrospectively, or concurrent with the provisions of
16 medical treatment services to employees all of the following requirements
 must be met:

17 “(1) Prospective or concurrent decisions shall be made in a timely fashion
18 that is appropriate for the nature of the employee's condition, not to exceed
19 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.

20 * * *

21 “(5) If the employer, insurer, or other entity cannot make a decision within
22 the timeframes specified in paragraph (1) or (2) because the employer or other
23 entity is not in receipt of all of the information reasonably necessary and
24 requested, because the employer requires consultation by an expert reviewer,
25 or because the employer has asked that an additional examination or test be
26 performed upon the employee that is reasonable and consistent with good
27 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

1 information reasonably necessary and requested by the employer, the
2 employer shall approve, modify, or deny the request for authorization within
3 the timeframes specified in paragraph (1) or (2).” (Lab. Code, § 4610(g),
emphasis added.)

4 “In *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd. (Sandhagen)*
5 (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*), the Supreme
Court noted that:

6 ““Section 4610 requires that ‘[e]very employer . . . establish a utilization
7 review process in compliance with this section’ [citation omitted], defining
8 utilization review as ‘functions that prospectively, retrospectively, or
9 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.)

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

13 “In a report dated September 25, 2008, Dr. Nagelberg requested authorization
14 for a Weight Watchers weight loss program, housekeeping services, pool
15 services, and gardening services, among other modalities. However, while
16 defendant issued a timely utilization review denial as to the weight loss
17 program, defendant failed to do so with regard to the housekeeping services,
18 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.

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

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 then
24 is whether household services in the particular case before the Board are
25 medically necessary and reasonable. If the claimant can produce evidence to
26 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.)

27 “Thus, the *Smyers* Court acknowledged that ‘medical treatment’ is a broad
concept that may encompass housekeeping services depending on the opinion

1 of a physician and what the physician believes is medically necessary to cure
2 or relieve an injured worker from the effects of his or her particular industrial
3 injury. This is necessarily a question of fact and the only procedure for
4 examining that question of fact presently available in workers' compensation
5 law is the utilization review process. Defendant could have challenged the
6 reasonableness and necessity of these modalities through the utilization
7 review process but did not do so.

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

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

21 I agree with former Commissioner Cuneo's analysis and incorporate his dissent herein. In
22 addition, I note that the majority's position is based on the concept that requests for housekeeping
23 services, gardening services, and pool services are not subject to utilization review because they
24 do not fall under the definition of "medical treatment." However, while that position may appear
25 logical, I am not persuaded that a claims adjuster should be the ultimate judge of whether any
26 given modality requested by a treating physician is or is not reasonable medical treatment
27 pursuant to section 4600. Instead, pursuant to *Sandhagen*, that question should be resolved first
through the utilization review process under section 4610. Thereafter, if the employee objects to
the utilization review determination, the question could proceed to the AME/QME process under
section 4062 and ultimately be decided by a WCJ at an expedited hearing pursuant to section
5502(b).

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1 Based on the reasons stated herein, I would grant applicant's Petition for Reconsideration
2 on the issue of entitlement to treatment in the form of housekeeping services, gardening services,
3 and pool services, reverse the April 22, 2011 Opinion and Decision After Reconsideration on that
4 issue, and reinstate the WCJ's award in this regard.

5 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **RONNIE G. CAPLANE, COMMISSIONER**

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