

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

MEMORANDUM FOR THE DIRECTOR
FROM: SAC, [illegible]
SUBJECT: [illegible]

DATE: [illegible]
RE: [illegible]

FEDERAL BUREAU OF INVESTIGATION
AND
DEPARTMENT OF JUSTICE

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Very truly yours,
[illegible signature]

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT**

**CALIFORNIA INSURANCE
GUARANTEE ASSOCIATION,**

Petitioner,

vs.

**WORKERS' COMPENSATION
APPEALS BOARD OF THE STATE
OF CALIFORNIA AND NICOLAS
MERCADO,**

Respondents.

2nd CIV. B

**WCAB Case Numbers:
ADJ8157719**

**Honorable Paul DeWeese
Workers' Compensation Administrative
Law Judge**

**PETITION FOR WRIT OF REVIEW
AND
ARGUMENT AND EXHIBITS IN SUPPORT THEREOF**

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**STATE OF CALIFORNIA
COURT OF APPEAL
SECOND APPELLATE DISTRICT**

**CERTIFICATE OF INTERESTED
ENTITIES OR PERSONS**

Court of Appeal Case Caption: CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, Petitioner, vs. WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA AND NICOLAS MERCADO, Respondents.

Court of Appeal Case Number:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person Information if necessary.

Please check here if applicable:

There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5 (d).

Signature of Attorney/Party Submitting Form

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SUBMIT PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

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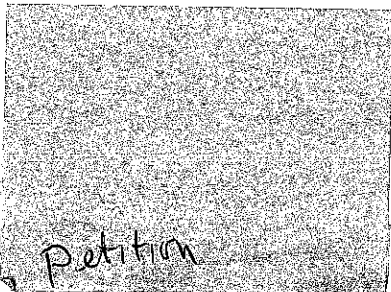
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III.
PETITION FOR WRIT OF REVIEW

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, IN AND FOR THE SECOND APPELLATE DISTRICT:

Petitioner, California Insurance Guarantee Association (“CIGA”), a statutorily-mandated involuntary association of insurers admitted to transact insurance in California, in this timely and verified Petition, respectfully applies to this Honorable Court, as provided in *Labor Code §5950*, for a Writ of Review for the purpose of inquiring into and determining the lawfulness of the Opinion and Decision After Reconsideration (“Opinion and Decision”), filed September 30, 2014 (Tab 1, 0001) in the proceedings before the Workers’ Compensation Appeals Board (“WCAB”) entitled Findings, Award and Orders (“Findings, Award and Orders”) dated May 21, 2014 (Tab 2, 0007)¹ in the proceedings before the WCAB entitled *Nicolas Mercado v. Vensure Staffing/Peo/Co-West Commodities* (ADJ8157719). CIGA filed a timely Petition for Reconsideration from said Findings, Award and Orders of the Workers’ Compensation Administrative Law Judge (“WCALJ”). (Tab 3, 0007) On September 30, 2014, the WCAB issued its Opinion and Decision in which the WCAB, in all relevant

¹ Exhibits are referred to by tab and page numbers.



parts, affirmed the Findings, Award and Orders of the WCALJ and adopted the WCALJ's reasons for decision, incorporated in the WCALJ's Report and Recommendation on Petition for Reconsideration, dated June 30, 2014 ("Report") (Tab 4, 0036). (Tab 1, 0002) CIGA now files this Writ Petition from said Opinion and Decision and the underlying Findings, Award and Orders.

1.

Petitioner, whose principal place of business is in Glendale, California, files this Writ Petition in the Second District as directed by *Labor Code*² §5950.

2.

This Writ Proceeding arises from the adjudication of the claim for workers' compensation benefits by Nicolas Mercado ("Mercado") against Vensure Staffing/PEO/Co-West Commodities by the Honorable Paul DeWeese, Workers' Compensation Administrative Law Judge ("WCALJ") in which the WCALJ found, based upon the WCAB's February 27, 2014, en banc decision in *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 313 (*Dubon I*) that CIGA's timely December 12, 2013, Utilization Review ("UR") determination regarding home modifications was invalid due to material

²All statutory references are to the Labor Code unless otherwise specified.

procedural defects, and therefore, not subject to independent medical review (“IMR”). The WCALJ therefore determined that he had jurisdiction to issue contrary findings regarding home modifications. On October 6, 2014, the WCAB en banc rescinded its decision in *Dubon I* (*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (*Dubon III*)) and determined that a UR decision is invalid, and not subject to IMR *only if it is untimely*, and that “*all other disputes regarding a UR Decision must be resolved by IMR.*” (Italics added.)

3.

Mercado raised the issue of “sanctions” at Trial, but did not raise the issue of “penalties” under §5814. Mercado did not file a Petition for §5814 penalties prior to Trial. The WCALJ, nevertheless, addressed and resolved the §5814 penalty issue, and awarded Mercado penalties, without first affording CIGA an opportunity to offer rebuttal.

4.

The WCALJ also awarded payment to Mercado’s wife, Linda Mercado, for attendant care to Mercado, under her *lien*, despite the fact that her lien is invalid under §4903.05(c)(2), for failure to pay the required lien filing fee, and

invalid under *Labor Code §4903.8(e)*, for failure to file required supporting documentation and declarations for the lien. Payment for attendant care was awarded despite Linda Mercado's failure to prove by a preponderance of the evidence that such care was reasonable and necessary under the new medical treatment guidelines.

5.

Mercado, on December 21, 2011, while employed as a truck driver for respondent/real party in interest Vensure Staffing/Peo/Co-West Commodities ("Co-West Commodities"), sustained numerous injuries including quadriplegia. (Tab 10, 0124)

6.

At the time of Mercado's December 21, 2011, injury, Co-West Commodities was insured against liability for workers' compensation losses by Ullico Casualty Company ("Ullico").

7.

On May 30, 2013, Ullico was declared insolvent, and liquidated, by a court of competent jurisdiction. The California Guarantee Association undertook

handling of its affairs pursuant to Article 14.2 of the Insurance Code, commencing with §1063.

8.

Directly relevant to this writ proceeding is *Labor Code §4610*, the language of uncodified Section 1 of Senate Bill (SB) 863, and the legislative history of SB 863, which indicate that “any dispute” over a Utilization Review (“UR”) Decision regarding “medical necessity” “shall be” resolved through Independent Medical Review (“IMR”). (§4610.5(b).) In the face of these requirements, the WCAB in its en banc decision, *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 313 (*Dubon I*), determined that a UR Decision is invalid if it is untimely, *or suffers from material procedural defects that undermine the integrity of the UR Decision*. The WCAB erroneously determined in *Dubon I*, that, if an employer’s *timely* UR Decision is found invalid due to material procedural defects, the issue of medical necessity is not subject to IMR, but is to be determined by the WCAB.

Based upon *Dubon I*, the WCALJ determined that CIGA’s timely December 12, 2013 UR Decision regarding home modifications was invalid due to material procedural defects, and not subject to IMR. Based upon the decision in *Dubon I*, the WCALJ erroneously assumed jurisdiction, and issued his own

contrary findings regarding home modifications in the Findings, Award and Orders.

9.

On May 22, 2014, the en banc WCAB granted defendant, State Compensation Insurance Fund Petition for Reconsideration from the decision in *Dubon I*. The WCAB determined in *Dubon II* that, pending issuance of a decision after reconsideration, the decision in *Dubon I* shall remain in effect and binding.³

10.

On September 30, 2014, the WCAB issued its Opinion and Decision in these proceedings affirming the WCALJ's determination that CIGA's December 12, 2013 UR Decision was invalid due to material procedural defect and therefore, not subject to IMR. (Tab 1, 0001)

11.

On October 6, 2014, the en banc WCAB, in *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 1298 (*Dubon III*) rescinded *Dubon I*, and determined that a UR Decision is invalid, and not subject to IMR *only if it is*

³ *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 566, 568 (*Dubon II*)

untimely, and that "all other disputes regarding a UR Decision must be resolved by IMR." (Italics added).

12.

Mercado did not raise the issue of §5814 penalties at Trial, raised the issue of “sanctions,” and did not file a Petition for Penalties under *Labor Code* §5814. The WCALJ nevertheless addressed and resolved the §5814 penalties issue, and issued an Award of §5814 penalties to Mercado, without first affording CIGA an opportunity to offer rebuttal.

Mercado made two incidental references to §5814 in his Trial Brief, submitted on the day of the April 2, 2014 Trial, without substantive discussion of such issues. (Tab 10, 0124) Because Mercado failed to raise the issue of penalties at trial and failed to file a petition for penalties, CIGA did not respond to the penalties references in its Response to the Trial Brief. (Tab 6, 0084)

The WCALJ, in his Report, characterized CIGA’s argument regarding the requirement to file a Petition for Penalties under §5814 and CIGA’s related due process rights as merely “form over substance” and “procedural” issues. (Tab 4, 0045)

In justifying the Award of Penalties, the WCALJ noted that Mercado had raised the issue of “sanctions;” that Mercado’s interchangeable use in his Trial

Brief of the terms “sanctions” and “penalties” was mistaken, vague and ambiguous; and that CIGA had failed to respond to this penalties issue in its reply brief. (Tab 4, 0045/0046) The WCALJ further noted *off-the-record discussions* with the parties during which CIGA was advised that it *may find itself in a penalty position* as a result of not having yet provided home modifications certified by UR. (Tab 4, 0046)

For these reasons, the WCALJ believed that CIGA was *well aware* of the penalty issue *prior to Trial*, and was provided notice of the issue, and an opportunity to be heard, thus satisfying due process. (Tab 4, 0045/0046)

The Board is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties both a fair and open hearing. All parties must be fully apprised of the evidence submitted to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents sent to offer evidence an explanation or a bottle. In no other way can a party maintain its rights or make its defense. The Board may not resolve and address an issue without first affording the parties an opportunity to offer rebuttal. The Board also may not base its award on off-the-record recollections of the WCALJ that are not part of the record. (§5908.5). A denial of due process is reversible error.

13.

The Board's power is limited to express statutory authority and the implied authority necessary to carry out the legislative purpose. There is no provision under §5814 that allows the Board to award penalties on its own motion. There are, however, specific statutory and regulatory provisions that required Mercado to file a Petition for Penalties under §5814. (See §5814(c) and *California Code of Regs. Title 8 §10450*.) The Board, accordingly, did not have jurisdiction to award §5814 penalties to Mercado.

Labor Code §5814(c) states that penalties are conclusively presumed to be resolved if an issue is submitted for Trial and the penalty issue is not submitted or expressly excluded in the statement of issues being submitted. For these reasons, accordingly, it was error for the WCALJ to award Mercado penalties, as such issue was resolved by operation of law.

14.

The legislative scheme for reviewing employee treatment requests has changed over time.⁴

⁴ *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal. 4th 230, 237 [79 Cal. Rptr.17, 186 P.3d 535, 73 Cal. Comp. Cases 981].

Before Senate Bill (“SB”) 228, there were no uniform medical treatment guidelines in effect. Medical treatment was deemed “necessary” depending solely upon the opinion of the treating physician as measured against the general standard that “necessary” treatment was that which was “reasonably required to cure or relieve the injured worker of the effects of his or her injury.”⁵

SB 228, effective January 1, 2004, enacted comprehensive workers’ compensation reform as a result of the Legislature reacting to escalating costs, including the statutory Utilization Review (“UR”) process incorporated in §4610.⁶

SB 899, effective April 19, 2004, was passed as an urgency bill in response to “a perceived crisis in skyrocketing workers’ compensation costs.”⁷

SB 899 amended §4600 to define “medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury” as “treatment that is based upon the guidelines adopted by the administrative director pursuant to §5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine’s Occupational Medicine Practice Guidelines.”

⁵ *Sandhagen, supra at p. 238.*

⁶ *Sandhagen, supra at p. 239-240.*

⁷ *Sandhagen, supra at p. 241, citing Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 1329 [57 Cal. Rptr. 3d 644, 156 P.3d 1100].*

SB 899 also amended §3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden on all issues by a preponderance of the evidence. Accordingly, “*notwithstanding whatever an employer does (or does not do),*” an injured employee must still prove that the sought treatment is medically reasonable and necessary, i.e., must demonstrate that the treatment request is consistent with the uniform guidelines or, alternatively rebut the guidelines with a preponderance of scientific medical evidence.⁸ (Italics added).

15.

At all times following his December 21, 2011 injury, Mercado was being cared for in a 24/7 nursing care facility. (Tab 12, 0145-0146)

Linda Mercado was awarded payment for attendant care due to the Board’s failure to apply, and appreciate the significance of, the changes enacted by the Legislature under SB 228 and SB 899, particularly the amendments to the definition of “medical treatment” under §4600, in light of Mercado’s care 24/7 care.

16.

Mercado’s counsel filed a lien for Linda Mercado for services rendered

⁸ *Sandhagen, supra at p. 242.*

to Mercado.⁹ (Tab 8, 0102) According to EAMS, Linda Mercado has not paid the lien filing fee required under *Labor Code §4903.05(c)(1)*.¹⁰ The lien document, which has no attached statements or declarations, is in the amount of \$31,000.00, for “home healthcare per agreement.” (Tab 8, 0104) There is no dispute regarding Linda Mercado’s failure to pay the filing fee. (Tab 9, 0115-0116) At the time of Trial, the lien was identified for “home/attendant care.” (Tab 10, 0125.)

Linda Mercado did not provide *any* evidence to support a determination that her attendant care was reasonable and necessary under the new SB 899 guidelines. Linda Mercado did not meet her burden of proof regarding such care under §3202.5. The WCALJ mistakenly applied the pre-SB 228 test for determining the necessity of treatment, based simply on recommendations made by the treating physician Dr. Patterson, without consideration of the SB 899 guidelines. (Tab 4, 0046) Further, Dr. Patterson did not explain why Linda Mercado’s care would be necessary under the guidelines, when Mercado was under 24/7 nursing care.

⁹ The Court is asked to take judicial notice of such lien as a court record, pursuant to Evidence Code §452(d).

¹⁰ The “filing fee” required under §4903.05 is to be distinguished from the “activation fee” under §4903.06, which has been suspended by order of the U.S. District Court for the Central District of California, in the matter of *Angelotti Chiropractic, Inc., et al. v. Baker, et al.* (2013) 78 Cal. Comp. Cases 1218. The “filing fee” is still required to be paid by lien claimants. The Court is asked to take judicial notice of the EAMS record as a court record, pursuant to Evidence Code §452(d).

Linda Mercado's lien was statutorily invalid on two accounts, because of her failure to pay the filing fee required under §4903.05(c)(1), and because of her failure to provide required supporting documentation and declarations, as required under §4903.8(e).¹¹

The WCALJ mischaracterized the requirements under §4903.05(c)(1) and §4903.08(e), enacted in 2012 under SB 863, as "procedural issues rather than substantive ones" and as "elevating form over substance for no good cause." The Legislature determined, however, that the changes made by SB 863 apply generally to all proceedings that have not resulted in a final Award.

The WCALJ stated that these rules were not intended to apply to family members caring for loved ones, and requiring a wife who is caring for her husband to meet the technical lien requirements was not reasonable. (Tab 4, 0047) The Legislature, however, has enacted specific limitations dealing with issues relating to the home care provided by family members for injured workers in catastrophic cases. (See §4600(h), enacted by SB 863). There is no reason to assume that the Legislature would require a lesser standard of review for attendant care provided by a family member while the injured worker was under

¹¹ §4903.05(a) states that a lien shall be invalid if the filing fee therein is not paid and §4903.8(e) states that "a lien submitted for filing on or after January 1, 2013, for medical treatment under §4600(b) that does not comply with the requirements of that section shall be deemed to be invalid."

24/7 nursing care. Linda Mercado was represented by counsel. Her attorney is presumed to know the law. There is, therefore, no reasonable basis for not applying these new rules with respect to her lien.

Since her lien was invalid, the Board did not have jurisdiction to award payment to Linda Mercado under such lien, and Linda Mercado failed to meet her burden of proof with respect to such care.

17.

The matter was tried and submitted for decision on April 2, 2014. The issues for hearing included Mercado's need for further medical treatment, including home modifications, the lien of Linda Mercado for home/attendant care, and sanctions.

18.

On May 22, 2014, the WCALJ issued the Findings, Award and Orders, in which the WCALJ awarded Mercado home modifications, as discussed in his Opinion on Decision. The WCALJ reasoned, relying on *Dubon I*, that the December 12, 2013, UR Decision regarding home modifications "is materially defective," and that the Board had jurisdiction over the dispute regarding home modifications without resort to IMR.

The WCALJ also awarded Mercado a 25% penalty under §5814, assessed against the value of the home modification benefits that were unreasonably delayed or refused, in an amount to be adjusted between the parties with jurisdiction reserved by the WCAB. The WCALJ also awarded Linda Mercado, under her lien, payment for attendant care provided to Mercado to the date of such Award.

19.

CIGA filed a timely Petition for Reconsideration from the May 21, 2014, Findings, Award and Orders, asserting, in relevant part, that the WCALJ erred in determining that the December 12, 2013 UR Decision was defective, it was error to award §5814 penalties, as Mercado had failed to raise the issue for Trial, and had failed to file a Petition for Penalties raising *Labor Code* §5814 penalties; and that Linda Mercado's lien was invalid under *Labor Code* §4903.8(e), and *Labor Code* §4903.05(c)(2), and she had not met her burden of proof under the new treatment guidelines.

20.

On August 7, 2014, the WCAB granted CIGA's Petition for Reconsideration, and deferred decision in such case. (Tab 11, 0138) On September 30, 2014, the WCAB filed its Opinion and Decision After

Reconsideration, affirming the May 21, 2014, Findings, Award and Orders, with the exception that the award of mileage to Linda Mercado was rescinded. This Writ Petition is filed within forty-five (45) days thereof as required by *Labor Code §5950*.

21.

The WCALJ, and Respondent WCAB, erred by failing to correctly interpret, and apply the provisions of *Labor Code §§4610, 5814, 4903.05, and 4903.8* to the undisputed facts of this case.

22.

At all material times mentioned herein, the WCALJ, and Respondent WCAB, had the judicial duty to apply the law of this State as set forth in the applicable statutes, particularly *Labor Code §4610, 5814, 4903.05, and 4903.8*.

Respondent breached its duty, and exceeded its powers, when it erroneously found that the December 12, 2013 UR Decision was not subject to IMR; when it awarded §5814 penalties to Mercado; and when it awarded payment to Linda Mercado for attendant care under her invalid lien, and given the fact that she had failed to meet her burden of proof.

23.

Because Respondent, WCAB, breached its judicial duty to apply the law of the State, the result has been prejudice to CIGA and reversible error. Had the Respondent, WCAB, correctly applied the law to the undisputed facts, it would have found that the December 12, 2013 UR Decision was subject to IMR; that no award of penalties could issue, as penalties were resolved by operation of law under §5814(c); and that there was no jurisdiction to issue payment to Linda Mercado, as she had no valid lien on file, and that she had failed to meet her burden of proof regarding the reasonableness and necessity of such care.

24.

Petitioner, CIGA, respectfully requests issuance of a Writ of Review as to the Findings, Award and Orders (Tab 2, 0007), as affirmed by the WCAB's Opinion and Decision (Tab 1, 0001), and thus seeks review on the following grounds, pursuant to *Labor Code §5952*:

- (a) The Appeals Board acted without or in excess of its powers;
- (b) The Order, Decision or Award was unreasonable;
- (c) The Order, Decision, or Award was not supported by substantial evidence;
- (d) The findings of fact do not support the Order, Decision, or Award.

25.

The Argument and Exhibits are made a part of this Petition.

26.

The material facts are undisputed. The questions raised by this Petition are questions of law. Petitioner is aggrieved, and has no further right to any administrative appeal from the Board's Decision, and has no plan, speedy, or adequate remedy, other than by Writ of Review. This Petition is authorized by *Labor Code §5950*.

27.

The parties whose rights will be affected by this Petition, are the Petitioner, and Respondent Mercado, the Respondent WCAB, and Linda Mercado. This Petition has been served on them.

WHEREFORE, Petitioner respectfully prays as follows:


That a Writ of Review issue out of this Court to the Workers' Compensation Appeals Board of the State of California commanding it to certify fully to this Honorable Court at a specified time, and place, the records and proceedings in the case of *Nicolas Mercado v. Vensure Staffing/Peo/Co-West Commodities* (ADJ8157719), so that this Court may inquire into the lawfulness of the Findings, Award and Orders (Tab 2, 0007) and the WCAB's Opinion and Decision After Reconsideration (Tab 1, 0001); and that the erroneous judicial acts of Respondent be set aside and vacated; and that Petitioner be granted such other and further relief as may be appropriate and just.

Dated: November 11, 2014

Respectfully submitted,

GUILFORD SARVAS &
CARBONARA LLP

By: _____



MARIO MANRIQUEZ, JR.
Attorneys for Petitioner
CALIFORNIA INSURANCE
GUARANTEE ASSOCIATION

IV.

VERIFICATION

I, Mario Manriquez, Jr., declare under penalty of perjury under the laws of the State of California that I have read the foregoing Petition for Writ of Review and know the contents thereof; I am informed and believe that the facts stated therein are true and on that ground allege that such matters are true; that the exhibits attached to this Petition are true and correct copies of the documents that they purport to be; that I make this verification as the attorney for Petitioner as I am more familiar with the facts than are the officers of the Petitioner.

Executed on November 11, 2014 at Anaheim, California.


MARIO MANRIQUEZ, JR.

V.

REASONS TO GRANT REVIEW

Labor Code §4610 and the legislative history of SB 863, impose the requirement that “any dispute” over a UR Decision regarding “medical necessity” “shall be” resolved through IMR. Despite these requirements, the WCAB in an en banc decision, *Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 313 (Dubon I)*, erroneously determined that a UR Decision is invalid if it is untimely, *or suffers from material procedural defects that undermine the integrity of the UR Decision*. An invalid UR Decision, the WCAB determined in *Dubon I*, was not subject to IMR, but is to be determined by the WCAB.

Based upon *Dubon I*, the WCALJ erroneously determined that CIGA’s timely December 12, 2013 UR Decision regarding home modifications was invalid due to material procedural defects, and not subject to IMR. Based upon the decision in *Dubon I*, the WCALJ erroneously assumed jurisdiction, and issued his own contrary findings regarding home modifications, incorporated in the Findings, Award and Orders.

On October 6, 2014, WCAB, in an en banc decision, *Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 1298 (Dubon III)* rescinded *Dubon I*, and corrected the error made therein by determining that a UR Decision is invalid, and not subject to IMR *only if it is untimely*, and that “*all other disputes*

regarding a UR Decision must be resolved by IMR." (Italics added).

It is clear, accordingly, that the Board's decision regarding CIGA's December 1, 2013 UR Decision is contrary to the language of §4610, and the WCAB's en banc interpretation of such statute in *Dubon III*.

The Board may not resolve and address an issue without affording the parties and opportunity to offer rebuttal. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal. App. 4th 151, 157, [97 Ca. Rptr. 2d 852, 65 Cal. Comp. Cases 805], citing *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal. App. 4th 396, 399 [94 Cal. Rptr. 2d 130, 65 Cal. Comp. Cases 264].)

The Board "is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties both forward a fair and open hearing. 'The right to such a hearing is one of the "rudiments of fair play" [citation] assured to every litigant by the Fourteenth Amendment as a minimal requirement.' [Citations.] The reasonable opportunity to meet, and rebut, the evidence produced by his opponent is generally recognized as one of the essentials of these minimal requirements [citations], and the right of cross-examination has frequently been referred to as another [citations]. ... 'All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its

rights or make its defense.”” (*Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal. App. 2d 54, 58 [240 P.2d 57].)

The WCAB was also required to base its Opinion and Decision on the record, and was not allowed to base its Opinion on Decision on the off-the-record recollections of the WCALJ. (§5908.5.)

CIGA was not afforded any due process protections with respect to the §5814 penalties award, as Mercado did not properly or adequately raise such issue prior to Trial. CIGA was not fully apprised of this issue prior to Trial. Raising the issue of “sanctions,” which is a completely different issue from “penalties,” did not fully apprise CIGA of such issue. Mercado’s mistaken, vague, ambiguous, and “interchangeable” use of the terms “sanctions” and “penalties” in his Trial Brief did not fully apprise CIGA of the §5814 penalties issue. Further, two incidental references to §5814 in Mercado’s Trial Brief, did not fully apprise CIGA of the §5814 penalties issue. Finally, providing CIGA an opportunity to respond to these incidental references to §5814 penalties in Mercado’s Trial Brief did not satisfy the due process requirement that CIGA be afforded an opportunity to offer rebuttal, as Trial or Responsive Briefs are not evidence. (*See California Highway Patrol/State of California v. Workers' Comp. Appeals Bd.* 68 Ca. Comp. Cas 227 (2003) (*writ denied*); *Fields v. Workers' Comp. Appeals Bd.* (2000) 65 Cal. Comp. Cas 1393 (Trial Briefs are

not evidence, merely arguments put forth by the parties for the purpose of persuading the Trier of Fact that his position is legally or factually correct.)

The Award by the WCAB of §5814 penalties, therefore, resulted in a denial of CIGA's due process rights, and must be reversed. (*See Beverly Hills Multispecialty Group, Inc v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 789, 806 [32 Cal. Rptr. 2d 293].*)

The Board's power is limited to express statutory authority and the implied authority necessary to carry out the legislative purpose. (*See E. Clemens Horst Co. v. Industrial Acc. Com. (1920) 184 Cal. 180, 192 [193 P. 105, 7 L.A.C. 180].*) There is no provision under §5814 that allows the Board to award penalties on its own motion. There are, however, specific statutory and regulatory provisions that required Mercado to file a Petition for Penalties under §5814. (*See §5814(c) and California Code of Regs. Title 8 §10450.*) Because Mercado failed to file the a Petition under §5814, the Board did not have jurisdiction to award §5814 penalties to Mercado.

Labor Code §5814(c) states that penalties are conclusively presumed to be resolved if an issue is submitted for Trial, and the penalty issue is not submitted or expressly excluded in the statement of issues being submitted. Mercado failed to properly submit the issue of penalties at the time of Trial. It was error, accordingly, for the WCALJ to award Mercado penalties, as such issue was resolved by operation of law. Linda Mercado's lien was filed by her attorney.

There is no dispute that she failed to pay the lien filing fee required under *Labor Code §4903.05(c)(1)*, and there is no dispute that she failed to provide supporting documentation and declarations required under *§4903.8(e)*. Therefore, under the controlling statutes, her lien is invalid, and the Board did not have jurisdiction to issue an Award to her under such lien. (See *§4903.05(c)(2)* and *§4903.8(e)*.)

These provisions are not procedural; they are substantive. The Legislature determined that the changes made by SB 863, which include these requirements, apply generally to all proceedings that have not resulted in a final award. (See *Valdez v. Workers' Comp. Appeals Bd. (2013) 57 Cal. 4th 1231, 1238 [164 Cal. Rptr. 3d 184, 312 P.3d 102, 78 Cal. Comp. Cases 1209]*.)

The argument that these provisions should not apply to loved ones caring for injured workers fails because the Legislature has recently enacted specific limitations dealing with home attendant care provided by family members for injured workers, even in catastrophic cases, and the WCAB has properly applied such provisions under such circumstances. (See *Hernandez v. Workers' Comp. Appeals Bd. (2014) 79 Cal. Comp. Cases 682 (Appeals Board en banc)* (regarding application of *§4600(h)*, enacted by SB 863, to home care provided by wife to catastrophically injured husband).

Linda Mercado did not provide *any* evidence to support a determination that her attendant care was reasonable and necessary under the new SB 899 guidelines. SB 899 now requires her to prove that the care she provided to Mercado was medically reasonable and necessary, and consistent with the new guidelines, or alternatively, rebut the guidelines with a preponderance of medical evidence. (*Sandhagen, supra at p. 242.*) The WCALJ mistakenly applied the pre-SB 228 test for determining the necessity of treatment, based simply upon recommendations made by the treating physician, Dr. Patterson, without consideration of the SB 899 guidelines. This was error. No evidence was provided as to why Linda Mercado's care would be necessary under the guidelines, when Mercado was under 24/7 nursing care. Accordingly, Linda Mercado did not meet her burden of proof regarding such care under §3202.5.

It was error, accordingly, for the Board to award payment to Linda Mercado under her lien, because the Board did not have jurisdiction to award payment to Linda Mercado under an invalid lien, and Linda Mercado failed to meet her burden of proof with respect to such care under the guidelines.

CIGA urges this Court to grant review.

VI.

SUMMARY OF MATERIAL FACTS

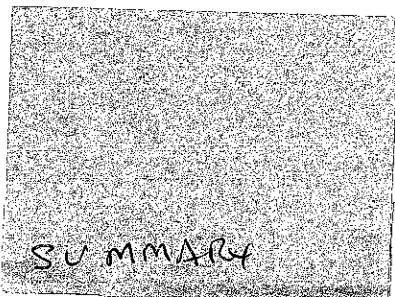
A. Facts relevant to Mercado's injuries and medical treatment.

The material facts are both straightforward and undisputed.

Mercado, while employed as a truck driver for the Co-West Commodities, suffered a motor vehicle accident on December 21, 2011, resulting in numerous injuries, including quadriplegia. The employer accepted liability for Mercado's industrial injury, and paid compensation. (Tab 10, 0124)

At the time of Mercado's injury, the employer was insured against liability for workers' compensation losses by Ullico Casualty Company ("Ullico"). On May 30, 2013, Ullico was declared insolvent, and liquidated, by a court of competent jurisdiction. The California Insurance Guarantee Association undertook handling of its affairs pursuant to *Article 14.2 of the Insurance Code*, commencing with §1063.

Mercado was initially hospitalized at Riverside Community Hospital, (Tab12, 0142) Mercado was subsequently transferred to Casa Colina for three (3) months, then to Kindred in Ontario for 1 ½ months before returning to Casa Colina for three (3) months. (Tab 12, 0142) When transferred to Casa Colina Hospital, he came under the care of David Patterson, M.D. (Tab 12, 0143).



While Mercado was under 24/7 care, Mercado's wife, Linda Mercado, assisted with his activities of daily living. (Tab 12, 0143-0144) Nurse Case Manager, Debra Moore, testified that there would have been no initial need for Linda Mercado to care for her husband, but would have required training in order to prepare her to care for him at home. (Tab10, 0131) Care by Linda Mercado was not really needed while he was at Casa Colina, as the 24-hour staff would have cared for the applicant. (Tab10, 0130-0131).

At all times relevant hereto, Mercado has been under 24/7 nursing care. (Tab 12, 0145-0146)

Dr. Patterson testified in his deposition that Linda Mercado performed occasional ministerial functions during the course of the Mercado's treatment, but that her primary role was in acting as the Mercado's advocate, reducing the applicant's anxiety and providing emotional support for him. (Tab13, 00161-0162)

The March 2, 2013, progress report of PTP, Shantharam Pai, M.D., determines that the applicant is permanent and stationary. His spinal cord injury, and quadriplegia, are determined to be permanent, and based upon *Labor Code* §4662, is determined to be 100% disabled. (Tab 14, 0208)

In her initial report dated March 8, 2013, Dr. Vasile determined that

Mercado was permanent and stationary on March 2, 2013 per Dr. Pai, Dr. Vasile recommended the applicant be transferred to a Care Meridian facility, which was determined to be able to provide skilled nurses that have expertise. (Tab 15, 0009-0010) Dr. Vasile made no recommendations regarding attendant care by Linda Mercado, as she believed that Linda Mercado was being compensated for eight (8) hours per day of attendant care.¹² (Tab 15, 0209)

Dr. Vasile recommended in her August 1, 2013, report that Linda Mercado be present at all *medical appointments*, as she provides “*emotional support*” and, *due to the applicant’s probable cognitive impairment, the “wife needs to be present to support memory and decision-making.”* (Tab 16, 0223-0224)

Dr. Vasile recommended, in her September 25, 2013, report that Linda Mercado to be present at all *medical appointments*, stating, “*Wife provides emotional support, the patient also has probable cognitive impairment and wife needs to be present to support memory and decision-making.*” (Italics added.) (Tab 17, 0228)

In her November 14, 2013 report, Dr. Vasile issued numerous recommendations for multiple home modifications for Mecado. (Tab 18, 0230)

¹² CIGA challenged the substantiality of Dr. Pai and Dr. Vasile’s determination regarding the applicant’s permanent and stationary status in its Petition for Reconsideration (Tab , 0001), but such issue is not the subject of this writ.

On November 25, 2013, Phil Martin, M.D., issued his Utilization Notice of Delay letter to Dr. Vasile regarding home modifications requested in Dr. Vasile's November 14, 2013 report. (Tab 20, 0235) The letter states "the patient was driving a tanker truck on the freeway on December 21, 2011, lost control and rolled over. The patient sustained head trauma, and cervical spinal cord trauma causing quadriplegia. Other injuries include rib fracture, pneumothorax, and pulmonary contusion. *"Regarding the multiple home modification requests for the patient on Dr. Vasile's 11/14/13 report, please provide a rationale for each of the specific requests that are listed."* (Tab 19, 0234) (Italics added.)

Dr. Martin issued a December 3, 2013, UR Denial letter to Dr. Vasile regarding home modifications requested in her November 14, 2013 report, stating that "a letter was forwarded requesting an explanation for the extensive home modifications. (Tab 20, 0235) There was no receipt of explanation to allow a reasonable review of the modifications requested. *Once received, it will be immediately reviewed and a decision based on reasonable medical necessity made.*" (Italics added.)

Dr. Martin issued a December 12, 2013, Notice of Modification regarding home modifications requested by Dr. Vasile, stating, in relevant part, "The 12/7/13 report was thoroughly reviewed as written by Dr. Vasile. (Tab 21, 0237) It did not address specific information necessary to make decisions on the medical necessity

of all the requested home modifications... The patient's condition is that he is a quadriplegic. Each request for home modification was addressed individually. The decisions for home modifications addressed below focused upon reasonable medical necessity supporting the medical management of the injured worker. Again the following decision modifications address medical necessity." (Tab 21, 0237) Dr. Martin certified thirty-one (31) home modifications, modified nine (9), and non-certified twenty-six (26) recommendations. (Tab 21, 00237)

Mercado's attorney, as attorney for Linda Mercado, filed WCAB Form 6, Notice and Request for Allowance of Lien, in this case, dated January 27, 2014, requesting allowance of a lien in the amount of \$31,000.00 for "home healthcare per agreement." (Tab 8, 0103.) At the time of the April 2, 2013, Trial, and presently, EAMS indicates that Linda Mercado has not paid the filing fee required under *Labor Code §4903.05(c)(1)*.¹³ (The "lien" does not provide "a full statement or itemized voucher supporting the lien and justifying the right to reimbursement," as required under *Labor Code §4903.05 (a)*, and does not provide the declaration under penalty of perjury required under *Labor Code §4903.8 (d)*).

¹³ EAMS, or the Electronic Adjudication Management System, is the Division of Workers' Compensation's case management system, in which external users can obtain status of liens. (www.dir.ca.gov/dwc/eams/eams.htm) The Court is asked to take judicial notice of the EAMS status of Linda Mercado's lien as a court document, pursuant to Evidence Code §452(d). The lien is identified on EAMS as "Berman More." (Tab 23)

B. The WCALJ's judicial determinations.

At the April 2, 2014 Trial, the issues were identified as follows: 1) whether applicant is permanent and stationary, and if so, what date he became P&S; 2) permanent disability; 3) need for further medical treatment, including but not limited to home modifications; 4) liability for self-procured medical treatment; 5) the lien of Linda Mercado for home/attendant care; 6) attorney fees; and 7) sanctions. (Tab 10, 0124-0125) The record was clarified to note that the "issues of attorney fees and sanctions including the various grounds for those claims are set forth in the pretrial conference statement under the heading of Other Issues." (Tab 10, 0125)

On the day of Trial, Mercado's attorney filed a Trial Brief (Tab 10, 0124) arguing, *inter alia*, : 1) that "[petitioner] should be penalized with sanctions" for failing to stipulate to permanent total disability under *Labor Code §4662*, pursuant to *Labor Code §§5813 and 5814*; 2) the December 12, 2013 UR Decision regarding home modifications was invalid, as certain information was not submitted by CIGA to Dr. Martin, and that penalties and sanctions should be imposed for Petitioner's failure to commence authorized home modifications, under *Labor Code §§5813 and 5814*; and 3) that the lien of Linda Mercado is ripe for adjudication. (Tab 5, 0050)

The WCALJ issued his Findings, Award and Orders on ADJ8157719, and Opinion on Decision dated May 21, 2014, in which he found, *inter alia*, that: 1) Mercado was entitled to medical treatment, including home modifications, as discussed in his attached Opinion on Decision; 2) Mercado's wife, Linda Mercado, was entitled to payment for attendant care provided to Mercado to date; and 3) CIGA unreasonably delayed, or failed to provide, medical treatment in the form of home modifications as certified by its own UR, and Mercado is entitled to a 25% penalty under §5814, to be assessed against the value of the benefits that were unreasonably delayed or refused.

The WCALJ's Opinion on Decision, dated May 21, 2014 ("Opinion"), states that CIGA timely submitted Dr. Vasile's November 14, 2013 report to UR. (Tab 7, 0008)

The WCALJ states in his Opinion that the December 12, 2013 UR Decision "is materially defective" and that it "focused on reasonable medical necessity supporting the medical management of the injured worker." The WCALJ emphasized that the UR Reviewer did not examine the applicant, and apparently did not review even a fraction of applicant's medical records. The WCALJ concluded that Dr. Martin, an Emergency Medicine Specialist, was not competent to issue the UR Decision. Based upon the foregoing, the WCALJ determined that the UR Decision by Dr. Martin was materially defective, was

therefore not subject to UR, and that the WCAB had jurisdiction over the dispute regarding home modifications pursuant to the *Dubon I* decision. (Tab 7, 0092-0094)

Despite the fact that §5814 penalties had not been raised at Trial, the WCALJ states in his Opinion that CIGA's UR Physician certified thirty-one (31) home modification recommendations, and that CIGA had unreasonably delayed, or failed, to provide medical treatment in the form of home modifications as certified by UR. As a result, the WCALJ found that Mercado was entitled to a 25% penalty pursuant to §5814, to be assessed against the value of the benefits that were unreasonably delayed or refused, in an amount to be adjusted between the parties, with jurisdiction reserved by the WCAB. (Tab 7, 0094-0095)

In his Opinion, the WCALJ states that the applicant's prior treating physician, Dr. Patterson, stated in his September 11, 2012 deposition, that the medical team caring for the applicant discussed the need for a one-on-one nurse in Mercado's room versus having a family member provide that level of attention, and it was decided (with Linda Mercado's agreement) that Mercado's wife, Linda Mercado, could be trained to provide the necessary attention. (Tab 7, 0094) The WCALJ notes in his Opinion that Linda Mercado had previously testified that she had been trained to perform a wide variety of necessary tasks for Mercado, and that Dr. Patterson testified that the hospital counted on her being there to perform

those tasks. Moreover, the WCALJ noted, Dr. Patterson agreed with a consulting psychologist, Dr. Skenderian, that Linda Mercado's presence and care was medically reasonable to help reduce Mercado's anxiety, and calm him down enough to handle the effects of his injuries.

The WCALJ states that the Nurse Case Manager, Deborah Moore, testified that Linda Mercado was actively involved with Mercado's care at all times, of which Ms. Moore was aware. (Tab 7, 0094) Based upon Dr. Patterson's testimony, the WCALJ determined that Linda Mercado's care was reasonably required to cure or relieve the effects of Mercado's injuries, and it was therefore found that Linda Mercado was entitled to payment for attendant care provided to Mercado to date, as well as reimbursement for mileage, in connection with such care, in an amount to be adjusted between the parties, with jurisdiction reserved by the WCAB.

CIGA filed a timely Petition for Reconsideration of the May 21, 2014, Findings, Award and Orders arguing, *inter alia*, that the WCALJ had erred in determining that the December 12, 2013 UR Decision was defective, that it was error for the WCALJ to award §5814 penalties when Mercado had failed to raise the issue at Trial, and had failed to file a Petition for Penalties under §5814, and that it was error for the WCALJ to award payment to Linda Mercado for attendant care, as her lien was invalid under §4903.05(c)(2) and §4903.8(e), and that Linda

Mercado had failed to meet her burden of proof that such care met the definition of “medical treatment” within the meaning of the guidelines. (Tab 3, 0011)

In his Report and Recommendation on Petition for Reconsideration, dated June 30, 2014, (“Report and Recommendation”) the WCALJ characterized CIGA’s arguments concerning the fact that the §5814 penalties issue was not raised at Trial, and that Mercado had failed to file a Petition for Penalties as a concern “with form over substance” and merely a procedural argument. (Tab 4, 0045)

The WCALJ notes in his Report and Recommendation that Mercado raised the issue of “sanctions” in the February 6, 2014, Pre-Trial Conference Statement. The WCALJ noted the unfortunate trend among parties, *not only in this case*, but in many others, towards vagueness and ambiguity in the preparation of Pre-Trial Conference Statements. The WCALJ noted that parties often use the words “sanction” and “penalty” interchangeably, even though they are two completely different things. Further, the WCALJ noted that Mercado asserted in his Trial Brief that “[petitioner] should be penalized with sanctions ... pursuant to Labor Code sections 5813 and 5814” suggesting to the WCALJ that Mercado was using the terms interchangeably. (Tab 4, 0045-0046)

The WCALJ notes in his Report and Recommendation his specific recollection of off-the-record discussions with the parties regarding the fact that

CIGA may find itself in a penalty position as a result of an unreasonable delay of home modifications. (Tab 4, 0046)

Because the Mercado raised the issue of “sanctions” at the Mandatory Settlement Conference, and used the term “sanctions” interchangeably with the term “penalty;” because of off-the-record discussions regarding a possible penalty for delay of home modifications; and because Mercado cited §5814 in his Trial Brief, and Petitioner had an opportunity to respond (but did not address the issue in its Reply Brief), the WCALJ believed that Petitioner was “*well aware of the penalty issue prior to trial and was provided notice of the issue and an opportunity to be heard.*” (Italics added.) (Tab 4, 0046)

In his Report and Recommendation, the WCALJ characterized CIGA’s argument that Linda Mercado’s lien was invalid under §4903.05(c)(2) and §4903.8(e) as “procedural issues rather than substantive ones.” (Tab 4, 0046) The WCALJ stated that the requirements under §§4903.05, 4903.8 involve the payment of a lien filing fee, and need for supporting documentation, to perfect a lien for medical services. (Tab 4, 0047) The WCALJ concludes that these provisions were intended to apply to medical providers rendering services to injured workers as part of their normal business practice, not to the lien of a family member for care provided to a loved one. Despite the fact that the lien was prepared by her attorney, the WCALJ stated that “[r]equiring a wife seeking

payment for caring for her husband to comply with a large number of technical rules and filing fees intended to apply to medical businesses is not only unreasonable, but would do nothing to further the intent and purposes of the applicable statutes. In short, it would be elevating form over substance for no good cause.” (Tab 4, 0047)

The WCALJ states in his Report on Reconsideration that Linda Mercado did not provide home healthcare, within the meaning of §4600(h). (Tab 4, 0047) Rather, Linda Mercado “provided attendant care as part of [Mercado’s] care in various care facilities in lieu of having the facilities charge [petitioner] for a one-on-one caregiver.”

VII.

ISSUES PRESENTED FOR REVIEW

1. Did the WCALJ err when he determined, based upon the decision in *Dubon I, supra*, that CIGA’s timely December 12, 2013, UR Decision regarding home modifications was invalid due to material procedural defects, not subject to IMR, and subject to the WCAB’s jurisdiction, when the basis for such decision was rescinded by the WCAB, in *Dubon III, supra*?
2. Did the WCAB err when it failed to determine that Mercado had resolved the issue of §5814 penalties by operation of law (§5814(c)),

when he failed to properly submit such issue at Trial or expressly exclude the penalties issue in the statement of issues submitted?

3. Did the WCAB err when it failed to determine that it did not have jurisdiction to award §5814 penalties because Mercado had failed to file a Petition for Penalties?
4. Did the WCALJ err by addressing, and resolving, the issue of §5814 penalties, and awarding such penalties, without affording CIGA the opportunity to offer rebuttal?
5. Did the WCALJ err in determining that he had jurisdiction to award payment to Linda Mercado under her lien, when she had failed to pay the lien filing fee required under §4903.05(c)(1) and had failed to provide the documentation and declarations required under §4903.8(e)?
6. Did the WCALJ err in determining that Linda Mercado had met her burden of proof by a preponderance of the evidence that her attendant care was reasonable and necessary under the SB 899 guidelines?

VIII.

ARGUMENT

A.

THE PROPER STANDARD OF REVIEW

This case involves clear questions of law regarding the WCAB's interpretation, and application, of *Labor Code* §4610, 5814, 4903.05 and 4903.8. The proper standard of review is de novo. "On review of a decision by the WCAB, we decide questions of statutory interpretation de novo." (*California Ins. Guarantee Assn. v Workers' Comp. Appeals Bd., (Mangum)* (2003) 112 Cal.App. 4th 358, 362, 5 Cal.Rptr. 3d 127) Although the Appellate Courts accord significant respect to the Appeals Board's interpretation and application of workers' compensation statutes, reviewing courts are "... cognizant of the rule that we are not bound by the Board's decision on questions of law, but instead undertake de novo review. [Citation.]" (*Barnes v. Workers' Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 685; 97 Cal.Rptr. 2d 638)

This case also involves the issues of whether Mercado properly raised the issue of penalties at Trial, and whether Linda Mercado met her burden of proof regarding her attendant care. Under the substantial evidence standard of review, the courts must determine "whether the evidence, when viewed in light of the entire record, supports the award of the WCAB." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 227, 233 [20 Cal. Rptr. 2d 26]) the court is not bound to accept the WCAB's factual findings if determined to be unreasonable, illogical, improbable or inequitable when viewed in light of the overall statutory scheme. (*Ibid.*) "[I]f the evidence relied

upon and the reasons stated for the decision do not support it, the decision must be annulled. [Citations.]” (*City of Santa Ana v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App. 3d 212 [180 Cal. Rptr. 125])

B.

SECTION 4610 REQUIRES THAT ANY DISPUTE OVER A UR DECISION REGARDING MEDICAL NECESSITY BE REVIEWED BY IMR

1. The Legislative History of UR and IMR.

Prior to the enactment of §4610, disputes regarding recommendations for treatment were resolved either by obtaining an agreed medical evaluator (“AME”), or by each party obtaining separate qualified medical evaluator (“QME”). (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* 44 Cal. 4th 230, 237 [79 Cal. Rptr. 3d 171, 186, 73 Cal. Comp. Cases 981].) Under this process, when a defendant disputed a treatment physician’s Request for Authorization of Treatment (“RFA”), a UR physician must determine, based upon “medical necessity,” whether to approve, modify, or deny the requested treatment (*Section 4610(a), (c), (e), (g)(4).*) In addition, §4610 requires that “[e]ach utilization review process shall be governed by written policies and procedures,” and mandates that certain procedural requirements “shall be met.” (§4610(c), (g).)

In 2004, while §4610 was not changed, there were amendments made to §4062 to allow an employee to object to a UR Decision, and obtain a comprehensive medical-legal report from an AME or QME. (*Sandhagen, supra*, 44 Cal. 4th at pp. 242-245).

In 2012, SB 863 was enacted. (Stats. 2012, ch. 363.) SB 863 did not change the procedural requirements of §4610 for UR Decisions, but amended the procedures for resolving post-UR disputes over the “medical necessity” of treatment requests. In its statement of purpose, uncodified section 1(e) of SB 863 provided:

“The Legislature finds and declares all the following: ... (e) [t]hat having medical professionals ultimately determined the necessity of requested treatment furthers the social policy of the state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy.”

(Stats. 2012, ch. 363, § 1(e); see also §1(d), (f), (g).)

To effectuate this purpose, the Legislature amended §§4062 and 4610 so that an injured employee could no longer use the AME/QME process to dispute a UR Decision. Instead, §§4610.5 and 4610.6 were adopted, introducing a new procedure whereby an injured worker who disputes a UR Decision may request IMR. Under §§4610.5 and 4610.6, an IMR physician evaluates the “medical

necessity” of the proposed treatment. (§§4610.5(c)(2), (c)(3), (k), 4610.6(a), (c), (e).)

As amended by SB 863, §4604 still vests the WCAB with jurisdiction to determine non-medical disputes regarding the timeliness of UR. Specifically, §4604 provides that: “[c]ontroversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5.”

In 2013, the Appeals Board adopted *Rule 10451.2(c)(1)*, which provides, in relevant part:

“Where applicable, independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely and otherwise procedurally proper utilization review (UR). ... All other medical treatment disputes are non-IMR[] disputes. Such non-IMR[] disputes shall include, but are not limited to: ... (c) a dispute over whether UR was timely undertaken or was otherwise procedurally deficient; however, if the employee prevails in this assertion, the employee ... still has the burden of showing entitlement to the recommended treatment ...”

(Cal. Code Regs., tit. 8, §10451.2(e).)”

2. The WCALJ erred when he found that CIGA’s timely December 12, 2013, UR Decision was not subject to IMR.

In its February 27, 2014 en banc decision, the WCAB held that “[a] UR determination is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR determination” and that [“m]inor

technical or immaterial defects are insufficient to invalidate a defendant's UR determination." (*Dubon I, supra* at pp. 315, 320.) On May 22, 2014, the WCAB granted defendant State Compensation Insurance Fund's Petition for Reconsideration from the Opinion and Decision after Reconsideration issued in *Dubon I*. (See *Dubon v. World Restoration, Inc. (2014) 79 Cal. Comp. Cases 313 (Appeals Board en banc) (Dubon II)*.)

On October 6, 2014, the WCAB en banc rescinded its decision in *Dubon I*, (*Dubon v. World Restoration Inc. (2014) 79 Cal. Comp. Cases 1298 (Dubon III)*), and determined that a UR Decision is invalid, and not subject to IMR *only if it is untimely*, and that "*all other disputes regarding a UR Decision must be resolved by IMR.*" (Italics added.)

There is no question that §§4610 and 4610.5 provide that disputes over UR Decisions shall be resolved by IMR. (*Dubon III, supra* at pp. 22.)

Section 4610(g)(3)(a) states that if a UR Decision does not fully approve a treatment request, then "disputes [regarding the UR decision] *shall be resolved pursuant to section 4610.5, if applicable*" (Italics added; see also §4610(g)(3)(b).)

Additionally, §4610.5 states:

(a) *This section applies to the following disputes:*

- (1) *Any dispute over a Utilization Review Decision* regarding treatment for an injury occurring on or after January 1, 2013.
- (2) *Any dispute over a Utilization Review Decision* if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.
- (b) A dispute described in subdivision (a) *shall be resolved only in accordance with this section.*

- (e) A Utilization Review Decision *may be reviewed or repealed only by independent medical review pursuant to this section.*

- (k) The [AD] ... shall expeditiously review [IMR] request and ... [i]f there appears to be any medical necessity issue, *the dispute shall be resolved pursuant to an independent medical review* [with specified exceptions not relevant here]. [Italics added.]

Additionally, as mentioned above, various provisions of uncodified section 1 of SB 863 expressly declare a legislative intent that IMR is to be the vehicle for reviewing a UR Decision. (Stats. 2013, ch. 363, § 1(c), (e), (f), (g).)

The WCAB in *Dubon III* determined that the timeliness of a UR Decision is a legal dispute within the jurisdiction of the WCAB. (*Dubon III, supra* at p. 25.) This issue is not relevant herein, as the WCALJ determined that the December 12, 2013 UR Decision was timely. With the exception of timeliness, the WCAB in *Dubon III* determined that a UR Decision must be “in compliance with” other elements of §4610, which are determined to go to the validity of the medical decision or decision-making process. The sufficiency of medical records provided, expertise of reviewing physician and compliance with the MTUS are all questions for the medical professional. If an injured worker disputes a UR Decision, §4610 mandates that it “shall be resolved in accordance with section 4610.5, if applicable” (*Section 4610(g)(3)(a)* (italics added); see also §4610(g)(3)(b).) Similarly, §§4610.5 and 4610.6 specifically provide that were there is a dispute regarding a UR Decision on “medical necessity,” the dispute shall be resolved only by IMR. (§4610.5(a)(1) & (2), (b), (e), (k).) According to the WCAB in *Dubon III*, with the exception of timeliness, all defects in the UR process can be remedied on appeal to IMR.

C.

MERCADO FAILED TO PROPERLY RAISE THE ISSUE OF PENALTIES AT TRIAL AND FAILED TO FILE THE REQUIRED PETITION FOR PENALTIES UNDER §5814.

1. Because Mercado failed to raise the issue of *Labor Code §5814* penalties at Trial, it was a violation of CIGA's due process rights, and reversible error, for the WCALJ to address and resolve the penalties issue without first affording CIGA an opportunity to offer rebuttal.

Mercado raised the issue of "sanctions" at Trial, which is a matter covered under Labor Code §5813¹⁴, but the WCALJ addressed and issued a "penalties" award pursuant to §5814, which was an issue not raised at Trial. A WCALJ may not resolve, and address, an issue without first affording the parties an opportunity to offer rebuttal. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal. App. 4th 151, 157, [97 Ca. Rptr. 2d 852, 65 Cal. Comp. Cases 805], citing *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal. App. 4th 396, 399 [94 Cal. Rptr. 2d 130, 65 Cal. Comp. Cases 264].)

The Board "is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties both forward a fair and open hearing. "The right to such a hearing is one of the "rudiments of Fair

¹⁴
Labor Code §5813, entitled "Sanctions for bad-faith actions or tactics, provides under subparagraph (a), in relevant part, "The [WCAB] may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." Subparagraph (b) states, "The determination of *sanctions* shall be made after written application by the party seeking sanctions or upon the appeals board's own motion." (Italics added.)

Play" [citation] assured to every litigant by the Fourteenth Amendment as a minimal requirement." [Citations.] The reasonable opportunity to meet, and rebut, the evidence produced by his opponent is generally recognized as one of the essentials of these minimal requirements [citations], and the right of cross-examination has frequently been referred to as another [citations]. ... "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." (Kaiser Co. v. Industrial Acc. Com. (1952) 109 Cal. App. 2d 54, 58 [240 P.2d 57].)

The Award by the WCALJ of §5814 penalties, therefore, resulted in a denial of Petitioner's due process, and must be reversed. (See Beverly Hills Multispecialty Group, Inc v. Workers' Comp. Appeals Bd. (1994) 26 Cal. App. 4th 789, 806 [32 Cal. Rptr. 2d 293].)

The record reflects the fact that the applicant's attorney failed to raise the issue of *Labor Code* §5814 penalties at Trial. Furthermore, the applicant's attorney failed to file a Petition for Penalties under *Labor Code* §5814 in this case. The April 2, 2014 Minutes of Hearing state that the "issues of attorney fees and sanctions including the various grounds for those claims are as set forth in the pretrial conference statement under the heading of Other Issues." With respect to

the “issues of attorney fees and sanctions” the Pre-Trial Conference Statement makes reference to §5814.5. However, there was no prior Award in the case.

Applicant’s attorney’s Trial Brief, submitted on the day of Trial, argues regarding “bad faith tactics” that defendant’s failure to admit that the applicant was permanently and totally disabled was subject to *Labor Code §§5813 and 5814*. (Trial Brief (4/1/14) Tab 5, 0052).

Applicant’s attorney also argued under the issue of “home modifications” that defendant’s failure to commence modifications authorized pursuant to Utilization Review were subject to *Labor Code §§5813 and 5814*. (Id. p.4.)

Trial Briefs are not evidence, merely arguments put forth by the parties for the purpose of persuading the Trier of Fact that his position is legally or factually correct. (*California Highway Patrol/State of California v. Workers' Comp. Appeals Bd.* 68 Ca. Comp. Cas 227 (2003) (writ denied); *Fields v. Workers' Comp. Appeals Bd.* (2000) 65 Cal. Comp. Cas 1393.) Furthermore, a Trial Brief is not effective to amend the stipulated issues without specific incorporation by the WCJ, and no such incorporation of the §5814 issue was made by the WCJ.

The award of §5814 penalties without adequate Notice to defendant is a violation of due process. (*Kaiser Co. v. Industrial Acc. Com.* (1952) 109 Cal app 2^d 54, 58 [65 Cal. Comp. Cas 805] (All parties must be fully apprised of the issues

and must be provided a reasonable opportunity to meet and rebut the evidence produced by his opponent.))

Further, the Board's power is limited to express statutory authority, and the implied authority necessary to carry out the legislative purpose. (*See E. Clemens Horst Co. v. Industrial Acc. Com.* (1920) 184 Cal. 180, 192 [193 P. 105, 7 I.A.C. 180].) There is no provision under §5814 that allows the Board to award penalties on its own motion. There are, however, specific statutory and regulatory provisions that required Mercado to file a Petition for Penalties under §5814. (*See §5814(c)*¹⁵ and *California Code of Regs. Title 8 §10450*.)¹⁶

The Board, accordingly, did not have jurisdiction to award §5814 penalties to Mercado.

¹⁵ *Labor Code §5814(c)* provides:
"Upon the approval of a compromise and release, findings and award's, or stipulation and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless of *whether a petition for penalty has been filed*, unless the claim for penalty is expressly excluded by the terms of the order or award. Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, *regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.*"
(Italics added.)

¹⁶ *California Code of Regulations, Title 8, §10450(a)* states that a "request for action by the Workers' Compensation Appeals Board, other than an Application for Adjudication, and Answer, or a Declaration of Readiness to Proceed, *shall be made by Petition*. The caption of each Petition *shall* contain the case title, and adjudication case number, and *shall* indicate the type of relief sought." The regulation also provides that the petition *shall* be verified and *shall* be served on all the parties. (*Regs. §10450(e), (f).*) Under the Labor Code "shall" is mandatory language (§15), and such would also necessarily be true for the regulations issued thereunder.

Regulations §10450(a) states that a “request for action by the Workers’ Compensation Appeals Board, other than an Application for Adjudication, and Answer, or a Declaration of Readiness to Proceed, *shall* be made by Petition. The caption of each Petition *shall* contain the case title, and adjudication case number, and *shall* indicate the type of relief sought.” (Italics added.) “Shall” is mandatory language. (*Section 15; Dubon I, supra at p.320.*) No Petition was filed by the applicant in this case for penalties under §5814, as required by *Regulations §10450*.

Accordingly, as the issue was not formally raised, and no Petition was timely filed, it was error for the WCJ to issue an Award of Penalties under *Labor Code §5814*.

2. **Because the §5814 issue was not submitted at trial and not expressly excluded, upon submission of the issues at the April 2, 2014, Trial, the Court must conclusively presume that any accrued claims for penalties have been resolved.**

Labor Code §5814(c) provides:

“Upon the approval of a compromise and release, findings and award’s, or stipulation and orders by the appeals board, it shall be conclusively presumed that any accrued claims for penalty have been resolved, regardless of whether a petition

for penalty has been filed, unless the claim for penalty is expressly excluded by the terms of the order or award. Upon the submission of any issue for determination at a regular trial hearing, it shall be conclusively presumed that any accrued claim for penalty in connection with the benefit at issue has been resolved, regardless of whether a petition for penalty has been filed, unless the issue of penalty is also submitted or is expressly excluded in the statement of issues being submitted.”

Mercado failed to file a Petition for §5814 penalties, and failed to raise the issue of 5814 penalties at the time of Trial. Accordingly, the accrued issue of penalties under *Labor Code §5814* with respect to home modifications is conclusively presumed to have been resolved upon the submission of the April 2, 2014 Trial.

D.

IT WAS ERROR FOR THE WCALJ TO AWARD PAYMENT TO LINDA MERCADO FOR ATTENDANT CARE TO MERCADO.

- 1. The Board lacked jurisdiction to award payment to Linda Mercado as her lien is invalid.**

Linda Mercado’s lien was statutorily invalid on two accounts, because of her failure to pay the filing fee required under §4903.05(c)(1), and because of her

failure to provide required supporting documentation and declarations, as required under §4903.8(e).¹⁷

Accordingly, there was no jurisdiction for the Board to issue any payment to Linda Mercado under such lien.

Labor Code §4903.05(a) provides in relevant part: “Every lien claimant shall file its lien with the appeals board in writing upon a form approved by the appeals board. The lien *shall* be accompanied by a full statement or itemized voucher supporting the lien in justifying the right to reimbursement...” [payment of filing fee].

Labor Code §4903.8(d) states in relevant part: “at the time of filing of a lien on or after January 1, 2003, ... Supporting documentation *shall* be filed including one or more declarations under penalty of perjury by a natural person or persons

¹⁷ §4903.05(a) provides in relevant part: “every lien claimant shall file its lien with the appeals board in writing upon a form approved by the appeals board. The lien shall be accompanied by a full statement or itemized vouchers supporting the lien in justifying the right to reimbursement...” *The lien shall be invalid if the filing fee is not paid. (§4903.05(c)(2).)* §4903.8(d) further states in relevant part: “at the time of filing of a lien on or after January 1, 2003, ... Supporting documentation shall be filed including one or more declarations under penalty of perjury by in natural person or persons competent to testify to the facts stated, declaring both the following: (1) the services or products described in the bill for services or products were actually provided to the injured employee [;] (2) the billing statement attached to the lien truly, and accurately, describes the services or products that were provided to the injured employee. Finally, §4903.8(e) states: “a lien submitted for filing on or after January 1, 2013, for expenses provided in subdivision (b) of §4903 [including medical treatment under §4600], that does not comply with the requirements of this section *shall be deemed to be invalid*, whether or not accepted for filing by the appeals board, and shall not operate to preserve or expand any time limit for filing of the lien.”

competent to testify to the facts stated, declaring both of the following: (1) The services or products described in the bill for services or products were actually provided to the injured employee [;] (2) The billing statement attached to the lien truly, and accurately, describes the services or products that were provided to the injured employee. *Labor Code §4903.8(e)* states: “A lien submitted for filing on or after January 2013, for expenses provided in subdivision (b) of §4903 [including medical treatment under *Labor Code §4600*], that does not comply with the requirements of this section *shall be deemed to be invalid*, whether or not accepted for filing by the appeals board, and shall not operate to preserve or expand any time limit for filing of the lien.”

“As used in the *Labor Code*, “shall” is mandatory.” (*Section 15; Dubon I, supra at p.320.*) The facts are clear regarding this issue, Linda Mercado failed to provide the full statement, or itemized voucher, required by *Labor Code §4903.05(a)*, and failed to provide the required validating declaration in her “lien” pursuant to *Labor Code §4903.8(d)*. Accordingly, her lien is invalid, and it was error for the WCJ to award payment to Linda Mercado for attendant care to the applicant, as the Board lacked jurisdiction to issue such award. (*Labor Code §4903.8(e).*)

2. **It was error for the WCALJ to award payment to Linda Mercado for attendant care as she failed to meet her burden of proof that such care was reasonable and necessary under the SB 899 guidelines.**

The legislative scheme for reviewing employee treatment requests has changed over time. (*Sandhagen, supra at p. 237.*)

Before SB 228, there were no uniform medical treatment guidelines in effect. Medical treatment was deemed “necessary” depending solely upon the opinion of the treating physician as measured against the general standard that “necessary” treatment was that which was “reasonably required to cure or relieve the injured worker of the effects of his or her injury.” (*Ibid. at p. 238.*)

SB 228, effective January 1, 2004, enacted comprehensive workers' compensation reform as a result of the Legislature reacting to escalating costs, including the statutory utilization review (“UR”) process incorporated in §4610. (*Ibid. at p. 239-240.*)

SB 899, effective April 19, 2004, was passed as an urgency bill in response to “a perceived crisis in skyrocketing workers’ compensation costs.” (*Ibid. at p. 241, citing Brodie v. Workers’ Comp. Appeals Bd., supra.*) SB 899 amended §4600 to define “medical treatment that is reasonably required to cure or relieve

the injured worker from the effects of his or her injury” as “treatment that is based upon the guidelines adopted by the administrative director pursuant to *Section 5307.27* or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine’s Occupational Medicine Practice Guidelines.”

SB 899 also amended §3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden on all issues by a preponderance of the evidence. Accordingly, “*notwithstanding whatever an employer does (or does not do),*” an injured employee must still prove that the sought treatment is medically reasonable and necessary, i.e., must demonstrate that the treatment request is consistent with the uniform guidelines or, alternatively rebut the guidelines with a preponderance of scientific medical evidence.²

Labor Code §4600(a) provides in relevant part: “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.”

Labor Code §4600(b) provides: “As used in this division and notwithstanding any other law, medical treatment that is reasonably required to

cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to *Section 5307.27*.” As required by *Labor Code §5307.27*, the Administrative Director, in consultation with the Commission on Health and Safety and Workers’ Compensation, has adopted a medical treatment utilization schedule (MTUS). (*See Regs. §§9792.20-9792.26*) The schedule incorporates the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the Commission pursuant to *Labor Code §77.5*, and addresses the frequency, duration, intensity, and appropriateness of all treatment procedures, and modalities, commonly performed in workers’ compensation cases.

The recommended guidelines set forth are presumptively correct on the issue of extent and scope of medical treatment, and diagnostic services, addressed in the schedule for the duration of the medical condition. The presumption is rebuttable, and may be controverted, by a preponderance of the scientific medical evidence establishing that a variance from the guidelines is reasonably required to cure or relieve the injured worker from the effects of his or her injury. The presumption created is one affecting the burden of proof. (*Labor Code §4604.5(a); Regs. §9792.25(a).*) According to the guidelines, “Medical Treatment” is defined as “care which is reasonably required to cure or relieve the employee from the effects of the industrial injury consistent with the requirements

of sections 9792.20-9792.26.”

The record reflects that following his accident on December 21, 2011, Mercado has been under 24/7 nursing care at all times. The record reflects that Mercado’s wife visited him regularly, and stayed with him, for extended periods of time, assisting with his activities of daily living while she was with him. Dr. Patterson testified in his deposition that Linda Mercado performed occasional ministerial functions during the course of Mercado’s treatment, but that her primary role was acting as her husband’s advocate, reducing his anxiety in providing emotional support for him. This is consistent with Dr. Vasile’s recommendations that Linda Mercado be present at all of his *medical appointments*, as she provides emotional support, and due to Mercado’s probable cognitive impairment. Dr. Vasile does limit the scope of recommended attendant care to *medical appointments*, in order to support her husband’s memory and decision-making. (Tab 16, 0224)

The WCALJ did not find it reasonable that limitations should be applied regarding the attendant care provided by Mercado’s wife in this case. However, the Legislature has enacted specific limitations dealing with similar issues relating to the home care provided by family members for injured workers, even in catastrophic cases. (*See Hernandez v. Geneva Staffing, Inc. (2014) 79 Cal. Comp. Cases 682 (Appeals Board en banc) (More stringent rules implemented by SB 863*

to home healthcare provisions under §4600(h) where applicable to home care provided by wife to injured worker who had sustained a catastrophic crash injury to his right hand.))

While Linda Merdado's care for her husband is more than commendable, there is no evidence to support the conclusion that her incidental care, while her husband was under 24/7 nursing care, was reasonable, and necessary, within the meaning of the guidelines. For this reason, accordingly, it was error for the WCALJ to award payment to Linda Mercado for attendant care for Mercado.

IX.

CONCLUSION

As construed by the WCAB in *Dubon III*, §4610 determined that a UR Decision is invalid, and subject to IMR, only if it is untimely and that all other disputes regarding a UR Decision must be resolved by IMR. Since CIGA's December 12, 2013 UR Decision was timely, it should have been resolved by IMR.

The issue of §5814 penalties must be properly raised at Trial, or expressly excluded; otherwise, the issue of penalties is conclusively presumed to be resolved by operation of law, under §5814(c). Mercado did neither. So, the penalties issue was resolved by operation of law. The record demonstrates that the WCALJ

addressed, and resolved the issue of penalties, without providing CICA an opportunity to offer rebuttal. This is a violation of due process and reversible error.

Linda Mercado's lien was clearly invalid under §§4903.05(c)(2) and 4903.8(e). Thus, the Board had no jurisdiction to award payment to Linda Mercado under such lien. SB 899 implemented stricter guidelines regarding the definition of reasonable and necessary medical treatment, and underscored the necessity by a party to prove by a preponderance of the evidence that the treatment sought meets new uniform guidelines. The records reflects that Linda Mercado did not meet her burden of proof. It was error for the WCALJ to award payment to Linda Mercado.


WHEREFORE, CIGA respectfully prays that its Petition for Writ of Review be granted, that the Findings of Fact and Award and Orders be annulled and for all relief this Court deems just and proper.

Dated: November 11, 2014

Respectfully submitted,

GUILFORD SARVAS & CARBONARA

By: _____


MARIO MANRIQUEZ, JR.
Attorneys for Petitioner,
CALIFORNIA INSURANCE
GUARANTEE ASSOCIATION

X.

CERTIFICATE OF APPELLATE COUNSEL

I, Mario Manriquez, Jr., certify that this Brief contains 12,664 words as per computer count.

Dated: November 11, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

MARIO MANRIQUEZ, JR.

XI.

TABLE OF EXHIBITS

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XI.
TABLE OF EXHIBITS

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EAMS Printout	11/2/14	22/0243

1 WORKERS' COMPENSATION APPEALS BOARD
2 STATE OF CALIFORNIA
3
4

5 NICOLAS MERCADO,

6 *Applicant,*

7 vs.

8 PARK WEST ENTERPRISES, INC., dba CO-
9 WEST COMMODITIES; CALIFORNIA
10 INSURANCE GUARANTEE ASSOCIATION
for ULLICO CASUALTY COMPANY, in
liquidation,

11 *Defendants.*

Case No. ADJ8157719
(Anaheim District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

12
13 We earlier granted defendant's petition for reconsideration of the May 21, 2014 Findings, Award
14 And Orders¹ of the workers' compensation administrative law judge (WCJ) who found that applicant
15 sustained industrial injury to multiple body parts while working for defendant as a truck driver on
16 December 21, 2011, causing 100% total permanent disability and a need for future medical treatment.

17 The WCJ further found that applicant's wife, Linda Mercado, is entitled to payment for attendant
18 care she provided applicant while in the hospital as well as reimbursement for mileage incurred in
19 connection with providing that care, and awarded applicant's attorney's fees based upon the commuted
20 value of the permanent disability indemnity award. In addition, the WCJ imposed a 25% penalty against
21 defendant for its unreasonable delay and failure to provide medical treatment in the form of home
22 modifications as certified by its utilization review (UR). In his accompanying Opinion on Decision, the
23 WCJ wrote that in deciding to award medical treatment he determined that defendant's December 12,
24 2013 UR is "materially defective."

25 ///

26
27 ¹ The WCJ's decision was served by mail on the parties on May 22, 2014.

1 Defendant contends that the WCJ erred in awarding a penalty, erred in determining that the
2 December 12, 2013 UR is materially defective, erred in awarding Mrs. Mercado reimbursement for
3 attendant care and mileage, erred in awarding applicant's attorney's fees based upon commutation, erred
4 in deferring certain home modification requests, and erred by relying on medical reports that are not
5 substantial evidence.

6 An answer was received from applicant.

7 The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report)
8 recommending that reconsideration be denied.

9 We have carefully reviewed the record and considered the allegations of defendant's Petition For
10 Reconsideration, applicant's Answer and the WCJ's Report. For the reasons stated by the WCJ in his
11 Report, which we adopt and incorporate by this reference except as discussed below, and for the reasons
12 below, we affirm the WCJ's May 21, 2014 decision as our Decision After Reconsideration, but amend it
13 to disallow the mileage reimbursement awarded applicant's wife.

14 DISCUSSION

15 The facts are set forth in the WCJ's Report and are not repeated in detail herein. In essence,
16 applicant sustained extensive injuries and was rendered a quadriplegic as a result of a vehicle collision he
17 was involved in while working for defendant as a truck driver on December 21, 2011.

18 The WCJ persuasively explains the reasons for his decision in his Report, and we incorporate that
19 analysis in responding to defendant's contentions concerning the substantiality of the evidence
20 supporting the finding of total permanent disability, the home modifications, and the award of attorney's
21 fees.

22 For the reasons expressed in the Report, we also affirm the order directing reimbursement for
23 attendant care provided by applicant's wife. Defendant was aware that Mrs. Mercado was providing a
24 significant part of the care applicant required. The value and use of her services were recognized by the
25 nurse case manager Deborah Moore as shown in her July 15, 2012 progress report and in her testimony at
26 trial.

27 ///

1 The provision of attendant care, like home health care, is medical treatment that a defendant is
2 obligated to provide pursuant to section 4600, and a defendant is not relieved of that obligation merely
3 because the care was provided by the applicant's spouse. (*Hodgman v. Workers' Comp. Appeals Bd.*
4 (2007) 155 Cal.App.4th 44 [72 Cal.Comp.Cases 1202] [mother of injured worker, who was also his
5 conservator, could be reimbursed for monitoring and managing her son's health care needs]; *Henson v.*
6 *Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452, 461-462 [37 Cal.Comp.Cases 1564],
7 [worker's wife entitled to reimbursement for providing required practical nursing services]; *Smyers v.*
8 *Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454]; *Neri Hernandez v.*
9 *Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (en banc).)

10 While we agree with the award providing reimbursement for attendant care provided by
11 Mrs. Mercado, we do not agree with the WCJ's decision to also allow mileage reimbursement, which is
12 explained in his Report as follows:

13 "[P]etitioner asserted that there is no authority in the *Labor Code* to award
14 mileage to Mrs. Mercado. As petitioner is undoubtedly well aware, case
15 law over the years has fleshed out what constitutes medical treatment
16 within the ambit of *Lab. C. §4600*, and it includes mileage related
17 to medical treatment even if not expressly stated in the statute. In the same
18 way that an applicant is entitled to mileage to and from his medical
appointments as part and parcel of his medical treatment even though
§4600 does not expressly authorize it, Mrs. Mercado is entitled to mileage
to and from her husband at his various care facilities as part and parcel of
the medical treatment she provided even though §4600 does not expressly
authorize it."

19 Mileage reimbursement may be allowed pursuant to section 4600 when it is part of the medical
20 treatment an applicant requires. However, allowing Mrs. Mercado mileage in this case is akin to
21 providing such reimbursement for employees at the facility where Mr. Mercado was being treated. In
22 short, the cost of mileage incurred in commuting to and from work is not an expense a medical provider
23 is entitled to recover in addition to the fee he or she earns for providing treatment. Instead, the provider
24 receives a fee for services and pays his or her own costs for travel to and from the place where the work
25 is performed.

26 In that we affirm that Mrs. Mercado is entitled to a fee for the attendant care she provided
27 applicant in partial satisfaction of defendant's obligation to provide medical treatment, we conclude that

1 she is not entitled to also receive reimbursement for mileage involved in traveling to the place where that
2 treatment was provided.

3 Lastly, we note the WCJ's discussion of the allowed penalty in his Report, as follows:

4 "Finally, petitioner asserted that even if allowed to stand, any penalty must
5 be limited to \$10,000. The court did not impose a specific penalty amount,
6 leaving it to be adjusted between the parties with jurisdiction reserved over
7 any disputes as to the amount, because the value of the underlying benefits
8 upon which the penalty is based has yet to be determined. In the same
9 vein, this judge would urge the Board to defer any comment on the actual
10 monetary value of the penalty until an amount is found at the trial level.
11 *Labor Code* §5814(a) provides that the 'amount of the payment
12 unreasonably delayed or refused' shall be increased up to a maximum of
13 \$10,000, but under the circumstances of this case the question of what
14 constitutes 'the payment' that was unreasonably delayed or refused has yet
15 to be determined, or whether there might be more than one such 'payment.'
16 The court would certainly apply the final sentence of §5814(a) to any
17 determination on this issue."

18 In that the WCJ is aware of the \$10,000.00 penalty limit described in Labor Code section 5814,
19 and has expressed his intention to assure that it is not exceeded, we see no need to amend that part of the
20 May 21, 2014 decision.

21 For the foregoing reasons,

22 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
23 Board that May 21, 2014 Findings, Award And Orders of the workers' compensation administrative law
24 judge are **AFFIRMED**, except for Findings Of Fact 4 and the Award, which are **RESCINDED**, and the
25 following are **SUBSTITUTED** in their places:

26 **FINDINGS OF FACT**

27 ****

4. Applicant's wife, Linda Mercado, is entitled to payment for attendant care provided to
applicant to date.

AWARD

AWARD IS MADE in favor of NICOLAS MERCADO against PARK WEST ENTERPRISES,
INC. dba CO-WEST COMMODITIES; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION

1 through its servicing facility PATRIOT RISK SERVICES for ULLICO CASUALTY COMPANY in
2 liquidation, of:

3 A. Permanent total disability indemnity at the rate of \$504.20 per week commencing March 3,
4 2013 and continuing for the remainder of applicant's life, with annual adjustments pursuant to *Labor*
5 *Code* §4659(c) commencing January 1, 2014, less credit to defendant for all indemnity benefits paid from
6 March 3, 2013 to date, and less \$110,997.38 in attorney fees pursuant to Findings Of Fact Paragraph 6 to
7 be commuted from the lifetime benefits by reducing the weekly payments in an amount sufficient to
8 produce the fee.

9 B. Future medical treatment reasonably required to cure or relieve from the effects of the injuries
10 herein, including but not limited to home modifications as discussed in detail in the Opinion on Decision
11 of the workers' compensation administrative law judge.

12 C. Payment to Linda Mercado for attendant care provided to applicant to date, in an amount to be
13 adjusted between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board.

14 D. A penalty of 25% of the amount ultimately paid for home modifications unreasonably delayed
15 or refused pursuant to Findings Of Fact Paragraph 5, payable to applicant in an amount to be adjusted
16 between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board, less 15%
17 of the penalty amount for attorney fees pursuant to Findings Of Fact Paragraph 6.

18 E. Pursuant to Findings Of Fact Paragraph 6, applicant's attorney is awarded a fee of \$110,997.38
19 plus 15% of the amount payable pursuant to Paragraph D above, payable to Berman More Gonzalez with
20 jurisdiction reserved by the Workers' Compensation Appeals Board.

21 ///

22 ///

23 ///

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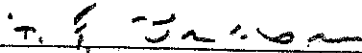
27 ///

1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board that the case is RETURNED to the trial for such further proceedings and
3 decisions by the workers' compensation administrative law judge as may be appropriate.
4

5 WORKERS' COMPENSATION APPEALS BOARD
6

7
8 I CONCUR,

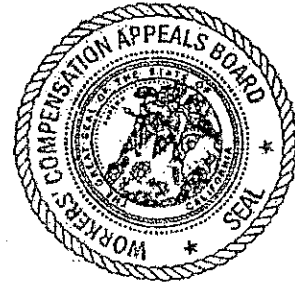

MARGUERITE SWEENEY

9
10
11 

FRANK M. BRASS

12 PARTICIPATING, BUT NOT SIGNING

13 NEIL P. SULLIVAN DEPUTY
14



15
16
17 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

18 SEP 30 2014
19

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

22 NICOLAS MERCADO
23 BERMAN, MORE, GONZALEZ
24 GUILFORD, SARVAS & CARBONARA LLP

25 JFS/abs
26
27

MERCADO, Nicolas

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

RECEIVED

MAY 23 2014

Guilford Sarvas & Carbonara LLP

Case No. ADJ 8157719
Anaheim District Office

NICOLAS MERCADO,

Applicant,

vs.

PARK WEST ENTERPRISES, INC. dba
CO-WEST COMMODITIES; CALIFORNIA
INSURANCE GUARANTEE ASSOCIATION through its
servicing facility PATRIOT RISK SERVICES for
ULLICO CASUALTY COMPANY in liquidation,

Defendants.

**FINDINGS, AWARD
and ORDERS**

The above-entitled matter was heard and submitted at regular hearing on April 2, 2014. The parties stipulated that applicant NICOLAS MERCADO, born October 29, 1960, while employed on December 21, 2011 as a Truck Driver (Group 350) at Riverside, California, by PARK WEST ENTERPRISES, INC. dba CO-WEST COMMODITIES, whose workers' compensation carrier was ULLICO CASUALTY COMPANY (now in liquidation with claims handled by CALIFORNIA INSURANCE GUARANTEE ASSOCIATION through its servicing facility PATRIOT RISK SERVICES), sustained injury arising out of and occurring in the course of employment to his head, neck, back, spine, both upper extremities, chest, ribs, internal organs, neurogenic bowel, neurogenic bladder, both lower extremities, psyche, eyes, jaw, and in the form of sleep deprivation and quadriplegia.

With regard to the issues submitted for decision, the Honorable Paul DeWeese, Workers' Compensation Judge, now decides as follows:

FINDINGS OF FACT

1. Applicant became permanent and stationary on March 2, 2013.
2. Applicant sustained permanent disability of 100%, entitling applicant to permanent total disability indemnity commencing March 3, 2013 at the rate of \$504.20 per week and continuing for life, subject to annual cost-of-living adjustments pursuant to *Labor Code* §4659(c) commencing January 1, 2014.
3. Applicant will require further medical treatment to cure or relieve from the effects of his injuries, including but not limited to home modifications as discussed in detail in the attached Opinion on Decision.
4. Applicant's wife, Linda Mercado, is entitled to payment for attendant care provided to applicant to date as well as reimbursement for mileage in connection with such care.
5. Defendant unreasonably delayed or failed to provide medical treatment in the form of home modifications as certified by its own utilization review, and applicant is entitled to a 25% penalty to be assessed against the value of the benefits that were unreasonably delayed or refused.
6. The reasonable value of the services of applicant's attorney is \$110,997.38, plus 15% of the amount payable pursuant to Paragraph D below.
7. The report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification as Applicant's Exhibit 38) is not admissible.

AWARD

AWARD IS MADE in favor of NICOLAS MERCADO against PARK WEST ENTERPRISES, INC. dba CO-WEST COMMODITIES; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION through its servicing facility PATRIOT RISK SERVICES for ULLICO CASUALTY COMPANY in liquidation, of:

A. Permanent total disability indemnity at the rate of \$504.20 per week commencing March 3, 2013 and continuing for the remainder of applicant's life, with annual adjustments pursuant to *Labor Code* §4659(c) commencing January 1, 2014, less credit to defendant for all indemnity benefits paid from March 3, 2013 to date, and less \$110,997.38 in attorney fees pursuant to Paragraph 6 above to be commuted from the lifetime benefits by reducing the weekly payments in an amount sufficient to produce the fee.

B. Future medical treatment reasonably required to cure or relieve from the effects of the injuries herein, including but not limited to home modifications as discussed in detail in the attached Opinion on Decision.

C. Payment to Linda Mercado for attendant care provided to applicant to date together with mileage reimbursement in connection with such care, in an amount to be adjusted between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board.

D. A penalty of 25% of the amount ultimately paid for home modifications unreasonably delayed or refused pursuant to Paragraph 5 above, payable to applicant in an amount to be adjusted between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board, less 15% of the penalty amount for attorney fees pursuant to Paragraph 6 above.

E. Pursuant to Paragraph 6 above, applicant's attorney is awarded a fee of \$110,997.38 plus 15% of the amount payable pursuant to Paragraph D above, payable to Berman More Gonzalez with jurisdiction reserved by the Workers' Compensation Appeals Board.

ORDERS

F. The report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification only as Applicant's Exhibit 38) is excluded from evidence.

G. All issues over which the WCAB has continuing jurisdiction are ordered off calendar pending the filing of a Declaration of Readiness to Proceed or further Board order.

DATE: May 21, 2014

Paul DeWeese

PAUL DeWEESE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

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ON: 5/22/2014

BY: *nm*

NICOLAS MERCADO

ADJ8157719
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Attorneys for Defendant
Patriot Risk Services for Ullico, in liq.

**BEFORE THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA**

Nicolas Mercado,

vs.

**Vensure Staffing/PEO/Co-West
Commodities; Patriot Risk
Services, for Ullico in liq.,**

Defendant.

WCAB NO.: ADJ8157719

**PETITION FOR
RECONSIDERATION**

Defendant, California Insurance Guarantee Association (CIGA), by its servicing facility Patriot Risk Services, for Ullico Casualty Company, in liquidation, hereby Petitions for Reconsideration from the Findings, Award & Orders, served by mail on May 22, 2014, on the following grounds:

1. The Workers' Compensation Judge ("WCJ") acted without, and in, excess of his powers;
2. The evidence does not justify the Findings of Fact;
3. The Findings of Fact do not support the Findings, Award & Orders ("FA&O").

I. CIGA'S CONTENTIONS

- 1) The WCJ erred in awarding penalties as no §5814 Petition was filed; the issue of §5814 penalties was not formally raised at Trial; and penalties were not limited to \$10,000.00. (*Labor Code §5814(a).*)
- 2) The WCJ erred in determining that the 12/12/13 UR decision is defective, as the issue was not formally raised at Trial; the UR Determination was based upon the "information" "reasonably necessary" to make the determination; and no evidence was offered regarding the UR physician's lack of competence;
- 3) It was error for the WCJ to defer and fail to deny, the "non-certified" home modification recommendations, as the applicant failed to meet his burden of proof.
- 4) It was error for the WCJ to award Linda Mercado reimbursement for "attendant care," as her lien was invalid under *Labor Code §4903.8(e)*, *Labor Code §4903.05(a)*, and *Labor Code §4903.05(c)(1)*; there was no RFA for such services, and no prescription per *Labor Code §4600(h)*.
- 5) The emotional support to applicant provided by Linda Mercado is not reimbursable medical treatment.

- 6) There is no authority under the *Labor Code* to award Linda Mercado mileage.
- 7) The March 2, 2013, report from Shantharam Pai, M.D., and the medical reports of Ann Vasile, M.D. are not substantial evidence.
- 8) The Award of \$110,997.38 as an attorney fee is not reasonable, and the commutation of such fees, given the applicant's guarded condition, is inequitable under *Labor Code §5100(b)*.

II. STATEMENT OF MATERIAL FACTS

The applicant, Nicolas Mercado, on December 21, 2011, while employed as a truck driver, sustained numerous injuries including quadriplegia. (MOH/SOE ("MOH") (4/2/14) p.2, lines 6-10.)

The applicant was initially hospitalized at Riverside Community Hospital, (App's Ex. 36, p.2.), where he was found to have a C4 fracture. (MOH (8/26/13) p.3, lines 21-22) The applicant ended up needing a tracheotomy procedure due to respiratory failure. The applicant was subsequently transferred to Casa Colina for three (3) months, then to Kindred in Ontario for 1 ½ months before returning to Casa Colina for three (3) months. (App Ex 36, p.2) During this time, he repeatedly developed respiratory problems, and had to be placed on a ventilator. (Id.) When transferred to Casa Colina Hospital, he came under the care of David Patterson, M.D. (MOH (4/2/14) p.6, line17).

While the applicant was under 24/7 care, the applicant's wife, Linda Mercado assisted with his activities of daily living. MOH (11/6/12) p.7, lines 12-21.) Nurse Case Manager, Debra Moore, testified that there would have been no initial need for Mrs. Mercado to care for her husband, but would have required training in order to prepare her to care for him at home. (MOH (4/2/14) p.9, lines 2-4) Care by Mrs. Mercado was not really needed while she was at Casa Colina, as the 24-hour staff would have cared for the applicant. (Id. Lines 8-9, 22-23).

Dr. Patterson testified in his deposition (App Ex 1.) that Mrs. Mercado performed occasional ministerial functions during the course of the applicant's treatment, but that her primary role was in acting as the applicant's advocate, reducing the applicant's anxiety and providing emotional support for him. (Id. at p.14, line 5 - p.15, line 13.) Dr. Patterson stated that it was clear from his date of injury that the applicant would be 100% disabled. (Id. at p9, lines 16-19).

The March 2, 2013, progress report of PTP, Shantharam Pai, M.D., (App Ex 22), determines that the applicant is permanent and stationary. His spinal cord injury, and quadriplegia, are determined to be permanent, and, based on *Labor Code §4662*, is determined to be 100% disabled. The report is unsigned, issued without declaration under penalty of perjury; no review of medical records is provided; and no AMA Guide determinations, including MMI, are issued pursuant to the AMA Guides.

In her initial report dated March 8, 2013, Dr. Vasile (App Ex 20.) provides no review of records. The applicant was determined to be permanent and stationary on March 2, 2013 per Dr. Pai,(p.10) Dr. Vasile recommended the applicant be transferred to a Care Meridian facility (p.9), which was determined to be able to provide skilled nurses that have expertise. (p.10) Dr. Vasile, on pages six (6) through ten (10), makes sixteen (16) recommendations for medical treatment, including physical therapy, occupational therapy, and speech therapy; urological evaluation for baseline urodynamics and cystoscopy; neuropsychological consult, and testing.

In her July 30, 2013, report, psychologist Teresita Morales, Ph.D., (App Ex 36, p.1.) diagnoses the applicant with major depressive disorder, adjustment disorder with mixed anxiety, and depressed mood (p.11), recommends psychotherapy (pp.10-11), and finds the applicant temporarily totally disabled on a psychological basis as of July 30, 2013, not MMI. (Id.)

Dr. Vasile's August 1, 2013, report (App Ex 35) recommended that Linda Mercado be present at all medical appointments, as she provides "emotional support" and, due to the applicant's probable cognitive impairment, the "wife needs to be present to support memory and decision-making." (pp.4-5.)

By report dated September 25, 2013 (App Ex 34), Dr. Vasile recommended referral to Dr. Rucker for pulmonary and "trach management," urological evaluation

including long-term intervention by catheterization or indwelling catheter and suprapubic, "continue with neuropsychologist ... continue with neuropsychologic testing with Dr. Morales to evaluate for any cognitive impairment related to the head trauma." (pp. 3-4) Dr. Vasile recommends as treatment for wife to be present all medical appointments... "Wife provides emotional support, the patient also has probable cognitive impairment and wife needs to be present to support memory and decision-making."

In her November 14, 2013 report (App Ex 32), Dr. Vasile issued her recommendations regarding multiple home modifications for the applicant.

On November 25, 2013, Phil Martin, M.D., issued his Utilization Notice of Delay letter to Dr. Vasile (Def Ex G) regarding home modifications requested in Dr. Vasile's 11/14/13 report. The letter states "the patient was driving a tanker truck on the freeway on 12/21/11, lost control and rolled over. The patient sustained head trauma, and cervical spinal cord trauma causing quadriplegia. Other injuries include rib fracture, pneumothorax, and pulmonary contusion. Regarding the multiple home modification requests for the patient on Dr. Vasile's 11/14/13 report, please provide a rationale for each of the specific requests that are listed." (p.1)

Dr. Martin issued a December 3, 2013, UR Denial letter to Dr. Vasile (Def Ex G) regarding home modifications requested in her 11/14/13 report, stating that "a letter was

forwarded requesting an explanation for the extensive home modifications. There was no receipt of explanation to allow a reasonable review of the modifications requested. Once received, it will be immediately reviewed and a decision based on reasonable medical necessity made." (p.1)

Dr. Martin issued a December 12, 2013, notice of modification regarding home modifications (Def Ex G) requested by Dr. Vasile, stating, in relevant part, "The 12/7/13 report was thoroughly reviewed as written by Dr. Vasile. It did not address specific information necessary to make decisions on the medical necessity of all the requested home modifications... The patient's condition is that he is a quadriplegic. Each request for home modification was addressed individually. The decisions for home modifications addressed below focused on reasonable medical necessity supporting the medical management of the injured worker. Again the following decision modifications address medical necessity." (p.1) Dr. Martin certifies thirty-one (31) home modifications, modifies nine (9), and non-certifies twenty-six (26) recommendations. (Pp.1-6)

On March 3, 2014, the applicant was admitted to West Anaheim Medical Center Emergency Room for respiratory failure. (Def Ex. J) Mrs. Mercado testified that the applicant had been recommended for surgical procedure in his trachea to remove a growth. (MOH (4/2/14) p.13 lines 9-10) Mrs. Mercado confirmed that the applicant was hospitalized at West Anaheim Medical Center on March 3, 2014, for respiratory failure.

(Id. p13 lines 11-13) Mrs. Mercado confirmed two other hospitalizations while under Dr. Vasile's care due to breathing difficulties. (Id. lines 14-15.)

Linda Mercado testified that she provided care to her husband for his benefit, as both his wife and guardian. (Id. lines 23-24)

III. PROCEDURAL HISTORY

On August 27, 2013, Linda Mercado was appointed Guardian Ad Litem and Trustee for the applicant, in regard to the Petition dated February 7, 2012.

Following an August 26, 2013 Trial, the WCJ issued his Findings and Orders, dated September 23, 2013. The Findings of Fact state, in relevant part: 1) The record is inadequate to determine whether defendant is liable for home modifications at this time; 2) applicant does not require 24 hour one-on-one care at this time; 3) the issue of reimbursement to Linda Mercado is premature in the absence of a formal lien and supporting documentation.

Further, the WCJ ordered: A) the parties are to develop the record regarding home modifications; B) applicant's request for twenty-four (24) hour one-on-one care is denied without prejudice; C) and the issue of reimbursement to Linda Mercado is deferred.

The WCJ has confirmed that Linda Mercado has filed a lien WCAB Form 6 in this case, dated January 27, 2014. (Opinion on Decision (5/21/14) p.3.) EAMS indicates that the filing fee has not been paid. The lien does not provide "a full statement or itemized

voucher supporting the lien and justifying the right to reimbursement," as required under *Labor Code §4903.05 (a)*, and does not provide the declaration under penalty of perjury required under *Labor Code §4903.8 (d)*.

At the April 2, 2014 Trial, the issues were identified as follows: 1) whether applicant is permanent and stationary, and if so, what date he became P&S; 2) permanent disability; 3) need for further medical treatment, including but not limited to home modifications; 4) liability for self-procured medical treatment; 5) the lien of Linda Mercado for home/attendant care; 6) attorney fees; and 7) sanctions. (MOH (4/2/14) p.2 line 21-p.3 line 7.) The record was clarified to note that the "issues of attorney fees and sanctions including the various grounds for those claims are set forth in the pretrial conference statement under the heading of Other Issues." (Id.) The applicant's attorney filed a Trial Brief on the day of Trial. (Ibid. p.2 line 1-3.)

The applicant attorney's Trial Brief argues: 1) that "defendant should be penalized with sanctions" for failing to stipulate to permanent total disability under Labor Code §4662, pursuant to Labor Code §§ 5813 and 5814; 2) the 12/12/13 UR decision regarding home modifications was invalid as certain information was not submitted by defendant to Dr. Martin, and that penalties and sanctions should be imposed for defendant's failure to commence authorized home modifications, under Labor Code §§5813 and 5814; and 3) lien of Linda Mercado is ripe for adjudication.

The FA&O provides in relevant part that 1) the applicant became permanent and stationary (P&S) on March 2, 2013; 2) the applicant was 100% permanent totally disabled; applicant's wife, Linda Mercado, is entitled to payment for attendant care provided to applicant to date, as well as reimbursement for mileage in connection with such care; 4) defendant unreasonably delayed or failed to provide medical treatment in the form of home modifications as certified by its own Utilization Review, and applicant is entitled to a 25% penalty to be assessed against the value of the benefits that were unreasonably delayed or refused; and 5) the reasonable value of the services of the applicant's attorney is \$110,997.38, plus 15% of the amount relating to the 25% penalty for home modifications.

The WCJ's Opinion on Decision, dated May 21, 2014 ("Opin. on Dec."), states that the applicant was determined to be P&S on March 2, 2013, per Shantharan Pai, M.D., of the same date, and the reports of Ann Vasile, M.D.

The WCJ states in his Opinion on Decision that the 12/12/13 UR Decision "is materially defective." The WCJ states that the decision "focused on reasonable medical necessity supporting the medical management of the injured worker." The WCJ emphasizes that the UR reviewer did not examine the applicant and apparently did not review even a fraction of applicant's medical records. The WCJ concludes that Dr. Martin, an Emergency Medicine specialist, is not competent to issue the UR decision.

The WCJ determined that the UR Decision by Dr. Martin was materially defective, and that the WCAB had jurisdiction over the dispute regarding home modifications pursuant to the *Dubon* decision.

The nine (9) modified recommendations were determined to be reasonable and necessary by the WCJ. Finally, with respect to the twenty-six (26) specific recommendations that were not certified by Dr. Martin, the record was determined by the WCJ to be "inadequate to determine the reasonableness and necessity of each specific item." The WCJ noted that "at least some of Dr. Martin's concerns have merit with regard to at least some of the recommendations, while Dr. Vasile's December 7, 2013 report does not adequately explain the medical need for some of the recommendations." Determination with respect to the non-certified home modifications was deferred with jurisdiction reserved by the WCAB.

Finally, with respect to the issue of "attorneys fees," the WCJ determined that the reasonable attorney fee was found to be \$110,997.38, based upon the present value of the lifetime permanent disability award, taking into account the §4659(c) increases as set forth in *Baker*. The fee was determined to be commuted from the lifetime award and payable to the applicant's attorney forthwith. An additional fee of 15% of the penalty amount under *Labor Code §5814* was also awarded to the applicant's attorney.

IV. ARGUMENTS

A. IT WAS ERROR FOR THE WCJ TO AWARD PENALTIES UNDER LABOR CODE §5814.

The applicant's attorney failed to properly raise the issue of §5814 penalties at Trial. (See 4/2/14 MOH, p.2-3.) Furthermore, the applicant's attorney failed to file a Petition for Penalties under *Labor Code §5814* in this case. Applicant attorney's Trial Brief, which makes cursory reference to §5814, was not effective in raising such issue. Trial Briefs are not evidence, merely arguments put forth by the parties for the purpose of persuading the Trier of Fact that his position is legally or factually correct (*California Highway Patrol/state of California v. Workers' Comp. Appeals Bd. 68 Ca. Comp. Cas 227 (2003) (writ denied); Fields v. Workers' Comp. Appeals Bd. (2000) 65 Cal. Comp. Cas 1393.*), and a Trial Brief is certainly not effective to amend the stipulated issues without specific incorporation by the WCJ. As such, the award of §5814 penalties was without adequate notice to defendant and in violation of due process. (*Kaiser Co. v. Industrial Acc. Com. (1952) 109 Cal app 2^d 54, 58 [65 Cal. Comp. Cas 805] (All parties must be fully apprised of the issues and must be provided a reasonable opportunity to meet and rebut the evidence produced by his opponent.)*)

Regulations §10450(a) states that a "request for action by the Workers' Compensation Appeals Board, other than an Application for Adjudication, and Answer,

or a Declaration of Readiness to Proceed, shall be made by Petition. The caption of each Petition shall contain the case title, and adjudication case number, and shall indicate the type of relief sought.” “Shall” is mandatory language. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cas 313, 320.).

Further, under *Labor Code §5814(c)*, the accrued issue of penalties under *Labor Code §5814* with respect to home modifications is conclusively presumed to have been resolved upon the submission of the April 2, 2014 Trial. Finally, the penalty award was not limited to \$10,000.00, per *Labor Code §5814(a)*.

B. WCJ ERRED IN DETERMINING THAT 12/12/13

UTILIZATION REVIEW DECISION WAS DEFECTIVE.

The applicant’s attorney never properly raised as an issue that the December 12, 2013 UR Decision was defective. The issue is simply part of the argument in applicant’s attorney’s Trial Brief, which is not evidence, but merely argument, and not effective to amend the stipulated issues. To do so, without appropriate Notice to defendant, would be a violation of due process. (*Kaiser Co. v. Industrial Acc. Com., supra.*) (*California Highway Patrol/State of California v. Workers' Comp. Appeals Bd., supra.*; and *Fields v. Workers' Comp. Appeals Bd., supra.*) The WCAB in *Dubon* does not determine that the UR physician must review all of the medical records, or personally examine the

applicant, but simply requires that the UR Decisions be based upon "information" that is "reasonably necessary" to make the determination. (*Dubon, supra at p.321.*)

The record reflects that Dr. Martin made a specific request from Dr. Vasile regarding a rationale for each of the specific requests for home modifications that were listed. Dr. Martin's 12/12/13 UR letter reflects an appropriate, and adequate appreciation of the applicant's quadriplegic medical condition. Further medical records were deemed unnecessary by Dr. Martin regarding the home modification issues. Upon receipt of Dr. Vasile's December 7, 2013 report, Dr. Martin was able to issue his 12/12/13 letter certifying thirty-one (31) recommendations, modifying nine (9), and non-certifying twenty-six (26).

No evidence was offered at Trial regarding Dr. Martin's lack of competence to issue a determination regarding the recommended home modifications. In fact, the only portion of Dr. Martin's UR decision that the WCJ takes issue with are merely the nine (9) modifications issued by Dr. Martin. With respect to the fifty-seven (57) other determinations by Dr. Martin regarding home modifications, the WCJ is in complete agreement. According to *Dubon*, a UR Decision is only invalid if it suffers from material procedural defects that undermines the integrity of the Utilization Review Decision (*Dubon, supra at p.321.*), and there was no such showing, with respect to the 12/12/13 Utilization Review.

Finally, if defendant's 12/12/13 UR Determination is found to be invalid, the issue of medical necessity is not subject to IMR, but is to be determined by the WCAB, based upon substantial medical evidence, with the employee having the burden of proving that the treatment is reasonably required. (*Id. at 324.*)

The WCJ determined, with respect to the twenty-six (26) non-certified recommendations, that the record was "inadequate to determine the reasonableness and necessity of each specific item" and that Dr. Vasile's December 7, 2013 report does not adequately explain the medical need for some of the recommendations. Accordingly, with respect to the non-certified home modifications, the applicant failed to meet his burden of proof with respect to such home modifications, and it was error to not deny such home modifications.

C. IT WAS ERROR FOR THE WCJ TO AWARD PAYMENT TO THE LINDA MERCADO FOR "ATTENDANT CARE" AND MILEAGE.

Labor Code §4903.05(a) provides in relevant part: "Every lien ... [filed] **shall** be accompanied by a full statement or itemized voucher supporting the lien in justifying the right to reimbursement..." The lien will also be invalid if the filing fee is not paid. (*Labor Code §4903.05(c)(2).*)

Labor Code §4903.8(d) states in relevant part: "at the time of filing of a lien on or after January 1, 2003, ... Supporting documentation **shall** be filed including one or more

declarations under penalty of perjury by a natural person or persons competent to testify to the facts stated, declaring both of the following: (1) The services or products described in the bill for services or products were actually provided to the injured employee [;] (2) The billing statement attached to the lien truly, and accurately, describes the services or products that were provided to the injured employee. *Labor Code §4903.8(e)* states: "A lien submitted for filing on or after January 2013, for expenses provided in subdivision (b) of §4903 [including medical treatment under *Labor Code §4600*], that does not comply with the requirements of this section **shall be deemed to be invalid.**"

"As used in the *Labor Code*, "shall" is mandatory." (*Dubon, supra at p.320.*) The facts are not in dispute, Linda Mercado failed to provide the full statement, or itemized voucher, required by *Labor Code §4903.05(a)*, failed to provide the required validating declaration in her "lien" pursuant to *Labor Code §4903.8(d)*, and according to EAMS, has failed to pay the filing fee. Therefore, her "lien" is invalid, and it was error for the WCJ to award payment to Linda Mercado for "attendant care."

For the applicant's date of injury, on and after January 1, 2013, a request for authorization (RFA) for a course of treatment as defined in *Regs §9792.6(e)* must be made by a treating physician, and must be in written form. (*See Regs. §9792.9 (with respect to a decision on a request communicated to the requesting physician prior to July 1, 2013);*

and Regs. §979 2.9.1(a) (with respect to a decision on a request communicated to the requesting physician on or after July 1, 2013).)

No evidence was submitted in the case that meets the definition of an RFA as defined above. Accordingly, it was error for the WCJ to award payment to Linda Mercado for "attendant care."

"Medical Treatment" is now defined as "care which is reasonably required to cure or relieve the employee from the effects of the industrial injury consistent with the requirements of sections 9792.20-9792.26." It is the applicant's burden to establish his entitlement to medical treatment. (*Dubon, supra at p. 324, citing Labor Code §§3202.5, 5705.*)

There is nothing in the guidelines, however, that indicates that the provision of emotional support for the applicant by Linda Mercado, constitutes care, which is reasonably required to cure or relieve the employee from the effects of the industrial injury. Thus, it was error for the WCJ to award payment to Linda Mercado for "attendant care."

There is no provision in the *Labor Code* for the payment of mileage to anyone providing "attendant care" to an injured worker. Accordingly, it was error for the WCJ to award Linda Mercado mileage.

D. THERE IS NO SUBSTANTIAL MEDICAL EVIDENCE TO SUPPORT THE FINDINGS, AWARD AND ORDERS.

The WCAB, in reviewing the evidence, must review the entire record to determine whether an award is supported by substantial evidence. (*Place v. WCAB* 3 Ca. 3d 372; *LeVesque v. WCAB* (1970) 1 Cal. 3d 627, 637.) Expert medical opinion, however, does not always constitute substantial evidence on which the board may rest its decision. Courts have held that the Board may not rely on medical reports, which it knows to be erroneous, upon reports which are no longer germane, or reports based upon inadequate medical history or examinations. (*Id.*) Expert opinion is also insufficient to support a determination by the Board when the opinion is based on surmise, speculation, conjecture, or guess. (*Id.*)

A medical opinion with a conclusory statement regarding a medical issue is not substantial evidence; rather the medical opinion must provide specific facts and specific reasoning establishing the basis for such determination. (See *People v. Bassett* (1968) 69 Cal. 2d 122, 141, 144 (“[t]he chief value of an expert’s testimony ... Rest upon the [m]aterial from which his opinion is fashioned in the [r]easoning by which he progresses from his material to his conclusion; ... It does not lie in his mere expression of a conclusion” and “the opinion of an expert is no better than the reasons upon which it is based”); *Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692 [13 Cal. Comp. Cas

80] ("the value of an expert's opinion is dependent upon its factual basis".)

Regulation §9785(e)(4) provides that the primary treating physician shall be responsible for obtaining all of the reports of the secondary physicians and shall, unless good cause is shown, within twenty (20) days of receipt of each report incorporate, or comment upon, the findings and opinions of the other physicians in the primary treating physician's report and submit all of the reports to the claims administrator.

Regulation §9785(f)(8) provides in relevant part that a narrative report from the primary treating physician "must contain the same declaration under penalty of perjury that is set forth in the Form PR-2: "I declare under penalty of perjury that this report is true and correct to the best of my knowledge and that I have not violated Labor Code §139.3.""

Regulation §9785(h) provides that when the primary treating physician determines that the employee's condition is permanent and stationary, the physician shall issue a report in such a manner in which provides all the information required under *Regulation §10606*. Additionally, for permanent disability evaluations performed pursuant to the schedule adopted after January 1, 2005, the primary treating physician's reports concerning the existence and extent of permanent impairment shall describe the impairment in accordance with the AMA guides, 5th Edition.

Regulations §10606(b) provides that medical reports should include where

applicable, *inter alia*, a list of all information received in preparation of the report or relied upon for the formulation of the physician's opinion; the patient's medical history, including injuries and conditions, and residuals thereof, if any; findings on examination; a diagnosis; opinion as to the nature, extent, and duration of disability and work limitations, if any; cause of the disability; treatment indicated, including past, continuing, and future medical treatment; opinion as to whether or not permanent disability has resulted from the injury, and whether or not it is stationary. If stationary, a description of the disability with a complete evaluation; apportionment of disability, if any; the reasons for the opinion; and the signature of the physician.

It is clear, based upon the entire record, that the medical reports of Dr. Pai and Dr. Vasile do not constitute substantial evidence, and do not meet the material regulatory requirements necessary to obtain substantial reporting in this case. Accordingly, there was no substantial medical evidence upon which to issue the Findings, Award, and Orders.

The applicant clearly is not permanent and stationary/MMI, as the entire record reveals that all reasonable healing modalities have not been attempted and completed, and such certainly was not the case as of March 2, 2013. (*See City of Glendale v. Workers' Comp. Appeals Bd. (Forrest)* (1982) 47 Ca. Comp. Cas 168 (writ denied); *Twentieth Century Fox Film Corp. v. Worker's Comp. Appeals Bd. (Shansey)* (1982) 47 Cal. Comp. Cas 102 (writ denied).); Regs. §10152 ("A disability is considered permanent when the

employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment."); AMA Guides 5th Ed. §2.4 ("An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, i.e. the date of maximal medical improvement (MMI).) An injured worker's level of permanent disability can only be determined after the applicant reaches maximum medical improvement. (Brower v. David Jones Construction (2014) 79 Cal. Comp. Cas 550, 560 (WCAB en banc).)

The applicant's respiratory condition has not yet been stabilized, as he has required multiple hospitalizations. The applicant should not have been found P&S by Dr. Vasile as she contemplated urological surgery for the applicant from her initial evaluation, which has yet to be completed. (*Ford Motor Co. v. Workers' Comp. Appeal Bd. (1975) 40 Cal. Comp. Cas 105 (writ denied)*) (The injured worker is not P&S during the period that surgery is being contemplated.) Accordingly, as the applicant was not yet P&S/MMI, it was error to make a determination regarding permanent disability/impairment.

E. THE AWARD OF ATTORNEY'S FEES IS NOT REASONABLE, AND THE WCJ ABUSED HIS DISCRETION BY COMMUTING THE ATTORNEY'S FEE, AS SUCH FEE IS INEQUITABLE, WITHIN THE MEANING OF LABOR CODE §5100(b).

An award of attorney's fees made by the WCAB must be reasonable, taking into account the responsibility assumed by the attorney, the care exercise in representing the applicant, the time involved, and the results obtained. (*Labor Code* §§4903(c), 4906(a) and (d); *Regs.* §10775.) Pursuant to *Reg.* §10775, the WCAB must adhere to the attorney's fee guidelines contained in its Policy and Procedure Manual, §1.140, and *Labor Code* §5313, by setting forth the reasons or grounds for applying the guidelines in any fee determination.

There is no determination by the WCJ regarding the complexity of the case. (See Opin. on Dec., p.4) By reference to the incorporated DEU calculations, the fee amount of \$110,997.38 was determined based on a 15% percentage. No evidence was submitted regarding the time expended by the applicant's attorney in the case.

The attorney's fee guidelines provide that, in cases of average complexity, the WCAB may allow an attorney's fee equal to between 9% and 12% of the applicable benefits, paid from the applicant's compensation benefits. In cases of above-average complexity, however, the WCAB may allow an attorney's fee that is in excess of 12% of the applicable benefits.

The applicant's attorney has only represented the applicant for a period of two and a half years. The case, despite the applicant's complex medical issues, is one of only average complexity. From the inception of the case, it has been understood that the

applicant sustained injuries resulting in quadraplegia and requiring constant medical care. The medical records reflect the fact that the applicant has been under constant 24/7 care in the various facilities providing his course of care, without intervention by the applicant's attorney.

Finally, any ultimate determination regarding the applicant's permanent total disability is not the result of the applicant's attorney's efforts, but was obviously determined immediately following his catastrophic December 12, 2011 injury, as stated by Dr. Patterson. It was error, accordingly, to award an attorney's fees in the amount of \$110,997.38.

Labor Code §5100 provides: "At the time of making its award may commute the compensation payable under this division to a lump sum, and order to be paid forthwith, if any of the following conditions appear: (a) That such commutation is necessary for the protection of the person entitled thereto, or for the best interest of either party [,and] (b) commutation will avoid inequity and will not cause undue expense or hardship to the applicant.

Determination of commutation under §5100 is a matter within the Board's discretion. However, the Board's discretion may not be exercised arbitrarily. (*Hulse v. Workers' Comp. Appeals Bd.* (1976) 63 Cal. App 3d 221, 226 [41 Cal. Comp. Cas 691].) *Labor Code §5100* must be construed liberally by the Board in the courts with the

purpose of affording protection to the injured employee. (*Id. at p.228-229.*) The employee is not protected where the basis on which the attorney fee is fixed is so low as to discourage competent attorneys from accepting employment by injured workers in compensation proceedings. (*Beloud v. Workers' Comp. Appeals Bd. (1975) 50 Cal. App. 3d 729, 737 [40 Cal. Comp. Cas 505].*)

The Industrial Accident Commission had at a very early date stated that, notwithstanding its view that the commutation-discount factor in *Labor Code §5101* "affords a fair remuneration to the insurance carrier for the advance payment, ... This Commission regards the authority vested in it to compel lump-sum payments as one to be exercised with great care and discretion and only in cases of very great urgency." (*Hulse, supra at p.227, citing Wilson v. Gallagher (1914) 1 I.A.C, Pt II, 306, 308.*)

The applicant, and his family, are aware of the applicant's poor prognosis. (*See App Ex 22.*) The applicant has sustained a catastrophic injury resulting in acute chronic respiratory failure secondary to quadriplegia secondary to cervical spine injury; and neurogenic bladder and bowel secondary to quadriplegia. (*Id.*) The applicant was most recently hospitalized on March 3, 2014 on an emergency basis for respiratory failure. (*Def Ex J.*)

Accordingly, it appears a reasonable certainty that the calculation of the attorney's fee, based upon the applicant's unmodified life expectancy, will likely result in

inequitable windfall for the applicant's attorney.

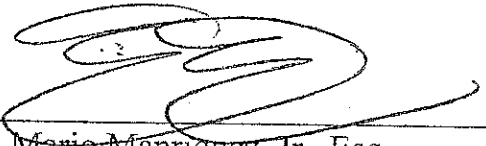
It would accordingly be an abuse of discretion to commute more than the amount sufficient to encourage a competent attorney to participate in this field of practice.

DATED: June 13, 2014

Respectfully submitted,

GUILFORD SARVAS & CARBONARA LLP
Attorneys at Law

By:



Mario Manriquez, Jr., Esq.
Attorney for Defendant

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ 8157719

NICOLAS MERCADO

-vs.-

CO-WEST COMMODITIES;
CIGA by PATRIOT RISK
SERVICES

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE:

Hon. PAUL DeWEESE

DATE:

June 30, 2014

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I

INTRODUCTION

Date of Injury:

December 21, 2011

Age on DOI:

51

Occupation:

Truck Driver

Parts of Body Injured:

Multiple, resulting in quadriplegia

Identity of Petitioner:

Defendant, CIGA by Patriot Risk Services for
Ullico Casualty Co. in liquidation

Timeliness:

The petition was timely filed on June 13, 2014

Verification:

The petition was verified

Date of Findings & Award:

May 21, 2014 (served May 22, 2014)

Petitioner's Contentions:

Petitioner contends the WCJ erred by: 1) finding a quadriplegic injured worker to be P&S and permanently totally disabled despite ongoing medical treatment; 2) finding a utilization review based on a standard of "reasonable medical necessity" from an emergency medicine specialist regarding recommended home accessibility modifications to be defective; 3) ordering the record developed regarding dozens of recommended home modifications that are not adequately explained by the present record; 4) assessing a penalty pursuant to *Lab. C. §5814* for petitioner's failure to provide medical

treatment consisting of numerous home modifications in the absence of genuine medical or legal doubt as to petitioner's liability for such treatment; 5) awarding reimbursement to applicant's wife for attendant care provided outside the home despite her incomplete compliance with technical lien filing procedures; and 6) awarding an attorney fee that petitioner believes is excessive because, in petitioner's view, the case is "of only average complexity."

II FACTS

Applicant Nicolas Mercado sustained extensive injuries in a work-related truck accident on 12/21/2011 that left him a quadriplegic. The parties stipulated that applicant injured his "head, neck, back, spine, both upper extremities, chest, ribs, internal organs, neurogenic bowel, neurogenic bladder, both lower extremities, psyche, eyes, jaw, and in the form of sleep disorder and quadriplegia." (Minutes of Hearing 4/2/2014, 2:8-10).

From his date of injury to present, applicant has been living in hospitals and various care facilities. He is unable to go home because his house is not accessible (see generally Summary of Evidence 11/6/2012, 5:5-11; SOE 8/26/2013, 5:2-6; SOE 4/2/2014, 7:13-19, 11:16-22). Extensive testimony from the applicant, his wife Linda, and former nurse case manager Deborah Moore over the course of three separate trials on 11/6/2012, 8/26/2013 and 4/2/2014, along with numerous medical and nurse management reports, establishes that applicant has required ongoing medical treatment for several conditions and complications related to his injury and will require ongoing treatment for the rest of his life.

Findings, Award and Orders were served on 5/22/2014, finding applicant to be P&S and awarding him 100% permanent total disability benefits; awarding medical treatment including but not limited to home modifications and payment to Linda Mercado for care rendered; and assessing a penalty pursuant to *Labor Code* §5814. Defendant's timely petition for reconsideration followed.

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III DISCUSSION

A. *PERMANENT AND STATIONARY STATUS and PERMANENT DISABILITY.*

Petitioner asserted that "the applicant is clearly not permanent and stationary/MMI, as the entire record reveals that all reasonable healing modalities have not been attempted and completed" (pet. for recon, p. 20). That assertion is disingenuous. The applicant will require ongoing medical care for the rest of his life; he will always be undergoing one "reasonable healing modality" or another. In this case, it is unreasonable to insist that applicant cannot be considered P&S and cannot be awarded permanent disability benefits until ongoing treatment ends, because it never will.

As pointed out by petitioner, Title 8, Cal. Code of Regs. §10152 provides that "a disability is considered permanent when the employee has reached maximal medical improvement, meaning that his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." Notwithstanding applicant's ongoing need for treatment, including possible surgical procedures, psychiatric treatment, "respiratory setbacks," and anything else, he has nevertheless reached "maximal medical improvement" as defined by Rule 10152. He is a quadriplegic. He is totally disabled. That is not going to change. See MOH 4/2/2014, 11:6-13, 13:20-14:1; progress note of Shantharam Pai, M.D. dated 3/2/2013 (Ex. 22); report of Ann Vasile, M.D. dated 3/8/2013 (Ex. 20). The fact that applicant was declared temporarily totally disabled on a psychological basis by Teresita Morales, Ph.D. on 7/30/2013 (Ex. 36) is irrelevant; applicant's total disability was already permanent as a result of quadriplegia, and cannot be said to have become temporary while receiving psychological care.

It must also be pointed out that petitioner itself makes contrary assertions while addressing issues other than applicant's disability status. On page 4 of the petition for reconsideration, petitioner states, "Dr. Patterson stated that it was clear from his date of injury that the applicant would be 100% disabled"; on page 22, "From the inception of the case, it has been understood that the applicant sustained injuries resulting in quadriplegia and requiring constant medical care"; and on page 23, "any ultimate determination regarding the applicant's permanent total disability ... was obviously determined immediately following his catastrophic

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December 12, 2011 [*sic*] injury ..." Clearly, petitioner has been aware "from the inception of the case" that applicant is 100% permanently totally disabled as a result of quadriplegia. Indeed, defense counsel conceded that there was no reasonable argument against an eventual finding of 100% permanent disability during discussions between the parties and this judge at the MSC on 2/6/2014. The only logical reasons for petitioner's insistence that applicant is not yet P&S and that a finding of permanent total disability should not yet be made would be to avoid the annual cost of living adjustment pursuant to *Labor Code* §4659(c), and to lower applicant attorney's fee.

However, even if petitioner were correct and applicant were not yet P&S, petitioner would still be paying permanent total disability benefits at this time because the two-year limit on temporary disability ended 12/21/2013, and the cost of living adjustments would still begin on 1/1/2014. *Brower v. David Jones Construction* (2014) 79 Cal. Comp. Cases 550 (WCAB *en banc*). Because the weekly rates of applicant's temporary and permanent total disability benefits are identical, because the cost of living adjustments would begin on 1/1/2014 whether or not applicant were found P&S, and because there is no reasonable doubt that applicant's medical conditions render him 100% permanently totally disabled regardless of any formal P&S date, the question of whether applicant is formally permanent and stationary is a "distinction without a difference" from the standpoint of the benefits due and payable to applicant.

That leaves attorney fees as petitioner's sole apparent motivating factor for disputing the findings that applicant became P&S on 3/2/2013 and is 100% permanently totally disabled. The fee award itself is addressed in detail *infra*; for now, it suffices to note that not only is this a cynical and callous reason for disputing the benefits due a catastrophically injured worker, it is not a legally valid reason to do so.

Finally, petitioner asserted that the findings of P&S status and permanent total disability were not based on substantial medical evidence. However, petitioner's entire argument in that regard is an homage to form over substance. Dr. Shantharam Pai declared applicant P&S and 100% disabled on 3/2/2013 in a "Physician Progress Note" typewritten in SOAP format as part of applicant's medical chart at Braswell's Colonial Care, where Dr. Pai was applicant's attending physician (Ex. 22). It is not a formal progress report or medical-legal report, it was not generated in order to comply with workers' compensation reporting

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requirements, and as such does not comply with Title 8, Cal. Code of Regs. §9785 or §10606. Failure to comply with those regulations does not, as petitioner suggests, automatically render a medical record incapable of supporting a finding. It should be noted that petitioner did not object to the admission of Dr. Pai's note into evidence. Moreover, Dr. Pai's conclusions are confirmed and supported by the opinions of applicant's current treating physician, Dr. Ann Vasile, in her initial report dated 3/8/2013 (Ex. 20), which does comply with applicable regulations.

Petitioner cited the well-settled and well-known case law to the effect that the Board may not rely on medical reports that are erroneous; no longer germane; based on inadequate medical histories or examination; or based on surmise, speculation, conjecture or guess. However, petitioner did not point out any way in which the medical reports relied upon by this judge might fall under any of those prohibitions, probably because they do not. Applicant is a quadriplegic and his condition is not likely to change in the next year regardless of what extensive treatment he may require. He is 100% permanently totally disabled pursuant to *Labor Code* §4662, both conclusively pursuant to subdivisions (b) and (c) as well as "in accordance with the fact." These conclusions are amply supported by the entire medical record and testimony herein, including but not limited to the reports of Dr. Pai and Dr. Vasile which constitute substantial medical evidence.

B. FURTHER MEDICAL TREATMENT: HOME MODIFICATIONS and VALIDITY OF UTILIZATION REVIEW.

The issue raised at trial (MOH 4/2/2014, 2:24) was "Need for further medical treatment, including but not limited to home modifications." The finding of fact was that "applicant will require further medical treatment ... including but not limited to home modifications" as discussed in the court's Opinion on Decision. The Award was for "future medical treatment ... including but not limited to home modifications" as discussed in the court's Opinion on Decision. In the Opinion on Decision, this judge explained that the utilization review (UR) decision dated 12/12/2013 relied upon by defendant (Ex. G) was materially defective, thus conferring jurisdiction on the Board to decide the dispute over home modifications without resort to Independent Medical Review (IMR). The court went on to base its finding and award of future medical treatment, including but not limited to home

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modifications, on the medical opinions of treating physician Dr. Ann Vasile as stated in reports dated 11/14/2013 and 12/7/2013 (Ex. 32 & 30 respectively).

Petitioner did not appeal either the finding or the award. Instead, petitioner objected solely to the court's determination that the UR was defective. Petitioner's primary objection was that the validity of the UR was not raised as an issue and that petitioner was therefore somehow deprived of due process.

As noted above, the issue was whether or not applicant was entitled to further medical treatment in the form of home modifications. In order to decide that issue, it was necessary for this judge to first decide whether the 12/12/2013 UR was valid. If it was, the Board would have no jurisdiction over the specific medical treatment recommended; applicant would first have to appeal the UR decision through the IMR process. If it was not, then the Board had jurisdiction to decide the underlying dispute over a specific treatment recommendation (here, home modifications) pursuant to *Dubon v. World Restoration, Inc.* (2014) 79 Cal. Comp. Cases 313. The issue submitted for decision could not be decided without first determining whether the court had jurisdiction over it, which in turn required a determination regarding the validity of defendant's UR.

Petitioner is presumed to be aware that current law requires this analysis whenever a specific treatment recommendation is in issue; thus petitioner's complaint that the validity of its UR was "never properly raised as an issue" is frivolous. Petitioner acknowledged in the petition for reconsideration (p. 13) that the validity of defendant's UR was discussed in applicant's trial brief dated 4/1/2014 and filed at trial the next day. What petitioner did not mention was that petitioner was granted time to respond to applicant's brief and did so on 4/25/2014. Petitioner's reply brief included a discussion of the UR decision and an argument that the Board did not have jurisdiction over the home modification issue until the IMR process was concluded. Petitioner was not only aware that the issue raised at trial could not be decided without first addressing the validity of defendant's UR, petitioner took advantage of the opportunity to be heard on that point by way of trial briefs. There was no denial of due process.

Petitioner also asserted that the court's finding that the UR decision was defective was itself erroneous. Petitioner's discussion on this point (pet. for recon, pp 13-15) is not entirely clear, but it appears that petitioner believes it sufficient that the UR reviewer, Dr. Phil Martin,

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had "an appropriate and adequate appreciation of the applicant's quadriplegic medical condition" and that "further medical records were deemed unnecessary by Dr. Martin regarding the home modification issues." This judge disagrees.

The authority and reliability of the UR process (and the IMR process for appealing UR determinations) is only valid and persuasive to the extent that UR determinations are based on objective, evidence-based, peer-reviewed guidelines for the provision of specific forms of medical treatment, applied by a physician within the scope of that physician's professional expertise following a review of sufficient medical records and documentation to enable the reviewing physician to apply the objective guidelines appropriately to the individual patient's circumstances. To most people, the idea that a bureaucrat sitting at a desk somewhere can overrule a treating physician's medical recommendations without ever having met, much less examined, the patient is counterintuitive. The process is acceptable only when people are assured that it can be carefully scrutinized to ensure that a treating physician's medical treatment recommendations are not arbitrarily disregarded. As explained by the WCAB at length in *Dubon, supra*, ensuring the integrity of the UR process and its resulting decisions by requiring strict compliance with all relevant statutes and regulations is necessary to further the public policy behind the process.

In the present case, the reviewing physician did not base his decision on any objective, evidence-based, peer-reviewed guidelines as required by law (*Lab. C. §4610(f); §4610.5(c)(2); Reg. §9792.8*), undoubtedly because such guidelines do not exist for the provision of home modifications to catastrophically injured quadriplegics (or at least this judge is unaware of any and the parties have not cited any). Instead, Dr. Martin's 12/12/2013 UR decision (Ex. G) is based solely on "reasonable medical necessity supporting the medical management of the injured worker." In short, Dr. Martin has substituted his medical opinion for that of the applicant's treating physician for no discernible reason other than that Dr. Martin disagrees with many of Dr. Vasile's recommendations.

According to her letterhead (Ex. 20), Dr. Vasile is a member of Rehabilitation Associates Medical Group, who collectively hold themselves out as providing "Rehabilitation Services for a Continuum of Care." She is a Diplomate of the American Board of Physical Medicine and Rehabilitation. Her particular expertise is in "Spinal Cord Injury Orthopaedic Rehabilitation." She has been applicant's treating physician since March 2013 and has

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discussed applicant's injuries at length with the applicant and his wife. She has provided numerous written reports, explaining in detail the nature of applicant's myriad medical problems and making dozens of treatment recommendations for them. She has recommended 66 specific modifications to applicant's home that would accommodate his disability and medical needs and render it accessible and safe to live in, thus allowing him to be discharged home and be surrounded by the love and care of his family rather than the cold comfort and busy nurses at a succession of long-term care facilities.

In contrast, Dr. Martin's specialty is given as "Emergency Medicine." There is no evidence that he is competent to evaluate the specific clinical issues involved in the long-term treatment of a catastrophically injured quadriplegic, or that the evaluation of dozens of recommended home modifications is within his scope of practice as required by *Lab. C. §4610(e)*. Without citations to any objective guidelines or criteria and in the absence of any evidence that home modifications are within the scope of his practice, Dr. Martin's opinions are simply that – opinions from a random physician who did not examine the patient or review extensive medical documentation regarding applicant's many medical needs.

Under these circumstances, this judge found that the UR decision suffered from material defects that undermined its integrity. As a result, the court found that it had jurisdiction to decide the disputed issue submitted for decision, and ultimately found that applicant met his burden of proof with substantial medical evidence, at least with respect to 40 of the 66 specific home modifications. 31 recommendations were also certified by Dr. Martin, meaning that there was no dispute regarding applicant's entitlement to those modifications, while 9 were modified. Because the UR was found to be defective and Dr. Vasile's opinion was found to be substantial medical evidence as to those recommendations, the 9 modified recommendations along with the 31 certified ones were found to be reasonable and necessary and were awarded to applicant.

C. DEVELOPMENT OF THE RECORD.

Among the 66 specific home modifications recommended by Dr. Vasile were 26 specific recommendations that were "non-certified" by UR. As discussed above, the UR decision was found to be materially defective, and the court turned to Dr. Vasile's opinions as the only other evidence in the record regarding the reasonableness and necessity of the

recommended home modifications.

While Dr. Vasile's opinions were found to be substantial medical evidence of the reasonableness and necessity of 40 recommended modifications that were either certified or modified by UR, they were not found to be substantial medical evidence of the reasonableness and necessity of the 26 recommendations that were non-certified. Petitioner asserted that this required a finding that applicant was not entitled to those 26 modifications because he failed to meet his burden of proof, and that it was error to order the record developed. Once again, this judge disagrees.

In the Opinion on Decision herein, the court found that the record was inadequate to determine the reasonableness and necessity of each of the 26 specific home modification recommendations that were non-certified by UR. Like most defendants, petitioner views the issue as clear-cut: if the record does not contain substantial evidence upon which to base a decision on a disputed issue, the party with the burden of proof (usually, as here, the applicant) loses. If that were the case, there would be no need for the power to develop the record. That power exists because of the constitutional mandate that the workers' compensation system accomplish substantial justice between the parties. The Board not only has the power but the obligation to make further inquiry (i.e. develop the record) when necessary "to ascertain the substantial rights of the parties and carry out justly the spirit and provisions" of the workers' compensation laws (*Lab. C. §5708*).

In the present case, the nature of applicant's injuries and medical needs, coupled with the fact that many modifications to his home are a necessary part of his medical treatment, gives rise to a duty on the court's part to make further inquiry in order to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of the law. Specifically, in the absence of an agreement between the parties it is necessary for this judge to determine the extent and parameters of any modifications to be made to applicant's home as part of his medical treatment. Some of the non-certified recommended modifications may very well not be necessary as medical treatment, while others might be. Due to the sheer number of recommended modifications, it was not possible (in light of the statutory time constraints imposed on the litigation process) for this judge to consider and address each and every recommended modification in any meaningful way while also considering and deciding the other significant issues submitted for decision, either in the original Findings and Award or in

NICOLAS MERCADO

ADJ8157719⁰⁰⁴⁴
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the instant report on reconsideration. Therefore, in order to accomplish substantial justice between the parties, the record was ordered developed with regard to the 26 specific home modification recommendations that were non-certified by the defective UR.

D. *PENALTY.*

As discussed *supra*, treating physician Dr. Vasile recommended 66 specific modifications to applicant's home as part of his medical treatment. Defendant timely submitted the recommendations to utilization review. On 12/12/2013, the UR reviewer, Dr. Martin, certified (i.e. approved) 31 of the specific home modifications recommended by Dr. Vasile.

At that point, there was no genuine medical or legal doubt regarding defendant's liability to provide the 31 certified home modifications. It is also undisputed that defendant did not take steps to begin modifying applicant's home in a timely fashion. By the time of trial on 4/2/2014, almost four months after the recommended treatment was certified by UR, the only step taken by defendant to provide the necessary home modifications was to arrange a single meeting between applicant's wife and a man named Ivan Hernandez for the purpose of obtaining an estimate of the cost of the necessary modifications. Applicant had not been contacted by anyone to actually begin the process of modifying the home or even to arrange for permits to do so. SOE 4/2/2014, 11:16-25.

Petitioner does not dispute any of these facts, *nor does petitioner dispute the finding that there was an unreasonable delay in the provision of medical treatment and that a 25% penalty pursuant to Labor Code §5814 is warranted as a result.* Instead, petitioner again concerns itself with form over substance, asserting that the award of penalty should be reversed solely on procedural grounds. Specifically, petitioner asserted that the issue of §5814 penalties was not properly raised and applicant did not file a formal petition for penalties.

In the Pretrial Conference Statement dated 2/6/2014, applicant raised the issue of "sanctions." This judge has noticed an unfortunate trend among parties, not only in this case but in many others, towards vagueness and ambiguity in the preparation of pretrial conference statements. Parties often use the words "sanction" and "penalty" interchangeably even though they are two completely different things. In his trial brief (3:5), applicant asserted that "defendants should be penalized with sanctions ... pursuant to Labor Code sections 5813 and

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5814," further suggesting to the court that applicant is using the terms interchangeably. At the 2/6/2014 MSC, this judge specifically recalls discussing with the parties the fact that nothing had yet been done to provide the undisputed home modifications certified by UR and that defendant may find itself in a penalty position as a result; that conversation appears to have prompted the single meeting with Mr. Hernandez two weeks after the MSC, but no more. Because applicant raised the issue of "sanctions" at the MSC and appears to have used the term as a synonym for "penalty;"¹ because the possible penalty was expressly pointed out to defense counsel at the MSC; and because applicant did cite §5814 in his trial brief and defendant was given an opportunity to respond (but did not address the issue in its reply brief), the court believes that petitioner was well aware of the penalty issue prior to trial and was provided notice of the issue and an opportunity to be heard.

It must be reemphasized that petitioner has not appealed the factual findings giving rise to the penalty or even the penalty itself, but only whether the issue should have been decided at all.

Finally, petitioner asserted that even if allowed to stand, any penalty must be limited to \$10,000. The court did not impose a specific penalty amount, leaving it to be adjusted between the parties with jurisdiction reserved over any disputes as to the amount, because the value of the underlying benefits upon which the penalty is based has yet to be determined. In the same vein, this judge would urge the Board to defer any comment on the actual monetary value of the penalty until an amount is found at the trial level. *Labor Code* §5814(a) provides that the "amount of the payment unreasonably delayed or refused" shall be increased up to a maximum of \$10,000, but under the circumstances of this case the question of what constitutes "the payment" that was unreasonably delayed or refused has yet to be determined, or whether there might be more than one such "payment." The court would certainly apply the final sentence of §5814(a) to any determination on this issue.

E. REIMBURSEMENT TO LINDA MERCADO.

Once again, petitioner has sidestepped the basis for a finding and award and has chosen to focus on procedural issues rather than substantive ones.

¹ He could just as easily have phrased his trial brief as a request that defendant be "sanctioned with a penalty," which would have made the issue of "sanctions" completely synonymous with "penalty."

Petitioner asserted that the lien of applicant's wife, Linda Mercado, for payment related to care she provided to her husband following his injury should be deemed invalid for failure to comply with the requirements of *Lab. C.* §§ 4903.05(a); 4903.05(c)(1); 4903.8(d); and 4903.8(e). Those sections involve the payment of a lien filing fee and the need for supporting documentation to perfect a lien for medical services. They were intended to apply to medical providers rendering services to injured workers for profit as part of their normal business, not to the lien of a family member for care provided to a loved one. Requiring a wife seeking payment for caring for her husband to comply with a large number of technical rules and filing fees intended to apply to medical businesses is not only unreasonable, but would do nothing to further the intent and purposes of the applicable statutes. In short, it would be elevating form over substance for no good cause. Again.

Petitioner also asserted that reimbursement was improper because there was no formal request for authorization (RFA) on the required form from a treating physician. Mrs. Mercado was seeking reimbursement for services provided in 2011 and 2012, before the RFA form was instituted.

Petitioner also asserted that it was not served with a prescription for Mrs. Mercado's services and it is therefore not liable pursuant to *Lab. C.* §4600(h). That section applies to home health care. Mrs. Mercado did not provide home health care because her husband has yet to be discharged home, largely due to petitioner's own recalcitrance. Rather, Mrs. Mercado provided attendant care as part of applicant's care at various care facilities in lieu of having the facilities charge defendant for a one-on-one caregiver. Petitioner also suggested that Mrs. Mercado only provided emotional support, which willfully ignores large parts of the record herein. See SOE 11/6/2012, pp 5-11; SOE 8/26/2013, 4:6 – 5:25; SOE 4/2/2014, 7:3-10, 7:24, 9:25 – 10:11, 14:7-14; deposition of David Patterson, M.D. dated 9/11/2012 (Ex. 1), 12:6 – 18:11, 54:3 – 55:15.

Finally, petitioner asserted that there is no authority in the *Labor Code* to award mileage to Mrs. Mercado. As petitioner is undoubtedly well aware, case law over the years has fleshed out what constitutes medical treatment within the ambit of *Lab. C.* §4600, and it includes mileage related to medical treatment even if not expressly stated in the statute. In the same way that an applicant is entitled to mileage to and from his medical appointments as part and parcel of his medical treatment even though §4600 does not expressly authorize it, Mrs.

NICOLAS MERCADO

Mercado is entitled to mileage to and from her husband at his various care facilities as part and parcel of the medical treatment she provided even though §4600 does not expressly authorize it.

F. ATTORNEY FEES.

Petitioner asserted that the award of attorneys' fees was excessive and inequitable, primarily because petitioner believes that applicant's life expectancy (in petitioner's opinion; no evidence is cited to support it) is insufficient to accrue enough benefits to warrant the fee awarded, thus resulting in a windfall to applicant's attorney and a loss to petitioner. Petitioner also asserted that this is a case of average complexity and 15% of the present value of the permanent disability award is excessive.

There have been three separate trials in this case with testimony from multiple witnesses. The instant petition is the third petition for reconsideration or removal. While addressing the issue of attorney fees, petitioner asserted that the applicant has always been 100% permanently disabled and it took no great skill to obtain that result; in the same petition while addressing the issue of permanent disability, petitioner asserted that applicant was not yet P&S and any finding on permanent disability was premature.² That alone reveals that obtaining a finding of permanent total disability in this case took greater time and effort than petitioner would have the Board believe. In addition to the issue of permanent disability, there have been hotly contested issues since 2012 involving home modifications and services rendered by Mrs. Mercado for her husband's benefit. Applicant's counsel has attended numerous conferences with applicant's physicians, nurse case manager and family to help coordinate the medical and legal issues involved in Mr. Mercado's complex medical issues, as well as numerous WCAB appearances. In short, this is a case of above average complexity that warrants an attorney fee based on 15% of the present value of the permanent disability award.

This judge also considered the factors set forth in *Lab. C.* §4906(d) and Rule 10775. Applicant's attorney assumed great responsibility in personally handling multiple complex medical and legal issues on behalf of a catastrophically injured worker and his family. Mr.

² Making two mutually exclusive assertions of fact in the same petition for the purpose of supporting petitioner's position on separate issues may itself be sanctionable conduct.

More is recognized in Orange County as a specialist in handling the medical and legal issues involved in serious spinal cord injuries. The skill and care exercised by Mr. More in this case was of the highest quality. He went above and beyond to coordinate his client's extensive medical needs as well as ensure that his client had medical transportation to WCAB hearings, in addition to being thoroughly prepared for all trials. Only Mr. More can say exactly how much time was spent on this case (he describes it in his Answer as "astronomical"), but this judge would not be at all surprised if his effective hourly rate (the fee awarded divided by the number of hours spent on the case) is no different than the amount routinely awarded in Southern California for simple deposition appearances. Finally, the result obtained for his client was fully favorable on all issues in the face of constant denial which continues even now, with every finding and award of benefits contested in the instant petition. Even if the findings and award are upheld, there are many more hours of skilled work and WCAB appearances ahead related to the ongoing issue of home modifications.

Accordingly, this judge believes that the fee awarded is reasonable, not an abuse of discretion, and should be upheld.

IV
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied in its entirety.

DATE: June 30, 2014

Paul DeWeese

PAUL DeWEESE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

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ON: 6/30/2014

BY: *NM*

NICOLAS MERCADO

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Document ID: 234939420093343334049

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5

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7 WORKERS' COMPENSATION APPEALS BOARD
8 STATE OF CALIFORNIA
9

10
11 NICOLAS MERCADO,

12 Applicant,

13 vs.

14 CO-WEST COMMODITIES/PATRIOT RISK
SERVICES,

15 Defendants.

) WCAB NO: ADJ8157719
)
)

) TRIAL BRIEF
)
)

16 FACTS OF THE CASE

17 1. On December 22, 2011 applicant Nicholas Mercado sustained admitted injuries to his head,
18 neck, back, spine, bilateral upper extremities, chest, ribs, internal , neurogenic bowel, neurogenic bladder,
19 bilateral lower extremities, psyche, neurology, sleep deprivation, quadriplegia, eyes and jaw. There are no
20 disputed body parts. Mr. Mercado is a quadriplegic.

21 2. At the February 6, 2014 MSC defendant failed to concede that applicant is 100% permanently
22 disabled, contrary to Labor Code section 4662 and stated to the Honorable Judge DeWeese that his client did
23 not want to admit to the obvious "because they don't want to pay attorney fees."

24 3. Labor Code section 4662 definitively states that "any of the following permanent disabilities
25 shall be conclusively presumed to be total in character: ... (b) an injury resulting in a practically total paralysis
26 (c) injury involving the loss of both hands or use thereof" Mr. Mercado clearly suffers from both of these
27 afflictions. He is totally and permanently disabled.
28

1 pay applicant attorney fees." That is a ridiculous explanation and clear violation of the tenants of worker's
2 compensation law, which are to compensate the injured worker for the injuries they have sustained and to cure
3 and relieve the effects of the industrial injury. Defendants are doing the exact opposite by insisting that Mr.
4 Mercado stand trial to demonstrate what is self-evident, that he is permanently and totally disabled.
5 Defendants should be penalized with sanctions for their egregious behavior and bad faith tactics, pursuant to
6 Labor Code sections 5813 and 5814.

7 II

8 **HOME MODIFICATION SHOULD NOW BE UNDER**
9 **THE JURISDICTION OF THE WCAB**

10 1. On December 12, 2013, a Utilization Review (UR) was issued, (See Exhibit A) authorizing
11 31 home modifications. These include but are not limited to installation of a ramp in order for Mr. Mercado
12 to enter and exit his home. Despite the fact that 31 modifications were authorized by UR, defendant has failed
13 to begin any of those modifications. NOTHING HAS BEEN DONE TO MODIFY MR. MERCADO'S
14 RESIDENCE. This is egregious, unexplainable and outrageous behavior by defendants and should be
15 sanctioned.

16 2. Since the UR of December 12, 2013 made modifications to nine of the requests for home
17 modifications and denied 26 other home modifications requested by the treating physician, Dr. Vasile,
18 applicant proceeded to IMR. (See Exhibit B, attached hereto and incorporated herein by reference). Applicant
19 cited the various items that were not provided to UR by defendants. That was procedural error and non-
20 compliance with the statutes governing Utilization Review. Dr. Vasile also issued a report wherein she
21 advised the doctor that signed the UR that they were not in possession of all materials necessary to make
22 appropriate determinations. (See Exhibit C, attached hereto and incorporated herein by reference)

23 3. Pursuant to the recent En Banc case of Dubon v. World Restoration, Inc; Southern California
24 Insurance Fund ADJ 4274323 and ADJ 1601669 compliance with statutes and regulations governing UR
25 are legal disputes within the jurisdiction of the WCAB. In Dubon, as in the instant case, defendants failed to
26 send the appropriate reports to UR in order for them to make the proper determination. While defendants in
27 Dubon complied with IMR, as we did in this case, the court still found that IMR solely resolves disputes over

1 the medical necessity of treatment requests. Issues of timeliness and compliance with statutes and regulations
2 governing UR are legal disputes within the jurisdiction of the WCAB.

3 4. The court in Dubon further found that a UR decision is invalid if it is untimely or suffers from
4 material procedural defects that undermine the integrity of the UR decision. Applicant argues that the facts
5 of Dubon are analogous to the case at hand. In Dubon, all of the medical reports were not provided to UR.
6 In Dubon, it is stated "Labor Code section 4610 expressly indicates that UR decisions should be based on the
7 "information" that is "reasonably necessary" to make that determination and that, if a decision to delay or deny
8 is based on "incomplete or insufficient information" the UR decision shall specify the additional information
9 needed." The court went on to state that "a UR that fails to comply with the procedural requirements of
10 section 4610 and the AD's Rules may also be invalid." Hence, the court found that the failure to send all
11 medical records and tests to UR, rendered their decision invalid.

12 5. Defendants failed to send several material pieces of evidence in regard to the home
13 modifications requested. Please see our letter dated January 21, 2014 (Exhibit B) for the list of items the
14 defendants failed to provide to UR. UR was not provided with several key pieces of information that would
15 have assisted them in their determination. As in Dubon, the court is entitled to render the UR review invalid
16 and to make a determination as to whether modifications to the home are necessary.

17 6. Defendants have admitted to injuries that caused our client to become a quadriplegic, a
18 condition that will forever alter the course of his life. The defendants have continually placed roadblocks in
19 Mr. Mercado's plan for recovery. These failures to comply with their own UR have put the course of the
20 applicant's recovery on hold. He cannot even go to his own home as no modifications have been made, as
21 required and authorized. Their failure to commence modifications that were authorized by their own UR
22 three and a half months ago is reprehensible; applicant therefore contends that penalties and sanctions should
23 be imposed on defendant pursuant to Labor Code sections 5813 and 5814.

24 III

25 **MRS. MERCADO'S LIEN IS RIPE FOR ADJUDICATION AT TRIAL ON APRIL 2, 2014**

26 1. Mrs. Mercado has waited over two years to have her lien adjudicated. She testified on November
27 6, 2012 as to her involvement with Mr. Mercado's care. Testimony has already been given and nothing would
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1 change the testimony already provided. In the interest of judicial economy and in order to save time, applicant
2 submits that the prior testimony is sufficient for the Judge to rule on this matter.

3 2. Further proof of the legitimacy of Mrs. Mercado's lien can be noted in the deposition of Dr.
4 Patterson on September 11, 2012. Dr. Patterson testified, under penalty of perjury, that Mrs. Mercado was
5 integral for the care of Mr. Mercado. (See Exhibit D, p. 14, excerpts from Dr. Patterson deposition, attached
6 hereto and incorporated by reference herein). She helped integrate his turning schedule and respiratory
7 therapy. (See Exhibit D, p. 14) Dr. Patterson further attested to the fact that if Mrs. Mercado could not assist
8 Mr. Mercado, a one-on-one nurse would have to be hired at additional expense. (See Exhibit D, p. 17). When
9 asked if it was a medical necessity for the well-being of Mr. Mercado to have his wife present and assist in
10 the integration with the team, Dr. Patterson answered affirmatively.

11 3. Should defendants argue that lien issues are not subject to hearing on the day of trial, let the court
12 observe that the lien of Mrs. Mercado was clearly listed as an issue on the Stipulations and Issues dated
13 February 12, 2014. Defendants are on notice that this lien issue is to be decided at trial. Since Mrs. Mercado
14 provided service that the insurance company would have had to pay for, without her involvement, she is
15 entitled to have her lien resolved immediately. It is blatantly unfair for defendants to continue to stall.

16 ///

17 ///

18 DATED: 4.1.14

Respectfully submitted,

BERMAN MORE GONZALEZ

21 By: 

22 DENISE CURREN DAVIES, ESQ.

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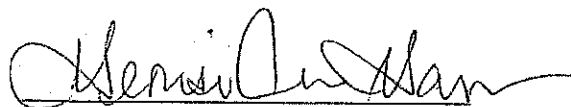
VERIFICATION

I, the undersigned, declare that I am one of the attorneys for Applicant, NICOLAS MERCADO, in the above-entitled action; I have read the foregoing TRIAL BRIEF and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

///

Dated: 4-1-14



DENISE CURREN DAVIES, ESQ.

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EXHIBIT A



15901 Red Hill Avenue Suite 201
Tustin, CA 92780

Hours: Monday – Friday 8:00 AM to 5:30 PM

12/14/13

cc: Keith More En
714. 543-5521

cc: Core Meridians GS
Fax 714-933-7965

**NOTICE OF
MODIFICATION**

12/12/2013

Fax: (562) 912-4511

Ann T. Vasile, MD
701 E 28th St. #116
Long Beach, CA 90806

RE: Employee: Nicolas Mercado
Claim #: 4341110000384
Referral #: 7530
Employer: Co-West Commodities
Injury Date: 12/21/2011

Patriot Risk Services has received a request for treatment of the above named employee.

RECEIPT DATE: 11/15/2013

DECISION DATE: 12/12/2013

REQUEST: Home modifications as stated on 11/14/13 report

DISCUSSION: There was an 11/14/13 report by Dr. Vasile requesting multiple home modifications.

The report was reviewed and there were multiple questions with regard to the specific home modifications recommended. On 11/25/13 a formal request was forwarded to Dr. Vasile regarding the requested home modifications. The requests were put on delay until such time the recommendations could be addressed.

The 12/7/13 report was thoroughly reviewed as written by Dr. Vasile. It did not address specific information necessary to make decisions on the medical necessity of all the requested home modifications.

The patient was driving a tanker truck on the freeway on 12/21/11, lost control and rolled over. The patient sustained head trauma and cervical spinal cord trauma causing quadriplegia. Other injuries included rib fracture, pneumothorax, and pulmonary contusion.

The patient's condition is that he is a quadriplegic.

Each request for home modification was addressed individually. The decisions for home modifications addressed below focused on reasonable medical necessity supporting the medical management of the injured worker.

Again the following decision modifications address medical necessity.

The following are responses to home modification requests for the patient based on Dr. Vasile's 11/14/13 report.

Certify the following home modifications:

- 1) Door to master bedroom to be at least 36" wide.
- 2) Vanity should be installed at wheelchair accessible height and include beneath it clear accessible space.

15901 Red Hill Avenue, Suite 201, Tustin, CA 92780
Phone: 855-260-1053 – Facsimile: 949-734-7272

- 3) Custom roll under sink.
- 4) Vanity should include an area offering full pullout storage to accommodate Mr. Mercado's medical supplies and linens.
- 5) Tub, tile and old vanity be removed.
- 6) Control should be in the front of the shower allowing caregiver to turn on the shower without getting wet and include anti-scalding device.
- 7) Hand-held shower device with hose of approximately 6 feet be mounted on the ADA compliant bar.
- 8) Grab bars installed 30 to 36 inches from the floor.
- 9) At least two shelves built into the shower for supplies.
- 10) Lighting should be installed in the shower itself with 2 lights so there is sufficient light to check the skin while performing showering.
- 11) Curved curtain rod.
- 12) New toilet that allows a commode chair to be placed over it.
- 13) Toilet basin should align with that of the commode chair.
- 14) Support structures need to be installed within the walls surrounding the toilet area to accommodate additional ADL grab bars.
- 15) Available lateral front and angle transfer areas at the toilet in the master bedroom.
- 16) Caregiver needs a separate area to prepare for medical procedures and a countertop of at least 20 inches long.
- 17) All doors need to be widened at least 36 inches.
- 18) New hollow core doors installed.
- 19) Primary door in the front of the house should have a screen door removed with no barriers at the sill of the door.
- 20) An automatic front door opener installed to allow patient to remotely control opening of the door.
- 21) Driveway should be wide enough to accommodate one vehicle as well as an additional 6 feet to allow for patient to exit and enter vehicle in wheelchair.
- 22) Porch in front of home needs to be made accessible.
- 23) Railings installed to assist in avoiding any accidents or falling off porch.
- 24) Ramp specifications as per outlined in-home evaluation.
- 25) Rear of home needs an emergency exit.
- 26) Hallway to be widened to 36 inches.
- 27) Automatic door opener installed in the master bedroom.
- 28) Master bedroom to be accessible, which means removing the 1-inch step-down and widening doorway.
- 29) Mirror on the wall for patient to view himself from wheelchair.

30) Ceiling track lift for master bedroom for transfers and caregiver decrease burden of care.

31) Smoke detectors for safety.

Modify the following home modifications:

- 1) Floor built to resist water leakage and prevent subfloor or lower floor from water damage: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.
- 2) Drain should be installed in the main floor of the bathroom with appropriate sloping to provide water drainage: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.
- 3) Custom roll-in tile shower should be 2 x 2 inch, ADA compliant, nonslip tile flooring: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.
- 4) Roll-in shower should incorporate 6' x 6' clear floor space to accommodate caregiver and patient while utilizing padded shower chair: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.
- 5) Ceiling track over the commode: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.
- 6) Installation of heat lamp or wall heater in front of the shower and an anti-slip flooring in the master bathroom: The patient has impairment of his ability to control his body temperature secondary to his spinal cord injury. However, there is no rationale presented why the patient cannot use a simple portable heater with a GFI switch.
- 7) Walkway up to the home and around the house, minimum of 48 inches wide and made of poured concrete. The patient will need a walkway up to the house; however, there is no medical necessity for a walkway around the house.
- 8) Air conditioning and heating secondary to patient's impaired body temperature regulation and risk of extremes of temperature: The patient will need heating and cooling due to his body thermoregulatory impairment, however, there is no rationale for general heating or cooling. This request will be modified to the living room and bedroom only.
- 9) Generator to be used in emergency secondary to patient's inability to tolerate extremes of temperature: A generator to power heating and cooling for the patient's bedroom room in an emergency situation should be sufficient.

Non-certify the following home modifications:

- 1) 6 x 6 foot clearance for turning radius be made available: This home modification does not identify the location of the requested turning radius.
- 2) All fixtures on the cabinet should be pull-style vs. knobs to accommodate for impaired hand function. There is no medical necessity for this modification or description of the referenced plumbing.
- 3) Additional cleaning station and sink installed for hygiene purposes: The details of this modification need to be clarified with demonstration of an absolute need.
- 4) Master bathroom accessible through the master bedroom for privacy purposes: There is no medical necessity for this request.
- 5) Driveway leading up to the house be level and consist of crushed concrete or road so patient can access driveway with decreased risk of falling: There is no clear rationale presented for this modification. There is no description of the current driveway or the medical necessity of this home modification.
- 6) Construction of driveway should allow for proper drainage: Again, there is no clear rationale presented for this modification. There is no description of the current driveway or the medical necessity of this home modification.

- 7) Garage be reconstructed to allow handicap van to fit: There is no medical necessity for this modification. There is no rationale presented why the handicap van cannot be parked on driveway.
- 8) Garage to contain a 6 x 6 foot turning radius on the side, which the patient will enter and exit the vehicle: As the garage reconstruction above is not recommended, this request is also not recommended.
- 9) Garage should be attached to the home to allow the patient to avoid extreme weather in accessing home from vehicle: As the garage reconstruction above is not recommended, this request is also not recommended.
- 10) Doors leading to the garage require 36-inch wide doorway: As the garage reconstruction above is not recommended, this request is also not recommended.
- 11) Rear of home exit to have a sidewalk 48 inches wide and leading around the home from back to front. There is no medical necessity to have the sidewalk surround the house.
- 12) Home equipped with motion sensors for indoor and outdoor lighting: There is no medical necessity for this request. The patient will have 24/7 attendant.
- 13) Designated area be built for washer and dryer for the laundry related to incontinence of bowel and bladder: There is no report that the patient's home does not currently have a designated laundry area including washer and dryer. The details of this request need to be clarified.
- 14) Front loading washer and dryer not necessarily for the patient, but for ease of access for caregiver: This home modification is not medically necessary for the patient.
- 15) Sufficient space for caregiver to assess laundry: There is no medical necessity for this home modification.
- 16) Flooring in the home hardwood for easier use of wheelchair accessibility: There is no medical necessity for this modification or description offered why the current flooring is inadequate for the patient to operate a wheelchair.
- 17) Access to kitchen areas as per outlined by Claire Malawry: There is no medical necessity for this request. The patient has 24-hour care and will not be using the kitchen himself.
- 18) Extra additional bedroom to be added for 24-hour caregiver: There is no medical necessity for this, as caregivers will work three eight-hour shifts per day.
- 19) Aspects of the bedroom should include 6 x 6 foot space for turning radius: There is no report of the dimensions of the patient's bedroom or report that this modification involves expanding the space and walls of the existing bedroom.
- 20) Clear floor space important to access areas of rooms in home. There is no explanation of the details of this modification. There is no documentation that there are permanent fixtures that need to be repositioned.
- 21) Electronic aid of daily living assessment for adaptive technology to allow patient to utilize remote and voice activated control of environment: There is no specific description provided of the electronic aid or report of medical necessity.
- 22) Automatic locking systems on all doors. The patient will have 24 hour per day caregivers. There is no rationale for this modification.
- 23) Remove and replace any exposed plumbing for safety: There is no medical necessity for this modification or description of the referenced plumbing.
- 24) All door handles to have to have lever style to allow patient to access: This modification is unreasonable, as the patient does not have motor function of his extremities.
- 25) New water heater to ensure appropriate temperature in showering: There is no report that the patient's current water heater is inadequate.

26) Yard work to be performed. Patient in light of the fact patient unable to perform on his own: There is no medical necessity for this request.

Our determination does not mean that the patient should not receive further medical treatment or personal care and does not refer to compensability. For questions regarding compensability, please contact the claim administrator.

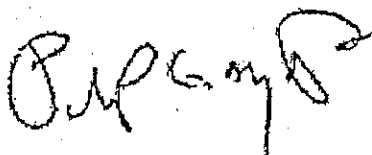
Requesting physician: You may request reconsideration of this decision by submitting additional information to Patriot Risk Services: PO Box 2650, Rancho Cordova, CA 95741; Facsimile (818)688-0179. Please clearly mark the document as a Reconsideration or Appeal. Requesting reconsideration is voluntary and neither triggers nor bars the Independent Medical Review dispute resolution procedures of Labor Code Sections 4610.5 and 4610.6. Pursuit of reconsideration is optional at your discretion.

This decision will remain effective for 12 months unless additional recommendation is received from you with documented change in the facts material to the basis of the Utilization Review decision.

Injured worker: Any dispute shall be resolved in accordance with the Independent Medical Review provisions of Labor Code sections 4610.5 and 4610.6. Any objection to this utilization review decision must be communicated by you, your representative, or your attorney on your behalf on the enclosed Application for Independent Medical Review (DWC Form IMR-1) within 30 calendar days of receipt of this decision.

You have a right to disagree with decisions affecting your claim. If you have questions about the information in this notice, please call [Tanya Bishop] at []. However, if you are represented by an attorney, please contact your attorney. For information about the workers' compensation claims process and your rights and obligations, go to www.dwc.ca.gov or contact an Information and Assistance (I&A) officer of the state Division of Workers' Compensation. For recorded information and a list of offices, call toll-free (800)736-7401.

Sincerely,



This decision was made by: Phil Martin, MD License #A45448 Specialty: Emergency Medicine

Copies to: See Proof of Service

15901 Red Hill Avenue, Suite 201, Tustin, CA 92780
Phone: 855-260-1053 - Facsimile: 949-734-7272

0062

1 the medical necessity of treatment requests. Issues of timeliness and compliance with statutes and regulations
2 governing UR are legal disputes within the jurisdiction of the WCAB.

3 4. The court in Dubon further found that a UR decision is invalid if it is untimely or suffers from
4 material procedural defects that undermine the integrity of the UR decision. Applicant argues that the facts
5 of Dubon are analogous to the case at hand. In Dubon, all of the medical reports were not provided to UR.
6 In Dubon, it is stated "Labor Code section 4610 expressly indicates that UR decisions should be based on the
7 "information" that is "reasonably necessary" to make that determination and that, if a decision to delay or deny
8 is based on "incomplete or insufficient information" the UR decision shall specify the additional information
9 needed." The court went on to state that "a UR that fails to comply with the procedural requirements of
10 section 4610 and the AD's Rules may also be invalid." Hence, the court found that the failure to send all
11 medical records and tests to UR, rendered their decision invalid.

12 5. Defendants failed to send several material pieces of evidence in regard to the home
13 modifications requested. Please see our letter dated January 21, 2014 (Exhibit B) for the list of items the
14 defendants failed to provide to UR. UR was not provided with several key pieces of information that would
15 have assisted them in their determination. As in Dubon, the court is entitled to render the UR review invalid
16 and to make a determination as to whether modifications to the home are necessary.

17 6. Defendants have admitted to injuries that caused our client to become a quadriplegic, a
18 condition that will forever alter the course of his life. The defendants have continually placed roadblocks in
19 Mr. Mercado's plan for recovery. These failures to comply with their own UR have put the course of the
20 applicant's recovery on hold. He cannot even go to his own home as no modifications have been made, as
21 required and authorized. Their failure to **commence** modifications that were authorized by their own UR
22 three and a half months ago is reprehensible; applicant therefore contends that penalties and sanctions should
23 be imposed on defendant pursuant to Labor Code sections 5813 and 5814.

24 III

25 **MRS. MERCADO'S LIEN IS RIPE FOR ADJUDICATION AT TRIAL ON APRIL 2, 2014**

26 1. Mrs. Mercado has waited over two years to have her lien adjudicated. She testified on November
27 6, 2012 as to her involvement with Mr. Mercado's care. Testimony has already been given and nothing would

1 change the testimony already provided. In the interest of judicial economy and in order to save time, applicant
2 submits that the prior testimony is sufficient for the Judge to rule on this matter.

3 2. Further proof of the legitimacy of Mrs. Mercado's lien can be noted in the deposition of Dr.
4 Patterson on September 11, 2012. Dr. Patterson testified, under penalty of perjury, that Mrs. Mercado was
5 integral for the care of Mr. Mercado. (See Exhibit D, p. 14, excerpts from Dr. Patterson deposition, attached
6 hereto and incorporated by reference herein). She helped integrate his turning schedule and respiratory
7 therapy. (See Exhibit D, p. 14) Dr. Patterson further attested to the fact that if Mrs. Mercado could not assist
8 Mr. Mercado, a one-on-one nurse would have to be hired at additional expense. (See Exhibit D, p. 17). When
9 asked if it was a medical necessity for the well-being of Mr. Mercado to have his wife present and assist in
10 the integration with the team, Dr. Patterson answered affirmatively.

11 3. Should defendants argue that lien issues are not subject to hearing on the day of trial, let the court
12 observe that the lien of Mrs. Mercado was clearly listed as an issue on the Stipulations and Issues dated
13 February 12, 2014. Defendants are on notice that this lien issue is to be decided at trial. Since Mrs. Mercado
14 provided service that the insurance company would have had to pay for, without her involvement, she is
15 entitled to have her lien resolved immediately. It is blatantly unfair for defendants to continue to stall.

16 ///

17 ///

18 DATED: _____

Respectfully submitted,

BERMAN MORE GONZALEZ

21 By: _____

22 DENISE CURREN DAVIES, ESQ.

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VERIFICATION

I, the undersigned, declare that I am one of the attorneys for Applicant, NICOLAS MERCADO, in the above-entitled action; I have read the foregoing TRIAL BRIEF and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

///

Dated: _____

DENISE CURREN DAVIES, ESQ.

DOCUMENT SEPARATOR SHEET



Product Delivery Unit ADJ

Document Type MISC

Document Title TYPED OR WRITTEN LETTER

Document Date 01/21/2014
MM/DD/YYYY

Author BERMAN MORE GONZALEZ

Office Use Only

Received Date _____
MM/DD/YYYY

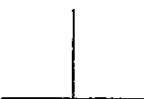


EXHIBIT B

Keith P. More
Jose Gonzalez
Jaimi M. Groothuis
Leslie J. Smith
Julieta O. Gonzalez

*A Professional Law Corporation
*Also Admitted to Illinois Bar

Denise Curren Davies
Of Counsel

BMIG

BermanMoreGonzalez
ATTORNEYS AT LAW

2677 North Main Street
Suite 225

Santa Ana, California

92705-6624

Telephone: (714) 835-5548

Fax: (714) 543-5561

January 21, 2014

MAXIMUS Federal Services, Inc.
Independent Medical Review
525 Coolidge Dr., #150
Folsom, CA 95630-3198

Sent Via Fed-Ex

Re: Nicolas Mercado vs. Co-West Commodities
WCAB No.: ADJ8157719 (AHM)
IMR Case No.: CM13-0065536

Gentlepersons:

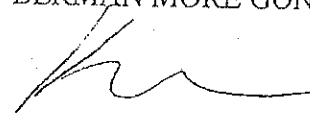
In response to the denial of treatment for home modifications, applicant's attorney submits the following:

1. UR Denial dated 12/12/2013
2. Dr. Ann Vasile's reports dated 1/14/2014, 12/7/2013, 12/5/2013, 11/14/2013; and 10/15/2013
3. Home Evaluation Summary from Claire Malawy, MA, OTR/L
4. Specialty Healthcare Services Quote from healthcare Solutions dated 8/15/2012
5. Letter from Berman More Gonzalez dated 1/13/2014
6. Photographs of the Applicant, Nicolas Mercado

Applicant contends that the apparent failure of the defendant carrier, Patriot Risk Services, to submit ALL information useful and necessary to make utilization review determinations is an abuse of process. Most every denial or modification in the utilization review could have been determined if the proper information had been provided by defendant. Had the study been provided with the utilization review request, the doctor would have had the information necessary to make this determination. Failure to provide that information is inexcusable and should result in penalty and fines to defendant.

Very truly yours,

BERMAN MORE GONZALEZ


KEITH P. MORE, ESQ.

KPM:ct
Enc.

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DOCUMENT SEPARATOR SHEET



Product Delivery Unit ADJ

Document Type MEDICAL DOCS

Document Title TREATING PHYSICIAN

Document Date 01/14/2014
MM/DD/YYYY

Author DR VASILE

Office Use Only

Received Date _____
MM/DD/YYYY

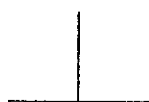


EXHIBIT C



REHABILITATION ASSOCIATES MEDICAL GROUP

1/14/2014

Philip Martin, MD
ARISSA COST STRATEGIES.
15901 Red Hill Ave, #201
Tustin, CA 92780

PATIENT: MERCADO, Nicolas
DOB: 10/29/60
DOI: 12/21/11
EMP: Co-West Commodities
CLM: 434-111-0000384

Dear Dr Martin,

Correspondence reveals that you did not have complete documentation on my patient, Nicolas Mercado when opining on home modifications.
I have attached home evaluation by Claire Malawy/OT and Specialty Health Care Service Quote.
I hope that this will help you in addressing areas that you had questions in authorizing the home modifications.
If you have any questions or comments, please do not hesitate to call my office.

Sincerely,

Ann T Vasile, MD
California State License No. G071400
Physical Medicine and Rehabilitation
cc: Patriot Risk Services
Adjuster: Tanya Bishop
Case Manager, Sandy Hood via facsimile 714-380-2567
Patrick Embrey, Esq via facsimile 949-720-1292
Care Meridian, Garden Grove, via facsimile 714-933-7565

PHYSICAL MEDICINE AND REHABILITATION AND ELECTRODIAGNOSTICS

*Diplomate of the
American Board of Physical Medicine and Rehabilitation*

Ann T. Vasile, M.D., Inc.
Spinal Cord Injury, General
Rehabilitation and Med-Legal

Diemha T. Hoang, M.D.
Neuro Rehab Balance and
Vestibular Rehab

Audrey H. Huang, M.D.
Diagnostics and General
Rehabilitation

Venus F. Ramos, M.D.
General Rehab and Pain
Management

Eric D. Feldman, M.D., Inc.
Musculoskeletal and Sports
Medicine, Balance

H. Richard Adams, M.D., Inc.
Neurorehabilitation and
Med-Legal

Fred H. Batkin, M.D., Inc.
Electrodiagnostics and
Musculoskeletal Rehabilitation

Ronald K. Takemoto, M.D.
Electrodiagnostics and
Musculoskeletal

*Diplomate of the
National Board of Acupuncture*

Sepidch Z. Said, OMD, QME, L.Ac.
Licensed Acupuncturist

701 E. 28th St., Suite 116, Long Beach, CA 90806 • (562) 424-8111 • Fax (562)492-6830

EXHIBIT D

DOCUMENT SEPARATOR SHEET



Product Delivery Unit ADJ

Document Type LEGAL DOCS

Document Title DEPOSITION TRANSCRIPT

Document Date 09/11/2012
MM/DD/YYYY

Author DR DAVID PATTERSON

Office Use Only

Received Date _____
MM/DD/YYYY

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

- - -

NICOLAS MERCADO,)
)
 Applicant,)
)
 vs.)
)
 CO-WEST COMMODITIES/PATRIOT)
 RISK SERVICES,)
)
 Defendants.)

WCAB No. ADJ8157719
(VOLUME ONE)

Deposition of DAVID ROBERT PATTERSON, M.D.,
taken on behalf of Applicant, at 255 East Bonita Avenue,
Pomona, California, commencing at 3:03 p.m., on Tuesday,
September 11, 2012, before Karen Ann Mariani, CSR No.
9544.

1 suppository insertion for a bowel program.

2 Q Now, I believe you said that Mr. Mercado began
3 under your care sometime in January of 2012; is that
4 true?

5 A Correct.

6 Q And did you at some point in time become
7 familiar with Linda Mercado?

8 A I did, yes.

9 Q Now, is it your custom and practice that during
10 the course of your treatment of an individual with a
11 catastrophic injury that you would conduct team meetings
12 with that family and the patient?

13 A Yes.

14 Q Now, I want you to think back from let's say
15 today's date all the way back to January of 2012. And
16 during the course of your treatment, have you had
17 occasion to do multiple team meetings?

18 A We did, yes.

19 Q And during the course of those team meetings,
20 was Mrs. Mercado present at all of those or most of
21 those where the family was allowed to be present?

22 A She was involved with every family meeting.
23 The team meetings that we have where we plan every
24 Tuesday, we don't usually invite the family so the team
25 can freely discuss the patient's needs.

1 But we have multiple family conferences because
2 of the nature of his injuries and discharge planning and
3 his medical issues, and those conferences were also
4 attended -- usually they're run by the rehab doctors.
5 But we even had the pulmonologist doctor, Dr. Sandhu,
6 S-a-n-d-h-u, come into the conference as well to sort of
7 explain his respiratory status.

8 Q Now, I was present at some of those family
9 conferences as was the nurse case manager, Deborah
10 Moore; true?

11 A That's right.

12 Q During those conferences, I noted that most of
13 the patient's responses were made by his wife as far as
14 his needs medically and what was being done for him on a
15 day-to-day basis.

16 Was that your impression as well? Maybe that
17 was a bad question.

18 A No, it's not a bad question. I would say
19 you're right to a certain degree, especially in the
20 beginning because Mr. Mercado wasn't advocating for
21 himself. He wasn't directing his care, and we relied a
22 lot on his wife to help bridge the gap between the
23 medical team and Mr. Mercado.

24 So she was pretty integral in the beginning for
25 the flow of information both ways, you know, from the

1 patient to us and from us to the patient.

2 Q And Mr. Mercado at certain points wasn't able
3 to even talk; correct?

4 A Correct.

5 Q So a lot of his advocating as you put it was
6 done by his wife; true?

7 A Absolutely.

8 Q Now, when you would see Mrs. Mercado, did you
9 have occasion to see her interacting with her husband at
10 any point?

11 A Yes.

12 Q And during points that you did see her, was it
13 true that she was providing some type of care for him?

14 A She was. She was helping integrate everything
15 from his turning schedule to integration with
16 respiratory therapy. He had a lot of secretions,
17 especially in the beginning when he was on a breathing
18 machine, so she helped in that regard.

19 But more importantly, I think she helped with
20 his anxiety. It was even the recommendation of our
21 rehabilitative psychologist, Dr. Skenderian,
22 S-k-e-n-d-e-r-i-a-n, that she be present to help reduce
23 his anxiety because he wasn't following the normal
24 parameters of being able to stay off the ventilator for
25 a longer period of time, what they call vent training or

1 vent weaning.

2 Q In fact, in reviewing some of the nurses'
3 notes, they're filled with just notation after notation
4 about his fear and anxiety over the ventilator and his
5 inability to breathe.

6 Is that your assessment as well?

7 A I'm sure in the respiratory notes as well. It
8 was a big barrier.

9 Q So did you agree or disagree with
10 Dr. Skenderian's recommendation that Mrs. Mercado be
11 present in order to assist in the anxiety and emotional
12 support of Mr. Mercado?

13 A I agreed with it. And, you know, Mr. Mercado
14 even expressed that, that he was more comfortable with
15 his wife present and not necessarily his other family
16 members. It's his wife that he really needed at
17 bedside. But there were times where the other family
18 members had to step in because of the obligations she
19 had, but there were family members here all the time.

20 Q And did you find that to be a reasonable
21 request or recommendation by Dr. Skenderian as far as
22 having Mrs. Mercado present to assist her husband?

23 A Well, it was either that or what I discussed
24 with her, which was put a one-on-one nurse inside the
25 room.

1 Typically when somebody has that type of
2 anxiety on a breathing machine and they're a new quad,
3 it's not uncommon that we request from the insurance
4 company a one-on-one nurse because the issue is, you
5 know, the call light sometimes can be out of reach of
6 somebody that's a quad or can't move their arms or
7 legs. And then if they get into a respiratory distress,
8 you know, there's no real way for them to get ahold of a
9 nurse.

10 So it's -- at times we'll request a
11 one-on-one. In this case we had a family member that
12 could do the job, was okay to do the job because we
13 asked her to do that, you know, to help integrate with
14 the nursing team. So it was either that or a one-on-one
15 nurse.

16 And we came to an agreement, myself, the case
17 manager, Claudia, and the family to use the wife in that
18 capacity.

19 Q Okay. So you asked her to integrate within the
20 team to assist his medical treatment; correct?

21 A Correct, yeah.

22 Q And she was doing that; true?

23 A Yes. And as far as you know, even up through
24 today, she continues to assist and be a part of the
25 medical team that provides treatment for her husband as

1 far as you know?

2 A As far as I know. I had discussion with
3 Dr. Paley, P-a-l-e-y, about two days ago. They keep me
4 updated. I know he's over at Kindred Ontario and, you
5 know, I'm constantly being updated by whatever doctor is
6 caring for him.

7 Q So if I have this right, you had made a
8 recommendation that possibly you would put a one-on-one
9 nurse in the room with Mr. Mercado or you would use
10 Mrs. Mercado instead; correct?

11 A Right.

12 Q Now, that one-on-one nurse would be an extra
13 charge from the facility; correct?

14 A Yes.

15 Q That's not something that Casa Colina does for
16 free.

17 A No, it's not. And generally, you know, we're
18 pretty aggressive about collecting that money as well.
19 I mean, it's an expense.

20 Q Now, you've said that you felt that was a
21 reasonable recommendation by Dr. Skenderian. Did you
22 feel it was a medical necessity as well for the
23 well-being of Mr. Mercado to have his wife present and
24 assist in the integration with the team?

25 A Yes.

1 Q Now, I believe that within the first six-month
2 time period from I'd say January up through July, there
3 was an indication that Mrs. Mercado was here for about
4 12 hours, between ten and 12 hours per day.

5 Was that your understanding?

6 A You know, I can only remember she was always
7 here, so I don't, you know -- I don't know if it was ten
8 or 12 or more. Occasionally, there would be
9 transportation issues where she couldn't get here and
10 somebody like the son would be here. For the most part,
11 she was always here at our request, yes.

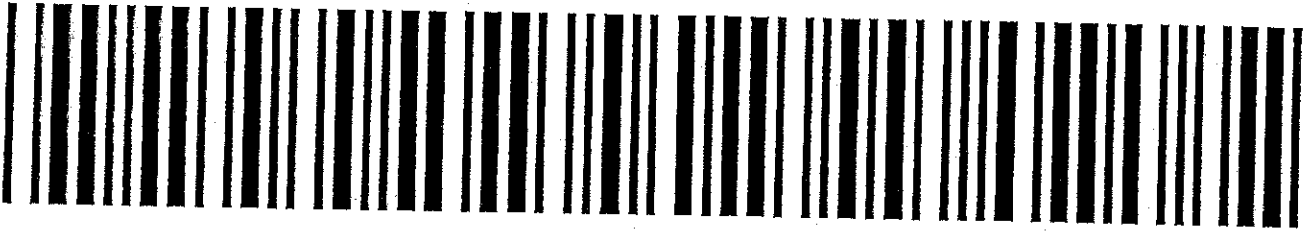
12 Q And then from July up through his discharge --
13 I believe he was discharged the first time approximately
14 when?

15 A I believe the first time was March, so January
16 to March.

17 Q Okay. And the reason of the discharge was
18 because he had to get out of the Casa Colina facility
19 just because of Medicare procedures and policies with
20 regard to your facility's billing practices or something
21 to this effect; correct?

22 A Like the stay. There's been some changes in
23 Medicare rule where even nonMedicare patients -- the
24 overall length of stay for diagnostic categories is
25 looked at and the payment can be withheld for other

DOCUMENT SEPARATOR SHEET



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Document Type LEGAL DOCS

Document Title PROOF OF SERVICE

Document Date 04/02/2014

MM/DD/YYYY

Author

BERMAN MORE GONZALEZ

Office Use Only

Received Date

MM/DD/YYYY

PROOF OF SERVICE BY MAIL
(CCP 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 years, and not a party to this action. I am employed in the county of Orange, State of California. My business address is 2677 N. Main Street, #225, Santa Ana, CA 92705.

On April 2, 2014 I served the foregoing documents described as **TRIAL BRIEF; VERIFICATION** on the interested parties in this action, by placing the [XX] original and/or [XX] a true copy thereof enclosed in sealed envelopes addressed as follows:

Worker's Compensation Appeals Board
1065 N. Pacificcenter Dr., #170
Anaheim, CA 92806

Mario Manriquez, Esq.
Guilford, Sarvas and Carbonara, LLP
2099 S. State College Blvd., Suite 400
Anaheim, CA 92806

Hand Delivered

Mundell, Odlum & Haws, LLP
650 E. Hospitality Lane, Suite 470
San Bernardino, CA 92408-3595

Hand Delivered

(BY MAIL) I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

(BY FACSIMILE) In addition to regular mail, I sent this document via facsimile, number(s) as listed on the mailing list, on _____

(BY PERSONAL SERVICE) I delivered such envelope by hand to the addressee(s)

Executed April 2, 2014 at Santa Ana, California, and declared under penalty of perjury under the laws of the State of California that the above is true and correct.


DENISE CURREN DAVIES, ESQ.

Mario Manriquez, Jr., Esq. (146937)
GUILFORD SARVAS & CARBONARA LLP
Attorneys at Law
2099 South State College Boulevard, Suite 400
Anaheim, CA 92806
Telephone: (714) 937-0300 Facsimile: (714) 937-0306

Attorneys for Defendant
Patriot Risk Services for Ullico, in liq.

**BEFORE THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA**

Nicolas Mercado,

vs.

**Vensure Staffing/PEO/Co-West
Commodities; Patriot Risk
Services, for Ullico in liq.,**

Defendant.

WCAB NO.: ADJ8157719

**CIGA'S RESPONSE TO
APPLICANT'S TRIAL BRIEF**

Defendant, California Insurance Guarantee Association, by its servicing facility Patriot Risk Services, for Ullico Casualty Company, in liquidation, hereby responds to the Applicant's April 1, 2014 Trial Brief, as follows:

I. PERMANENT AND STATIONARY ISSUE.

The applicant is not permanent and stationary until all reasonable healing modalities have been attempted, and all reasonable diagnostic testing has been completed. Even though tests determine that the symptoms are unrelated to the injury, the condition is still TTD during testing. (*City of Glendale v. WCAB (Forrest)* 47 Cal.Comp.Cases 168 (writ denied); *Twentieth Century Fox Film Corp. v. WCAB*

(Shansey) 47 Cal. Comp. Cases 102 (writ denied).) Following Trial in this case, the facts demonstrate indisputably that the applicant has not yet completed all recommended healing modalities, diagnostic testing, and recommended surgical procedures. Furthermore, the applicant's attorney has requested Panel QME evaluations of the applicant in six (6) different specialties. Accordingly, the applicant is not yet permanent and stationary.

The March 8, 2013 "permanent and stationary" report issued by the PTP, Ann Vasile, M.D., outlines on pages 6 through 10 16 recommended treatment modalities, some of which required referral to medical specialists, such as psychologist, Dr. Morales, who subsequently found the applicant temporarily totally disabled on a psychological basis, and urologist, Baron Wachs, M.D., who has recommended further surgical intervention. The applicant's wife, Linda Mercado, indicated that the applicant is scheduled to complete two additional surgical procedures. The applicant's attorney has scheduled the applicant for evaluation by six (6) separate Panel QMEs, who are presently in the process of evaluating the applicant.

Clearly, given the applicant's catastrophic condition, the temptation by the PTP is to find the applicant permanent and stationary, irrespective of the many additional healing modalities, diagnostic testing, surgical procedures, and medical evaluations that are yet to be completed.

While the applicant has purportedly been found permanent and stationary by the PTP, the applicant continues to receive benefits at his full TTD rate. According to the rule of law cited above, the applicant should not yet be found permanent and stationary, despite the applicant's attorney's predisposition to be paid his attorney's fees at this time. Given the facts in this case, the PTP's opinion regarding the applicant's permanent and stationary status is not substantial. Accordingly, the WCJ should find that the applicant continues TTD, or is not permanent and stationary, until such time as he has completed all recommended healing modalities, surgical procedures, and Panel QME evaluations.

2. PERMANENT DISABILITY ISSUE.

Since the applicant is not yet permanent and stationary, it is premature to address the applicant's level of permanent disability.

3. HOME MODIFICATIONS ISSUE.

Utilization Review has issued an opinion regarding recommended home modifications by the PTP, Ann Vasile, M.D., dated December 12, 2013. Thirty-one (31) issues were certified; nine (9) issues were modified; and twenty-five (25) issues were non-certified. The applicant's attorney has filed an Application under IMR, and the parties are awaiting final determination with respect to the modified, and non-certified, home modifications from IMR.

Defendant has initiated contact with the applicant's wife, Linda Mercado, regarding evaluation of the applicant's home with respect to home modifications. Linda Mercado indicated that her home is approximately 700 square feet in size. A number of the recommended home modifications that were modified, or non-certified, would require substantial construction to the applicant's home. (See, for example, non-certified item number 1: (6 x 6 foot clearance for turning radius be made available).) Completion of the certified portion of the home modifications prior to final determination by IMR regarding the modified, and non-certified, portions of home modifications, would likely result in the destruction, and waste, of the certified portion of the home modification construction, if IMR were to determine that additional modified, or non-certified, home modifications needed to be completed. For this reason, accordingly, the prudent and responsible course is to wait for IMR to make a final determination regarding home modifications, before initiating alterations, and construction, to the applicant's home. Further, until such time as IMR has ruled on the applicant's Application from Utilization Review, the Board does not have jurisdiction to address such issues.

4. "LIEN" OF LINDA MERCADO.

EAMS does not reveal that a lien has been filed in this case by Linda Mercado. Accordingly, there does not appear to be jurisdiction to address such lien issue at this time.

5. CONCLUSION.

The applicant clearly has not completed recommended healing modalities, diagnostic testing, surgical procedures, and Panel QME evaluations requested by the applicant's attorney. For these reasons, accordingly, the applicant is not yet permanent and stationary.

Home modifications should not be initiated until such time as IMR has ruled on the applicant's Application regarding the modified, and non-certified, home modifications, as initiation of construction on the certified portions of the home modifications would likely result in the destruction, and waste, of such substantial construction expenses, if a final determination by IMR required the completion of the modified, and non-certified, portions of home modifications. Furthermore, until such time as IMR has issued a final determination regarding the modified, and non-certified, portions of home modifications, the Board lacks jurisdiction with respect to such issues.


Finally, there does not appear to be any lien filed by Linda Mercado in this case. Accordingly, such issue appears to be moot.

DATED: April 23, 2014

Respectfully submitted,

GUILFORD SARVAS & CARBONARA LLP
Attorneys at Law

By: _____


Mario Manriquez, Jr., Esq.
Attorney for Defendant

DOCUMENT SEPARATOR SHEET



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Document Type LEGAL DOCS

Document Title PROOF OF SERVICE

Document Date 04/25/2014
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Author GUILFORD SARVAS ANAHEIM

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Received Date _____
MM/DD/YYYY

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE) Re: Nicolas Mercado

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2099 S. State College Boulevard, Suite 400, Anaheim, California 92806.

On April 25, 2014, I served the foregoing document described as:

CIGA'S RESPONSE TO APPLICANT'S TRIAL BRIEF

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Workers' Compensation Appeals Board
1065 N. PacificCenter Drive, Suite 170
Anaheim, CA 92806-2141
(Via Hand-Delivery by Attorney Mario Manriquez, Jr., on 4/25/14)

Patriot Risk Services
c/o California Insurance Guarantee Association
P. O. Box 29066
Glendale, CA 91209-9066
Attn: Tanya Bishop

Berman, More & Gonzalez
2677 N. Main St., Ste. 225
Santa Ana, CA 92705

Aghabalajin & Carroll
15315 Magnolia Blvd., Ste. 426
Sherman Oaks, CA 91403

Prior Defense Attorney

Proof of Service Continued

RE: Nicolas Mercado

Mundell, Odlum & Haws, LLP
650 E. Hospitality Lane, Suite 470
San Bernardino, CA 92408-3595
Attn: James A. Odlum

*Represents Park West Enterprises;
dba Co-West Commodities*

ARS Legal
13925 Whittier Blvd.
Whittier, CA 90605

*Identified as Non-Physician
Under LC 3209.3*

XX (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Anaheim, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on April 25, 2014, at Anaheim, California.

XX (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

By: Betty J. Nauwer

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ 8157719

NICOLAS MERCADO

-vs.-

CO-WEST COMMODITIES;
CIGA for ULLICO

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Hon. PAUL DeWEESE

DATE: May 21, 2014

OPINION ON DECISION

1. PERMANENT AND STATIONARY STATUS

Based on the medical report of Shantharam Pai, M.D. dated 3/2/2013 as well as the reports of Ann Vasile, M.D. dated 3/8/2013 and thereafter, all of which were found to be persuasive and substantial medical evidence, it was found that applicant's medical conditions are permanent and stationary as of March 2, 2013.

Defendant asserted that applicant was not yet P&S because he was declared temporarily totally disabled on a psychological basis by Teresita Morales, Ph.D. in a report dated 7/30/2013. However, it is obvious from the medical record that applicant's physical condition has reached maximum medical improvement and that he is 100% permanently totally disabled, whether or not his psychological condition improves with treatment. Applicant's total disability is permanent. Insisting that it is temporary is nonsensical.

2. PERMANENT DISABILITY

Based on the medical reports of Dr. Pai and Dr. Vasile as well as *Labor Code* §4662(b) and (c), it was found that applicant sustained permanent disability of 100%, entitling applicant to permanent total disability indemnity commencing March 3, 2013 at the rate of \$504.20 per week and continuing for life, subject to annual cost-of-living adjustments pursuant to *Labor Code* §4659(c) commencing January 1, 2014.

3. FURTHER MEDICAL TREATMENT / HOME MODIFICATIONS

As a permanently totally disabled quadriplegic, there is no dispute that applicant will require further medical treatment for the rest of his life as a result of his work injuries. The

real dispute at trial involved the recommendations for home modifications and the extent thereof.

In a report dated 11/14/2013, Dr. Vasile reviewed home evaluation documents that were admitted into evidence at prior hearings (Ex. 19 & 21) and provided a list of home modifications that she believed were necessary in order to allow applicant to be discharged home. Defendant timely submitted that report to utilization review. On 11/25/2103, UR physician Phil Martin, M.D. requested additional information consisting of a rationale for each of the dozens of specific modifications requested. On 12/3/2013, having received no immediate response from Dr. Vasile, Dr. Martin denied the recommended modifications but indicated that on receipt of further information from Dr. Vasile, it would be immediately reviewed and a decision based on reasonable medical necessity would be made.

On 12/7/2013, Dr. Vasile provided a report outlining her rationale for each of the recommended home modifications.

On 12/12/2013, UR Dr. Martin issued his decision. Dr. Martin certified 31 specific home modifications as reasonable and necessary. He modified 9 other specific recommendations, and denied outright 26 more.

Dr. Martin's utilization review decision is materially defective. It was not based on the MTUS, ACOEM guidelines, or any other identifiable objective criteria as required by *Labor Code* §4610. The only rationale given by Dr. Martin for his decision on each specific recommendation was that the decisions "focused on reasonable medical necessity supporting the medical management of the injured worker." Frankly, the court is far more persuaded by the opinions of applicant's primary treating physician regarding the "reasonable medical necessity supporting the medical management of the injured worker" than the opinions of a UR reviewer who has not examined the applicant and who apparently did not have even a fraction of applicant's medical records available for review. Moreover, Dr. Martin's specialty is listed as "Emergency Medicine." There is no evidence that he is competent to evaluate the specific clinical issues involved in the long-term treatment of a seriously injured quadriplegic or that the dozens of recommended home modifications are within his scope of practice, as required by §4610(e). As a result, the UR decision is materially defective and the WCAB has jurisdiction over the dispute regarding home modifications without resort to Independent Medical Review, pursuant to the recent *Dubon* case.

As noted above, there is no dispute that the 31 specific recommendations listed from the bottom of page 1 to the top of page 3 of the 12/12/2013 UR decision are reasonable and necessary; Dr. Vasile recommended them, UR Dr. Martin recommended they be certified, and there is no medical evidence against them.

Turning to the 9 specific recommendations listed as "modified" on page 3 of the 12/12/2013 UR decision, the rationale for the proposed modifications is not persuasive; in fact, there is no actual rationale at all for the first 5 of the items. Based on Dr. Vasile's 11/14/2013 and 12/7/2013 reports, those 9 specific recommendations are found to be reasonable and necessary.

Finally, with regard to the 26 specific recommendations that were "non-certified" by UR Dr. Martin, the record is inadequate to determine the reasonableness and necessity of each specific item. Although the UR decision is defective and cannot be relied upon, it does appear that at least some of Dr. Marin's concerns have merit with regard to at least some of the recommendations, while Dr. Vasile's 12/7/2013 report does not adequately explain the medical need for some of the recommendations. It is the court's intention, once this opinion is final and

if it has not been overturned by the WCAB, to set the matter for status conference solely on the issue of home modifications at a time when the parties will have this judge's undivided attention for a few hours so that the parties and the court can determine how best to proceed on this issue.

Based on the medical reports of Dr. Vasile, it was found that applicant will require further medical treatment to cure or relieve from the effects of his injuries. Based on Dr. Vasile's reports dated 11/14/2013 and 12/7/2013 as well as the fact that the UR decision was found to be defective, it was found that the finding and award of further medical treatment includes but is not limited to the 31 specific recommendations that were certified by the 12/12/2013 UR decision as well as the 9 specific recommendations that were modified (but without modification). A finding regarding the remaining 26 specific recommendations is deferred with jurisdiction reserved by the WCAB.

4. SELF-PROCURED TREATMENT / LIEN OF LINDA MERCADO

In deposition on 9/11/2012, applicant's prior treating physician David Patterson, M.D. testified that the medical team caring for the applicant discussed the need for a one-on-one nurse in applicant's room versus having a family member provide that level of attention, and it was decided (with Mrs. Mercado's agreement) that applicant's wife, Linda Mercado, could be trained to provide the necessary attention. Mrs. Mercado has previously testified that she has been trained to perform a wide variety of necessary tasks for her husband, and Dr. Patterson testified that the hospital counted on her being there to perform those tasks. Moreover, Dr. Patterson agreed with a consulting psychologist, Dr. Skenderian, that Mrs. Mercado's presence and care was medically reasonable to help reduce applicant's anxiety and calm him down enough to handle the effects of his injuries. In addition, nurse case manager Deborah Moore testified that Mrs. Mercado was actively involved with her husband's care at all times of which Ms. Moore was aware. Based on Dr. Patterson's testimony, it was found that Mrs. Mercado's care was reasonably required to cure or relieve the effects of applicant's injuries, and it was therefore found that Linda Mercado is entitled to payment for attendant care provided to her husband to date as well as reimbursement for mileage in connection with such care, in an amount to be adjusted between the parties with jurisdiction reserved by the WCAB.

Defendant asserted that the Board has no jurisdiction over this issue because Mrs. Mercado has not filed a lien for services rendered. That is incorrect. On 1/28/2014, the Board received a lien dated 1/27/2014 filed by Berman More Gonzalez on behalf of lien claimant Linda Mercado. The lien was accompanied by proof of service on defense counsel and CIGA.

5. PENALTIES

As discussed in Section 3 above, on 12/12/2013 defendant's utilization reviewer certified 31 specific home modification recommendations made by treating physician Dr. Vasile. There is no genuine medical or legal doubt that defendant is liable to provide those home modifications as medical treatment reasonably required to cure or relieve the applicant from the effects of his very serious injuries. Yet by the time of the MSC on 2/6/2014, defendant had done absolutely nothing with regard to authorizing and arranging for the

provision of that treatment. By the time of trial on 4/2/2014, the only thing that had been done was a home visit by a contractor in February; no work had been authorized or begun almost four months after the home modifications were approved by defendant's UR.

In its post-trial brief, defendant now asserts that the "prudent and responsible course" is to wait for the IMR process to be completed (which is now moot pursuant to Section 3 above) and for each and every recommended home modification to be finally adjudicated before providing any of them. That assertion is outrageous. The "prudent and responsible course," not to mention the legally required course and the only moral and humane one, is to assist Mr. Mercado in returning home forthwith. His doctors have been recommending since 2012 that his home be modified so that he can return to it. He was declared P&S over one year ago and the only reason he has not returned home is defendant's steadfast refusal to make his home accessible to him, as recommended by his physicians and as required by law. As a result, Mr. Mercado is left languishing in various care facilities, unable to return home to the love and care of his family and to be there for all of the family events and milestones that are his reason for living.

The words "prudent" and "responsible" do not just apply to cold financial calculations. They apply equally to human care and compassion; they suggest doing the right thing. Defendant's concern that it might be subject to additional costs if current home modifications must be altered to accommodate subsequent modifications is far, far outweighed by the needs of one of the most seriously injured of workers; needs that defendant is legally obligated to meet. More practically, defendant's concern can be alleviated if, instead of insisting on the "form over substance" process of UR and IMR that was never intended to apply to a situation like this, defendant would simply sit down with the applicant (and this judge, if necessary) and work out an agreement regarding what home modifications will be done as soon as possible so that Mr. Mercado can get on with the rest of his life.

Because there is no genuine medical or legal doubt as to defendant's liability to provide at least 31 specific home modifications recommended by applicant's treating physician and certified by UR, it was found that defendant unreasonably delayed or failed to provide medical treatment in the form of home modifications as certified by its own utilization review, and it was found that applicant is entitled to a 25% penalty pursuant to *Labor Code* §5814 to be assessed against the value of the benefits that were unreasonably delayed or refused, in an amount to be adjusted between the parties with jurisdiction reserved by the WCAB.

6. ATTORNEY FEES

Based on WCAB Rules of Practice and Procedure (Title 8, Cal. Code of Regs. §10775) and the guidelines for awarding attorney fees found in the WCAB Policy and Procedural Manual, section 1.140, a reasonable attorney fee was found to be \$110,997.38. This amount is based on the present value of the lifetime permanent disability award, taking into account the §4659(c) increases as set forth in *Baker*, per the attached calculations from the DEU that are incorporated herein by reference. The fee is to be commuted from the lifetime award and is payable to applicant's attorney forthwith. An additional fee of 15% of the penalty amount pursuant to Section 5 above was also awarded.

7. ADMISSIBILITY OF EVIDENCE

Defendant objected to the admissibility of a report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification only as Applicant's Exhibit 38) on the grounds that it was obtained after the MSC, it was not served on defense counsel, and is not relevant. At least the first two of defendant's objections were found to have merit, and the 2/24/2014 report was found to be inadmissible and Applicant's Exhibit 38 was excluded from evidence.

DATE: May 21, 2014

Paul DeWeese

PAUL DeWEESE
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

SERVICE:

BERMAN MORE SANTA ANA , 2677 N MAIN ST STE 225 SANTA ANA CA 92705,
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92408
NICOLAS MERCADO , 235 E OLIVE ST SAN BERNARDINO CA 92410
PATRIOT RISK CIGA RANCHO CORDOVA , PO BOX 29066 GLENDALE CA 91209

ON: 5/22/2014

BY: *cm*

NICOLAS MERCADO

ADJ8157719
Document ID: -179911902242013184 0096

COMMUTATION REQUEST

Revised August 2011

Directions: Fill in the section under All Cases as completely as possible. Remaining sections only need to be filled in if you are requesting a commutation of those benefits.

All cases:

IW: MERCADO, Nicolas
EAMS Case#: ADJ 8157719

Requested by: WCJ DeWeese
Contact number: _____
FAX Number _____
Request Date: 5/19/2014

DOI: 12/21/2011
P&S date: 3/2/2013

If DOI is o/a 1/1/03, then any LP or PTD benefits would be subject to annual SAWW-based increases.

Attorney fee% (if applicable) 15%
Annual SAWW increase (if applicable) 3.50%

Will use 4.6% unless otherwise specified. (4.6% is based on a 50 year average)

Permanent Disability:

PD Rating: _____
PD duration (in weeks): _____
Initial PD weekly rate: _____

If DOI is o/a 1/1/05, then PD may be subject to adjustment under LC 4658(d). If applicable, enter the effective date of adjustment and rate after adjustment in Additional Comments section below.

Is PD subject to +15% adjustment under LC 4658(d)? (Y/N) _____
Is PD subject to -15% adjustment under LC 4658(d)? (Y/N) _____

Life Pension:

Date of birth: _____
PD start date (typically the day after TD ends or P&S date) _____
PD duration (in weeks): _____
Initial rate of LP benefits: _____
Gender: _____

Death Benefit:

Average Weekly Earnings: _____
Start date of benefits: _____
Initial benefit rate: _____
Death benefit am't (LC 4702): _____
DOB of youngest child: _____

100% Permanent Total Disability:

Date of birth: 10/29/1960
PTD start date (typically the day after TD ends or P&S date): 3/3/2013
Initial rate of PTD benefits: \$504.20
Gender: Male

All commutations will follow Baker vs. WCAB in determining effective date of first SAWW increase.

Additional Comments:

IW:	Mercado, Nicolas
WCAB#	ADJ8157719
Date:	5/20/2014

ATTORNEY FEE CALCULATION - PERMANENT TOTAL DISABILITY

DOI:	12/21/11
Date of commutation (DOC):	05/20/14
Attorney fee %:	15.0%
Assumed annual SAWW increase:	3.50%

This calculation utilizes the approach set forth in Baker v. WCAB and X.S. (ADJ1510738/SJO 0251902). This calculation will be invalid unless benefits are paid to applicant in a manner consistent with this decision.

PTD starting rate:	\$504.20
PTD rate on DOC:	\$507.95
PTD start date:	03/03/13
Assumed SAWW increase:	3.50%

1) PTD accrued through commutation date.....		\$33,579.54
2) Commuted value of remaining PTD.....	+	\$706,403.00
3) Total basis for attorney fee.....		\$739,982.54
4) Attorney fee percentage.....	x	15.0%
5) Total amount of attorney fee.....		\$110,997.38
6) Weekly deduction from future PTD payments to produce attorney fee:	Method #1*	\$132.91
	Method #2*	\$79.81

Method #1 notes:

Method #1 is the Uniform Reduction Method. The weekly deduction remains constant or uniform for the life of the injured worker. The reduction becomes effective on the day after the date of commutation.

Method #2 notes:

Method #2 is the Uniformly Increasing Reduction Method. The weekly reduction increases every year effective January 1st by the same fixed percentage equal to the "Assumed annual SAWW increase" listed above. The initial reduction becomes effective on the day after the date of commutation. For the convenience of the parties, the reductions for the current year plus the next three years are show below.

Year	Reduction:
2014	\$79.81
2015	\$82.61
2016	\$85.50
2017	\$88.49

* The claims administrator is cautioned that when calculating the annual increase in PTD pursuant to LC 4659(c), the applicable SAWW adjustment is to be applied to the pre-reduced PTD rate, i.e. the rate before reduction for any prior commutations.

Calculated by: Melanie Tham
Disability Evaluation Unit

Mercado, Nicolas
ADJ8157719

1) Indemnity total for date range

	Start Date	End Date	#Weeks (inclusive)	Rate of indemnity	Amount of indemnity
1	3/3/2013	12/31/2013	43.4286	\$504.20	\$21,896.69
2	1/1/2014	6/10/2014	23.0000	\$507.95	\$11,682.85
3			0.0000		\$0.00
4			0.0000		\$0.00
5			0.0000		\$0.00
6			0.0000		\$0.00
7			0.0000		\$0.00
8			0.0000		\$0.00
9			0.0000		\$0.00
		Sum =	66.4286	Sum =	\$33,579.54

3) SAWW rate calculator

	Indemnity rate	Increase on Jan 1st	Min/MaxTD Rates	
			Minimum	Maximum
2003	\$0.00	NA	\$126.00	\$602.00
2004	\$0.00	0.000000%	\$126.00	\$728.00
2005	\$0.00	1.974700%	\$126.00	\$840.00
2006	\$0.00	4.008138%	\$126.00	\$840.00
2007	\$0.00	4.959328%	\$132.25	\$881.66
2008	\$0.00	3.931818%	\$137.45	\$916.33
2009	\$0.00	4.548436%	\$143.70	\$958.01
2010	\$0.00	2.994144%	\$148.00	\$986.69
2011	\$0.00	0.000000%	\$148.00	\$986.69
2012	\$0.00	2.413512%	\$151.57	\$1,010.50
2013	\$504.20	5.563250%	\$160.00	\$1,066.72
2014	\$507.95	0.742887%	\$161.19	\$1,074.64

PRESENT VALUE OF PERMANENT TOTAL DISABILITY

Name: Mercado, Nicolas
WCAB#: ADJ8157719
Date: 5/20/2014

Date of birth:	10/29/1960
Date of commutation	6/10/2014
Rate of PTD benefits on DOC	\$507.95
Assumed annual increase	3.50%
Gender:	Male

Present Value = \$706,403

Calculated by: Melanie Tham
Disability Evaluation Unit

IW:	Mercado, Nicolas
WCAB#	ADJ8157719
Date:	5/20/2014

F) COMMUTATION OF PORTION OF REMAINING LIFE PENSION BY UNIFORM REDUCTION OF LIFE PENSION

Date of birth:	10/29/60
DOI:	12/21/11
LP starts:	03/03/13
DOC:	06/10/14

Life pension rate:	\$507.95
Gender:	Male
Amount to commute:	\$110,997.38

1 Determine exact age in years as of date of commutation (DOC).

1a # of days from DOB through DOC.....	19582
1b Divide by average number of days per year..... [÷]	365.24
1c Exact age on DOC.....	<u>53.614</u>

2 Determine PV of life pension as of exact age on DOC.

	Age	PV
2a Enter PV for age in table below 1c*.....	53	<u>847.65</u>
2b Enter PV for age in table above 1c*.....	54	<u>827.23</u>
2c Difference of 2a and 2b.....		20.42
2d Multiply by fractional portion of 1c..... ^x		<u>0.614</u>
2e Interpolation adjustment for age.....		12.54
2f PV for age in table below 1c (2a from above).....		847.65
2g Subtract 2e..... ⁻		<u>12.54</u>
2h PV of life pension as of exact age on DOC.....		835.11

3 Calculate amount of reduction in LP rate necessary to produce lump sum.

3a Amount to be commuted.....	\$110,997.38
3b Divide by PV for exact age on DOC (2h from above)..... [÷]	<u>835.11</u>
3c Amount of weekly reduction in LP.....	\$132.91

4 Calculate LP rate after commutation.

4a LP rate before commutation.....	\$507.95
4b Subtract weekly reduction in LP (3c from above)..... ⁻	<u>132.91</u>
4c LP rate after commutation.....	\$375.04

5 Additional interest due for payment after date of commutation:

Additional interest due for each day late.....	\$30.41
--	----------------

* Take values from Table 2 - Present Value of Life Pension for a Male, or Table 3 - Present Value of Life Pension for a Female, as dictated by gender.



STATE OF CALIFORNIA
 DIVISION OF WORKERS' COMPENSATION
 WORKERS' COMPENSATION APPEALS BOARD
 NOTICE AND REQUEST FOR ALLOWANCE OF LIEN

Date Of Original Lien: 01/27/2014
MM/DD/YYYY

Original Lien Amended Lien

ADJ8157719
 Case No.

(Choose only one)
 a specific injury on 12/21/2011
(DATE OF INJURY: MM/DD/YYYY)

a cumulative injury which began on _____ and ended on _____
(START DATE: MM/DD/YYYY) (END DATE: MM/DD/YYYY)

552-55-1590
 SSN (Numbers Only) 10/29/1960
(DATE OF BIRTH: MM/DD/YYYY)

Injured Worker:
NICOLAS
 First Name
MERCADO
 Last Name MI

235 E. OLIVE
 Address/PO Box (Please leave blank spaces between numbers, names or words)
SAN BERNARDINO
 City CA 92410
State Zip Code

Attorney/Representative for Injured Worker:
BERMAN MORE SANTA ANA
 Name

2677 N MAIN ST STE 225
 Address/PO Box (Please leave blank spaces between numbers , names or words)
SANTA ANA
 City CA 92705
State Zip Code

Lien Claimant (Completion of this section is required):

LINDA
 Name of Organization filing lien (for individual lien claimants, leave blank)
MERCADO
 First Name of Individual filing lien(organizational lien claimants, leave blank)
235 E OLIVE
 Last Name of Individual filing lien(organizational lien claimants, leave blank)

Address/PO Box (Please leave blank spaces between numbers, names or words)
SAN BERNARDINO
 City CA 92410
State Zip Code

(909) 709-5404
 Phone

T

Lien Claimant's Attorney/Representative, if any

Law Firm/Attorney

Non-Attorney Representative

Lien Claimant not represent.

BERMAN MORE SANTA ANA
Lien Claimant Law Firm/Representative

KEITH P
First Name

MORE
Last Name

2677 N MAIN ST STE 225
Address/PO Box (Please leave blank spaces between numbers, names or words)

SANTA ANA
City

CA
State

92705
Zip Code

(714) 835-5548
Phone

Employer

CO-WEST COMMODITIES
Name

1389 W. MILL STREET
Address/PO Box (Please leave blank spaces between numbers, names or words)

SAN BERNARDINO
City

CA
State

92410
Zip Code

Insurance Carrier or Claims Administrator

PATRIOT RISK SERVICES
Name

P.O. BOX 2650
Address/PO Box (Please leave blank spaces between numbers, names or words)

RANCHO CORDOVA
City

CA
State

95741
Zip Code

Employer or Claims Administrator Attorney/Representative (if known)

Name

Address/PO Box (Please leave blank spaces between numbers, names or words)

City

State

Zip Code

The lien claimant hereby requests the Workers' Compensation Appeals Board to determine and allow as a lien the sum of \$ 31,000.00 against any amount now due or which may hereafter become payable as
Total Lien Amount

compensation to the above-named employee on account of the above-claimed injury.

This request and claim for lien is for (mark appropriate box):

- A reasonable attorney's fee for legal services pertaining to any claim for compensation either before the appeals board or before any of the appellate courts, and the reasonable disbursements in connection therewith. (Labor Code § 4903 (a).)
- The reasonable expense incurred by or on behalf of the injured employee, as provided by Labor Code § 4600. (Labor Code § 4903 (b).)
- Reasonable expense incurred by or on behalf of the injured employee for medical-legal expenses. (Labor Code § 4903 (b).)
- The reasonable value of the living expenses of an injured employee or of his or her dependents, subsequent to the injury. (Labor Code § 4903 (c).)
- The reasonable burial expenses of the deceased employee. (Labor Code § 4903 (d).)
- The reasonable living expenses of the spouse or minor children of the injured employee, or both, subsequent to the date of the injury, where the employee has deserted or is neglecting his or her family. (Labor Code § 4903 (e).)
- The reasonable fee for interpreter's services performed on _____ 20 _____. (Labor Code § 4600 (f).)
- The amount of indemnification granted by the California Victims of Crime Program. (Labor Code § 4903 (i).)
- The amount of compensation, including expenses of medical treatment, and recoverable costs that have been paid by the Asbestos Workers' Account. (Labor Code § 4903 (j).)
- Other Lien(s): Specify nature and statutory basis.

HOME HEALTHCARE PER AGREEMENT

NOTE: ITEMIZED STATEMENT JUSTIFYING THE LIEN MUST BE ATTACHED

- A copy of the lien claim and supporting documents was served by mail or delivered to each of the above-named parties.

(Signature of Attorney/Representative for Lien Claimant)

SIGNATURE ON FILE

(Signature of Lien Claimant)

1/27/14

Date (MM/DD/YYYY)

PROOF OF SERVICE BY MAIL
(CCP 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 years, and not a party to this action. I am employed in the county of Orange, State of California. My business address is 2677 N. Main Street, #225, Santa Ana, CA 92705.

On January 27, 2014 I served the foregoing documents described as **NOTICE AND REQUEST FOR ALLOWANCE OF LIEN** on the interested parties in this action, by placing the [XX] original and/or [XX] a true copy thereof enclosed in sealed envelopes addressed as follows:

Workerss Compensation Appeals Board
1065 N. Pacificenter Dr., #170
Anaheim, CA 92806

Mario Manriquez, Esq.
Guilford, Sarvas and Carbonara, LLP
2099 S. State College Blvd., Suite 400
Anaheim, CA 92806

Julie Hall
Patriot Risk Services
c/o CIGA
P.O. Box 29066
Glendale, CA 91209-9079

[XX] (BY MAIL) I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

[XX] (BY FACSIMILE) In addition to regular mail, I sent this document via facsimile, number(s) as listed on the mailing list, on _____

[] (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the office of the addressee(s)

Executed January 27, 2014 at Santa Ana, California, and declared under penalty of perjury under the laws of the State of California that the above is true and correct.


CARMEN TOSTADO

1 he had a proper bath, clean sheets and gowns, and access to nurses who could not understand him or would
2 otherwise ignore him (Id. at page 6, lines 6-14)

3 on the applicant's behalf at all of the medical te (Id. at page 6, lines 20-21)

4 9. Mrs. Mercado also received medi (Id. at page 10, line

5 Defendants assert that Mrs. Mercad sed for providing emotional

6 in is a material misrepres board. As Guardian ad Litem,

7 ed to assist in his care, was trained to assist with his special needs and did all of this per her

8 Guardian ad Litem. (Id. p. 10, line 25-page 11, line 1).

9 cross examination by defendant.

10 Pursuant to Hodgman, Mrs. Mercado, the Gua reimbursement for

11 are that she provided from the employer per her testimon; ie case manager,

12 Deborah Moore (see below).

13 B. DEFENDANTS ENTERED INTO AN AGREEMENT WITH MRS. MERCADO FOR
14 HER SERVICES.

15 1. Early in Mr. Mercado's care the use of a one-on-one 24 hour attendant was discussed (See MOH
16 4.2.14 page 7, line 3). Dr. Patterson, the nurse case manager, Deborah Moore, and Mrs. Mercado, in a medical
17 team meeting, agreed to allow Mrs. Mercado, to be trained to attend to the daily aspects of the Applicant. (Id.)
18 Mrs. Mercado, as Guardian ad Litem, offered to be trained to care for her husband in lieu of the hiring of an
19 attendant by defendants. Ms. Moore agreed that Mrs. Mercado would be reimbursed for her care. Note the
20 progress report of July 15, 2012, wherein NCM Deborah Moore forwarded a discussion from applicant's
21 attorney which stated:

22 Per AA: thank you for the update, please note that Mrs. Mercado provides a great deal
23 of support to her husband from...a physical stand point...she has been unable to get a
24 job and spends every day possible with her husband and assisting as a caregiver - I am
25 requesting that she be provided with reimbursement for 8 hours per day at the rate of
26 \$16.00 per hour - I am also requesting that her mileage be reimbursed for her daily trips
27 (See Applicant Exhibit 17, p.2).

28 2. Ms. Moore testified under penalty of perjury that Mrs. Mercado attended to her husband and
provided "the care that she was trained to give." (MOH 4.2.14 p. 7., line 9).

Start of 12

end of 11 to #9 Q6

end of 12, but change to "deceive this court" back to Verge for Q6

1 3. Mrs. Mercado also testified under penalty of perjury that Ms. Moore told "her that she would
2 be compensated for her time providing one-on-one care to her husband, so they would not have to pay someone
3 else to do it." (Id, p. 14, line 13-14).

4 4. Dr. Patterson was deposed by Applicant's counsel on September 11, 2012. In that deposition
5 he attested to the fact that if Mrs. Mercado could not assist Mr. Mercado, a one-on-one nurse would have to
6 be hired at additional expense. (9/11/2012 Patterson deposition, Applicant Exhibit 1, p.53, l.19-p.54, l.19-p.
7 54, l.2). When asked if it was a medical necessity for the well-being of Mr. Mercado to have his wife present
8 and assist in the integration with the team, Dr. Patterson answered affirmatively. (Id).

9 5. Dr. Patterson, the primary treating physician at the time, was questioned regarding the issue of
10 defendants paying for Mrs. Mercado's services for treatment she provided to her husband, as well as mileage
11 to attend to her husband's care. Dr. Patterson answered, under penalty of perjury, that he thought it was
12 reasonable for Mrs. Mercado to be paid mileage to come and assist her husband, and that he had seen it in other
13 cases. (Id.).

14 6. Dr. Patterson also stated that Mrs. Mercado's services not only constituted medical treatment,
15 but that they were "indispensable." (Id).

16 7. Dr. Patterson further testified that Mrs. Mercado was integral for the care of Mr. Mercado. (Id).
17 She helped integrate his turning schedule and respiratory therapy. (Id).

18 8. Mrs. Mercado is entitled to be reimbursed for the care she provided in lieu of defendants hiring
19 an additional care-giver for Applicant.

20 C. THE LIEN FILED BY THE GUARDIAN AD LITEM MRS. MERCADO IS IN
21 ACCORDANCE WITH THE LAW.

22 1. WCJ DeWeese disputed defendants assertion that no lien was filed in his Opinion on Decision,
23 dated May 21, 2014, under heading 4.

24 2. Defendants suffered no harm as Mrs. Mercado testified under penalty of perjury as to the
25 services she provided. Clearly WCJ DeWeese used that testimony to substantiate the services rendered in
26 2011-2012, before SB 863, and the requirement that an RFA be issued:

27 3. In essence the Trial held on November 6, 2012 could be considered a lien trial which afforded
28

1 defendants counsel an opportunity to not only inquire about services provided but all cross-examine the lien
2 claimant.

3 VI.

4 THE WCJ CORRECTLY ORDERED PENALTIES

5 UNDER LABOR CODE SECTION 5814

6 1. Whether penalties were raised they are relevant and specifically indicated in the Labor Code
7 to be applied when there is unreasonable delay. Per the case of Gitner v. W.C.A.B. (1970) 35 Cal Comp Cases
8 269, once it is shown that an employer or its insurance carrier refuses or has delayed the tender of
9 compensation benefits, the burden shifts to the employer or its insurance carrier to prove that the refusal or
10 delay was not unreasonable. Defendants have not done so. They can't explain their complete disregard for the
11 most injured of worker's, a quadriplegic, previously on a ventilator, who would like to return to his home and
12 family.

13 2. Applicant need not request penalties for them to be imposed. In a catastrophic injury case, such
14 as this, where the behavior of the defendants is so egregious and outrageous, the Trial Judge is permitted to
15 issue penalties and sanctions at his or her discretion. In this case, as Judge DeWeese pointed out in his
16 Opinion on Decision, "there is no genuine medical or legal doubt that defendants are liable to provide" the 31
17 certified specific home modification recommendations. Yet by the time of the MSC on 2/6/14, defendants
18 **have done absolutely nothing with regard to authorizing and arranging for the provision of that**
19 **treatment.**

20 3. Defendants asserted in their trial brief that "the prudent and responsible" course is to wait for
21 the IMR process to be completed and for each and every recommended home modification to be finally
22 adjudicated before providing any of them. Judge DeWeese stated in his Opinion. "That assertion is
23 outrageous." He went on to state that the "prudent and responsible course, not to mention the legally
24 required course, and the only moral and humane one, is to assist Mr. Mercado in returning home
25 forthwith." Judge DeWeese goes on to lambaste Defendants' arguments by noting that "Applicant's
26 doctors have recommended since 2012 that his home be modified so that he can return to it. Mr.
27 Mercado was declared P&S over one year ago and the only reason he has not returned home is

28

1 defendants steadfast refusal to make his home accessible to him, as recommended by his physicians and
2 as required by law." (See Opinion dated 5.21.14, heading 5).

3 4. Judge DeWeese further points out the UR and IMR procedures were never intended to apply
4 to situations like this. How can any 'Officer of the Court' in good conscience argue against the most basic
5 fundamental rights of an injured worker, especially in the case of a quadriplegic.

6 5. Judge DeWeese further found that **since** there "was no genuine medical or legal doubt as to
7 defendants' liability to provide at least 31 specific home modifications recommended by applicant's treating
8 physician and certified by UR... **defendants unreasonably delayed** or failed to provide medical treatment
9 in the form of home modifications as certified by its own utilization review... **applicant is entitled to a 25%**
10 **penalty pursuant to Labor Code section 5814...**"

11 VII.

12 **15% ATTORNEY FEE IS WARRANTED**

13 1. Applicant has been represented by BERMAN MORE GONZALEZ (hereinafter referred to as
14 BMG) since January 19, 2012. Applicant's attorney BMG, has reviewed several hundred pages of pleadings,
15 correspondence, medical reports and records. The amount of time required to review the documents and
16 medical reports in order to appropriately represent a catastrophically injured quadriplegic is astronomical.

17 2. BMG has prepared for and aggressively defended the rights of the injured worker at three trials.
18 **Each** of those trials required hours of legal research, review and preparation of witnesses.

19 3. Moreover, BMG has filed two Answers to Petition for Reconsideration, two Answers to
20 Defendants' Petitions for Removal, filed a Trial Brief for the Court on the issues for trial, and has attended
21 at least 8 hearings, inclusive of trials and/or depositions.

22 4. In addition, BMG has participated in the oversight of the medical treatment received by
23 applicant by communicating regularly with the applicant's doctor, nurse case manager and attending team
24 conferences. BMG sought the change to Dr. Vasile and attended the complete evaluation.

25 5. To represent to the Court that the applicant's attorneys have taken on an "average complexity"
26 case is ludicrous. Their argument is made to establish that a 15% fee is not warranted.

27 6. Based on Title 8, Cal Code of Regs, §10775 and the guidelines for awarding attorney fees per
28

1 the Policy and Procedural Manual Index No.: 8.4, this instant case is one of above average complexity and
2 WCJ correctly awarded attorney fees of 15% of benefits awarded.

3 CONCLUSION

4 Applicant hereby requests that based upon the foregoing arguments, defendants' Petition for
5 Reconsideration be denied in that the Workers' Compensation Judge ruled on issues before the Court; the
6 Judge properly considered the evidence presented before the court; and issued a decision within the powers
7 of the Workers' Compensation Appeals Board. The Findings of Fact support the Judge's Findings and Award
8 and Order.

9 WHEREFORE, Applicant prays:

10 1. Defendants' Petition for Reconsideration be denied in total and that the May 21, 2014 Findings,
11 Award and Orders be upheld in all respects.

12 2. That defense counsel and/or defendants Park West Enterprises, Inc. dba Co-West
13 Commodities; California Insurance Guarantee Association through its servicing facility Patriot Risk Services
14 for Ullico Casualty Company in liquidation be sanctioned for this frivolous Petition for Reconsideration; the
15 assertion that a quadriplegic is not 100% permanently disabled is absurd; to continue to make this argument
16 in light of overwhelming evidence to the contrary is preposterous and a waste of the court's valuable time.

17 3. For an Award of attorney fees in having to respond to this frivolous, disingenuous Petition for
18 Reconsideration that flies in the face of reality, morality and plain common sense.

19 4. For any other relief this Court may deem just and proper.

20 ///

21 ///

22 DATED: June 23, 2014

Respectfully submitted,
BERMAN MORE GONZALEZ

24
25 By: 
26 KEITH P. MORE, ESQ.

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VERIFICATION

I, the undersigned, declare that I am one of the attorneys for Applicant, NICOLAS MERCADO, in the above-entitled action; I have read the foregoing APPLICANT'S ANSWER TO DEFENDANTS' PETITION FOR RECONSIDERATION and know the contents thereof; and the same is true of my own knowledge, except as to the matters which are therein stated upon my information and belief, and as to those matters, I believe it to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

///
Dated: 6/23/14



KEITH P. MORE, ESQ.

PROOF OF SERVICE BY MAIL
(CCP 1013a(3))

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am over the age of 18 years, and not a party to this action. I am employed in the county of Orange, State of California. My business address is 2677 N. Main Street, #225, Santa Ana, CA 92705.

On June 23, 2014 I served the foregoing documents described as **APPLICANT'S ANSWER TO DEFENDANTS' PETITION FOR RECONSIDERATION** on the interested parties in this action, by placing the [XX] original and/or [XX] a true copy thereof enclosed in sealed envelopes addressed as follows:

Attn: The Honorable Judge DeWeese
Worker's Compensation Appeals Board
1065 N. Pacificcenter Dr., #170
Anaheim, CA 92806

Patriot Risk Services
c/o California Insurance Guarantee Association
P.O. Box 29066
Glendale, CA 91209-9066

Mario Manriquez, Esq.
Guilford, Sarvas and Carbonara, LLP
2099 S. State College Blvd., Suite 400
Anaheim, CA 92806

Attn: James A. Odlum
Mundell, Odlum & Haws, LLP
650 E. Hospitality Lane, #470
San Bernardino, CA 92408-3595

(BY MAIL) I am "readily familiar" with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Santa Ana, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter is more than one day after date of deposit for mailing in affidavit.

(BY FACSIMILE) In addition to regular mail, I sent this document via facsimile, number(s) as listed on the mailing list, on _____

(BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the office of the addressee(s)

Executed June 23, 2014 at Santa Ana, California, and declared under penalty of perjury under the laws of the State of California that the above is true and correct.


CARMEN TOSTADO

STATE OF CALIFORNIA
DWC DISTRICT OFFICE

DOCUMENT COVER SHEET



Is this a new case? Yes No Companion Cases Exist Walkthrough Yes No

More than 15 Companion Cases

06/13/2014
Date:(MM/DD/YYYY)

SSN: _____

ADJ8157719
Case Number 1

Specific Injury

Cumulative Injury (Start Date: MM/DD/YYYY) (End Date: MM/DD/YYYY)
(If Specific Injury, use the start date as the specific date of injury)

Body Part 1: _____

Body Part 3: _____

Body Part 2: _____

Body Part 4: _____

Other Body Parts: _____

14 JUN 13 PM 4:20
DWC DISTRICT OFFICE

Please check unit to be filed on (check only one box)

ADJ DEU SIF UEF INT RSU

Companion Cases

Specific Injury

Case Number 2 Cumulative Injury (Start Date: MM/DD/YYYY) (End Date: MM/DD/YYYY)
(If Specific Injury, use the start date as the specific date of injury)

Body Part 1: _____

Body Part 3: _____

Body Part 2: _____

Body Part 4: _____

Other Body Parts: _____

RECEIVED

APR 16 2014

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STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD Guilford Sarvas & Carbonara LLP

Anaheim District Office

1)	CASE NO. ADJ8157719
2	NICOLAS MERCADO,)	
3)	
4)	MINUTES OF HEARING
5	Applicant,)	AND
6	vs.)	SUMMARY OF EVIDENCE
7)	
8	CO-WEST COMMODITIES; CIGA for)	
9	ULLICO INSURANCE COMPANY in)	
10	liquidation, PATRIOT RISK)	
	SERVICES,)	
)	
	Defendant.)	

Place and Time: ANAHEIM, CA; April 2, 2014;
9:30 a.m. -- 11:20 a.m.
1:45 p.m. -- 2:29 p.m.

Judge: THE HON. PAUL DEWEESE
Reporter: LINDA J. MC KOWN, CSR NO. 8449 (a.m.)
MELODY PANGANIBAN, CSR NO. 11279 (p.m.)

Appearances: APPLICANT PRESENT

LAW OFFICES OF BERMAN, MORE, GONZALEZ
BY: KEITH P. MORE, ESQ.
Attorneys for Applicant through his
Guardian ad Litem, Linda Mercado

LAW OFFICES OF GUILFORD, SARVAS & CARBONARA
BY: MARIO MANRIQUEZ, JR., ESQ.
Attorneys for Defendant

VERONICA JENKS, Spanish Interpreter
Certified Interpreters, Cert. No. 100643

Also Present: LORENA ROQUE
DENISE DAVIES
SHAUNA MCKINLAY

WITNESSES: DEBORAH MOORE
LINDA MERCADO

(PARTIES SERVED PER OFFICIAL ADDRESS RECORD 4/15/14.)
56 pgs est. a.m.; 30 pgs est p.m.

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DISPOSITION: The applicant has filed a Trial Brief on the issues today. The defendant has requested time to respond and the defendant is granted until April 25, 2014 to file any response that defendant may wish; otherwise, the matter stands submitted as of today.

THE ADMITTED FACTS IN THIS CASE ARE AS FOLLOWS:

1. APPLICANT NICOLAS MERCADO, born October 29, 1960, while employed on December 21, 2011 as a truck driver, occupational group number 350, at Riverside, California, by Park West Enterprises, Inc. dba Co-West Commodities, sustained injury arising out of and in the course of the employment to his head, neck, back, spine, both upper extremities, chest, ribs, internal organs, neurogenic bowel, neurogenic bladder, both lower extremities, psyche, eyes, jaw, and in the form of sleep deprivation and quadriplegia.

2. At the time of the injury the employer's workers' compensation carrier was Ullico Casualty Company, which is now in liquidation and the claim is being handled by the California Insurance Guarantee Association through its servicing facility Patriot Risk Services for Ullico Casualty Company in liquidation.

3. At the time of the injury the employee's earnings were \$756.30 per week, warranting indemnity rates of up to \$504.20 per week.

4. The employer has furnished some medical treatment. The primary treating physician is Dr. Ann Vasile.

5. No attorney fees have been paid and no attorney fee arrangements have been made.

THE ISSUES INVOLVED IN TODAY'S PROCEEDING:

1. Whether applicant is permanent and stationary and if so what date he became P&S.

2. Permanent disability.

3. Need for further medical treatment, including but not limited to home modifications.

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APPLICANT'S EXHIBIT 32:
Medical report from Dr. Vasile dated November 14, 2013.

APPLICANT'S EXHIBIT 33:
Medical report from Dr. Vasile dated October 15, 2013.

APPLICANT'S EXHIBIT 34:
Medical report from Dr. Vasile dated September 25,
2013.

APPLICANT'S EXHIBIT 35:
Medical report from Dr. Vasile dated August 1, 2013.

APPLICANT'S EXHIBIT 36:
Medical report from Dr. Teresita Morales, Ph.D. dated
July 30, 2013.

APPLICANT'S EXHIBIT 37:
Correspondence from applicant's counsel to defense
counsel dated August 27, 2013.

APPLICANT'S EXHIBIT 38: (Marked for Identification
only, admissibility to be determined at the time of the
Findings and Award)
Correspondence from Enhanced Living Design, Ivan
Hernandez, dated 2/24/14 and attachments.

Applicant's Exhibits 22 through 37 are admitted
into evidence at this time.

Applicant's Exhibit 38 is Marked for Identification
only at this time.

DEFENDANT'S EXHIBIT E:
Medical report Dr. Teresita Morales, Ph.D. dated
February 5, 2014.

DEFENDANT'S EXHIBIT F:
Correspondence from defense counsel addressed to
Dr. Vasile dated February 26, 2014.

DEFENDANT'S EXHIBIT G:
Three Utilization Review Determinations or letters
signed by Phil Martin, M.D. dated November 25, 2013
through December 12, 2013.

\\\\\\

1 DEFENDANT'S EXHIBIT H:
2 Utilization Review Certification from Dr. Martin dated
3 December 23, 2013.

4 DEFENDANT'S EXHIBIT I:
5 UR Certification from Dr. Martin dated January 19,
6 2014.

7 DEFENDANT'S EXHIBIT J:
8 Record from West Anaheim Medical Center dated March 3,
9 2014.

10 DEFENDANT'S EXHIBIT K:
11 QME Appointment Notification form that appears to be
12 dated March 24, 2014.

13 DEFENDANT'S EXHIBIT L:
14 Correspondence from applicant's attorney to defense
15 attorney dated March 17, 2014 and attachments thereto.

16 Defendant's Exhibits E through I are admitted without
17 objection.

18 Based on the fact that Exhibits J, K, and L were not
19 in existence at the time of the MSC and could not have been
20 discovered with due diligence prior to the MSC, and based on
21 Defendant's representation they are relevant to the issue
22 of whether or not applicant's condition is permanent and
23 stationary, applicant's objection to their admissibility
24 is overruled and Defendant's Exhibits E through L are admitted
25 into evidence at this time.

SUMMARY OF EVIDENCE

DEBORAH MOORE, called by the applicant, was
sworn and testified as follows:

ON DIRECT EXAMINATION: She works for Genex as a
Certified Case Manager. She has been doing this work for
20 years, and has been with this company for four years. In
general, her job involves coordinating and facilitating medical
care for injured workers.

She is familiar with the applicant, who was one of the
injured workers under her care in 2011 and 2012. She provides
these services as an employee of Genex. She does not know who
hired Genex to provide the services.

1 She would coordinate the physician recommendations
2 through the insurance company. In this particular case,
3 she discussed all of the doctor's recommendations with the
4 insurance company, and they would make the final decisions.
5 This would include discussions regarding transfer of care
6 from one facility to another.

7 She is also familiar with the applicant's wife,
8 Linda Mercado. She was unaware that Mrs. Mercado was
9 appointed as the applicant's Guardian ad Litem.

10 She first became involved in this case at the end of
11 2011, shortly after the injury. She believes she first met the
12 applicant and his wife at the same time.

13 The applicant was originally at an acute care facility,
14 and was then transferred to Casa Colina. Her job involved
15 coordinating and facilitating that care and transfer.

16 When she first met the Mercados, the applicant was
17 unable to speak as he was ventilator dependent and required
18 a special valve to enable him to speak. At that time,
19 Mrs. Mercado would speak for and advocate for her husband,
20 and every time the witness saw the applicant, his wife was
21 there.

22 She went to most of the team meetings regarding
23 the applicant's case, where the doctors would discuss the
24 treatment plan and recommendations as well as alternatives.

25 At Casa Colina, the applicant came under the care
of Dr. Patterson. She has been familiar with him for about
four years. He is a physical medicine and rehabilitation
specialist. She has worked with him on other cases involving
spinal cord injuries.

At the team meetings they would discuss all of the
medical recommendations, which would include occupational
and physical therapy, registered nursing care, physician
care, medications, ventilator support, and eventual plans
to discharge to other facilities or to home.

She is not familiar with Casa Colina's practices as
they relate to Medicare.

She did coordinate and facilitate the transfer from
Casa Colina to Reche Canyon. She believes that Dr. Patterson
remained the primary treating physician during this transfer.

1 She did not attend any further team meetings after
2 the transfer to Reche Canyon.

3 At some point, the applicant did require one-on-one
4 care, which involves having someone in his room and supervising
5 him at all times. This was discussed during most of the team
6 meetings. They discussed the possibility that Mrs. Mercado
7 could provide the necessary one-on-one care, assuming she was
8 given the necessary training. It is the type of care that
9 would normally require a CNA to provide. Mrs. Mercado was
10 always at these meetings and the facility when the witness
11 was.

12 Both Casa Colina and Reche Canyon did provide training
13 to Mrs. Mercado to provide the necessary care. The witness
14 always observed Mrs. Mercado attending to her husband, feeding
15 him and making him comfortable. She believes that she did
16 provide the care that she was trained to give.

17 The witness was not there during the time that
18 applicant was on a bowel program, but assumes that Mrs. Mercado
19 provided whatever care was needed at that point.

20 She is shown Exhibit 16, and acknowledges her signature
21 on that document. She would have generated that report as part
22 of her usual job. Counsel references the entry under activity
23 date August 6, 2012. She does think that the applicant could
24 have been discharged home around that time but for the lack of
25 accessibility and home modifications.

26 She does recall discussing home modifications with
27 the insurance company, and is unclear on what the delay was.
28 Today, she was surprised to learn that the applicant was not
29 yet at home. She recalls team meetings at which the physicians
30 indicated a desire to get the applicant home as soon as
31 possible.

32 She does not recall what the insurance carrier's
33 response was to any provision of construction recommendations
34 or estimates.

35 She did not discuss with Mrs. Mercado what exactly she
36 needed to learn in order to care for her husband. Others were
37 responsible for that training.

38 She thinks the insurance company was fine with
39 Mrs. Mercado providing the necessary one-on-one care as long
40 as she was trained to do so. She is unaware if Mrs. Mercado
41 was to provide the care in lieu of a CNA. She was not involved

1 in any discussions regarding the cost of such care.

2 She does not recall coordinating or facilitating any
3 one-on-one care besides through Mrs. Mercado. It is possible
4 she could have obtained a quote for the insurance company
5 regarding the cost of CNA care. As she sits here today, she
6 has no idea what a CNA would charge; she does not normally
7 keep that information in her mind.

8 She does believe that a CNA level of care would be
9 most similar to what Mrs. Mercado was providing.

10 She does not recall meeting with a Dr. Francini, she
11 did generally receive reports from all physicians in this case
12 while she was on it.

13 She is referred to Exhibit 8, and notes that the
14 doctor's statement on June 23, 2012 regarding continuing to
15 train the family is consistent with her understanding of what
16 was to happen.

17 She is referred to Exhibit 7, Dr. Patterson's report
18 of June 18, 2012. It was her understanding that the applicant
19 needed 24-hour care at the level of a CNA, with higher level
20 care (such as that provided by an LVN), available as needed.

21 Such things as catheterization and suctioning can be
22 done by either a CNA or LVN.

23 The applicant cannot drive and requires transportation
24 to go anywhere. She is unaware of the applicant wanting to go
25 to church, or of his being denied transportation for that. She
would have recommended transportation for medical care.

She does not recall the applicant being depressed
because he could not leave the facility.

She also provided coordination or facilitation services
in this case in May or June of 2012.

21 ON CROSS-EXAMINATION: At the time she worked with the
22 applicant, she was also working with about 30 other patients.
23 She believes she saw the applicant once or twice while he was
at the initial acute care facility.

24 He was then transferred to Casa Colina, where he
25 remained for several months (four to six).

\\\\\\

1 The applicant received 24-hour care at the acute
2 facility. He also received 24-hour nursing care at Casa
3 Colina. There would have been no initial need for
4 Mrs. Mercado to care for her husband, but as his rehabilitation
5 progressed, she would have required training in order to
6 prepare her to care for him at home. That training would have
7 been necessary for about a couple of months before the planned
8 discharge.

9 She does not know exactly what training Mrs. Mercado
10 received. That would have been the responsibility of the case
11 manager at the facility.

12 She believes the training would be needed to enable
13 her to care for her husband at home. It was not really needed
14 while he was at Casa Colina.

15 The applicant was at Reche Canyon for maybe three
16 weeks. She does not know if Mrs. Mercado completed any
17 training program but knows she was being trained. She does
18 not know if she was trained specifically for catheterization
19 or any other specific duties.

20 She closed her file after applicant was transferred
21 to Reche Canyon, and someone else took over.

22 A CNA has to do demonstrate proficiency at various
23 tasks in order to be certified. Formal training is required
24 which consists of classes at a tech school. She does not know
25 how long that program would be.

 She does not know all of the qualifications to be an
LVN but knows they are demanding. It does require a couple of
years of college.

 She saw the applicant every other week while he was
at Casa Colina, as well as at meetings. She saw him at least
twice per month, and more often as needed. She would also
talk to the case manager at the facility to get reports on
applicant's progress, and they would tell her that Mrs. Mercado
was there and what she was doing.

 She is unaware of any days that Mrs. Mercado was not
there. She does believe that staff would care for the
applicant when she was not.

 ON REDIRECT EXAMINATION: Casa Colina is a 24-hour
skilled facility. There are multiple nurses on staff at all

1 times. However, this does not mean they provide one-on-one
2 care. She is unaware of any individual nurses assigned to
the applicant for that purpose.

3 One-on-one care means having someone in the room with
4 the patient at all times. He would not have had that level of
care at Casa Colina or Reche Canyon unless someone from the
5 family was there.

6 She does believe that Mrs. Mercado provided one-on-one
7 care to her husband with she was there. She does not have any
personal recollection of whether Dr. Patterson specifically
8 identified Mrs. Mercado as the person to provide the
recommended one-on-one care. She does recall discussing that
Mrs. Mercado could provide it if she was trained to do so.

9 She does not know why the applicant was at Reche
10 Canyon for only three weeks. She does know there were issues
regarding the care he received there. The nurse told her
11 that Mrs. Mercado was more comfortable being there as much
as possible while the applicant was at that facility.

12 She does not know where the applicant went after Reche
13 Canyon.

14 She is shown Exhibit 17, and counsel specifically
references an activity date of June 21, 2012. She does not
15 remember what the insurance company's response might have
been. She does not remember discussing any numbers regarding
16 appropriate reimbursement for care.

17 She does not remember instances regarding problems at
night when Mrs. Mercado was not there.

18 **ON RECROSS EXAMINATION:** She does not recall
19 Mrs. Mercado providing care 24/7; that would not be feasible.
She does not know how much time Mrs. Mercado actually spent
20 with her husband. She believes he would have gotten adequate
care when she was not there.

21
22 **ON FURTHER REDIRECT EXAMINATION:** She does not know
23 what adequate care would mean, but knows that applicant would
not have gotten one-on-one care, but should have it if it was
24 recommended by Dr. Patterson.

25 **LINDA MERCADO**, called by the applicant, was sworn and
testified as follows:

1 ON DIRECT EXAMINATION: She recalls testifying in
2 this case on November 6, 2012 regarding the activities she
3 performed for her husband and the time spent doing so. She
4 was part of his care team, and testified regarding the training
5 she received in that regard.

6 Since that time, applicant's condition has changed.
7 He is now able to talk, he is breathing better, he can move
8 his arms a little more, and his attitude is better.

9 However, he still remains paralyzed and cannot move
10 his legs. He still has no function whatsoever in his hands,
11 and has remained that way since his injury.

12 She recalls Dr. Pai, at Braswell. She was still
13 providing one-on-one care at that facility.

14 She does recall Dr. Pai telling her that her husband's
15 condition had stabilized and he was not going to get any
16 better.

17 Exhibit J, references a setback in which the applicant
18 had to go to West Anaheim Medical Center. He had respiratory
19 failure and was in the hospital for about three days. However,
20 this episode did not result in any overall change in his
21 quadriplegic condition.

22 She does not recall reviewing his reports from
23 Dr. Vasile, regarding home modifications.

24 She does recall meeting with a man named Ivan Hernandez
25 from Enhanced Living Design on February 20, 2014. He came to
inspect her home and took photographs inside and out. He made
recommendations regarding numerous modifications needed in the
home in order to allow her husband to live there.

 Doctors have told her he could return home as long as
appropriate modifications were made.

 No modifications have been done since Utilization
Review certified them in December 2013. The February 20
visit with Mr. Hernandez was the first time anybody came
out to inspect the home or provide estimates.

 She has not had any contact with Handi Habitat
regarding making any modifications or construction. She
has not had any contact with the city regarding permits.

 Mr. Hernandez told her that he was hired by the

1 defendant to evaluate the home for the needed modifications.

2 Mr. Hernandez's report is marked as Exhibit 38 for
3 Identification only, with ruling on the admissibility deferred.

4 The applicant cannot drive. He last attended a family
5 function at Christmas 2013.

6 She has attended meetings with Dr. Vasile and the
7 applicant regarding transportation. The doctor told her
8 that he could have transportation for family activities and
9 church, as well as medical appointments. She does recall one
10 time when he asked for transportation to go to church, but it
11 was denied.

12 He has only been given transportation once since
13 March 2013.

14 The applicant has told her that he wants to live
15 and wants to be around his family and see them grow up.

16 She has not done anything that would prevent the
17 start of the necessary home modifications.

18 End of Direct Examination.

19 (Lunch Recess.)

20 ON CROSS-EXAMINATION: Dr. Vasile took over her
21 husband's care after Dr. Pai. She does not recall when that
22 was.

23 Her husband did not get many therapies at Braswell
24 before Dr. Vasile took over.

25 After Dr. Vasile assumed her husband's care, he began
getting more physical therapy and speech therapy. He has
continued to receive speech therapy twice a week to date, and
it has helped. As for physical therapy, this consists of
exercising his legs and arms and moving him around into
different positions.

She has met with Dr. Vasile and discussed the treatment
plan. Physical therapy was recommended in order for her
husband to get more movement in his body and not just be
sitting in his chair; however, he still is unable to
voluntarily move his legs and hands.

1 Dr. Vasile did refer her husband for psychotherapy, and
2 he has seen Drs. Lopez and Morales. They are both female, and
3 work in the same office. The referral was made because her
4 husband was feeling depressed and anxious.

5 He was seen for psychotherapy one time per week.
6 She does not remember how many weeks. She thinks that
7 antidepressant medications may have been recommended, but
8 does not recall. Her husband's depression and anxiety did
9 improve with treatment.

10 He does still have depression and anxiety at times, and
11 she cannot say whether it is the same overall as it was before.

12 Dr. Vasile has also referred him to other specialists,
13 including a urologist, Dr. Wachs. Dr. Wachs has recommended
14 some surgery which has not happened yet. It has also been
15 recommended that he have a procedure in his trachea to remove a
16 growth.

17 Her husband was admitted to the hospital at West
18 Anaheim Medical Center on March 3, 2014 for respiratory
19 failure. He was having trouble breathing due to some sort
20 of internal pressure on his lungs. They had to do CPR at the
21 hospital.

22 He has had a couple of other hospitalizations while
23 under Dr. Vasile's care, and both times were for trouble
24 breathing.

25 ON REDIRECT EXAMINATION: She signed the petition for
appointment of guardian ad litem on February 7, 2012. She did
so because her husband was incapable of handling his own
affairs at that time, and could not sign any documents. He
still cannot sign any documents. He has had complete loss of
the use of his hands from the date of injury until now.

The doctors have told her that he will require ongoing
medical care for the rest of his life, and this could include
surgical procedures from time to time. None of the ongoing or
pending surgical procedures or other medical treatment is going
to help her husband recover movement in his hands or legs. The
psychotherapy was provided in order to help him adapt to his
disability.

She provided care to her husband for his benefit, as
both his wife and guardian.

Dr. Pai told her that her husband would need medical

1 treatment for the rest of his life.

2 The bankruptcy of Ullico Casualty Company did cause a
3 delay in the provision of medical treatment and benefits. Her
4 husband did not refuse any treatment or do anything else to
5 deny it.

6 The treatment he received at Reche Canyon was not good.
7 Their bowel program was done in bed, and he would often not be
8 cleaned or helped timely. She would provide care herself that
9 he would otherwise not get at that facility.

10 When she first met Dr. Vasile, the doctor had come to
11 Braswell at the request of applicant's attorney, and met with
12 her, her husband, and their attorney. Dr. Vasile was appalled
13 at the treatment or lack thereof that he was receiving. She
14 began to do more for her husband at the facility, including
15 suctioning, repositioning, brushing his teeth, and a lot of
16 other things she had to do because the nurses were too busy.
17 They could sometimes take up to two hours to respond to a call.

18 She estimates that she averaged 8 hours a day,
19 7 days per week caring for her husband.

20 Deborah Moore told her that she would be compensated
21 for her time providing one-on-one care to her husband, so they
22 would not have to pay someone else to do it.

23 She thinks he will need speech therapy for the rest
24 of his life, not just for speaking, but to help him with his
25 breathing.

26 The purpose of receiving physical therapy even though
27 he cannot move himself is so that his muscles do not atrophy.

28 She remembers calculating with her attorney what the
29 value of the home/attendant care she has provided might be.
30 She does not recall the value off the top of her head, but when
31 shown a lien filed by her attorney's office, she agrees that
32 about \$34,000 is accurate.

33 ON RECROSS EXAMINATION: She does not have any
34 documentation regarding any agreement between herself,
35 Dr. Patterson and Ms. Moore regarding her being compensated for
36 care provided to her husband.

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* * *

Paul DeWeese
PAUL DeWEESE
WORKERS' COMPENSATION JUDGE

1 KEITH P. MORE, Bar #140679
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2 Attorneys at Law
2677 N. Main Street, Ste. 225
3 Santa Ana, CA 92705
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4
5 Attorneys for Applicant

6
7 WORKERS' COMPENSATION APPEALS BOARD
8 STATE OF CALIFORNIA
9

10
11 NICOLAS MERCADO,)
12)
13 vs. Applicant,)
14 CO-WEST COMMODITIES/PATRIOT RISK)
SERVICES,)
15 Defendants.)

WCAB NO: ADJ8157719

**APPLICANT'S ANSWER TO
DEFENDANTS' PETITION FOR
RECONSIDERATION**

16
17 Applicant, by and through his attorneys of record, Berman More Gonzalez, hereby answers
18 Defendants' Petition for Reconsideration as follows:

- 19 1. By the Findings & Award dated May 22, 2014 the Appeals Board did not act without and in
20 excess of its power;
- 21 2. The evidence does justify the Findings of Fact;
- 22 3. The Findings of Fact do support the Decision and Award;
- 23 4. The Findings and Award does not result in significant prejudice; and
- 24 5. The Findings and Award does not result in irreparable harm.

25 In support of his position, Applicant relies upon the following Procedural and Historical Facts of the
26 Case and Issues and Argument:

27
28

PROCEDURAL AND HISTORICAL FACTS OF THE CASE

1
2 1. On 12/21/2011 applicant Nicolas Mercado was involved in a single vehicle admitted rollover
3 truck accident arising out of and occurring in the course of his employment. This accident caused a
4 devastating injury to multiple parts of his body, resulting in **quadriplegia**, injury to applicant's internal organs,
5 neurological system, and psyche [11/6/12 Minutes of Hearing, p.2].

6 2. Mr. Mercado has been in various care facilities since the date of injury in 2011. He has been
7 at Casa Colina, Reche Canyon (MOH 4/2/14 p.7, line 8), Braswell (Id. at p. 11, line 10) and is currently
8 staying at Care Meridian in Garden Grove, CA.

9 3. Due to the catastrophic nature of Mr. Mercado's injuries, his wife, Linda Mercado, filed to be
10 appointed Guardian ad Litem on February 7, 2012. After it was brought to the attention of the WCAB that
11 no action had been taken, an Order Appointing her Guardian Ad Litem and Trustee issued on August 27,
12 2013.

13 4. A Declaration of Readiness for an Expedited Hearing was filed on September 17, 2012 over
14 medical treatment, inclusive of reimbursement to Linda Mercado for assistant care, and home modification
15 issues. The matter proceeded to Trial on November 6, 2012, wherein Mrs. Mercado provided compelling
16 testimony as to all aspects of the case and detailed the extensive care and hours she provided to her husband.

17 5. Findings and Award issued on February 1, 2013. WCJ DeWeese found that issues regarding
18 home modifications and 24 hour one-on-one care were premature at that time. However, WCJ DeWeese did
19 address medical care provided by Mrs. Mercado and awarded payment to Mrs. Mercado "for care provided
20 to her husband to date as well as reimbursement for mileage in connection with such care, in an amount to
21 be adjusted between the parties with jurisdiction reserved by the WCAB." (Opinion on Decision, p. 2)

22 6. Defendants filed a Petition for Reconsideration and Petition for Removal on February 22,
23 2013.

24 7. Applicant filed an Answer to the Petition for Reconsideration and Petition for Removal on
25 March 8, 2013.

26 8. WCJ DeWeese issued an Order Rescinding the Findings and Award on March 8, 2013.

27 9. The WCAB issued a Denial of the Petition for Removal on April 18, 2013.

1 10. As Applicant remained unable to leave the care facility for even a home visit, a DOR was filed
2 and the matter was placed back on calendar on all issues. A Mandatory Settlement Conference was set for
3 August 1, 2013. Thereafter, Defendants filed a **19 page** Petition for Removal, dated August 19, 2013.

4 11. Applicant filed an Answer to Petition for Removal on August 23, 2013.

5 12. This **second** Petition for Removal was Denied in a **one page, one paragraph Order Denying**
6 Petition for Removal dated October 10, 2013. These Petitions must be considered frivolous and bad faith
7 tactics in order to deny workers' compensation benefits to Applicant.

8 13. The matter proceeded to trial again on August 26, 2013 and Findings and Award were issued
9 on September 23, 2013.

10 14. Although two home evaluations were admitted into evidence demonstrating the needs of the
11 Applicant, the Judge found that the record was inadequate to determine whether defendants were liable for
12 home modifications. Also, the issue of whether the applicant's Guardian ad Litem was entitled to payment
13 for care provided to applicant was found to be an inappropriate issue for an Expedited Hearing in the absence
14 of a formal lien.

15 15. Dr. Ann Vasile, the PTP, then issued a subsequent report dated December 7, 2013 outlining
16 her rationale for each and every one of the previously recommended home modifications.

17 16. A Utilization Review from Dr. Martin Black issued on December 12, 2013, wherein 31 home
18 modification items were approved, 9 were modified and 26 were denied.

19 17. Despite the approvals in the Utilization Review process, no home modifications were done and
20 Applicant remained stranded, in the care facility with no way to visit his home. Defendants would not even
21 provide a ramp to the front door.

22 18. A lien was filed on behalf of the Guardian ad Litem on January 28 2014 for reimbursement
23 of services provided at defendants' request.

24 19. A Mandatory Settlement Conference was requested by Applicant's attorney and that took place
25 on February 6, 2014. Stipulations and Issues were completed and filed and the matter was set for Trial on
26 April 2, 2014.

27 20. The matter proceeded to trial on April 2, 2014. **As of that date, still no home modifications**
28

1 were completed. (MOH 4.2.14 page 11, line 22) Judge DeWeese's opinion issued on May 22, 2014.

2 21. Applicant's counsel filed a Trial Brief at the time of trial. Defendants were provided three
3 weeks to respond and did so.

4 22. After review of testimony, exhibits and briefs, Judge DeWeese found the following:

5 That Applicant became permanent and stationary on March 2, 2013. Applicant
6 sustained permanent disability of 100%, entitling applicant to permanent total
7 disability indemnity commencing March 3, 2013 at the rate of \$504.20 per
week and continuing for life, subject to annual cost-of-living adjustments
pursuant to labor Code section 4659(c).

8 Applicant will require further medical treatment to cure or relieve from the
effects of his injuries, including but not limited to home modifications.

9 Applicant's wife, Linda Mercado, is entitled to payment for attendant care
10 provided to applicant to date as well as reimbursement for mileage in
connection with such care.

11 Defendants unreasonably delayed or failed to provide medical treatment in the
12 form of home modifications as certified by its own utilization review, and
applicant is entitled to a 25% penalty to be assessed against the value of the
13 benefits that were unreasonably delayed or refused.

14 The reasonable value of the services of applicant's attorney is \$110,997.38,
plus 15% of the amount payable pursuant to Paragraph D.

15 The report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014
16 (marked for identification as Applicant's Exhibit 38) is not admissible.

17 23. Defendants disagreed with these findings and filed this Petition for Reconsideration.

18 **ISSUES AND ARGUMENTS**

19 I

20 **APPLICANT IS PRESUMPTIVELY 100% PER LABOR CODE SECTION 4662**

21 1. On April 2, 2014, Defendants stipulated to Applicant's injury of quadriplegia, neurogenic
22 bowel and bladder as well as other major injuries.

23 2. Despite that Stipulation, Defendants continue to waste the court's time and resources arguing
24 that Applicant is not 100% disabled and that he has yet to be declared Permanent and Stationary.

25 3. **This non-sensical argument can only be seen as a bad faith delay tactic.**

26 4. As this Board knows, under 4662 of the Labor Code, total practical paralysis equates to
27 Permanent Total Disability. Applicant is a quadriplegic!

1 10561(b)(5) for their material misrepresentation of fact. They stipulated that Mr. Mercado was permanent
2 and stationary at the Mandatory Settlement Conference and now argue to this Board that Mr. Mercado is not
3 permanent and stationary.

4 10. Pursuant to WCAB Rule 10561(b)(5) sanctions may be imposed for executing "a declaration
5 or verification to any petition, pleading, or other document filed with the Worker's Compensation Appeals
6 Board: (A) that (i) contains false or substantially false statements of fact; (ii) contains statements of fact that
7 are substantially misleading; (iii) contains substantial misrepresentations of fact; (iv) contains statements of
8 fact that are made without any reasonable basis or with reckless indifference as to their truth or falsity..."
9 (Cal.Code Regs., tit. 8, § 10561(b)(5).)

10 III.

11 THE MEDICAL REPORTS OF DR. VASILE AND DR. PAI ARE SUBSTANTIAL

12 MEDICAL EVIDENCE

13 1. WCJ De Weese, after thoroughly reviewing all medical reports, found the reports of Dr. Pai
14 and Dr. Vasile "to be persuasive and substantial medical evidence."

15 2. Dr. Vasile holds a specialty board certification in Spinal Cord Medicine and is Board Certified
16 in Physical Medicine and Rehabilitation. Dr. Vasile reviewed the care that Mr. Mercado received and issued
17 a thorough comprehensive report dated March 8, 2013 (Applicant's Exhibit 20). Her report concluded that
18 Mr. Mercado should be moved to a Care Meridian facility as they can better treat and assist Mr. Mercado with
19 the "level of acuity and care that is appropriate and medical necessity for a spinal cord injury/tetraplegic" (Id.
20 at p. 9)

21 3. This report contains a thorough medical history, her findings on examination, her 17 diagnosis,
22 her opinion of the nature and extent of Mr. Mercado's disability, the cause of the disability, the past,
23 continuing and future medical treatment required and her opinion of whether Mr. Mercado is permanent and
24 stationary. A comprehensive treatment plan is identified at pages 6-10. The report references and agrees
25 with Dr. Pai's assessment that Mr. Mercado is permanent and stationary. The report is signed and Dr. Vasile
26 did make the declaration that her report was done under penalty of perjury and does not violate Labor Code
27 Section 139.3. (Id. at pages 10-11)

1 were not provided to UR.

2 9. In Dubon, it is stated "Labor Code section 4610 expressly indicates that UR decisions should
3 be based on the "information" that is "reasonably necessary" to make that determination and that, if a decision
4 to delay or deny is based on "incomplete or insufficient information" the UR decision shall specify the
5 additional information needed." (Id.)

6 10. The Board went on to state that "a UR that fails to comply with the procedural requirements
7 of section 4610 and the AD's Rules may also be invalid." Hence, the Board found that the failure to send all
8 medical records and test to UR, rendered their decision invalid. (Id.)

9 11. Defendants in this case, failed to send several material pieces of evidence in regard to the home
10 modifications requested. In our letter dated January 13, 2014, a list of items the defendants failed to provide
11 to UR was included. Specifically omitted were the Specialty Healthcare Service Quote and a second home
12 evaluation summary conducted by an occupational therapist.

13 12. As in Dubon, WCJ DeWeese had jurisdiction to render the UR review invalid and to make
14 determinations as to whether modifications to the home are necessary.

15 13. As WCJ DeWeese points out in his Opinion (see heading 3), "Dr. Martin's utilization review
16 decision is materially defective. It was not based on the MTUS, ACOEM guidelines, or any other identifiable
17 objective criteria as required by Labor Code section 4610."

18 14. WCJ DeWeese goes on to indicate that "the court is far more persuaded by the opinions of
19 applicant's primary treating physician. . . than the opinions of a UR reviewer who has not examined the
20 applicant and who apparently did not have even a fraction of applicant's medical records available for
21 review."

22 15. Additionally, the specialty of the UR reviewer, Dr. Martin, specialty is "emergency medicine."
23 As Judge DeWeese pointed out, "there is no evidence that he is competent to evaluate the specific clinical
24 issues involved in the long term treatment of a seriously injured quadriplegic or that the dozens of
25 recommended home modifications are within his scope of practice, as required by LC section 4610(e)."

26 16. For all of the reason pointed out above, the UR decisions are materially defective and the
27 WCAB ought to have jurisdiction over the disputes regarding home modifications.

WCJ CORRECTLY FOUND THAT PAYMENT TO LINDA MERCADO FOR
ATTENDANT CARE AND MILEAGE WAS APPROPRIATE

A. AS GUARDIAN AD LITEM, MRS. MERCADO IS ENTITLED TO REIMBURSEMENT FOR CARE SHE PROVIDED

1. Following this catastrophic injury, Applicant Mr. Mercado was intubated and on a ventilator. He was unable to speak and unable to understand the full extent of his injuries. Applicant's wife was required to act on applicant's behalf and as such the request for Guardian ad Litem was filed.

2. As Guardian ad Litem she was given the power and authority to make decisions on Mr. Mercado's behalf. She attended medical appointments and assisted Applicant's medical team.

3. The Case of Hodgman v. Workers' Compensation Appeals Board 2007(155 Cal.App.4th 44) held that a guardian ad litem is entitled to be compensated by the worker's employer for care provided to the injured worker.

4. The court also found the following facts to be dispositive: the Guardian ad Litem in the Hodgman case attended medical appointments, medical team conferences, interacted with medical providers and evaluated and checked on the level of attendant care.

5. The court reasoned in Hodgman that "absent this exceedingly high level of commitment and advocacy...it would be unlikely that he (applicant) would have accessed as many services that he received to date..."

6. Similar. As evidenced in the Minutes of Hearing of the November 6, 2012 Trial, Mrs. Mercado was trained to catheterize and provide suction as needed for the Applicant. "She was trained to help him with all activities of daily living, brushing his teeth, turning and repositioning him as needed, scratching him, elevating him, helping him with bowel movements, massaging and all other aspects of his care." (MOH 11.6.12, page 5, lines 18-22)

7. As in Hodgman, Mrs. Mercado attended meetings with the medical team that involved her husband's medical needs and became an important part of his care. (Id.)

8. Mrs. Mercado testified that she was assertive and spoke up for her husband in order to ensure

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

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AUG 09 2014

Guilford Sarvas & Carbonara LLP

Case No. ADJ8157719
(Anaheim District Office)

NICOLAS MERCADO,

Applicant,

vs.

CO-WEST COMMODITIES; CALIFORNIA
INSURANCE GUARANTEE ASSOCIATION;
administered by PATRIOT RISK SERVICES,
for ULLICO CASUALTY COMPANY, in
liquidation,

Defendants.

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION**

Reconsideration has been sought by defendant, with regard to a decision filed on May 22, 2014.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

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1 IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in
2 the above case, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to the
6 Anaheim District Office or any other district office of the WCAB and shall not be e-filed in the
7 Electronic Adjudication Management System.

8 WORKERS' COMPENSATION APPEALS BOARD

9  DEPUTY

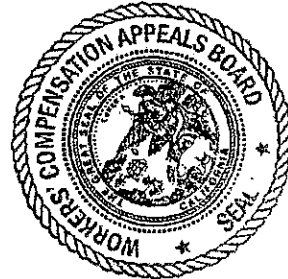
10 NEIL P. SULLIVAN

11 I CONCUR,

12
13
14 
15 FRANK M. BRASS

16 CONCURRING, BUT NOT SIGNING

17 MARGUERITE SWEENEY



18
19
20 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

21 AUG 07 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 GUILFORD SARVAS & CARBONARA LLP

25 BERMAN MORE GONZALEZ

26 NICOLAS MERCADO

27 sye

MERCADO, Nicolas

RECEIVED

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MS

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

SEP 10 2013

Guilford Sarvas & Carbonara LLP

3	NICOLAS MERCADO,)	CASE NO. ADJ8157719
)	ANAHEIM DISTRICT OFFICE
4	APPLICANT,)	
)	
5	vs.)	MINUTES OF HEARING
)	AND
6	CO-WEST COMMODITIES,)	SUMMARY OF EVIDENCE
	CIGA FOR ULLICO INSURANCE)	
7	CO. in liquidation,)	
	PATRIOT RISK SERVICES,)	
8)	
	DEFENDANTS.)	
9)	

10 LOCATION: Anaheim, California

11 DATE AND TIME: August 26, 2013; 9:23 a.m. - 11:38 a.m.

12 JUDGE: THE HON. PAUL DE WEESE

13 REPORTER: MELODY A. PANGANIBAN, CSR, RPR

14 APPEARANCES: APPLICANT PRESENT

15 Berman, More & Gonzalez

16 BY: Keith P. More, Esq.

17 Attorneys for Applicant through his

18 Guardian Ad Litem, Linda Mercado

19 GUILFORD, SARVAS & CARBONARA, LLP

20 BY: MARIO MANRIQUEZ, JR., ESQ.

21 Attorneys for Defendant

(Continued on Page 2)

22 *Parties served as indicated*

23 *on the Official Address*

24 *Record on September 9, 2013*

25 *By Melody Pang*

(54 pgs. est.)

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APPEARANCES: (Continued)
ALSO PRESENT: ROSARIO LINAREZ, Certificate No. 300580
Certified Spanish Interpreter
LINDA MERCADO
WITNESSES: NICOLAS MERCADO
DISPOSITION: The matter stands submitted.

* * *

STIPULATIONS AND ISSUES

THE FOLLOWING FACTS ARE ADMITTED:

LET THE RECORD REFLECT the admitted facts in this case are as set forth at the prior proceeding on November 6, 2012; and specifically those are:

1. Nicolas Mercado, born October 29, 1960, while employed on December 21, 2011 as a truck driver, Occupational Group No. 350 at Riverside, California, by Co-West Commodities, sustained injury arising out of and in the course of employment to his head, neck, back, upper extremities, lower extremities, chest, ribs, internal organs, psyche and neurological systems resulting in Mr. Mercado becoming a quadriplegic.

2. At the time of the injury, the employer's workers' compensation carrier was Ullico Casualty Company. Since the last hearing, Ullico Casualty has gone into liquidation. The claim is now being handled by California Insurance Guarantee Association for Ullico Casualty Company in liquidation through its Administrator, Patriot Risk Services.

3. The employer has furnished some medical treatment.

4. No attorney fees have been paid and no attorney fee arrangements have been made.

THE ISSUES FOR TODAY'S PROCEEDINGS REMAIN AS THEY WERE LAST NOVEMBER AS FOLLOWS:

1. Whether defendant is liable for modifications on applicant's home or perhaps a new home as part of the reasonably required medical treatment.

2. Whether applicant requires one on one care around the

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clock.

3. Whether applicant's wife is entitled to reimbursement for health care services and mileage provided to date and the value of such services and mileage.

LET THE RECORD REFLECT the Court will consider all of applicant's and defendant's exhibits which were offered and admitted into evidence at the prior hearing of November 6, 2012. In addition, applicant has offered the following exhibits:

EXHIBITS

APPLICANT'S EXHIBIT 20: (Marked for Identification)

The March 8, 2013 report from Dr. Vasile.

APPLICANT'S EXHIBIT 21: (Marked for Identification)

A document entitled "Specialty Healthcare Services Quote" dated September 5, 2012.

LET THE RECORD REFLECT that the defendant has objected to both Applicant's 20 and 21 on the grounds that they were not disclosed as evidence prior to the MSC of August 1, 2013.

LET THE RECORD REFLECT Applicant's 20 and 21 will be marked for identification only and the Court will rule on the admissibility of both exhibits at the time he issues his findings in this matter.

SUMMARY OF EVIDENCE

NICOLAS MERCADO, called as a witness on his own behalf, having been first duly sworn, testified through a Certified Spanish Interpreter substantially as follows:

DIRECT EXAMINATION:

After his injury, he was taken to Riverside Community Hospital where he stayed until approximately January 19, 2012.

He was then transferred to Casa Colina for approximately 90 days.

He then went to Kindred for approximately 8 weeks.

He then went back to Casa Colina for another

1 90 days.

2 He then went to Reche Canyon for 14 days.

3 He was then at Braswell Colonial for 8 months.

4 He then went to Care Meridian approximately two months
5 ago, and he is there at this time.

6 His wife, Linda, was with him and assisted him while he
7 was at Riverside Community Hospital. She helped him scratch
8 his head, wipe his eyes, and provide suction. She was there
9 essentially around the clock.

10 He remembers Dr. Patterson at Casa Colina. Deborah Moore
11 was the case manager there as well. He remembers having
12 meetings with Dr. Patterson, Ms. Moore, his wife, and sometimes
13 his attorney, Mr. More. Dr. Patterson would ask Deborah Moore
14 for authorization for various treatment, and she would provide
15 the authorization. This was during early 2012.

16 He remembers the specific team meeting in approximately
17 February 2012. All of the above individuals were there. They
18 discussed having his wife provide one-on-one care for him while
19 he was in the hospital instead of hiring a nurse to do so.
20 They agreed that she would. It was his understanding that the
21 case manager, Deborah Moore, agreed to this as well.

22 From that point, his wife provided the care at all of the
23 facilities he was at. He confirmed his wife's testimony from
24 the prior hearing regarding the numerous things she would do
25 for him.

He describes his wife assisting him with bowel movements
by pushing on his stomach. If she was not there, sometimes he
would have the movement while in bed, and he would be left
soiled for hours. This would happen at both Kindred and at
Reche Canyon.

At Reche Canyon, there were also times when he could not
breathe and he would try to summon help, but no one would come.
He felt like he was drowning in his secretions. That's why he
was only there for two weeks, because he did not like it.

When his wife was at the facilities, she would talk to the
nurses and staff members, and would make sure he got whatever
care he needed.

When he went to Braswell, she continued to provide that

1 care and advocate for him to his doctors.

2 He has not been to church since his injury. He has not
3 been home since his injury, since his home has not been
4 modified to allow it. He does want to go home and see his
5 family.

6 He remembers Dr. Vasile and seeing him while he was at
7 Braswell. She said he could go home to visit, but his home
8 would need to be modified to allow him to do so. There are
9 concrete steps going up to his door. Nothing has been done to
10 his house since the date of injury.

11 He got to Court today with transportation. He does not
12 know who paid for it. He recalls one other time when he
13 received transportation in order to do something with his
14 family. That was last Thanksgiving, when he was able to go to
15 his daughter's house. He was able to go inside but not much
16 more. His wife was there and assisted him during that visit.

17 He does not recall how many days Linda was not there
18 between the date of injury and November 2012.

19 His home address is 235 East Olive Street in
20 San Bernardino. He is currently at the Care Meridian facility
21 in Garden Grove. His wife has been having car trouble the last
22 4 weeks, and has not been able to visit him for several weeks.
23 When she is not there, nobody scratches him or cleans him
24 often.

25 However, at Care Meridian they do help him on a daily
basis with his bowel movements. He does feel better there, and
they try to make it feel like home. They also bathe him better
there.

There were issues regarding food at prior facilities, so
his wife would bring him homemade food, which made him feel
better.

There is no one-on-one care at Care Meridian when his wife
is not there. It can take a while to get them when she is not
there. This includes help going to the bathroom, brushing his
teeth, or just scratching or wiping his eyes.

When he was at Reche Canyon, he would get showers twice a
week. At Braswell, it was three times per week. He would
sometimes not be showered after he soiled himself, and they
would clean him off only with water and not soap. When his
wife would come, she would then clean him properly with soap

1 and water.

2 He believes the car repairs his wife needs would cost
3 about \$700, and it has not been fixed yet.

4 **CROSS-EXAMINATION:**

5 He was in the emergency care section at Riverside
6 Community Hospital in which he got 24 hour care and was closely
7 monitored. He had breathing problems and underwent a
8 tracheotomy procedure there.

9 The February 2012 team meeting was at Casa Colina. That
10 is a 24/7 care facility. He got medical treatment, physical
11 therapy, speech therapy, and psychiatric treatment. He does
12 not remember the name of the psychiatric doctor. He also saw
13 separate doctors for his lungs and to monitor his medications,
14 as well as Dr. Patterson and others whose names he cannot
15 recall.

16 He saw an average of 4 doctors a day at Casa Colina in
17 approximately February of 2012. He also had one nurse per
18 12-hour shift looking after him. His wife would visit him
19 generally in the afternoons. During the morning, she was
20 helping to care for their granddaughter. She would not bring
21 their granddaughter with her to Casa Colina, but would leave
22 the granddaughter with their niece until their daughter came
23 to pick her up.

24 In February 2012, he took several medications at Casa
25 Colina whose names he cannot recall. He took medications for
pain, spasms, anxiety, to help him sleep at night, and some
others. He would also take naps during the day.

26 The nurse case manager Deborah Moore was in charge of his
27 case. She would speak with him at team meetings, and would
28 sometimes visit him in his room. The frequency of her visits
29 varied, and was sometimes once per month. He does not remember
30 how often they had team meetings.

31 At the meeting in February of 2012, they discussed fixing
32 his house, having a nurse at home, having his wife help him in
33 the hospital, and other things. He was able to speak at that
34 time. He does not remember telling anybody he had problems at
35 Casa Colina at that meeting.

36 His wife was always there unless she was sick. When she
37 was not there, the nursing staff would care for him, but not
38 the same way that his wife would.

1 He was transferred to Kindred to get off the ventilator.
2 He was there for about a month and a half. He then went back
to Casa Colina with 24/7 care.

3 He transferred to Reche Canyon to be closer to home.
4 However, he was only there for about two weeks because he was
not getting the treatment he needed. He requested a transfer.

5 He then went to Braswell, a 24/7 care facility. He does
6 not remember the name of his primary treating physician at
Braswell, but he believes it must be Dr. Pai. He was there for
7 8 months.

8 He does not remember if there was an agreement for his
9 wife to provide care while at Braswell. They did have nurses
there.

10 He was then transferred to Care Meridian in Garden Grove
11 by his current primary treating physician, Dr. Vasile. He
does not remember how long she has been his PTP.

12 She transferred him to Care Meridian because he needed
13 more and better therapy than he was getting at Braswell. He
now gets speech therapy, physical therapy, and psychiatric
14 therapy. He gets treatment designed to assist him with his
transfer home. He does not know when that might be. He is
waiting for his house to be fixed so that he can go home.

15 Other family members have come to visit him over the
16 months, including his son, daughter, brother-in-law,
sister-in-law and others. They especially visit on Sundays.
17 At Care Meridian there is a room they can use to visit. While
they would bring him food at other facilities, they do not
18 bring him food at Care Meridian.

19 Care Meridian is a 24/7 care facility. He sees two
20 doctors there, Dr. Vasile and another whose name he does not
know. There are two nurses per day, each on a 12-hour shift.
When his wife is not there, the nursing staff cares for him.

21 He no longer takes medication for pain. He is now off
22 the ventilator. He no longer takes medication for sleep. He
believes he sleeps well, and sometimes naps during the day.
23 He does still take medication for muscle spasms and for other
things that he cannot recall. The nurses administer his
24 medications.

25 His condition has improved over time. He does not know
what treatment he might still need in order to enable him to

1 go home. He does still get several forms of therapy.

2 REDIRECT EXAMINATION:

3 He has seen Dr. Vasile at Care Meridian one time. He has
4 seen the other doctor one time. He does not see a doctor every
day.

5 He saw Dr. Patterson often at Casa Colina, but not every
6 day. He believes he saw the other doctors there once a week.


7 He transferred to Care Meridian because they do not have
the proper care for him at Braswell.

8 He would prefer to be at home if the doctor said he could
9 go and his home was appropriately modified.

10 The nursing staff at Care Meridian does not help him the
11 same way his wife does. She would help him more frequently
than they do.

12 He does not remember Dr. Patterson being able to see him
13 at Kindred, Reche Canyon or Braswell. He switched to Dr. Pai
while at Braswell because Dr. Patterson would not go there.

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19 PAUL DEWEESE
20 WORKERS' COMPENSATION JUDGE

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NICOLAS MERCADO,)
)
 Applicant,)
) WCAB No. ADJ8157719
 vs.)
) (VOLUME ONE)
 CO-WEST COMMODITIES/PATRIOT)
 RISK SERVICES,)
)
 Defendants.)
)

DEPOSITION OF
DAVID ROBERT PATTERSON, M.D.
POMONA, CALIFORNIA
SEPTEMBER 11, 2012

ATKINSON-BAKER, INC.
COURT REPORTERS
(800) 288-3376
www.depo.com

REPORTED BY: KAREN ANN MARIANI, CSR NO. 9544
FILE NO.: A6088A8

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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

- - -

NICOLAS MERCADO,)
)
 Applicant,)
) WCAB No. ADJ8157719
 vs.)
) (VOLUME ONE)
)
 CO-WEST COMMODITIES/PATRIOT)
 RISK SERVICES,)
)
 Defendants.)

Deposition of DAVID ROBERT PATTERSON, M.D.,
taken on behalf of Applicant, at 255 East Bonita Avenue,
Pomona, California, commencing at 3:03 p.m., on Tuesday,
September 11, 2012, before Karen Ann Mariani, CSR No.
9544.

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A P P E A R A N C E S

FOR THE APPLICANT:

LAW OFFICES OF BERMAN MORE GONZALEZ
BY: KEITH P. MORE, ESQUIRE
LESLIE J. SMITH, ESQUIRE
2677 North Main Street
Suite 225
Santa Ana, California 92705-6624
(714) 835-5548

FOR THE DEFENDANTS:

LAW OFFICES OF AGHABALA JIN & CARROLL
BY: KELLY M. CARROLL, ESQUIRE
15315 Magnolia Boulevard
Suite 426
Sherman Oaks, California 91403
(818) 788-0810

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I N D E X

WITNESS: DAVID ROBERT PATTERSON, M.D.

EXAMINATION	PAGE
BY MR. MORE	5, 53
BY MS. CARROLL	22

EXHIBITS

(None offered)

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DAVID ROBERT PATTERSON, M.D.,
having first been placed under oath,
was examined and testified as follows:

EXAMINATION

BY MR. MORE:

Q Dr. Patterson, could you state your full name
for the record, please.

A Sure. It's David Robert Patterson.

Q Dr. Patterson, have you ever had your
deposition taken before?

A I have.

Q And how many occasions would that be?

A 75 or greater.

Q Do you feel comfortable with the admonition?
That we can dispense of that and move towards your
testimony?

A Yes.

Q All right. You and I have met before; is that
correct?

A We have.

Q We've had several of your patients and my
clients that just happened to be at Casa Colina or the
TLC Center; correct?

A That's correct.

1 Q You're familiar with Nicolas Mercado; is that
2 true?

3 A I am.

4 Q And you are his primary care physician; true?

5 A Primary treating physician, yes, for workers'
6 compensation.

7 Q Okay. And are you familiar with the injuries
8 that Mr. Mercado sustained?

9 A I am.

10 Q And what are those injuries just overall?

11 A Sure. A spinal cord injury at the C4 level,
12 and it's classified as ASIA B, which is American Spine
13 Injury Association B, which means sensory incomplete.
14 He also has a condition called neurogenic bowel and
15 bladder, respiratory failure with a tracheostomy tube
16 placement, history of a mood disorder including anxiety,
17 and chronic neck pain.

18 Q Is that it for the most part?

19 A For the most part, yes.

20 Q And you began treating him approximately when?

21 A Shortly after his injury. I think that they
22 were missing one other chart, they said. This session
23 of treatment was from May 7 of 2012 until August 3rd of
24 2012, but he was with us for a significant amount of
25 time before that. And I want to say he transferred --

1 yeah, I took care of him 1-18-2012 until 3-26-2012.

2 Q And the date of injury is 12-21-2011; correct?

3 A Right.

4 Q And December 21, 2011 --

5 A I'm sorry. 12-12; right, 2011?

6 Q 12-12 or 12-21? I've got the police report
7 here. Hold on. I'm showing 12-21.

8 A Okay. Maybe we have it wrong here then. Yeah,
9 it's 12-21. You're right.

10 Q Okay.

11 A Thank you. Sorry.

12 Q And I show the police report demonstrates a
13 12-21-2011 date of injury.

14 A All right. Thank you.

15 Q So is it your understanding that on December
16 21, 2011, at that point in time Mr. Mercado sustained
17 the C4 spinal cord injury?

18 A Yes.

19 Q And at that same point in time he developed a
20 neurogenic bowel and neurogenic bladder; true?

21 A Correct.

22 Q And at that same time he had a respiratory
23 failure; correct?

24 A Yes.

25 Q So are you familiar with Labor Code, Section

1 4662?

2 A No.

3 Q Let me read that to you. That's permanent
4 disability, presumption of total disability.

5 "Any of the following permanent disabilities
6 shall be conclusively presumed to be total in
7 character: (A) would be loss of both eyes or the sight
8 thereof. That means you're totally disabled. (B), loss
9 of both hands or the use thereof. That would be total
10 disability. (C), an injury resulting in a practically
11 total paralysis, or (D), any injury to the brain
12 resulting in incurable mental capacity or insanity."

13 And the code section goes on. "In all other
14 cases, permanent total disability shall be determined in
15 accordance with the fact."

16 So you take the whole situation and you can
17 figure that out as well, so if you have any of the top
18 four A, B, C, or D, or in all of the other cases.

19 Do you understand that?

20 A I do.

21 Q Now, you have in your practice been a medical
22 doctor for how long?

23 A Since 1994.

24 Q All right. And over the past several years
25 you've become more and more involved in work-related

1 injuries; true?

2 A Correct.

3 Q And you do have some familiarity with the Labor
4 Code; correct?

5 A Correct.

6 Q All right. And in instances where you have
7 dealt with individuals who have a total practical
8 paralysis, you have in fact deemed them to be 100
9 percent disabled; true?

10 A Yes, both pre and post 2004.

11 Q Okay. Now, in this particular instance with
12 Labor Code 4662 as I read it to you, does -- or did
13 Mr. Mercado lose the use of both of his hands on
14 December 21, 2011?

15 A Yes.

16 Q So at that point in time on December 21, 2011,
17 when he lost the use of his hands, at that point he
18 would be 100 percent disabled according to you; correct?

19 A Correct.

20 Q Now, looking at subsection (C), "an injury
21 resulting in a practically total paralysis," on December
22 21, 2011, Mr. Mercado would also be considered 100
23 percent according to you; true?

24 A You know, the words "practically totally" for a
25 paralytic is difficult, but he does meet that criteria.

1 Even though he's at ASIA B, which means he's sensory
2 incomplete, he doesn't have motor function below the
3 level of his injury.

4 So as you stated earlier, he can't use his
5 hands, he can't use his feet, he can't control his
6 bowel, he can't control his bladder. So he is for all
7 intents and purposes paralyzed, so it does fit the
8 criteria.

9 Q And that would be as of December 21, 2011;
10 correct?

11 A That's correct.

12 Q Okay. Now, in situations like Mr. Mercado
13 where he's had several complications -- you would agree
14 with that statement?

15 A Multiple complications, yes.

16 Q And have you had the ability to work with nurse
17 case managers in the past?

18 A I have, yes.

19 Q And in this particular case, would you believe
20 that it would be reasonably medically necessary to have
21 a nurse case manager on this case?

22 A Yes. He's catastrophically injured, and that's
23 the standard usually.

24 Q Now, you also have made a statement after
25 reviewing the Casa Colina Home Evaluation Summary. You

1 read that document at one point?

2 A I did.

3 Q And you found that the home modifications as
4 outlined would basically be impossible to perform and
5 modify the home that he presently is in; correct?

6 A Correct. And that was also the therapists'
7 opinion as well that it -- they went out to the house
8 and it wasn't accessible at all. And it wasn't even
9 capable of being modified to meet his needs.

10 Q Okay. Now, if in fact Mrs. Mercado and
11 Mr. Mercado wanted to be together, they would have to
12 basically have some type of a home that would be
13 modified and suitable for Mr. Mercado; true?

14 A Correct. Also with care and inside the house
15 as well.

16 Q And I believe that you have indicated that
17 Mr. Mercado requires 24-hour L.V.N. care; is that true?

18 A That's correct. Because of his tracheostomy
19 tube with the history of respiratory failure and then
20 the nature of his spinal cord injury, he requires the
21 higher licensure.

22 Q And L.V.N.'s are allowed to dispense
23 medications as well; correct?

24 A Correct. They're also allowed to enter an
25 orifice, meaning they can catheterize casts and do

1 suppository insertion for a bowel program.

2 Q Now, I believe you said that Mr. Mercado began
3 under your care sometime in January of 2012; is that
4 true?

5 A Correct.

6 Q And did you at some point in time become
7 familiar with Linda Mercado?

8 A I did, yes.

9 Q Now, is it your custom and practice that during
10 the course of your treatment of an individual with a
11 catastrophic injury that you would conduct team meetings
12 with that family and the patient?

13 A Yes.

14 Q Now, I want you to think back from let's say
15 today's date all the way back to January of 2012. And
16 during the course of your treatment, have you had
17 occasion to do multiple team meetings?

18 A We did, yes.

19 Q And during the course of those team meetings,
20 was Mrs. Mercado present at all of those or most of
21 those where the family was allowed to be present?

22 A She was involved with every family meeting.
23 The team meetings that we have where we plan every
24 Tuesday, we don't usually invite the family so the team
25 can freely discuss the patient's needs.

1 But we have multiple family conferences because
2 of the nature of his injuries and discharge planning and
3 his medical issues, and those conferences were also
4 attended -- usually they're run by the rehab doctors.
5 But we even had the pulmonologist doctor, Dr. Sandhu,
6 S-a-n-d-h-u, come into the conference as well to sort of
7 explain his respiratory status.

8 Q Now, I was present at some of those family
9 conferences as was the nurse case manager, Deborah
10 Moore; true?

11 A That's right.

12 Q During those conferences, I noted that most of
13 the patient's responses were made by his wife as far as
14 his needs medically and what was being done for him on a
15 day-to-day basis.

16 Was that your impression as well? Maybe that
17 was a bad question.

18 A No, it's not a bad question. I would say
19 you're right to a certain degree, especially in the
20 beginning because Mr. Mercado wasn't advocating for
21 himself. He wasn't directing his care, and we relied a
22 lot on his wife to help bridge the gap between the
23 medical team and Mr. Mercado.

24 So she was pretty integral in the beginning for
25 the flow of information both ways, you know, from the

1 patient to us and from us to the patient.

2 Q And Mr. Mercado at certain points wasn't able
3 to even talk; correct?

4 A Correct.

5 Q So a lot of his advocating as you put it was
6 done by his wife; true?

7 A Absolutely.

8 Q Now, when you would see Mrs. Mercado, did you
9 have occasion to see her interacting with her husband at
10 any point?

11 A Yes.

12 Q And during points that you did see her, was it
13 true that she was providing some type of care for him?

14 A She was. She was helping integrate everything
15 from his turning schedule to integration with
16 respiratory therapy. He had a lot of secretions,
17 especially in the beginning when he was on a breathing
18 machine, so she helped in that regard.

19 But more importantly, I think she helped with
20 his anxiety. It was even the recommendation of our
21 rehabilitative psychologist, Dr. Skenderian,
22 S-k-e-n-d-e-r-i-a-n, that she be present to help reduce
23 his anxiety because he wasn't following the normal
24 parameters of being able to stay off the ventilator for
25 a longer period of time, what they call vent training or

1 vent weaning.

2 Q In fact, in reviewing some of the nurses'
3 notes, they're filled with just notation after notation
4 about his fear and anxiety over the ventilator and his
5 inability to breathe.

6 Is that your assessment as well?

7 A I'm sure in the respiratory notes as well. It
8 was a big barrier.

9 Q So did you agree or disagree with
10 Dr. Skenderian's recommendation that Mrs. Mercado be
11 present in order to assist in the anxiety and emotional
12 support of Mr. Mercado?

13 A I agreed with it. And, you know, Mr. Mercado
14 even expressed that, that he was more comfortable with
15 his wife present and not necessarily his other family
16 members. It's his wife that he really needed at
17 bedside. But there were times where the other family
18 members had to step in because of the obligations she
19 had, but there were family members here all the time.

20 Q And did you find that to be a reasonable
21 request or recommendation by Dr. Skenderian as far as
22 having Mrs. Mercado present to assist her husband?

23 A Well, it was either that or what I discussed
24 with her, which was put a one-on-one nurse inside the
25 room.

1 Typically when somebody has that type of
2 anxiety on a breathing machine and they're a new quad,
3 it's not uncommon that we request from the insurance
4 company a one-on-one nurse because the issue is, you
5 know, the call light sometimes can be out of reach of
6 somebody that's a quad or can't move their arms or
7 legs. And then if they get into a respiratory distress,
8 you know, there's no real way for them to get ahold of a
9 nurse.

10 So it's -- at times we'll request a
11 one-on-one. In this case we had a family member that
12 could do the job, was okay to do the job because we
13 asked her to do that, you know, to help integrate with
14 the nursing team. So it was either that or a one-on-one
15 nurse.

16 And we came to an agreement, myself, the case
17 manager, Claudia, and the family to use the wife in that
18 capacity.

19 Q Okay. So you asked her to integrate within the
20 team to assist his medical treatment; correct?

21 A Correct, yeah.

22 Q And she was doing that; true?

23 A Yes. And as far as you know, even up through
24 today, she continues to assist and be a part of the
25 medical team that provides treatment for her husband as

1 far as you know?

2 A As far as I know. I had discussion with
3 Dr. Paley, P-a-l-e-y, about two days ago. They keep me
4 updated. I know he's over at Kindred Ontario and, you
5 know, I'm constantly being updated by whatever doctor is
6 caring for him.

7 Q So if I have this right, you had made a
8 recommendation that possibly you would put a one-on-one
9 nurse in the room with Mr. Mercado or you would use
10 Mrs. Mercado instead; correct?

11 A Right.

12 Q Now, that one-on-one nurse would be an extra
13 charge from the facility; correct?

14 A Yes.

15 Q That's not something that Casa Colina does for
16 free.

17 A No, it's not. And generally, you know, we're
18 pretty aggressive about collecting that money as well.
19 I mean, it's an expense.

20 Q Now, you've said that you felt that was a
21 reasonable recommendation by Dr. Skenderian. Did you
22 feel it was a medical necessity as well for the
23 well-being of Mr. Mercado to have his wife present and
24 assist in the integration with the team?

25 A Yes.

1 Q Now, I believe that within the first six-month
2 time period from I'd say January up through July, there
3 was an indication that Mrs. Mercado was here for about
4 12 hours, between ten and 12 hours per day.

5 Was that your understanding?

6 A You know, I can only remember she was always
7 here, so I don't, you know -- I don't know if it was ten
8 or 12 or more. Occasionally, there would be
9 transportation issues where she couldn't get here and
10 somebody like the son would be here. For the most part,
11 she was always here at our request, yes.

12 Q And then from July up through his discharge --
13 I believe he was discharged the first time approximately
14 when?

15 A I believe the first time was March, so January
16 to March.

17 Q Okay. And the reason of the discharge was
18 because he had to get out of the Casa Colina facility
19 just because of Medicare procedures and policies with
20 regard to your facility's billing practices or something
21 to this effect; correct?

22 A Like the stay. There's been some changes in
23 Medicare rule where even nonMedicare patients -- the
24 overall length of stay for diagnostic categories is
25 looked at and the payment can be withheld for other

1 patients based on those criteria.

2 So given the fact that he wasn't at a stage
3 where he could safely go home, we had a discharge plan
4 in conference with the family and elected to send him to
5 a place that could take care of him because of his
6 respiratory and spinal cord injury need, but not
7 necessarily be here in anticipation of hopefully weaning
8 him off the ventilator, bringing him back here, and then
9 sending him to our transitional living center program
10 and then transitioning him to home, hopefully if home
11 modifications or a new home was done by that time or
12 whatever.

13 Q Got it. And then after he was discharged the
14 first time, he was brought back again; correct?

15 A He was.

16 Q And do you know approximately when that was?

17 A I do. He was brought back May 7, 2012.

18 Q And then he remained at the facility under your
19 care from May 7, 2012 to when?

20 A August 3rd, 2012.

21 Q And then he was released on August 3, 2012, and
22 went to Reche Canyon, I believe?

23 A Right.

24 Q Were you or are you familiar with any of the
25 things that happened at Reche Canyon with his care?

1 A You know, only in passing from Dr. Paley, not
2 specifically as a chart or medical record review, but
3 that it didn't go well.

4 Q Okay.

5 A And there were complications based mostly on
6 nursing care and respiratory care that they couldn't
7 handle him basically, so he ended up being transferred
8 to long-term acute care, LTAC. And the reason was the
9 nursing care, the internal medicine, and pulmonary
10 critical care is better at Kindred certainly than at
11 Reche Canyon.

12 Q And have you talked to Dr. Sandhu recently
13 about the respiratory issues that he is now at least
14 getting back to where he may have been when he was
15 released from here in August?

16 A Yes, yesterday.

17 Q What did Dr. Sandhu tell you?

18 A She was surprised that he was weanable from the
19 ventilator. In fact, when he left in August, she wasn't
20 so sure he would be able to come off the ventilator.
21 She thought at best he would have to be on the
22 ventilator at nighttime, but it would be for lifelong on
23 the ventilator and didn't really know why.

24 He didn't really have a good physiologic reason
25 of why that would be. And also, his anxiety was fairly

1 well controlled at the time when we were trying to wean
2 him in July of 2012, but medically he just kept
3 retaining carbon dioxide. And so every time we would go
4 to take him off the ventilator, he would get really
5 somnolent and tired. And his PCO2 in the blood would --
6 I think it got as high as 103 if I remember. It would
7 hang out in the 60's and 80's, so he clearly wasn't
8 exchanging his gases.

9 So when I talked to Dr. Sandhu yesterday, she
10 said, "I think he'll make it. I think he'll get off the
11 ventilator and get him to the TLC and get him home." So
12 her and Dr. Paley vote for reevaluation to come back to
13 Casa Colina.

14 Q Beautiful. And the TLC is the transitional
15 living center here on property; correct?

16 A It is. And it's not really a medical model
17 like the hospital, you know. When people go over to the
18 transitional living center, they have to be very
19 medically stable.

20 Q He's not even close to that yet?

21 A Correct.

22 MR. MORE: I don't have any further questions,
23 Dr. Patterson.

24 Any questions?

25 MS. CARROLL: I do.

EXAMINATION

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BY MS. CARROLL:

Q Are you familiar with the concept of maximum medical improvement?

A I am.

Q Okay. And with respect to the injuries sustained by this particular applicant, have you ever seen people become mobile after a certain period of rehabilitation?

A Yes.

MR. MORE: I'm going to object to the question as vague and ambiguous.

BY MS. CARROLL:

Q In your clinical experience, have you seen people regain mobility with respect to their feet and their hands and bowel function and bladder function after an injury sustained such as the one sustained by the applicant in this matter?

A Yes. If you looked at some of the neurological recovery data that's out there on ASIA B, sensory incomplete, they have about a three to five percent chance of regaining independence.

Q So in this particular case, counsel read for you the Labor Code section. And of significance was the words "resulting in," i.e. a permanent state.

1 So do you believe that the current -- I stand
2 corrected.

3 The state of the applicant on December 21st,
4 2011, when he had the injury was permanent at that point
5 in time?

6 A Not at that point in time, no. I mean,
7 generally you'll give six to 12 months for a neurologic
8 recovery in a spinal cord injury.

9 Q And we are still technically within that
10 window; correct?

11 A We are still within the window, yes, because
12 it's not December yet.

13 Q Got you. Now, counsel mentioned the report
14 prepared by Casa Colina. And in particular, the report,
15 16 pages long, spells out numerous modifications for the
16 applicant's house including the addition of a bathroom,
17 the addition of an additional bedroom.

18 So I'm a little confused. You read this
19 report; correct?

20 A I did.

21 Q So when I read this report, I read all the
22 recommendations of what they said needed to be done to
23 the house. And yet you testified that the house is not
24 capable of modification.

25 So are you saying the recommendations that they

1 have made are not capable of being performed?

2 A According to the therapists, yes. In other
3 words, the therapists went out there and said this is
4 what is necessary. But it's my understanding, correct
5 me if I'm wrong, but there hasn't been an architectural
6 assessment of whether that can even be performed on that
7 dwelling.

8 But clearly, the therapists said he cannot be
9 discharged to that house. And I know --

10 Q As it is right now?

11 A I know. And I know what the report says too.
12 They also had fears that that particular house couldn't
13 be modified to meet that need, and I don't know why.

14 Q So the individuals that performed this home
15 evaluation made recommendations for substantive changes
16 to the frame of the house and the electrical in the
17 house, but they're not architects.

18 A Correct, nor are they contractors.

19 Q So they're in no position to truly comment on
20 what's necessary in order to modify this house?

21 A Just on their experience, right.

22 Q And I believe I asked for the one therapist.
23 How long have they been performing home assessments for
24 you?

25 A Claire?

1 Q Um-hum.

2 A I believe -- I'm not -- employment, I know I've
3 been working with her for probably six or seven years at
4 least.

5 Q Has she been doing home assessments that entire
6 time?

7 A Oh, yes. She's our primary spinal cord
8 therapist.

9 Q All right. Separately, are you familiar with
10 an entity called Cypress Care?

11 A No.

12 Q Okay. They perform many aspects of the medical
13 treatment, both in terms of providing medication,
14 providing home health care, things along that line.

15 They performed a home assessment. Have you had
16 a chance to review this report?

17 A Not that I'm aware of, no.

18 Q Obviously, you would be willing to review it if
19 we provided it to you; correct?

20 A Sure.

21 Q Okay.

22 MR. MORE: Is that something you were going to
23 serve on my office as well, Kelly?

24 MS. CARROLL: My understanding is they
25 forwarded it. But I brought a spare copy, and it's one

1 of the reasons why I wasn't sure if everybody had a
2 chance to review it yet.

3 So I don't want to present it to the doctor
4 without you having had a chance to look at it first, but
5 in providing it to you, will provide it to him
6 afterwards.

7 Q And due to the concerns regarding architectural
8 changes to the house, my understanding is the
9 individuals who performed this do have experience in
10 that respect. And they have also been supplied with a
11 copy of Casa Colina's home health assessment and asked
12 to comment both on the architectural means of performing
13 these changes.

14 So what I'd like to do is reserve my right in
15 your deposition to provide you with their review of Casa
16 Colina's report, and we'll go from there on that.

17 A I look forward to that. Thank you.

18 MR. MORE: Are you saying that they reviewed
19 that?

20 MS. CARROLL: They have reviewed it. They have
21 not provided us with their response to Casa Colina's
22 review. They're going to provide that to us, and we
23 will provide that to all parties.

24 MR. MORE: Okay.

25 / / /

1 BY MS. CARROLL:

2 Q Just on a side note, you had mentioned that
3 individuals with an injury presented by this particular
4 applicant have a three to five percent chance of
5 regaining mobility. I'm assuming that's with respect to
6 hands and feet; correct?

7 MR. MORE: I'm going to object. Before you
8 answer, Doctor, I'd like to state my objection.

9 THE WITNESS: Sure.

10 MR. MORE: Objection. Misstates the testimony
11 of the doctor. The doctor said three to five percent
12 chance of regaining independence, not mobility.

13 MS. CARROLL: Oh, great. Independence.

14 THE WITNESS: Correct.

15 BY MS. CARROLL:

16 Q Independence for what things?

17 A For things such as mobility like ambulation,
18 use of upper and lower extremities on a functional
19 basis. And it would include bowel and bladder function.

20 Q Okay. So when I look at the home evaluation
21 performed by Casa Colina, they provided an entire
22 section on the necessary remodeling to house a new
23 washer and dryer that are front loading so that the
24 applicant can load laundry in and out of the washer and
25 dryer.

1 Is that actually feasible for this applicant?

2 A No. I don't think it will be either.

3 Q So at least with respect to this one issue, the
4 laundry, that's unreasonable given this particular
5 applicant's condition and the future for him?

6 A Right. Statistically speaking, I don't see him
7 doing his own laundry.

8 Q Now, counsel also mentioned a lot of the
9 meetings that took place while the applicant has been
10 here in the care of Casa Colina.

11 In addition to the family meetings and the team
12 meetings, have you had closed-door meetings with counsel
13 here?

14 A Not that I'm aware of, no.

15 Q So you're not -- you don't recall any meetings
16 that have taken place singularly between you and counsel
17 behind closed doors without any other members or
18 individuals present?

19 A No. I mean, he came to one team conference
20 with the whole team there.

21 Q Okay.

22 A And then, you know, he attended all of the
23 family conferences, I believe.

24 Q And there were no subsequent conversations
25 after the team meeting or the family meeting between

1 just the two of you?

2 A No.

3 Q All right. Now, you mentioned that the wife
4 has -- excuse me. Was involved in the family meetings
5 in order to integrate the applicant's medical care;
6 correct?

7 A Correct.

8 Q Okay. What was her input that aided you in the
9 applicant's medical care?

10 A Oh, sure. Everything from where he was
11 emotionally to help with Dr. Skenderian. Also, some of
12 her help in assuring the continuity of our turning
13 schedule for the patient.

14 Q What does that mean when you -- I mean, those
15 are -- pardon me. I'm unsophisticated in this respect.

16 A Sure.

17 Q Assuring the continuity of his turning
18 schedule. What does that involve?

19 A Well, every two hours they have to be turned,
20 patients with insensate skin. And what she would do is
21 she would certainly help grab the nurse and participate
22 in that turning as if we had a one-on-one nurse in the
23 room.

24 Q Okay. So but for her participation, your
25 nurses don't have a schedule? They don't have .

1 something, you know, any kind of a documentation that
2 would tell them, hey, at this time we need to turn the
3 patient?

4 A Well, they do, but they assist. But typically
5 as I testified to earlier, in a catastrophically injured
6 individual we would then do a one-on-one. And we would
7 have that conversation I believe with two case
8 managers.

9 I can't remember who. We had it with -- I
10 think there was a Shelly involved as well as in addition
11 to Deborah.

12 And we talked about just putting a one-on-one
13 in there, and we all collectively came to the conclusion
14 we would have the family provide it.

15 Q Well, I know that was a separate thing that was
16 discussed, the one-on-one nurse, but I'm breaking down
17 each of the things that involve the participation of the
18 applicant's wife.

19 So we have a turn -- you mentioned the
20 emotional. I understand you.

21 A Correct.

22 Q "My husband's feeling this. My husband's
23 feeling that."

24 A Yes.

25 Q Then you talked about the continuity of the

1 turning schedule, and then we talked about every two
2 hours.

3 Now, if the applicant's wife was not there, the
4 applicant could still get turned; correct?

5 A Right.

6 Q Okay.

7 A Especially if we put the one-on-one in the
8 room. That's why I brought that up.

9 Q Let's assume that the one-on-one nurse wasn't
10 there. Would he not get turned? Would your nurses
11 forget to turn him?

12 MR. MORE: I'm going to object. Lacks
13 foundation, incomplete hypothetical.

14 THE WITNESS: There have been times where, yes,
15 the turning schedule hasn't been as consistent as it can
16 be. But for the most part, it would be as timely as
17 possible to the two-hour turning schedule.

18 BY MS. CARROLL:

19 Q So in essence, what we're looking at in terms
20 of this one specific act is the applicant's wife simply
21 going, "Hey, just a reminder. You guys need to turn
22 him."

23 A And she participated in turning him as well.

24 Q How did she participate in turning?

25 A She helps position him, holds his arms. There

1 were opportunities where she would be involved where the
2 respiratory therapist would be involved in the turning.
3 And there's tubing and all sorts of other issues where
4 she would jump right in and help. That's part of
5 rehab. We have to get the loved ones comfortable with
6 touching their injured loved ones.

7 Q Is that more for him or for her?

8 A For both. People have a great fear when
9 they're nonmedically based coming into a medical, you
10 know, arena. And so family training becomes important
11 when you don't know what the outcome is. You have to
12 make her comfortable with the ventilator, comfortable
13 with the tubing, comfortable with turning him, so that's
14 all part of it as well.

15 Q That's her being comfortable with this?

16 A Absolutely.

17 Q Okay. Now, do you have patients in your
18 hospital right now that have to be turned that don't
19 have the assistance of a family member when it comes
20 time to turn them?

21 A Yes.

22 Q And does that prohibit them from getting
23 turned?

24 A No.

25 Q Now, what were some of the other things? We

1 talked emotions, the applicant's wife helped express to
2 physicians in a hospital what the applicant is feeling.
3 This is, of course, all trained physicians with other
4 individuals they observe as well.

5 But we have the turning schedule. What other
6 activities did the applicant's wife help with in terms
7 of integration of medical treatment?

8 A Respiratory. She was good in letting us know
9 when he needed to be suctioned and helping us with the
10 situation I testified to earlier about the call light.
11 Those can easily not be within a patient's reach, so she
12 was a safety valve so to speak for his respiratory
13 status.

14 Q And did the applicant's wife ever actually
15 learn how to suction the applicant?

16 A Yes, she did. She learned how to suction.

17 Q Did she actually do that after she learned how
18 to do it?

19 A Only with the assistance of the respiratory
20 therapist because he required really deep suctioning
21 based on his injury, which you generally wouldn't allow
22 a family member to do. But if there was oral suctioning
23 for secretion management, she did that and was trained
24 in what they call oral management. But she didn't do
25 the -- was not taught to do -- not allowed to do the

1 deep suctioning to the trache. She wouldn't.

2 Q How often did she do the oral suctioning?

3 A I'm not sure. I mean, she was trained in it.
4 You know, I don't know how often he required it.

5 Q Okay. Do you happen to know for a fact that
6 your staff continued to oral suction him after she had
7 been trained to do that?

8 A Oh, I'm sure they did, yes.

9 Q Now, you mentioned the call light. How often
10 did the call light not work for the applicant? Were you
11 aware of any incidences where the applicant was in
12 distress that he couldn't reach the call light and the
13 wife was forced to do it for him?

14 A Yeah, there's quite a few unfortunately because
15 he had neck spasms and spasticity. And she -- there
16 were times when she wasn't here, and that's when we
17 would have a setback in his anxiety because he wouldn't
18 be able to communicate that.

19 He would try and click or grunt when that would
20 happen so somebody passing by could hear it. Because if
21 he didn't have his speaking valve on his trache, he
22 couldn't talk. He didn't have the breath support to
23 talk.

24 So we kept his room in close proximity to the
25 nurses' station and the door where the nurses go in and

1 out of as possible.

2 Q Okay. Is there any reason why if the applicant
3 didn't have anybody in his room, because I'm sure his
4 wife couldn't be there 24/7, he didn't have a speaking
5 trache in case he needed to call for help?

6 A Yeah, he had intolerance to it because of
7 secretions. Because of his anxiety, he didn't feel like
8 he would get enough breath support. So getting him to
9 tolerate the speaking valve was one of the challenges in
10 his rehab.

11 Q So what happened when nobody was there and this
12 happened? You said he would click or grunt and somebody
13 would come to his assistance?

14 A Yeah, absolutely.

15 Q All right. Anything else that she did in order
16 to assist in his medical --

17 A Sure. When we were getting him up out of bed,
18 she assisted in helping the therapist get him down to
19 the gym, get him out of the room. She helped take him
20 when he was -- there were times when he clearly wasn't
21 on the ventilator when she would take him out to the
22 courtyard and areas like that. And because she was
23 trained, we would allow her to do that.

24 Q So as before when I asked the previous
25 question, you have other patients here who don't have

1 family members who have a therapist get them out of bed
2 with no problem; correct?

3 A Correct.

4 Q Her participation was not indispensable;
5 correct?

6 MR. MORE: I'm going to object. Misstates his
7 testimony and it's an incomplete hypothetical.

8 BY MS. CARROLL:

9 Q I will ask you. Was her participation
10 indispensable?

11 A Yes. And if we didn't have her participation,
12 I think we would have had to do what we discussed is put
13 a one-on-one in there. And the one-on-one wouldn't be
14 an L.V.N. in the hospital. The one-on-one would have
15 been a C.N.A.

16 Q I'm a little confused. If you have other
17 patients that have similar to the applicant's condition
18 and they don't have a one-on-one nurse or a family
19 member, how do they get out of bed with the help of a
20 therapist all by themselves?

21 MR. MORE: I'm going to object. Hold on,
22 Doctor.

23 I'm going to object. You are asking two
24 separate things. You didn't give him a hypothetical
25 before when you asked those questions of individuals

1 with similar C4 ventilator quads. You just asked other
2 patients.

3 True, Doctor?

4 THE WITNESS: That's what I was going to say.
5 You used other patients in the hospital, not other
6 patients with a respiratory failure, C4 quad, and a
7 trache.

8 BY MS. CARROLL:

9 Q I asked it in connection with the turning
10 schedule. And I assumed we were still operating under
11 the same assumption, but let's apply it here.

12 Do you have other patients in the same similar
13 condition as this applicant who do not have one-on-one
14 nurses and do not have family members and are taken out
15 of their bed and sent down for therapy via a therapist
16 without outside assistance?

17 A No.

18 Q So every other individual that is in the
19 applicant's condition that doesn't have a one-on-one
20 nurse or a family member has more than the therapist,
21 i.e., two individuals to help them get out of bed?

22 A Depends on their physiologic state, but we --

23 Q We premised this --

24 MR. MORE: Let him finish his statement.

25 MS. CARROLL: No.

1 MR. MORE: He's not done.

2 MS. CARROLL: We premised this on somebody in
3 the same condition as the applicant.

4 MR. MORE: Let the doctor finish his response.

5 THE WITNESS: Currently, we don't have anybody
6 in Mr. Mercado's same condition. On average for a
7 high-ventilated spinal cord patient, we probably get
8 four to six admissions a year because it's a pretty rare
9 injury. And I can tell you that most of the time they
10 have a one-on-one.

11 BY MS. CARROLL:

12 Q Then you mentioned that will be a C.N.A. ;
13 correct?

14 A Correct.

15 Q Okay. And why would it be a C.N.A. versus an
16 L.P.N.?

17 MR. MORE: L.V.N.

18 MS. CARROLL: Well, there's L.P.N.'s and
19 L.V.N.'s.

20 MR. MORE: He testified earlier to L.V.N.

21 BY MS. CARROLL:

22 Q I'm asking you why would it be a C.N.A. as
23 opposed to an L.P.N. Yes, you testified earlier about
24 an L.V.N., but I'm asking you specifically about an
25 L.P.N.

1 A Because we would have the nurse that was the
2 primary caretaker of the patient do anything that would
3 require what was necessary within that scope of
4 practice.

5 In other words, the scope of practice of an
6 L.V.N. is medication administration, intermittent
7 catheterizations. If they have the I.V. certificate, it
8 would be hanging IV's. Otherwise, the R.N. has to step
9 in because it's a hospital environment.

10 So the C.N.A. would simply be doing all the
11 things we discussed earlier like helping with the
12 turning schedule, interacting with respiratory therapy,
13 interacting with the nursing staff and the therapy
14 staff.

15 So you wouldn't need the scope of practice of
16 an L.V.N. That L.V.N. would go back to whatever the
17 rotation is, which is five-to-one in this hospital.

18 Q Now let me ask you something. At any point in
19 the care of this applicant, did you make a request or
20 recommend that a one-on-one nurse be available to the
21 applicant outside of the window in which the applicant's
22 wife was available?

23 A I don't know. I would have to look at the
24 first chart to tell you. I'm pretty sure we did.

25 Q Can I ask you -- not here today, but can you

1 please review your file and provide me with every time
2 you recommended that a one-on-one nurse be available for
3 this applicant when his wife was not available to be
4 there?

5 A I can. And I think there are case management
6 notes. I can ask the case manager to look in her notes
7 as well because she would be the one that would have to
8 interface with the insurance in that situation. So I'll
9 look into the case management notes and then any orders
10 that myself and/or the pulmonologist or the primary care
11 doctor might have written.

12 MR. MORE: You should get an agreement as to
13 how you're going to get paid for your time on that,
14 Doctor.

15 THE WITNESS: Okay.

16 BY MS. CARROLL:

17 Q Okay. And I'm assuming that if you -- as
18 you've testified here today, indicate that but for the
19 wife's presence, a one-on-one nurse should be available,
20 that if a one-on-one nurse is not provided for the
21 applicant outside of the window of the applicant's wife,
22 then that would call into question the necessary
23 presence of the wife.

24 A No, it wouldn't because the nursing staffing
25 grid -- he was -- they have an acuity scale here

1 which -- I don't know. You would have to talk to the
2 director of nurses to where when he was not having a
3 family member present, they shifted the nursing acuity
4 to where he would have I believe an R.N. only. And then
5 that R.N. would only be responsible for I think two
6 other patients.

7 So I think that when he was assigned when
8 family wasn't here, he was -- basically, that nurse only
9 had three patients, if I remember right.

10 Q I don't know. And I'm curious. Do you -- you
11 said you're not familiar with this acuity scale.

12 A I'm not familiar with that. I know they just
13 staff it and that's the nursing function.

14 Q Who maintains the assessment of the acuity
15 scale such that they would be staffing for this
16 particular applicant?

17 A We have a position here called nursing
18 supervisors. And the nursing supervisor on a daily
19 basis makes the nursing schedule based on acuity.

20 Q Do you know who they are, their names?

21 A There's probably eight of them. I know that
22 the overall person responsible for that would be a
23 Daniel Moreno. He's the assistant chief nursing
24 officer.

25 Q And there was no schedule by which -- well,

1 strike that. Let me preface this by saying to the best
2 of your knowledge, there was no schedule that the
3 applicant's wife was keeping in terms of when she was
4 coming here; correct?

5 A I think that's a fair assessment, right. There
6 was no real -- she was constantly consistently here.
7 But when she didn't show, that sort of was a bind
8 sometimes.

9 Q So how would the nursing supervisor know how to
10 schedule this acuity scale in order to make sure that
11 there was this R.N. present because this is necessary
12 when the wife would not be there?

13 A I'm pretty sure they were calling, but I don't
14 know that for sure. I'm almost positive they called the
15 family. We have to do that for other families as well.
16 We assign families for one-on-one for patients where
17 their insurance obviously doesn't pay for it. We offer
18 them that we can provide it for you and you can pay, or
19 we can train you and you can provide it.

20 And every shift the nursing supervisor has to
21 call and make sure somebody's going to show up.
22 Otherwise, we have to staff it accordingly.

23 Q So who would be the person that would be
24 calling the family to say, "Hey, you know, is somebody
25 going to be here? And if so, when?"

1 A The clinical supervisor.

2 Q And who's the clinical supervisor?

3 A Like I said before, there's multiple ones.

4 Daniel Moreno has the authority over them, but --

5 Q So the nursing supervisors are the same thing
6 as the clinical supervisors, one and the same?

7 A Clinical nursing supervisor, yes.

8 Q So not a different body or a different
9 department?

10 A Same person.

11 Q All right. And so as far as your understanding
12 is, they would be calling up the family, asking the
13 family, "When are you going to be here so that we can
14 schedule our acuity scale around that?"

15 A Yes.

16 Q So in that sense, would they be clocking when a
17 family member walked in the door and when a family
18 member walked out the door?

19 A I don't know about clocking. But keeping a
20 log? I don't think so.

21 Q Well, Doctor, counsel is going to submit a
22 request that the applicant's wife get paid for the time
23 that she has spent here. I mean, you run a hospital.
24 People clock in, they clock out. They demand payment
25 for the time that they're there.

1 So one of the key questions here that we're
2 going to run into is when was she actually here? I
3 mean, I'm sure he'd like it to be 12 hours a day every
4 day, but that's just not possible as you've already
5 pointed out in your testimony.

6 So my question is how do we -- and this helps
7 us. Because by all means, if you have a department
8 that's calling up the family and saying, "When are you
9 going to be here on this day," and I have a calendar of
10 every day a family walked in the door and when they
11 walked out the door, that helps us considerably.

12 A Yeah. They don't keep that, though. I know
13 they would keep that from shift to shift, but I don't
14 think they store that anywhere. I'm sure that gets them
15 through the first 12 hours of their shift, and then that
16 gets passed on. I'm sure it's stored and you'd have to
17 talk to them.

18 That's a good question, a good point. Other
19 than, you know, looking at each individual note and
20 noting family present, you could probably do that and go
21 through every day there's nurses' notes.

22 Typically they'll write if the family is
23 present, but it's not going to show you what you want
24 which is they came in at 8:00 o'clock in the morning and
25 left at 8:00 o'clock at night. It won't do that for

1 you.

2 Q But then we also get back to the situation of
3 there are times when the wife would be available to say,
4 "Hey, I think somebody needs to suction him."

5 A Right.

6 Q But then you have nurses who do rounds as well;
7 correct?

8 A Absolutely.

9 Q So the nurse would obviously come and check on
10 him and note that he needs to be suctioned; correct?

11 MR. MORE: I'm going to object. Incomplete
12 hypothetical, lacks foundation, and assumes facts not in
13 evidence. Also calls for speculation unless you have a
14 specific particular day you're talking about, Counsel.

15 Do you know what time it is?

16 THE REPORTER: Yes, it's 3:54.

17 BY MS. CARROLL:

18 Q He raises a very interesting point. So how do
19 you know when the applicant's wife's participation was
20 indispensable as opposed to, you know, her providing a
21 service that the nurse would come along and provide it?
22 It's speculation; correct?

23 A Not really, because it's a period of coverage
24 and it's sort of no different than when we use the
25 one-on-ones in the hospital. Well, if the patient is

1 agitated let's say from a brain injury, there might be
2 only one intervention for 25 minutes that that
3 one-on-one provided, but what it did was prevent things
4 from happening. By their very presence, it may have
5 prevented agitation, maybe prevented a fall.

6 You can use the same analogy and logic in this
7 case, which is if somebody's at the bedside, it's not
8 only -- it's not reactionary alone. It's also
9 preventative.

10 So do respiratory therapists do rounds? Sure.
11 Would the nursing do rounds? Absolutely. So would the
12 C.N.A. But by having somebody present in the room,
13 you're hopefully allowing some, as we talked about the
14 psychological benefit of it, allowing, you know,
15 Mr. Mercado to sort of control his anxiety to a certain
16 degree by just having somebody there which would prevent
17 a whole host of things.

18 Q Okay.

19 A Not just medically.

20 Q And if the applicant's wife was not there at
21 all -- let's say hypothetically speaking the applicant
22 didn't have a family member at all. Then your staff by
23 virtue of what you've already pointed out I guess would
24 elevate his case in the acuity scale to make sure there
25 was a nurse making rounds more often; correct, or giving

1 more attention?

2 A Correct.

3 Q Do you know how much additional cost that care
4 would be under your program if he were in a heightened
5 level under the acuity scale? Would it result in a
6 change in the charges at all or do you know?

7 A You know, I don't know. There's two levels,
8 but it depends on the contract with the specific
9 insurance company.

10 You know, he's already at the maximum level by
11 the fact that he's on a breathing machine, so I normally
12 do acuity. I think it's just a loss leader, so to
13 speak.

14 Unless you occupy a whole room and ask for the
15 bed occupancy of that room, then that's a whole
16 different contract where you want that bed empty so that
17 family members can be there.

18 So then I know they do different contract
19 negotiating. And I know when we do enter a one-on-one
20 agreement, they get that outside of what the daily
21 contractual rate is.

22 But generally when we go to a three-to-one
23 acuity scale, they're not going back to insurance
24 companies and asking for more.

25 Q Okay. So if the applicant were under a

1 heightened acuity scale, to the best of your knowledge
2 that wouldn't be a change in rate. It would only be if
3 there was a one-on-one nurse.

4 A In this case because he was probably at the
5 maximum rate based on his diagnosis and the fact that he
6 has a breathing machine.

7 Q And if the applicant did not have a family
8 member or anybody who could be there, you would elevate
9 the acuity scale?

10 A Correct.

11 Q Okay.

12 MR. MORE: Counsel, I've got some follow-up
13 questions. So we are roughly at 4:00 o'clock. If you
14 want to reschedule the depo and --

15 MS. CARROLL: We're going to have to do
16 another. And can I make a suggestion that we do it
17 after all of the home assessment has been reviewed and
18 he's had a chance to take a look at it and prepare for
19 next depo?

20 MR. MORE: Just depends on whether we're in --

21 MS. CARROLL: On what's in it?

22 MR. MORE: -- agreement on the issues that
23 we're talking about.

24 MS. CARROLL: Okay.

25 MR. MORE: So Doctor, I don't want to belabor

1 the points.

2 MS. CARROLL: Actually, can I just ask one more
3 question before or do you think you're going to need the
4 extra time or do you --

5 MR. MORE: Yeah. I mean, he's on one hour, my
6 time. You have taken up about 40 minutes of that time,
7 so I don't --

8 MS. CARROLL: Well, does that mean you're going
9 to pay for this and you're not going to submit the
10 request for reimbursement to my client?

11 MR. MORE: I'm going to submit the request.

12 MS. CARROLL: Okay.

13 MR. MORE: I'm advancing that cost with no
14 guarantee that you're going to pay it. So if you're
15 telling me on the record that I will advance the cost
16 and then you're going to reimburse me within 14 days,
17 I'll be happy to let you sit here all day.

18 MS. CARROLL: Okay. Fair enough, because
19 actually you beat me to the punch. I was going to
20 depose him myself. So by all means my client will be
21 paying for this deposition, but then that makes it both
22 our deposition.

23 MR. MORE: That's not a problem.

24 BY MS. CARROLL:

25 Q I just want to ask one real quick question.

1 You had mentioned that while the applicant was at Reche
2 Canyon you did not review the chart, but you had I guess
3 in essence heard some things; right?

4 A Correct.

5 Q Who did you hear them from?

6 A I heard them from the family member. I heard
7 them from I believe it was Pat in our admissions
8 department that Mr. Mercado wanted to be transferred to
9 Kindred Ontario. I'm not entirely sure if I heard it
10 from Dr. Paley. I can't recall.

11 Q And which family member did you hear things
12 from?

13 A The wife.

14 Q The wife?

15 A She called and left a message with Olga, sort
16 of a desperate message that she wanted to get out of
17 Reche Canyon.

18 Q All right. You had mentioned that some of the
19 things that you had heard were regarding the nursing
20 care; correct?

21 A Right.

22 Q Who were those comments made by, Pat or the
23 wife?

24 A I think it was Pat. Actually, it was the
25 admissions department.

1 Q And what were those comments in particular?

2 A Just generality. They were not happy with the
3 nursing care.

4 Q So since they were general statements and you
5 don't know the specifics, you don't know if the
6 objections to the nursing care were reasonable
7 objections; correct?

8 A That's correct.

9 Q And you said you were involved with the
10 applicant's care early on in this case when he first
11 came to Casa Colina; correct?

12 A Yes.

13 Q And do you recall very early on in the
14 applicant's treatment here that the applicant's wife had
15 actually requested that the applicant be transferred to
16 Reche Canyon?

17 In particular, in the beginning of January.
18 And I mean I have on or about January 13th that a
19 discussion took place with the applicant's wife, and she
20 was requesting transfer to Reche Canyon.

21 A Yeah. I think I do recall that. And I recall
22 most things were for the family revolved around certain
23 geographics to get here, wanting somewhere that was
24 closer. I know that that's one of the reasons we had
25 Dr. Sandhu come in in the first family conference to

1 talk about his pulmonary status and that fact that she
2 really wasn't feeling too comfortable at that point in
3 time about a lower level of care.

4 Q So -- and I have a note here to that effect
5 that there was discussion in January following request
6 to transfer to Reche Canyon regarding the caliber of
7 treatment available to the applicant in different
8 facilities; correct?

9 A Caliber? I don't know what that means. I
10 think more about the lower level of care. This is a
11 higher level of care than Reche Canyon.

12 Q Yeah, I guess that's assumed. So as you had
13 mentioned early on, it was your impression that the
14 family was concerned with the distance. And they had to
15 be counseled on the level of medical care as an element
16 to be taken into consideration; correct?

17 A Correct. I think that, you know, it was stress
18 on the family to come this far. And I know that even if
19 we wanted to discharge him to say like a Care Meridian
20 because they were certainly in the mix--they have a lot
21 of experience in taking care of spinal cord injury--they
22 could have handled him at that point in time.

23 It was geographically just too far for the
24 family, which is one of the reasons he had chosen Reche
25 Canyon.

1 Q So to the best of your knowledge, the reason
2 why Reche Canyon was selected was due to distance,
3 making distance the primary factor over the caliber of
4 medical care?

5 MR. MORE: I'm going to object. That misstates
6 his testimony.

7 MS. CARROLL: You know, you don't have to
8 answer. I think you already did.

9 You can go ahead and -- you had some questions
10 you wanted to ask, I know.

11

12

FURTHER EXAMINATION

13 BY MR. MORE:

14 Q So Doctor, when Mrs. Mercado was having to
15 travel from their home on Olive Street in San Bernardino
16 all the way to here, she expressed concerns about the
17 distance; true?

18 A True.

19 Q And she had made request to Deborah Moore, the
20 nurse case manager who was supposed to be providing her
21 with basically what medical necessity her husband needed
22 and take care of her. She had requested that they pay
23 for mileage.

24 Did you think that was an unreasonable request
25 for Mrs. Mercado to be paid mileage to come and assist

1 her husband?

2 A No, I've seen it before in other cases. Yes.

3 Q And in fact, you made a recommendation as the
4 primary treating physician in a work comp case that
5 either the applicant be provided with one-on-one care or
6 Mrs. Mercado would integrate within that care being
7 provided by your team. True or false?

8 A It's true.

9 Q And in fact, you discussed that with the nurse
10 case manager, Deborah Moore, and Shelly; true?

11 A Correct.

12 Q In fact, that was more of a cost savings to the
13 insurance company than it was a matter of who's going to
14 provide that care, Mrs. Mercado or the insurance
15 company; correct?

16 A Yeah, it was a cost savings. But I don't think
17 that's how we rendered the decision, so to speak.

18 Q Because I remember being in team meetings, and
19 that was a discussion as to whether or not there was
20 one-on-one care being necessary. And you said it was
21 being -- it should be necessary and was necessary for
22 Mr. Mercado to have that one-on-one care.

23 Do you remember making those statements?

24 A I do.

25 Q Okay. So regardless of whether or not

1 Mrs. Mercado suctioned her husband, turned her husband,
2 any which way you look at it, she provided a service
3 that you made a recommendation for; is that true?

4 A Correct.

5 Q And she has been doing that since January when
6 you took over as the primary treating physician in this
7 case; correct?

8 A For the points of care that she was -- I was
9 involved with here, right.

10 Q Right. So when he would be discharged, whether
11 you are under the assumption or not, you believe that
12 she still continued with the same continuity of care
13 that she had been providing when Mr. Mercado was here;
14 true?

15 A Correct.

16 Q All right. So whether it would be eight hours,
17 ten hours, or 12 hours, that would depend on whether or
18 not Mrs. Mercado kept track; correct?

19 A Right.

20 Q Do you know if Mrs. Mercado had made a request
21 back in January or February for Deborah Moore to
22 reimburse her for her time? Do you know that?

23 A I thought it came up in a team conference --
24 the family conference actually.

25 Q And Miss Moore, the nurse case manager, was

1 going to get back to Mrs. Mercado. Wasn't that her
2 response in the team meeting?

3 A It was, yes. And the sons were asking as well.

4 MR. MORE: All right. I don't have anything
5 else.

6 I think you have to go, Doctor; right?

7 THE WITNESS: I have to, unfortunately.

8 MS. CARROLL: Okay. I had some follow-up
9 anyway for Volume Two.

10 MR. MORE: So let's stipulate to relieve the
11 court reporter of her duties under the Code of Civil
12 Procedure. We'll make this Volume One of
13 Dr. Patterson's deposition.

14 I believe that we have an agreement by defense
15 counsel that she will be paying for the deposition, this
16 volume as well as Volume Two, but I will advance it
17 because Dr. Patterson requires payment be made on the
18 day of the deposition.

19 Is that correct?

20 MS. CARROLL: I will reimburse. If you are
21 adamant that it be paid today, we'll be happy to put it
22 in line for payment.

23 MR. MORE: It's up to you, Doctor.

24 THE WITNESS: It's okay with me how you want to
25 do it.

1 MS. CARROLL: You want to just tell me how much
2 or do you have any kind of statement that I can pass
3 along to my client? I'll just tell her to pay it.

4 THE WITNESS: Okay.

5 MR. MORE: Dr. Patterson, do you want to
6 receive Volume One so you can review it and make changes
7 and corrections or do you want to waive signature on the
8 depo?

9 THE WITNESS: I'd like to have it and sign it.

10 MR. MORE: Fine. So the court reporter will
11 make the deposition of Volume One available to
12 Dr. Patterson. We will ask that Dr. Patterson have 45
13 days to read it and -- well, let's make it 30 days --

14 THE WITNESS: 30 is fine.

15 MR. MORE: -- to read it, make any changes or
16 corrections, and sign it under penalty of perjury. He
17 will notify my office -- well, actually, you can notify
18 both counsel's office of any changes or corrections.

19 The court reporter will provide you with a
20 sheet that will have space for you to make any changes
21 to the deposition.

22 If you can just send that out to both sides at
23 the same time, that would be great. Sign it under
24 penalty of perjury, and then provide my office with the
25 original transcript.

1 STATE OF CALIFORNIA)
2 COUNTY OF _____) SS.

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I, the undersigned, declare under penalty of perjury that I have read the foregoing transcript, and I have made any corrections, additions, or deletions that I was desirous of making; that the foregoing is a true and correct transcript of my testimony contained therein.

EXECUTED this _____ day of _____ 2012 at _____ California.

DAVID ROBERT PATTERSON, M.D.

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REPORTER'S CERTIFICATE

I, KAREN ANN MARIANI, CSR No. 9544, Certified
Shorthand Reporter, certify:

That the foregoing proceedings were taken
before me at the time and place therein set forth, at
which time the witness was placed under oath by me;

That the testimony of the witness, the
questions propounded, and all objections and statements
made at the time of the examination were recorded
stenographically by me and were thereafter transcribed;

That the foregoing is a true and correct
transcript of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any attorney of the parties nor financially
interested in the action.

I declare under penalty of perjury under the
laws of California that the foregoing is true and
correct.

Dated this 18th day of September 2012.

KAREN ANN MARIANI, CSR No. 9544

"Dr Pai Progress Note"

March 2, 2013

S: This 52 y/o gentleman continues to have problems like muscle spasms which causes some pain. He seems to be worse when he is put down flat all the way to change his clothes or from a bowel or bladder accident. He required vent all the time, however he does have periods where is off the vent. At night he still needs to be on the vent and sometimes during the day. Pt is full assist and is transferred from the bed to the wheelchair. He is able to make his needs known and does have a great deal of assistance with his spouse. Pt had this quadriplegia from a work-related injury. Pt is anxious to go home as soon as his home is modified to provide for his physical needs. A home eval was completed and it appears to provide for the modifications so that the pt can be released. There may be some minor changes required but that should be worked out. He is worried about his heart rate going down. He is also worried about taking his foley catheter out, because the last time it was removed he was not able to void. His foley got blocked recently that caused him some discomfort and anxiety.

O: Vitals are stable. HEENT: Unchanged from before. LUNGS: Clear to auscultation bilaterally with decreased breath sounds at the base. HEART: Regular rate and rhythm with ejection systolic murmur. ABD: Soft, non-tender, bowel sounds positive, PEG in place, no mass. EXT: DJD, wasting, increase tone. SKIN: Age-related changes. CNS: High Quadriplegia with generalized wasting with neurogenic bladder

- A:**
1. Acute on chronic respiratory failure secondary to quadriplegia secondary to cervical spine injury secondary to work-related injury, Rec Physiatrist consult.
 2. Neurogenic bladder and bowel secondary to quadriplegia secondary to spinal cord injury, rule out BPH which might be making his outlet obstruction worse will consider Urology consult.
 3. Sinus Bradycardia, from Zanaflex, will taper and try Robaxin. EKG R/o Pericarditis. I will order for Cardiology consult.
 4. Hypertension.
 5. GERD.
 6. COPD with Chronic allergic rhinitis.

P: There is no medical reason that the applicant cannot be discharged except the fact that the home has yet to be modified. If the modifications were already completed Mr. Mercado could have been discharged home. He will need full time trained care giver. He will need medical equipment. He will need to follow up by Physiatrist on discharge. He will need to be on ventilator from time to time because of his chronic respiratory failure. His condition is permanent and stationary. His spinal cord injury and quadriplegia are permanent. He will need future medical for the remainder of his life and based upon LC section 4662 Mr. Mercado is 100% disabled. He must be provided with transportation for all activities of daily living inclusive but not limited to medical appointments. Pt and family are aware of poor prognosis.

Shantharam Pai, M.D.
Braswell's Colonial Care

PHYSICIAN PROGRESS NOTES

MERCADO, NICOLAS
DOB: 10/29/1960

0208





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PHYSICAL MEDICINE AND REHABILITATION AND ELECTRODIAGNOSTICS

March 8, 2013

**PRIMARY TREATING PHYSICIAN
PHYSICAL MEDICINE & REHABILITATION
DOCTOR'S FIRST REPORT OF OCCUPATIONAL INJURY**

**Review of Records
Request for Authorization**

PATIENT: MERCADO, Nicolas
DOB: 10/29/60
DOI: 12/21/11
EMP: Co-West Commodities
CLM: 434-111-0000384

REFERRING SOURCE: Keith More, Esq.
Via facsimile 714-543-5561

INTRODUCTION:

Patient seen at Braswell Colonial Care skilled nursing facility, Redlands, California, with Keith More, applicant attorney, and wife present.

Discussed case with Craig Sanders, pulmonary P.A., and Lisa McClain, C.R.T.T., R.C.P., from the facility.

HISTORY:

Mr. Mercado is a 52-year-old male who was involved in a motor vehicle accident, 12/21/2011. Reportedly patient was driving a tanker truck, which lost controlled and rolled over. Patient reportedly was extricated from the vehicle and brought to Riverside Community Hospital. Patient was reportedly noted to have no movement in arms and legs. Solu-Medrol protocol was started and MRI was ordered urgently. Impression as follows: 1) Fracture of left lamina C4 with displaced fracture fragments posterior lateral to the spinal canal, fracture of the inferior articulating facet of C4 with displacement, subsequent facet dislocation at C4-C5 on the left, 3 mm anterior subluxation C4 on C5 and 2 mm posterior disc protrusion, severe spinal canal stenosis, small amount of epidural edema and possible hemorrhage posterior to C4 vertebral body. 2) Cord contusion centered at C4-C5 level, focal area of acute hemorrhage of cord extending to left of midline extending 10 mm craniocaudal

RE: MERCADO, Nicolas

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March 8, 2013

HISTORY: (continued)

extent 3 mm anterior-posterior 4 mm transverse extent, cord edema ischemia, contusion extends from C3-4 level to C4-5 level. 3) C5-C6 with 1-2 mm retrolisthesis C5 on C6 and 2 mm posterior disc protrusion, moderate spinal canal stenosis. 4) C3-C4 level 2 mm posterior disc protrusion, spinal canal mildly stenotic, probable small fracture of inferior articulating facet of 3 on the left with bone edema. 5) Loss of usual flow void signal in the left vertebral artery, possibly decreased flow, slow flow or occlusion left vertebral artery.

Hospital course significant for respiratory failure requiring ventilatory support. Comorbidities reported as rib fracture, pneumothorax, pulmonary contusion and facial laceration.

Patient underwent the following surgical intervention by Clifford Douglas on 12/22/11. Stage I: 1) C4-C5 and C5-C6 total anterior cervical discectomy two levels. 2) C5 corpectomy and foraminotomy with nerve root decompression bilaterally at C4-5 and C5-6. 3) C4 to C6 strut cage placement utilizing the PEEK cage placement device. 4) C4-C6 anterior interbody arthrodesis utilizing autograft from local corpectomy bone, allograft mixed with new cell and NuCel stem cell bone growth medium and Evo3 demineralized bone matrix. 5) C4-C6 screw plate internal fixation utilizing the titanium K2 Medical Pyrenees plating system. 6) Microscope with micro-dissection. 7) Intraoperative fluoroscopy. Stage II: 1) Posterior cervical stabilization through separate incision with screw rod fixation from C4 to C5-C6 lateral mass utilizing the K2 medical mini Denali system with crossbar placement. 2) Dorsolateral interlaminar interfacet and lateral mass arthrodesis utilizing autograft allograft, NuCel and Evo3 from C4 to C5-C6 bilaterally. 3) Intraoperative fluoroscopy.

On 12/23/11, patient underwent inferior vena cava filter placement.

On 1/6/12, patient underwent tracheostomy procedure by William Alex, M.D.

On 1/11/12, patient underwent percutaneous endoscopic gastrostomy tube placement.

Reportedly patient then transitioned to Casa Colina Rehab, then Kindred, then back to Casa Colina, then to Reche Canyon skilled nursing facility, then back to Kindred, then to Braswell Colonial Care skilled nursing facility since October 2012.

RE: MERCADO, Nicolas

-3-

March 8, 2013

SUBJECTIVE COMPLAINTS (FUNCTIONAL HISTORY):

RESPIRATORY: Patient, wife and respiratory team report that patient is off the vent in the daytime and receives positive pressure ventilator treatments every 4 hours. Patient, wife and respiratory team report that patient remains on the vent in the evening. Patient's tracheostomy is still in place and uses a Passey-Muir valve. Patient reports he tolerates using the valve all day.

MOBILITY/ACTIVITIES OF DAILY LIVING: Patient is currently dependent for transfers with a Hoyer lift. Patient reports that he is out of bed daily and can tolerate being up in the chair 6 to 8 hours. Patient reports he is dependent for activities of daily living. Patient reports that he has not had any recent therapy and, therefore, has not been able to work on activities of daily living with adaptive equipment, range of motion or cardiovascular exercises.

EQUIPMENT: Patient has a power wheelchair with a Hybrid Elite cushion. The chair is less than one-year-old. Patient reports that difficulties include discomfort in the chair.

SKIN: Patient and wife report a history of pressure sores that were relieved with conservative treatment. No current pressure sores secondary to the fact that the wife is present at the facility and checks his skin routinely, supports position change for pressure relief and changes diaper with episodes of bowel incontinence if not done by the facility staff.

Patient performs pressure relief while in the chair with recline/tilt-in-space power device.

PODIATRY: Wife provides nail care. Reportedly podiatrist not available through facility for nail care.

DENTAL: Patient reports that a gold cap has fallen out. This is presenting a medical problem of difficulty in eating, which is affecting patient's nutrition. It is causing difficulty with food being stuck in this area and patient is unable to perform oral hygiene to address the excess food.

SPASTICITY: Patient and wife report that spasticity interferes with function and respiratory status. Patient reports it does not interfere with sleep. Patient notes that when trunk spasticity occurs, it causes pressure, which knocks the air out of his lungs and makes it difficult for him to breathe.

RE: MERCADO, Nicolas

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March 8, 2013

SUBJECTIVE COMPLAINTS (FUNCTIONAL HISTORY): (continued)

Current medications for spasticity include baclofen 20 mg q6h. Tizanidine was recently discontinued secondary to reports of causing bradycardia. Valium 10 mg daily was recently added.

PAIN: Patient reports bilateral shoulder and posterior shoulder pain. Lidoderm patch being applied to the posterior right shoulder.

NEUROGENIC BOWEL: Patient is currently on no bowel program. Patient has incontinence in the diaper and reports episodes where he has been sitting in stool for 3 to 4 hours. Patient's wife provides the assistance for cleaning up of stool after these incontinence episodes.

Patient had been on a bowel program while in rehab at Casa Colina that was effective and routinely evacuating his stool without incontinence in between bowel programs.

NEUROGENIC BLADDER: Patient currently has a Foley catheter. He had an episode of catheter being clogged, which caused autonomic dysreflexia.

Patient reports that he attempted to direct his care in asking for catheter to be unclogged, but staff was not familiar with autonomic dysreflexia and its inciting stimuli.

Patient has not seen urologist yet for baseline urodynamics and cystoscopy and to discuss options of bladder management.

ADJUSTMENT: Patient uses family to address his sadness and depression from the disability. He reports that he feels more sad if family is not able to be with him. Patient would like to have community re-entry activities with his church, pastor, family, friends.

HOME: Reportedly home evaluation was performed by Casa Colina Rehab and modification recommendations were made.

ATTENDANT: Wife being compensated for 8 hours per day of attendant care.

SWALLOW: Patient on a regular diet. Medications administered through G-tube.

RE: MERCADO, Nicolas

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March 8, 2013

MEDICATIONS:

Multivitamin with mineral one daily, vitamin C 250 mg b.i.d., baclofen 20 mg q6h, calcium carbonate/vitamin D 500 mg b.i.d., Lidoderm patch p.r.n., cholecalciferol 400 units daily, Ampyra 10 mg q12h, psyllium one packet daily, Lovenox 30 mg subQ daily, Pepcid 20 mg q12h, fludrocortisone 0.1 mg daily, Valium 10 mg daily, Dulcolax suppository p.r.n. no BM times 3 days, p.r.n. Tylenol, MOM, enema, polyethylene glycol, clonidine.

OBJECTIVE FINDINGS (FOCUSED PHYSICAL EXAM):

RANGE OF MOTION: Limited, bilateral shoulders, wrists, fingers.

TONE: Modified Ashworth II, bilateral upper and lower extremities.

PALPATION: Subluxation at bilateral shoulders. Myofascial trigger points, posterior shoulder and scapular region.

OBSERVATION: Tracheostomy in place.

MOTOR:

	<u>Rt</u>	<u>Lt</u>
C4:	5	5
C5:	5	0
C6:	0	0
C7:	0	0
C8:	0	0
T1:	0	0

DIAGNOSES:

1. Status post work related motor vehicle accident, 12/21/11.
2. Cervical spinal cord injury.
3. Probable head trauma with reports of confusion at time of injury.
4. MRI, 12/21/11, revealing fracture, left lamina C4, fracture articulating facet C4 with displacement, facet dislocation C4, C5 on left, anterior subluxation C4 on C5 with 2 mm posterior disc protrusion with subsequent severe spinal canal stenosis, small amount of epidural hematoma and possible hemorrhage posterior C4 vertebral body, cord contusion C4-C5, acute hemorrhage C4-C5, cord edema/ischemia/contusion, C3-4, C4-5, 1-2 mm retrolisthesis C5-C6, 2 mm posterior disc protrusion C5-C6 with subsequent moderate spinal canal stenosis, 2 mm posterior disc protrusion C3-C4, mild stenosis.

RE: MERCADO, Nicolas

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March 8, 2013

DIAGNOSES: (continued)

5. 12/22/11, surgical intervention by Clifford C. Douglas, M.D., 360 degree anterior and posterior cervical spinal décompression, stabilization with arthrodesis with a post-operative diagnosis of unstable three column spinal injury with fracture, dislocation at C4, C5 and secondary quadriplegia.
6. Status post IVC filter placement 12/23/11.
7. Comorbidities of respiratory failure requiring vent and tracheostomy placement 1/6/12, rib fracture, pneumothorax, pulmonary contusion, facial laceration.
8. Status post percutaneous endoscopic gastrostomy tube placement 1/11/12.
9. Right C5, left C4 tetraplegia, ASIA A.
10. Neurogenic bowel.
11. Neurogenic bladder.
12. Spasticity.
13. Musculoskeletal/myofascial pain.
14. Adjustment disorder.
15. Risk for aspiration.
16. Risk for skin integrity impairment.
17. Risk for toenail impairment.

TREATMENT PLAN:

1. **RESPIRATORY:** Recommend to continue with current regimen of vent in the p.m.'s and daytime IPPV treatments every 4 hours.

Current pulmonary team feels that patient will not be a candidate to be off the vent 24 hours.

If patient is unable to be weaned, then will consider a referral for percutaneous placement of electrical stimulation to the diaphragm to allow patient less or no time on the ventilator.

Patient at risk for aspirations secondary to retained food in the site of missing tooth. Will need to have aggressive oral hygiene before and after all meals to clear out any retained food and decrease risk of aspiration of food, which will increase risk of pneumonia.

2. **MOBILITY/ACTIVITIES OF DAILY LIVING:** Patient has not been involved in physical therapy, occupational therapy and speech therapy for a significant amount of time.

RE: MERCADO, Nicolas

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March 8, 2013

TREATMENT PLAN: (continued)

Patient has potential to benefit from therapeutic intervention by skilled therapist familiar with spinal cord injury.

Areas that can be improved from a functional standpoint include activities of daily living with adaptive equipment, respiratory and breath support, evaluate swallow and potentially take pills and food by mouth, evaluate seating for improved comfort, adaptive technology and environmental control unit evaluation, range of motion to decrease spasticity.

3. EQUIPMENT: Once patient's long term housing has been identified, will need a comprehensive evaluation for all adaptive equipment and modifications to maximize patient's functional potential in the home.

4. SKIN: Continue with close oversight, assessment and preventative measures. For any episodes of skin breakdown, patient should be evaluated by clinician specializing in pressure sore in spinal cord injury.

All seating and pressure relief devices should be routinely addressed, evaluated, modified and replaced as needed for appropriate pressure relief. Patient should have close assessment of nutritional status for appropriate skin integrity.

5. PODIATRY: Persons with spinal cord injury are at risk of ingrown, infected and fungal nail and, therefore, patient should have routine nail care and treatment of such pathology by a podiatrist familiar with spinal cord injury.

6. DENTAL: Patient's missing cap causes a medical problem related to patient's spinal cord injury as follows: Patient is having difficulty eating that is impairing nutrition which puts him at further risk for pressure sore, impaired immune system and impaired respiratory status. Also, food stuck in this area can then be aspirated, increasing risk of pneumonia which patient is already at high risk from his level of spinal cord injury.

As noted under respiratory, recommend strict oral hygiene before and after all food and recommend dental evaluation to replace the missing cap.

RE: MERCADO, Nicolas

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March 8, 2013

TREATMENT PLAN: (continued)

7. SPASTICITY: Currently patient's spasticity is interfering with function and respiratory status. Reportedly patient did not tolerate tizanidine secondary to brachycardia.

Current baclofen dose at 20 mg q6h can be increased to 30 mg q6h as the maximum dose that I recommend. Secondary medications would include tizanidine (which reportedly patient failed), Dantrium and benzodiazepines which patient is on Valium. However, further medications can cause cognitive impairment and respiratory impairment.

For all of the above reasons, patient should be evaluated for intrathecal baclofen pump to allow for appropriate spasticity management with the least amount of oral sedating medications.

8. PAIN: Patient's shoulder pain is primarily musculoskeletal and myofascial. This would benefit from a physical therapeutic intervention with myofascial release, range of motion, strengthening, appropriate positioning in both the bed and the chair.

To avoid further oral sedating medications, recommend acupuncture as an adjunctive intervention, which is very effective for musculoskeletal and myofascial pain.

9. NEUROGENIC BOWEL: Patient must have a bowel program on a routine basis. This is a medical necessity to routinely evacuate the stool without incontinence.

Current program reportedly does not have the resources or skilled staff to perform this bowel program.

A bowel program should begin with suppository, then up in chair, then digital stimulation. Medications to be adjusted for hard or loose stools. Medications to be adjusted to facilitate motility.

It is unacceptable to have patient have incontinence of stool into a diaper secondary to the high risk of infecting urine, causing skin breakdown and the social unacceptance of this.

RE: MERCADO, Nicolas

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March 8, 2013

TREATMENT PLAN: (continued)

10. NEUROGENIC BLADDER: Continue with Foley catheter for now. Patient will require urology evaluation for baseline urodynamics and cystoscopy. Long term intervention can either be intermittent catheterization or an indwelling catheter and suprapubic probably a better option than Foley catheter for this patient.
11. AUTONOMIC DYSREFLEXIA: Patient has had episodes of dysreflexia related to bladder. Top four inciting stimuli include bladder, bowel, skin and toenails. If patient develops autonomic dysreflexia, increased spasticity, increased neuropathic pain, then these top four areas need to be addressed.

If there is no evidence of any pathology or changes needed for these areas, then next is to look for a syrinx with an MRI of the spine.
12. SPINE: Patient should have routine followup with his spine surgeon or another identified spine surgeon to evaluate that surgical site is healing well, hardware is in place and there is no evidence of syrinx or tethering at the site of injury.
13. ADJUSTMENT: Recommend for patient to work with a neuropsychologist familiar with spinal cord injury to facilitate adjusting to disability as well as patient's new role as an individual and in his family.
14. COGNITION: Reports of patient being confused at the time of original injury if not already done, recommend neuropsychologic testing to evaluate for any cognitive impairment related to the head trauma.
15. COMMUNITY RE-ENTRY/HOME: Recommend for patient to be able to return home with family in appropriate adapted/modified home to meet all of his functional needs related to his spinal cord injury disability and impairment.

While modifications or adaptations vs. identifying a home are being done, recommend for patient to receive his care through a Care Meridian facility. Skilled nursing facility cannot provide the level of acuity and care that is appropriate and medical necessity for a spinal cord injury/tetraplegic.

RE: MERCADO, Nicolas

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March 8, 2013

TREATMENT PLAN: (continued)

Care Meridian will be able to provide skilled nurses that have expertise in neurogenic bowel and bladder, skin care, respiratory care and mobility/ADL as related to nursing. Care Meridian will have skilled physical therapist and occupational therapist familiar with spinal cord injury to address the outlined areas of increased ADL's with adaptive equipment, adaptive technology evaluation, current equipment evaluation, range of motion, endurance, cardiovascular and community re-entry.

Patient should begin community re-integration by participating in visits to the home, visits to friends, visits to church and all medical and community activities of daily living. This will require transportation appropriate for his level of injury and being accompanied by attendant if not requiring respiratory care or LVN/skilled nurse if requiring respiratory interventions.

16. EDUCATION: All of the above was discussed at length with patient and wife and questions were answered.

WORK STATUS:

Permanent and stationary, March 2, 2013, per Dr. Shantharam Pai.

TIME SPENT:

60 minutes review of records. 60 minutes evaluation, case management, counseling. Travel time 3 hours.

I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

"I have not violated Labor Code Section 139.3 and the contents of the report and bill are true and correct to the best of my knowledge. This statement is made under penalty of perjury."

Per labor code 5307.1, additional pages required to properly document the required information will be billed.

Date of report: March 8, 2013

RE: MERCADO, Nicolas

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March 8, 2013

Dated this 12 day of March, 2013 at Los Angeles County, California.

The above report for assessment of injury is not to be construed as a complete physical examination for general health purposes. Only those symptoms which are involved in the injury or which might relate to the injury have been assessed.



ANN T. VASILE, M.D.
California State License No. G071400
Physical Medicine and Rehabilitation

ATV/et

cc: Patriot Risk Services
Adjuster: Julie Hall

Progress Notes

Nicolas Mercado (MR# 118003179)

Progress Notes Info

Author	Note Status	Last Update User	Last Update Date/Time
Vasile, Ann T, MD	Signed	Vasile, Ann T, MD	8/1/2013 5:24 PM

Progress Notes

8/1/2013

**PRIMARY TREATING PHYSICIAN
 PHYSICAL MEDICINE & REHABILITATION
 PROGRESS REPORT/ CARE MERIDIAN TEAM CONFERENCE
 Review of Records
 Request for Authorization**

PATIENT: MERCADO, Nicolas
 DOB: 10/29/60
 DOI: 12/21/11
 EMP: Co-West Commodities
 CLM: 434-111-0000384

REFERRING SOURCE: Keith More, Esq.
 Via facsimile 714-543-5561

INTRODUCTION:

Patient seen at Care Meridian Garden Grove with wife, Care Meridian nursing, Ida/Geraldine, patient's attys Keith More and Patrick Embrey

HISTORY:

Mr. Mercado is a 52-year-old male who was involved in a motor vehicle accident, 12/21/2011. Reportedly patient was driving a tanker truck, which lost controlled and rolled over. Patient reportedly was extricated from the vehicle and brought to Riverside Community Hospital. Patient was reportedly noted to have no movement in arms and legs. Solu-Medrol protocol was started and MRI was ordered urgently. Impression as follows: 1) Fracture of left lamina C4 with displaced fracture fragments posterior lateral to the spinal canal, fracture of the inferior articulating facet of C4 with displacement, subsequent facet dislocation at C4-C5 on the left, 3 mm anterior subluxation C4 on C5 and 2 mm posterior disc protrusion, severe spinal canal stenosis, small amount of epidural edema and possible hemorrhage posterior to C4 vertebral body. 2) Cord contusion centered at C4-C5 level, focal area of acute hemorrhage of cord extending to left of midline extending 10 mm craniocaudal extent 3 mm anterior-posterior 4 mm transverse extent, cord edema ischemia, contusion extends from C3-4 level to C4-5 level. 3) C5-C6 with 1-2 mm retrolisthesis C5 on C6 and 2 mm posterior disc protrusion, moderate spinal canal stenosis. 4) C3-C4 level 2 mm posterior disc protrusion, spinal canal mildly stenotic, probable small fracture of inferior articulating facet of 3 on the left with bone edema. 5) Loss of usual flow void signal in the left vertebral artery, possibly decreased flow, slow flow or occlusion left vertebral artery.

Hospital course significant for respiratory failure requiring ventilatory support. Comorbidities reported as rib fracture, pneumothorax, pulmonary contusion and facial laceration.

Patient underwent the following surgical intervention by Clifford Douglas on 12/22/11. Stage I: 1) C4-C5 and C5-C6 total anterior cervical discectomy two levels. 2) C5 corpectomy and foraminotomy with nerve root decompression bilaterally at C4-5 and C5-6. 3) C4 to C6 strut cage placement utilizing the PEEK cage placement device. 4) C4-C6 anterior interbody arthrodesis utilizing autograft from local corpectomy bone, allograft mixed with new cell and NuCel stem cell bone growth medium and Evo3 demineralized bone matrix. 5) C4-C6 screw plate internal fixation utilizing the titanium K2 Medical Pyrenees plating system. 6) Microscope with micro-dissection. 7) Intraoperative fluoroscopy. Stage II: 1) Posterior cervical stabilization through separate incision with screw rod fixation from C4 to C5-C6 lateral mass utilizing the K2 medical mini Denali system with

crossbar placement. 2) Dorsolateral interlaminar interfacet and lateral mass arthrodesis utilizing autograft allograft, NuCel and Evo3 from C4 to C5-C6 bilaterally. 3) Intraoperative fluoroscopy. On 12/23/11, patient underwent inferior vena cava filter placement. On 1/6/12, patient underwent tracheostomy procedure by William Alex, M.D. On 1/11/12, patient underwent percutaneous endoscopic gastrostomy tube placement. Reportedly patient then transitioned to Casa Colina Rehab, then Kindred, then back to Casa Colina, then to Reche Canyon skilled nursing facility, then back to Kindred, then to Braswell Colonial Care skilled nursing facility since October 2012.

INTERVAL HISTORY:

RESPIRATORY: off vent and tolerating passey-muir valve all day, usually takes off at night, needs bronchoscopy evaluation for either replace trach or decannulation

MOBILITY/ACTIVITIES OF DAILY LIVING: working with PT, OT and increased endurance, increased incorporation of UE with use of adaptive equipment, increased use of power chair mobility, still needs to increase activities out of house/facility

EQUIPMENT: vendor will be evaluating chair for repairs and parts as needed. Await authorized commode. Await authorized diabetic shoes. Requests phone to communicate with family.

SKIN: Patient and wife report a history of pressure sores that were relieved with conservative treatment. Patient performs pressure relief while in the chair with recline/tilt-in-space power device. Team reports skin issues at distal urethra secondary to foley

PODIATRY: Dr Aslmand providing nail care and recommended custom shoes.

DENTAL: Patient reports that a gold cap has fallen out. This is presenting a medical problem of difficulty in eating, which is affecting patient's nutrition. It is causing difficulty with food being stuck in this area and patient is unable to perform oral hygiene to address the excess food. Evaluation by Dr Hom and comprehensive recommendations.

SPASTICITY: patient and team report that spasticity is less of a barrier to function.

Current medications for spasticity include baclofen 20 mg q6h. Valium 10 mg daily.

PAIN: Patient reports bilateral shoulder and posterior shoulder pain, patient reports better with exercise Lidoderm patch being applied to the posterior right shoulder.

NEUROGENIC BOWEL: bowel program instituted- qhs with magic bullet and dig stim, no incontinence or impaction. Hemorrhoids bleeding.

NEUROGENIC BLADDER: Patient currently has a Foley catheter. Patient developing skin issues at distal end of urethra.

Patient has not seen urologist yet for baseline urodynamics and cystoscopy and to discuss options of bladder management such as suprapubic.

ADJUSTMENT/COGNITION: Patient uses family to address his sadness and depression from the disability. He reports that he feels more sad if family is not able to be with him. Patient would like to have community re-entry activities with his church, pastor, family, friends. Patient acknowledges memory problems. Currently works with Dr Morales. Wife has been invited for counseling as well. Patient reports he needs support of wife for his emotional status and request her presence on a daily basis.

HOME: Reportedly home evaluation was performed by Casa Colina Rehab and modification recommendations were made. No modifications were started. Goal is patient to return to community in a wheelchair accessible environment and live with family.

ATTENDANT: wife and Care Meridian staff providing support, wife and patient request for wife to be present at all medical appts.

SWALLOW/NUTRITION: Patient on a regular diet. All food, liquid, calories and meds through mouth. Referral to GI has been made for peg removal.

TRANSPORTATION: patient and family would like to visit family, friends and church

VISION: reports blurry vision, tearing form right eye

OBJECTIVE FINDINGS (FOCUSED PHYSICAL EXAM):

GEN: tearful when spoke about meeting with psychologist

RANGE OF MOTION: Limited, bilateral shoulders, wrists, fingers. (improved from previous exam)

TONE: Modified Ashworth 1+- II, bilateral upper and lower extremities.

PALPATION: less Subluxation at bilateral shoulders. Myofascial trigger points, posterior shoulder and scapular region.

OBSERVATION: Tracheostomy in place.

MOTOR:

Rt Lt

C4: 5 5

C5: 5 1-2

C6: 1 0

C7: 0 0

C8: 0 0

T1: 0 0

DIAGNOSES:

1. Status post work related motor vehicle accident, 12/21/11.
2. Cervical spinal cord injury.
3. Probable head trauma with reports of confusion at time of injury.
4. MRI, 12/21/11, revealing fracture, left lamina C4, fracture articulating facet C4 with displacement, facet dislocation C4, C5 on left, anterior subluxation C4 on C5 with 2 mm posterior disc protrusion with subsequent severe spinal canal stenosis, small amount of epidural hematoma and possible hemorrhage posterior C4 vertebral body, cord contusion C4-C5, acute hemorrhage C4-C5, cord edema/ischemia/contusion, C3-4, C4-5, 1-2 mm retrolisthesis C5-C6, 2 mm posterior disc protrusion C5-C6 with subsequent moderate spinal canal stenosis, 2 mm posterior disc protrusion C3-C4, mild stenosis.
5. 12/22/11, surgical intervention by Clifford C. Douglas, M.D., 360 degree anterior and posterior cervical spinal decompression, stabilization with arthrodesis with a post-operative diagnosis of unstable three column spinal injury with fracture, dislocation at C4, C5 and secondary quadriplegia.
6. Status post IVC filter placement 12/23/11.
7. Comorbidities of respiratory failure requiring vent and tracheostomy placement 1/6/12, rib fracture, pneumothorax, pulmonary contusion, facial laceration.
8. Status post percutaneous endoscopic gastrostomy tube placement 1/11/12.
9. Right C5, left C4 tetraplegia, ASIA A.
10. Neurogenic bowel.
11. Neurogenic bladder.
12. Spasticity.
13. Musculoskeletal/myofascial pain.
14. Adjustment disorder.
15. Risk for aspiration.
16. Risk for skin integrity impairment.
17. Risk for toenail impairment.
18. Evaluate for cognitive disorder

TREATMENT PLAN:

1. **RESPIRATORY:** evaluation by Dr Law for bronchoscopy to evaluate change in trach size and begin process for ultimate decannulation.

2. **MOBILITY/ACTIVITIES OF DAILY LIVING:** continue physical therapy, occupational therapy and speech therapy

Patient has potential to benefit from therapeutic intervention by skilled therapist familiar with spinal cord injury.

Areas that can be improved from a functional standpoint include activities of daily living with adaptive equipment, respiratory and breath support, evaluate seating for improved posture and comfort, adaptive technology and environmental control unit evaluation, range of motion to decrease spasticity.

3. **EQUIPMENT:** current wheelchair evaluation for repairs and parts as needed. Patient may benefit from custom seating, such as Rlde for comfort, improved posture and support, better skin

protection .

4. SKIN: Continue with close oversight, assessment and preventative measures. For any episodes of skin breakdown, patient should be evaluated by clinician specializing in pressure sore in spinal cord injury. Evaluation by urology for a bladder program different than foley. (see BLADDER)

All seating and pressure relief devices should be routinely addressed, evaluated, modified and replaced as needed for appropriate pressure relief. Patient should have close assessment of nutritional status for appropriate skin integrity.

5. PODIATRY: Persons with spinal cord injury are at risk of ingrown, infected and fungal nail and, therefore, patient should have routine nail care and treatment of such pathology by a podiatrist familiar with spinal cord injury.

6. DENTAL: agree with recommendations from Dr Hom. Dental hygiene and care is critical to avoid aspiration in a high risk patient.

As noted under respiratory, recommend strict oral hygiene before and after all food and recommend dental evaluation to replace the missing cap.

7. SPASTICITY: spasticity has significantly decreased with decrease of inciting stimuli and a consistent therapy program recommend trial off valium and a taper order was written to avoid abrupt cessation.

8. PAIN: Patient's shoulder pain is primarily musculoskeletal and myofascial. This would benefit from a physical therapeutic intervention with myofascial release, range of motion, strengthening, appropriate positioning in both the bed and the chair.

To avoid further oral sedating medications, recommend acupuncture as an adjunctive intervention, which is very effective for musculoskeletal and myofascial pain if pain persists and does not respond to above measures.

9. NEUROGENIC BOWEL: continue bowel program on a routine basis. This is a medical necessity to routinely evacuate the stool without incontinence. Trial of amitiza to be used for episodes when no bowel results.

Treat bleeding hemorrhoids with anusol--hc supp qhs for 7 nights. If hemorrhoid bleeding becomes a barrier to bowel program or worsens AD, spasticity, neuropathic pain, then referral to colorectal specialist to evaluate for removal.

10. NEUROGENIC BLADDER: Urology evaluation for baseline urodynamics and cystoscopy. Long term intervention can either be intermittent catheterization or an indwelling catheter and suprapubic probably a better option than Foley catheter for this patient secondary to skin issues at urethra.

11. AUTONOMIC DYSREFLEXIA: Patient has had episodes of dysreflexia related to bladder. Top four inciting stimuli include bladder, bowel, skin and toenails. If patient develops autonomic dysreflexia, increased spasticity, increased neuropathic pain, then these top four areas need to be addressed.

If there is no evidence of any pathology or changes needed for these areas, then next is to look for a syrinx with an MRI of the spine.

12. SPINE: Patient should have routine followup with his spine surgeon or another identified spine surgeon to evaluate that surgical site is healing well, hardware is in place and there is no evidence of syrinx or tethering at the site of injury.

13. ADJUSTMENT: continue with a neuropsychologist, Dr Morales, familiar with spinal cord injury to facilitate adjusting to disability as well as patient's new role as an individual and in his family. Wife to be involved in counseling.

14. COGNITION: recommend neuropsychologic testing with Dr Morales to evaluate for any cognitive impairment related to the head trauma.

15. VISION: consult with Dr Ikeda for visual impaired reports, assess if related to head trauma or medications

16. COMMUNITY RE-ENTRY/HOME: Recommend for patient to be able to return home with family in appropriate adapted/modified home to meet all of his functional needs related to his spinal cord injury disability and impairment.

17. TRANSPORTATION: recommend for patient to have transportation for all medical and community re-entry and ADLs. This is important for mood as well as allows patient to practice function in community.

18. ATTENDANT: recommend for wife to be present all medical appointments. Wife provides

emotional support, but patient also has probable cognitive impairment and wife needs to be present to support memory and decision making.

19. EDUCATION: All of the above was discussed at length with patient and wife and questions were answered.

WORK STATUS:

Permanent and stationary, March 2, 2013, per Dr. Shantharam Pai.

TIME SPENT:

60 minutes evaluation, case management, counseling. 15 minute record review of Care Meridian reports. Travel time 1 hours.

I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

"I have not violated Labor Code Section 139.3 and the contents of the report and bill are true and correct to the best of my knowledge. This statement is made under penalty of perjury."

Per labor code 5307.1, additional pages required to properly document the required information will be billed.

Date of report: August 1, 2013

Dated this 1 day of August, 2013 at Los Angeles County, California.

The above report for assessment of injury is not to be construed as a complete physical examination for general health purposes. Only those symptoms which are involved in the injury or which might relate to the injury have been assessed.



ANN T. VASILE, M.D.
California State License No. G071400
Physical Medicine and Rehabilitation

cc: Patriot Risk Services
Adjuster: Julie Hall
Patrick Embrey, Esq via facsimile 949-720-1292
Care Meridian, Garden Grove, via facsimile 714-933-7565

Progress Notes

Nicolas Mercado (MR# 118003179)

Progress Notes Info

Author	Note Status	Last Update User	Last Update Date/Time
Vasile, Ann T, MD	Signed	Vasile, Ann T, MD	9/25/2013 6:20 PM

Progress Notes

9/25/2013

**PRIMARY TREATING PHYSICIAN
PHYSICAL MEDICINE & REHABILITATION
PROGRESS REPORT
Review of Records
Request for Authorization**

PATIENT: MERCADO, Nicolas
DOB: 10/29/60
DOI: 12/21/11
EMP: Co-West Commodities
CLM: 434-111-0000384

REFERRING SOURCE: Keith More, Esq.
Via facsimile 714-543-5561

INTRODUCTION:

Patient seen in exam room with wife, Care Meridian nursing/ Ida, and attendant/Raul

HISTORY:

Mr. Mercado is a 52-year-old male who was involved in a motor vehicle accident, 12/21/2011. Reportedly patient was driving a tanker truck, which lost controlled and rolled over. Patient reportedly was extricated from the vehicle and brought to Riverside Community Hospital. Patient was reportedly noted to have no movement in arms and legs. Solu-Medrol protocol was started and MRI was ordered urgently. Impression as follows: 1) Fracture of left lamina C4 with displaced fracture fragments posterior lateral to the spinal canal, fracture of the inferior articulating facet of C4 with displacement, subsequent facet dislocation at C4-C5 on the left, 3 mm anterior subluxation C4 on C5 and 2 mm posterior disc protrusion, severe spinal canal stenosis, small amount of epidural edema and possible hemorrhage posterior to C4 vertebral body. 2) Cord contusion centered at C4-C5 level, focal area of acute hemorrhage of cord extending to left of midline extending 10 mm craniocaudal extent 3 mm anterior-posterior 4 mm transverse extent, cord edema ischemia, contusion extends from C3-4 level to C4-5 level. 3) C5-C6 with 1-2 mm retrolisthesis C5 on C6 and 2 mm posterior disc protrusion, moderate spinal canal stenosis. 4) C3-C4 level 2 mm posterior disc protrusion, spinal canal mildly stenotic, probable small fracture of inferior articulating facet of 3 on the left with bone edema. 5) Loss of usual flow void signal in the left vertebral artery, possibly decreased flow, slow flow or occlusion left vertebral artery.

Hospital course significant for respiratory failure requiring ventilatory support. Comorbidities reported as rib fracture, pneumothorax, pulmonary contusion and facial laceration.

Patient underwent the following surgical intervention by Clifford Douglas on 12/22/11. Stage I: 1) C4-C5 and C5-C6 total anterior cervical discectomy two levels. 2) C5 corpectomy and foraminotomy with nerve root decompression bilaterally at C4-5 and C5-6. 3) C4 to C6 strut cage placement utilizing the PEEK cage placement device. 4) C4-C6 anterior interbody arthrodesis utilizing autograft from local corpectomy bone, allograft mixed with new cell and NuCel stem cell bone growth medium and Evo3 demineralized bone matrix. 5) C4-C6 screw plate internal fixation utilizing the titanium K2 Medical Pyrenees plating system. 6) Microscope with micro-dissection. 7) Intraoperative fluoroscopy. Stage II: 1) Posterior cervical stabilization through separate incision with screw rod fixation from C4 to C5-C6 lateral mass utilizing the K2 medical mini Denali system with crossbar placement. 2) Dorsolateral interlaminar interfacet and lateral mass arthrodesis utilizing

autograft allograft, NuCel and Evo3 from C4 to C5-C6 bilaterally. 3) Intraoperative fluoroscopy. On 12/23/11, patient underwent inferior vena cava filter placement. On 1/6/12, patient underwent tracheostomy procedure by William Alex, M.D. On 1/11/12, patient underwent percutaneous endoscopic gastrostomy tube placement. Reportedly patient then transitioned to Casa Colina Rehab, then Kindred, then back to Casa Colina, then to Reche Canyon skilled nursing facility, then back to Kindred, then to Braswell Colonial Care skilled nursing facility since October 2012.

INTERVAL HISTORY:

RESPIRATORY: off vent and tolerating passey-muir valve, s/p bronchoscopy and trach changed to regular Shiley #6, then short hospital stay with dx of pneumonia. Another ER visit and changed back to Shiley long #6. Needs MD to follow trach/pulmonary.

MOBILITY/ACTIVITIES OF DAILY LIVING: working with PT, OT, decline from recent medical issues, wants more therapy

EQUIPMENT: await vendor evaluating chair for repairs and parts as needed. Await authorized commode. Await authorized diabetic shoes. Received mini iPad

SKIN: Patient performs pressure relief while in the chair with recline/tilt-in-space power device. Currently intact. PEG removed and still healing.

PODIATRY: Dr Aslmand providing nail care and recommended custom shoes, authorized.

DENTAL: treatment by Dr Horn

SPASTICITY: patient and team report that spasticity is less of a barrier to function.

Current medications for spasticity include baclofen 20 mg q6h and Valium was restarted.

PAIN: Patient reports bilateral shoulder and posterior shoulder pain, patient reports better with exercise Lidoderm patch being applied to the posterior right shoulder.

NEUROGENIC BOWEL: bowel program qhs with magic bullet and dig stim, no incontinence or impaction. Hemorrhoids less bleeding.

NEUROGENIC BLADDER: Patient currently has a Foley catheter. Patient skin issues at distal end of urethra is stable.

Appt with urologist, Dr Wachs, has been made.

ADJUSTMENT/COGNITION: Patient uses family to address his sadness and depression from the disability. He reports that he feels more sad if family is not able to be with him. Patient would like to have community re-entry activities with his church, pastor, family, friends. Patient acknowledges memory problems. Currently works with Dr Lopez. Wife has been invited for counseling as well. Patient reports he needs support of wife for his emotional status and request her presence on a daily basis.

HOME: Reportedly home evaluation was performed by Casa Colina Rehab and modification recommendations were made. No modifications have been. Goal is patient to return to community in a wheelchair accessible environment and live with family.

ATTENDANT: Attendant and wife for outings outside of facility.

SWALLOW/NUTRITION: Patient on a regular diet. All food, liquid, calories and meds through mouth. PEG removed.

TRANSPORTATION: patient and family would like to visit family, friends and church

VISION: reports blurry vision, await auth for visual evaluation

OBJECTIVE FINDINGS (FOCUSED PHYSICAL EXAM):

HEENT: trach with passey- muir valve

RANGE OF MOTION: Limited, bilateral shoulders, wrists, fingers. (improved from previous exam)

TONE: Modified Ashworth 1+- II, bilateral upper and lower extremities.

PALPATION: less Subluxation at bilateral shoulders. Myofascial trigger points, posterior shoulder and scapular region.

OBSERVATION: Tracheostomy in place.

MOTOR:

Rt Lt

C4: 5 5

C5: 5 1-2

C6: 1 0
C7: 0 0
C8: 0 0
T1: 0 0

DIAGNOSES:

1. Status post work related motor vehicle accident, 12/21/11.
2. Cervical spinal cord injury.
3. Probable head trauma with reports of confusion at time of injury.
4. MRI, 12/21/11, revealing fracture, left lamina C4, fracture articulating facet C4 with displacement, facet dislocation C4, C5 on left, anterior subluxation C4 on C5 with 2 mm posterior disc protrusion with subsequent severe spinal canal stenosis, small amount of epidural hematoma and possible hemorrhage posterior C4 vertebral body, cord contusion C4-C5, acute hemorrhage C4-C5, cord edema/ischemia/contusion, C3-4, C4-5, 1-2 mm retrolisthesis C5-C6, 2 mm posterior disc protrusion C5-C6 with subsequent moderate spinal canal stenosis, 2 mm posterior disc protrusion C3-C4, mild stenosis.
5. 12/22/11, surgical intervention by Clifford C. Douglas, M.D., 360 degree anterior and posterior cervical spinal decompression, stabilization with arthrodesis with a post-operative diagnosis of unstable three column spinal injury with fracture, dislocation at C4, C5 and secondary quadriplegia.
6. Status post IVC filter placement 12/23/11.
7. Comorbidities of respiratory failure requiring vent and tracheostomy placement 1/6/12, rib fracture, pneumothorax, pulmonary contusion, facial laceration.
8. Status post percutaneous endoscopic gastrostomy tube placement 1/11/12.
9. Right C5, left C4 tetraplegia, ASIA A.
10. Neurogenic bowel.
11. Neurogenic bladder.
12. Spasticity.
13. Musculoskeletal/myofascial pain.
14. Adjustment disorder.
15. Risk for aspiration.
16. Risk for skin integrity impairment.
17. Risk for toenail impairment.
18. Evaluate for cognitive disorder

TREATMENT PLAN:

1. RESPIRATORY: referral to Dr Rucker for pulmonary and trach management.
2. MOBILITY/ACTIVITIES OF DAILY LIVING: continue physical therapy, occupational therapy and speech therapy . After patient improves in respiratory status, then begin outpatient programs. Patient has potential to benefit from therapeutic intervention by skilled therapist familiar with spinal cord injury. Areas that can be improved from a functional standpoint include activities of daily living with adaptive equipment, respiratory and breath support, evaluate seating for improved posture and comfort, adaptive technology and environmental control unit evaluation, range of motion to decrease spasticity.
3. EQUIPMENT: await wheelchair evaluation for repairs and parts as needed. Patient may benefit from custom seating, such as Ride for comfort, improved posture and support, better skin protection .
4. SKIN: Continue with close oversight, assessment and preventative measures. Evaluation by urology for a bladder program different than foley. (see BLADDER)
5. PODIATRY: continue with Dr Aslmand
6. DENTAL: agree with recommendations from Dr Hom. Dental hygiene and care is critical to avoid aspiration in a high risk patient.
7. SPASTICITY: address respiratory issues, then goal os to decrease off valium. Patient requests to currently continue valium because trunk spasticity causes SOB.

8. PAIN: Patient's shoulder pain is primarily musculoskeletal and myofascial. This would benefit from a physical therapeutic intervention with myofascial release, range of motion, strengthening, appropriate positioning in both the bed and the chair.
To avoid further oral sedating medications, recommend acupuncture as an adjunctive intervention, which is very effective for musculoskeletal and myofascial pain if pain persists and does not respond to above measures.
9. NEUROGENIC BOWEL: continue bowel program on a routine basis.
10. NEUROGENIC BLADDER: Urology evaluation for baseline urodynamics and cystoscopy. Long term intervention can either be intermittent catheterization or an indwelling catheter and suprapubic probably a better option than Foley catheter for this patient secondary to skin issues at urethra.
11. AUTONOMIC DYSREFLEXIA: Patient has had episodes of dysreflexia related to bladder. Top four inciting stimuli include bladder, bowel, skin and toenails. If patient develops autonomic dysreflexia, increased spasticity, increased neuropathic pain, then these top four areas need to be addressed.
If there is no evidence of any pathology or changes needed for these areas, then next is to look for a syrinx with an MRI of the spine.
12. SPINE: Patient should have routine followup with his spine surgeon or another identified spine surgeon to evaluate that surgical site is healing well, hardware is in place and there is no evidence of syrinx or tethering at the site of injury.
13. ADJUSTMENT: continue with neuro psychologist
14. COGNITION: continue with neuropsychologic testing with Dr Morales to evaluate for any cognitive impairment related to the head trauma.
15. VISION: consult with Dr Ikeda for visual impaired reports, assess if related to head trauma or medications
16. COMMUNITY RE-ENTRY/HOME: Recommend for patient to be able to return home with family in appropriate adapted/modified home to meet all of his functional needs related to his spinal cord injury disability and impairment.
17. TRANSPORTATION: recommend for patient to have transportation for all medical and community re-entry and ADLs. This is important for mood as well as allows patient to practice function in community.
18. ATTENDANT: recommend for wife to be present all medical appointments. Wife provides emotional support, but patient also has probable cognitive impairment and wife needs to be present to support memory and decision making.
19. EDUCATION: All of the above was discussed at length with patient and wife and questions were answered.

WORK STATUS:

Permanent and stationary, March 2, 2013, per Dr. Shantharam Pai.

TIME SPENT:

30 minutes evaluation, case management, counseling. 15 minute record review of Care Meridian reports.

I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

*"I have not violated Labor Code Section 139.3 and the contents of the report and bill are true and correct to the best of my knowledge. This statement is made under penalty of perjury."
Per labor code 5307.1, additional pages required to properly document the required information will be billed.*

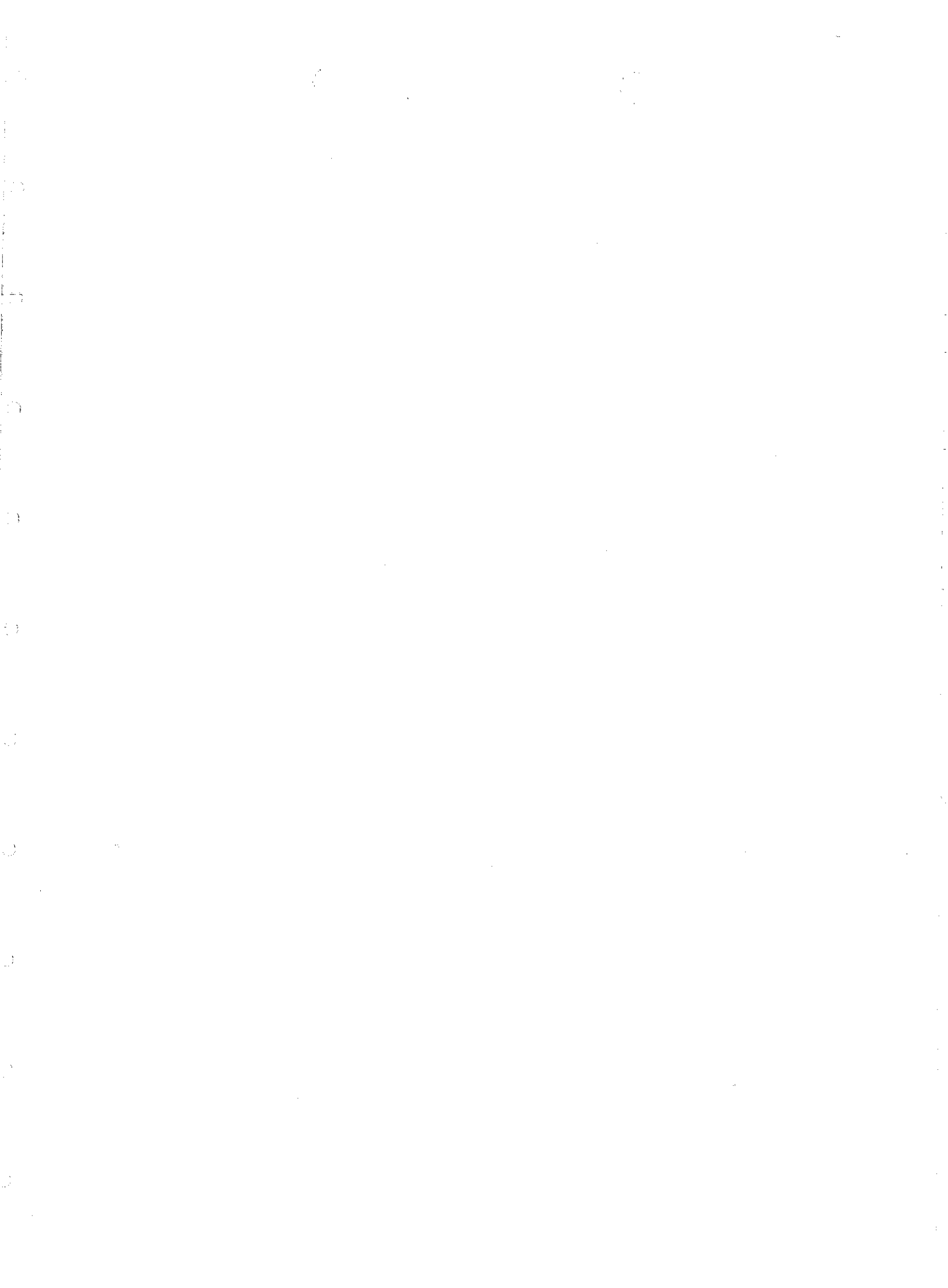
Date of report: September 25, 2013

Dated this 25 day of September, 2013 at Los Angeles County, California.

The above report for assessment of injury is not to be construed as a complete physical examination for general health purposes. Only those symptoms which are involved in the injury or which might relate to the injury have been assessed.



ANN T. VASILE, M.D.
California State License No. G071400
Physical Medicine and Rehabilitation
cc: Patriot Risk Services
Adjuster: Julie Hall
Patrick Embrey, Esq via facsimile 949-720-1292
Care Meridian, Garden Grove, via facsimile 714-933-7565





REHABILITATION ASSOCIATES MEDICAL GROUP

A MEDICAL PARTNERSHIP

Diplomats of the American Board of Physical Medicine and Rehabilitation

Eric D. Feldman, M.D., Inc.
Musculoskeletal and Sports Medicine, Balance

H. Richard. Adams, M.D., Inc.
Brain Injury and Med-Legal

Fred H. Batkin, M.D., Inc.
Electrodiagnostics and Musculoskeletal Rehabilitation

Ann T. Vasile, M.D., Inc.
Spinal Cord Injury, Orthopaedic Rehabilitation and Med-Legal

Dienha T. Hoang, M.D.
Neurorehabilitation, Balance and Vestibular Rehab

Audrey H. Huang, M.D.
Neurorehabilitation and General Rehabilitation

Venus F. Ramos, M.D.
Musculoskeletal and Pain Management

Ronald K. Takemoto, M.D.
Electrodiagnostics and Musculoskeletal

Diplomate of the National Board of Acupuncture

Sepideh Z. Sald,
OMD, QME, L.Ac.
Licensed Acupuncturist

701 E. 28th Street,
Suite 116
Long Beach, CA 90806

(562) 424-8111
Fax (562) 492-6830

PHYSICAL MEDICINE AND REHABILITATION AND ELECTRODIAGNOSTICS

November 14, 2013

**PHYSICAL MEDICINE & REHABILITATION
PRIMARY TREATING PHYSICIAN
SUPPLEMENTARY REPORT**

Response to Request for Information
Review of Records:

PATIENT: MERCADO, Nicolas
DOB: 10/29/60
DOI: 12/21/11
EMP: Co-West Commodities
CLM: 434-111-0000384

REFERRING SOURCE: Keith More, Esq.
via facsimile 714-543-5561

I have been asked to review in detail the recommendations for transportation and home modifications.

HOME MODIFICATIONS/HOME EVALUATION:

Summary was provided by Claire Malawy and home evaluation done by Healthcare Solutions. I agree to the following:

- ▶ Door to master bathroom be at least 36 inches wide.
- ▶ 6 x 6 foot clearance for turning radius be made available.
- ▶ Vanity should be installed at wheelchair accessible height and include beneath it clear accessible space.
- ▶ Custom roll under sink.
- ▶ Vanity should include an area offering full pullout storage to accommodate Mr. Mercado's medical supplies and linens.
- ▶ All fixtures on the cabinet should be pull style vs. knobs to accommodate for impaired hand function.
- ▶ Tub, tile and old vanity be removed.
- ▶ Floor built to resist water leakage and prevent subfloor or lower floor from water damage.
- ▶ Drain should be installed in the main floor of the bathroom with appropriate sloping to provide water drainage.

RE: MERCADO, Nicolas

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November 14, 2013

- ▶ Custom roll-in tile shower should be 2 x 2 inch, ADA compliant, nonslip tile flooring.
- ▶ Roll-in shower should incorporate 6-foot x 6-foot clear floor space to accommodate caregiver and patient while utilizing padded shower chair.
- ▶ Control should be in the front of the shower allowing caregiver to turn on the shower without getting wet and include anti-scalding device.
- ▶ Hand-held shower device with hose of approximately 6 feet be mounted on the ADA compliant bar.
- ▶ Grab bars installed 30 to 36 inches from the floor.
- ▶ At least two shelves built into the shower for supplies.
- ▶ Lighting should be installed in the shower itself with two lights so there is sufficient light to check the skin while performing showering.
- ▶ Curved curtain rod.
- ▶ New toilet that allows a commode chair to be placed over it.
- ▶ Toilet basin should align with that of the commode chair.
- ▶ Support structures need to be installed within the walls surrounding the toilet area to accommodate additional ADL grab bars.
- ▶ Available lateral front and angle transfer areas at the toilet in the master bedroom.
- ▶ Ceiling track over the commode.
- ▶ Additional cleaning station and sink installed for hygiene purposes.
- ▶ Caregiver needs a separate area to prepare for medical procedures and a countertop of at least 20 inches long.
- ▶ Installation of heat lamp or wall heater in front of the shower and an anti-slip flooring in the master bathroom.
- ▶ Master bathroom accessible through the master bedroom for privacy purposes.
- ▶ All doors need to be widened to at least 36 inches.
- ▶ New hollow core doors installed.
- ▶ Primary door in the front of the house should have screen door removed with no barriers at the sill of the door.
- ▶ An automatic door opener installed to allow patient to remotely control opening of door.
- ▶ Driveway leading up to house be level and consist of crushed concrete or road so patient can access driveway with decreased risk of falling.
- ▶ Construction of driveway should allow for proper drainage.
- ▶ Driveway should be wide enough to accommodate one vehicle as well as an additional 6 feet to allow for patient to exit and enter vehicle in wheelchair.

RE: MERCADO, Nicolas

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November 14, 2013

- ▶ Walkway up to the home and around the house, minimum of 48 inches wide and made of poured concrete.
- ▶ Porch in front of home needs to be made accessible.
- ▶ Railings installed to assist in avoiding any accidents or falling off porch.
- ▶ Ramp specifications as per outlined in home evaluation.
- ▶ Garage be reconstructed to allow handicap van to fit.
- ▶ Garage to contain a 6 x 6 foot turning radius on the side, which the patient will enter/exit the vehicle.
- ▶ Garage should be attached to the home to allow patient to avoid extreme weather in accessing home from vehicle.
- ▶ Doors leading to the garage require 36 inch wide doorway.
- ▶ Rear of home needs an emergency exit.
- ▶ Rear of home exit to have a sidewalk 48 inches wide and leading around the home from back to front.
- ▶ Home equipped with motion sensors for indoor and outdoor lightening.
- ▶ Designated area be built for washer and dryer for the laundry related to incontinence of bowel and bladder.
- ▶ Front loading washer and dryer not necessarily for the patient, but for ease of access for caregiver.
- ▶ Sufficient space for caregiver to access laundry.
- ▶ Flooring in home hardwood for easier use of wheelchair accessibility.
- ▶ Access to kitchen areas as per outlined by Claire Malawry.
- ▶ Hallway to be widened to 36 inches.
- ▶ Extra additional bedroom to be added for 24 hour caregiver.
- ▶ Automatic door opener installed in the master bedroom.
- ▶ Master bedroom to be accessible, which means removing the 1 inch step-down and widening doorway.
- ▶ Aspects of bedroom should include 6 x 6 foot space for turning radius.
- ▶ Clear floor space important to access areas of rooms in home.
- ▶ Mirror on the wall for patient to view self from wheelchair.
- ▶ Ceiling track lift for master bedroom for transfers and caregiver decrease burden of care.
- ▶ Electronic aid of daily living assessment for adaptive technology to allow patient to utilize remote and voice activated control of environment.
- ▶ Automatic locking systems in all doors.
- ▶ Air conditioning and heating secondary to patient's impaired body temperature regulation and risks of extremes of temperature.
- ▶ Smoke detectors for safety.

RE: MERCADO, Nicolas

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November 14, 2013

- ▶ Remove and replace any exposed plumbing for safety.
- ▶ All door handles to have lever style to allow patient to access.
- ▶ New water heater to ensure appropriate temperature in showering.
- ▶ Generator to be used in emergency secondary to patient's inability to tolerate extremes of temperature.
- ▶ Yard work to be performed for patient in light of the fact patient unable to perform on his own.

TIME SPENT:

15 minutes record review of correspondence from applicant attorney, Keith More, dated November 5, 2013.

I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As to information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.


"I have not violated Labor Code Section 139.3 and the contents of the report and bill are true and correct to the best of my knowledge. This statement is made under penalty of perjury."

Per labor code 5307.1, additional pages required to properly document the required information will be billed.

Date of report: November 14, 2013

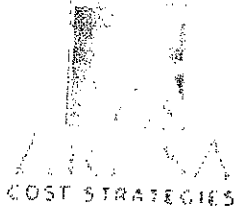
Dated this 18 day of Nov, 2013 at Los Angeles County, California.

The above report for assessment of injury is not to be construed as a complete physical examination for general health purposes. Only those symptoms which are involved in the injury or which might relate to the injury have been assessed.


 ANN T. VASILE, M.D.
 California State License No. G071400
 Physical Medicine and Rehabilitation

ATV/et

cc: Tanya Bishop, adjuster, Patriot Risk Services
 Sandra Hood, Case Manager, via facsimile 949-706-2402
 Care Meridian Garden Grove, via facsimile 714-933-7565



15901 Red Hill Avenue Suite 201
Tustin, CA 92780

Hours: Monday – Friday 8:00 AM to 5:30 PM

11/25/2013

NOTICE OF DELAY

Fax: (562) 912-4511

Ann T. Vasile, MD
701 E 28th St. #116
Long Beach, CA 90806

RE: Employee: Nicolas Mercado
Claim #: 4341110000384
Referral #: 7530
Employer: Co-West Commodities
Injury Date: 12/21/2011

Patriot Risk Services has received a request for treatment of the above named employee.

RECEIPT DATE: 11/15/2013

DECISION DATE: 11/25/2013

FINAL DETERMINATION DATE: 12/3/2013

REQUEST: Home modifications as stated on 11/14/13 report

DISCUSSION: The patient was driving a tanker truck on the freeway on 12/21/11, lost control and rolled over. The patient sustained head trauma and cervical spinal cord trauma causing quadriplegia. Other injuries include rib fracture, pneumothorax, and pulmonary contusion.

Regarding the multiple home modification requests for the patient on Dr. Vasile's 11/14/13 report, please provide a rationale for each of the specific requests that are listed.

Our determination does not mean that the patient should not receive further medical treatment or personal care and does not refer to compensability. For questions regarding compensability, please contact the claim administrator.

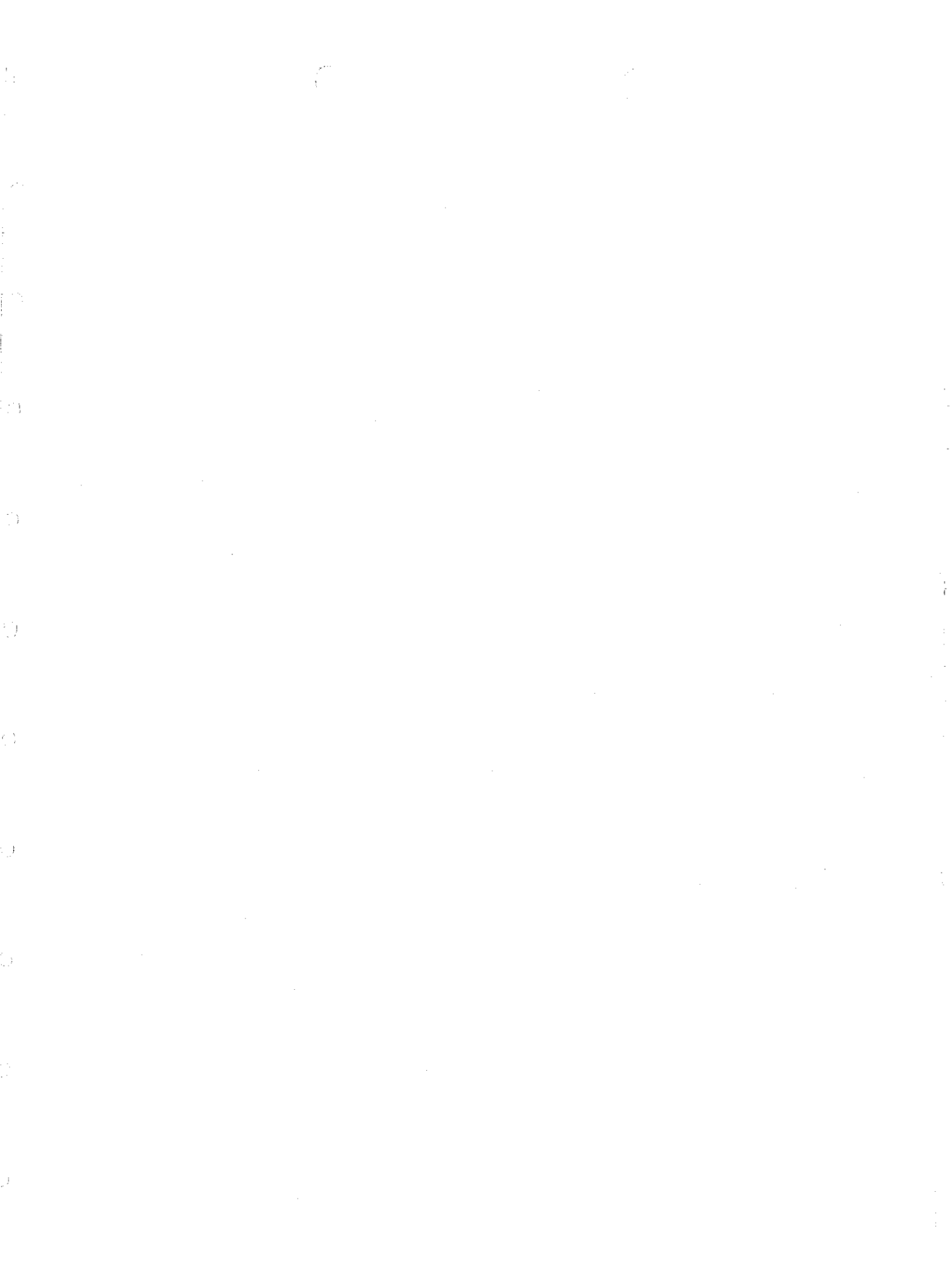
Requesting physician: You may request reconsideration of this decision by submitting additional information to Patriot Risk Services: PO Box 2650, Rancho Cordova, CA 95741; Facsimile (818)688-0179. Please clearly mark the document as a Reconsideration or Appeal. Requesting reconsideration is voluntary and neither triggers nor bars the Independent Medical Review dispute resolution procedures of Labor Code Sections 4610.5 and 4610.6. Pursuit of reconsideration is optional at your discretion.

This decision will remain effective for 12 months unless additional recommendation is received from you with documented change in the facts material to the basis of the Utilization Review decision.

Injured worker: Any dispute shall be resolved in accordance with the Independent Medical Review provisions of Labor Code sections 4610.5 and 4610.6. Any objection to this utilization review decision must be communicated by you, your representative, or your attorney on your behalf on the enclosed Application for Independent Medical Review (DWC Form IMR-1) within 30 calendar days of receipt of this decision.

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Phone: 714-259-1053 – Facsimile: 949-734-7272

0234





15901 Red Hill Avenue Suite 201
Tustin, CA 92780

Hours: Monday – Friday 8:00 AM to 5:30 PM

12/03/2013

NOTICE OF DENIAL

Fax: (562) 912-4511

Ann T. Vasile, MD
701 E 28th St. #116
Long Beach, CA 90806

RE: Employee: Nicolas Mercado
Claim #: 4341110000384
Referral #: 7530
Employer: Co-West Commodities
Injury Date: 12/21/2011

Patriot Risk Services has received a request for treatment of the above named employee.

RECEIPT DATE: 11/15/2013

DECISION DATE: 12/03/2013

REQUEST: Home modifications as stated on 11/14/13 report

DISCUSSION: This is a notice of denial for the requests made for the home modifications. A letter was forwarded requesting an explanation for the extensive home modifications. There was no receipt of explanation to allow a reasonable review of the modifications requested. Once received, it will be immediately reviewed and a decision based on reasonable medical necessity made.

Our determination does not mean that the patient should not receive further medical treatment or personal care and does not refer to compensability. For questions regarding compensability, please contact the claim administrator.

Requesting physician: You may request reconsideration of this decision by submitting additional information to Patriot Risk Services: PO Box 2650, Rancho Cordova, CA 95741; Facsimile (818)688-0179. Please clearly mark the document as a Reconsideration or Appeal. Requesting reconsideration is voluntary and neither triggers nor bars the Independent Medical Review dispute resolution procedures of Labor Code Sections 4610.5 and 4610.6. Pursuit of reconsideration is optional at your discretion.

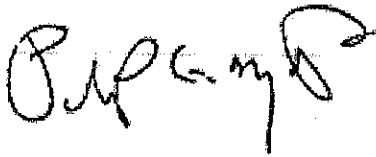
This decision will remain effective for 12 months unless additional recommendation is received from you with documented change in the facts material to the basis of the Utilization Review decision.

Injured worker: Any dispute shall be resolved in accordance with the Independent Medical Review provisions of Labor Code sections 4610.5 and 4610.6. Any objection to this utilization review decision must be communicated by you, your representative, or your attorney on your behalf on the enclosed Application for Independent Medical Review (DWC Form IMR-1) within 30 calendar days of receipt of this decision.

You have a right to disagree with decisions affecting your claim. If you have questions about the information in this notice, please call [Tanya Bishop] at []. However, if you are represented by an attorney, please contact your attorney. For information about the workers' compensation claims process and your rights and obligations, go to www.dwc.ca.gov or contact an Information and Assistance (I&A) officer of the state Division of Workers' Compensation. For recorded information and a list of offices, call toll-free (800)736-7401.

15901 Red Hill Avenue, Suite 201, Tustin, CA 92780
Phone: 855-260-1053 – Facsimile: 949-734-7272

Sincerely,



This decision was made by: Phil Martin, MD License #A45448 Specialty: Emergency Medicine

Copies to: See Proof of Service

Utilization Review Appeal Process

The purpose of the appeal process is to review a request for medical treatment that has not been certified, by a Physician Reviewer, who determined that the request did not meet the evidence-based guidelines for medical treatment generally recognized and accepted by the medical community for medical necessity and appropriateness.

Appeal process timelines:

- o Expedited appeals will be processed within three (3) business days following the initiation of the process.
- o Standard appeals will be processed within thirty (30) business days following the initiation of the process.
- o Appeals are in accordance with the state of California Labor Code statutes.

Copies of the medical records containing supportive medical information must be included with the request for a standard appeal. Arissa Cost Strategies will consider all documentation, records or other information submitted by the requesting physician, facility, injured worker or provider pertinent to and relating to the service requested.

APPEAL OF MEDICAL DECISION

1. The physician, facility, injured worker or provider who received the denial may request an appeal of the decision in writing, via facsimile or by telephone, within 30 days of receipt of the denial.
2. The Medical Director or designee will initially review the appeal.
3. The appeal will then be assigned to an appropriate Physician Advisor. The physician advisor must have an active practice in the major clinical area being reviewed; and have admitting privileges and direct patient care responsibilities in medical treatment facilities. The physician advisor is will not be the same physician who rendered the original denial decision.
4. The Physician Advisor will notify the requesting physician via telephone or facsimile within twenty-four (24) hours of the decision.
5. The Physician Advisor will communicate the final decision to the Medical Director in writing.
6. Written notification of adverse appeal determination will include the principal reason for the determination to substantiate a non-certification.
7. The clinical rationale for the non-certification determination will be available to the requesting physician upon request.
8. Record retention:
 - a. Name of the injured worker, requesting provider or facility.
 - b. Copies of all records and other pertinent documentation including correspondence related to the determination and appeal.

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Phone: 855-260-1053 – Facsimile: 949-734-7272



15901 Red Hill Avenue Suite 201
Tustin, CA 92780

Hours: Monday – Friday 8:00 AM to 5:30 PM

**NOTICE OF
MODIFICATION**

12/12/2013

Fax: (562) 912-4511

Ann T. Vasile, MD
701 E 28th St. #116
Long Beach, CA 90806

RE: Employee: Nicolas Mercado
Claim #: 4341110000384
Referral #: 7530
Employer: Co-West Commodities
Injury Date: 12/21/2011

Patriot Risk Services has received a request for treatment of the above named employee.

RECEIPT DATE: 11/15/2013

DECISION DATE: 12/12/2013

REQUEST: Home modifications as stated on 11/14/13 report

DISCUSSION: There was an 11/14/13 report by Dr. Vasile requesting multiple home modifications.

The report was reviewed and there were multiple questions with regard to the specific home modifications recommended. On 11/25/13 a formal request was forwarded to Dr. Vasile regarding the requested home modifications. The requests were put on delay until such time the recommendations could be addressed.

The 12/7/13 report was thoroughly reviewed as written by Dr. Vasile. It did not address specific information necessary to make decisions on the medical necessity of all the requested home modifications.

The patient was driving a tanker truck on the freeway on 12/21/11, lost control and rolled over. The patient sustained head trauma and cervical spinal cord trauma causing quadriplegia. Other injuries included rib fracture, pneumothorax, and pulmonary contusion.

The patient's condition is that he is a quadriplegic.

Each request for home modification was addressed individually. The decisions for home modifications addressed below focused on reasonable medical necessity supporting the medical management of the injured worker.

Again the following decision modifications address medical necessity.

The following are responses to home modification requests for the patient based on Dr. Vasile's 11/14/13 report:

Certify the following home modifications:

- 1) Door to master bedroom to be at least 36" wide.
- 2) Vanity should be installed at wheelchair accessible height and include beneath it clear accessible space.

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Phone: 855-260-1053 – Facsimile: 949-734-7272

0237

- 3) Custom roll under sink.
- 4) Vanity should include an area offering full pullout storage to accommodate Mr. Mercado's medical supplies and linens.
- 5) Tub, tile and old vanity be removed.
- 6) Control should be in the front of the shower allowing caregiver to turn on the shower without getting wet and include anti-scalding device.
- 7) Hand-held shower device with hose of approximately 6 feet be mounted on the ADA compliant bar.
- 8) Grab bars installed 30 to 36 inches from the floor.
- 9) At least two shelves built into the shower for supplies.
- 10) Lighting should be installed in the shower itself with 2 lights so there is sufficient light to check the skin while performing showering.
- 11) Curved curtain rod.
- 12) New toilet that allows a commode chair to be placed over it.
- 13) Toilet basin should align with that of the commode chair.
- 14) Support structures need to be installed within the walls surrounding the toilet area to accommodate additional ADL grab bars.
- 15) Available lateral front and angle transfer areas at the toilet in the master bedroom.
- 16) Caregiver needs a separate area to prepare for medical procedures and a countertop of at least 20 inches long.
- 17) All doors need to be widened at least 36 inches.
- 18) New hollow core doors installed.
- 19) Primary door in the front of the house should have a screen door removed with no barriers at the sill of the door.
- 20) An automatic front door opener installed to allow patient to remotely control opening of the door.
- 21) Driveway should be wide enough to accommodate one vehicle as well as an additional 6 feet to allow for patient to exit and enter vehicle in wheelchair.
- 22) Porch in front of home needs to be made accessible.
- 23) Railings installed to assist in avoiding any accidents or falling off porch.
- 24) Ramp specifications as per outlined in-home evaluation.
- 25) Rear of home needs an emergency exit.
- 26) Hallway to be widened to 36 inches.
- 27) Automatic door opener installed in the master bedroom.
- 28) Master bedroom to be accessible, which means removing the 1-inch step-down and widening doorway.
- 29) Mirror on the wall for patient to view himself from wheelchair.

30) Ceiling track lift for master bedroom for transfers and caregiver decrease burden of care.

31) Smoke detectors for safety.

Modify the following home modifications:

1) Floor built to resist water leakage and prevent subfloor or lower floor from water damage: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.

2) Drain should be installed in the main floor of the bathroom with appropriate sloping to provide water drainage: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.

3) Custom roll-in tile shower should be 2 x 2 inch, ADA compliant, nonslip tile flooring: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.

4) Roll-in shower should incorporate 6' x 6' clear floor space to accommodate caregiver and patient while utilizing padded shower chair: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.

5) Ceiling track over the commode: Any modification to the bathroom must to meet the compliance requirements of the ADA for this patient.

6) Installation of heat lamp or wall heater in front of the shower and an anti-slip flooring in the master bathroom: The patient has impairment of his ability to control his body temperature secondary to his spinal cord injury. However, there is no rationale presented why the patient cannot use a simple portable heater with a GFI switch.

7) Walkway up to the home and around the house, minimum of 48 inches wide and made of poured concrete. The patient will need a walkway up to the house; however, there is no medical necessity for a walkway around the house.

8) Air conditioning and heating secondary to patient's impaired body temperature regulation and risk of extremes of temperature: The patient will need heating and cooling due to his body thermoregulatory impairment, however, there is no rationale for general heating or cooling. This request will be modified to the living room and bedroom only.

9) Generator to be used in emergency secondary to patient's inability to tolerate extremes of temperature: A generator to power heating and cooling for the patient's bedroom room in an emergency situation should be sufficient.

Non-certify the following home modifications:

1) 6 x 6 foot clearance for turning radius be made available: This home modification does not identify the location of the requested turning radius.

2) All fixtures on the cabinet should be pull-style vs. knobs to accommodate for impaired hand function. There is no medical necessity for this modification or description of the referenced plumbing.

3) Additional cleaning station and sink installed for hygiene purposes: The details of this modification need to be clarified with demonstration of an absolute need.

4) Master bathroom accessible through the master bedroom for privacy purposes: There is no medical necessity for this request.

5) Driveway leading up to the house be level and consist of crushed concrete or road so patient can access driveway with decreased risk of falling: There is no clear rationale presented for this modification. There is no description of the current driveway or the medical necessity of this home modification.

6) Construction of driveway should allow for proper drainage: Again, there is no clear rationale presented for this modification. There is no description of the current driveway or the medical necessity of this home modification.

- 7) Garage be reconstructed to allow handicap van to fit: There is no medical necessity for this modification. There is no rationale presented why the handicap van cannot be parked on driveway.
- 8) Garage to contain a 6 x 6 foot turning radius on the side, which the patient will enter and exit the vehicle: As the garage reconstruction above is not recommended, this request is also not recommended.
- 9) Garage should be attached to the home to allow the patient to avoid extreme weather in accessing home from vehicle: As the garage reconstruction above is not recommended, this request is also not recommended.
- 10) Doors leading to the garage require 36-inch wide doorway: As the garage reconstruction above is not recommended, this request is also not recommended.
- 11) Rear of home exit to have a sidewalk 48 inches wide and leading around the home from back to front. There is no medical necessity to have the sidewalk surround the house.
- 12) Home equipped with motion sensors for indoor and outdoor lighting: There is no medical necessity for this request. The patient will have 24/7 attendant.
- 13) Designated area be built for washer and dryer for the laundry related to incontinence of bowel and bladder: There is no report that the patient's home does not currently have a designated laundry area including washer and dryer. The details of this request need to be clarified.
- 14) Front loading washer and dryer not necessarily for the patient, but for ease of access for caregiver: This home modification is not medically necessary for the patient.
- 15) Sufficient space for caregiver to assess laundry: There is no medical necessity for this home modification.
- 16) Flooring in the home hardwood for easier use of wheelchair accessibility: There is no medical necessity for this modification or description offered why the current flooring is inadequate for the patient to operate a wheelchair.
- 17) Access to kitchen areas as per outlined by Claire Malawry: There is no medical necessity for this request. The patient has 24-hour care and will not be using the kitchen himself.
- 18) Extra additional bedroom to be added for 24-hour caregiver: There is no medical necessity for this, as caregivers will work three eight-hour shifts per day.
- 19) Aspects of the bedroom should include 6 x 6 foot space for turning radius: There is no report of the dimensions of the patient's bedroom or report that this modification involves expanding the space and walls of the existing bedroom.
- 20) Clear floor space important to access areas of rooms in home. There is no explanation of the details of this modification. There is no documentation that there are permanent fixtures that need to be repositioned.
- 21) Electronic aid of daily living assessment for adaptive technology to allow patient to utilize remote and voice activated control of environment: There is no specific description provided of the electronic aid or report of medical necessity.
- 22) Automatic locking systems on all doors. The patient will have 24 hour per day caregivers. There is no rationale for this modification.
- 23) Remove and replace any exposed plumbing for safety: There is no medical necessity for this modification or description of the referenced plumbing.
- 24) All door handles to have to have lever style to allow patient to access: This modification is unreasonable, as the patient does not have motor function of his extremities.
- 25) New water heater to ensure appropriate temperature in showering: There is no report that the patient's current water heater is inadequate.

26) Yard work to be performed for patient in light of the fact patient unable to perform on his own: There is no medical necessity for this request.

Our determination does not mean that the patient should not receive further medical treatment or personal care and does not refer to compensability. For questions regarding compensability, please contact the claim administrator.

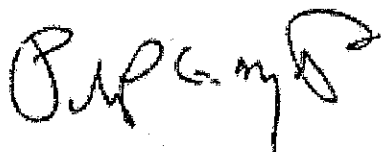
Requesting physician: You may request reconsideration of this decision by submitting additional information to Patriot Risk Services: PO Box 2650, Rancho Cordova, CA 95741; Facsimile (818)688-0179. Please clearly mark the document as a Reconsideration or Appeal. Requesting reconsideration is voluntary and neither triggers nor bars the Independent Medical Review dispute resolution procedures of Labor Code Sections 4610.5 and 4610.6. Pursuit of reconsideration is optional at your discretion.

This decision will remain effective for 12 months unless additional recommendation is received from you with documented change in the facts material to the basis of the Utilization Review decision.

Injured worker: Any dispute shall be resolved in accordance with the Independent Medical Review provisions of Labor Code sections 4610.5 and 4610.6. Any objection to this utilization review decision must be communicated by you, your representative, or your attorney on your behalf on the enclosed Application for Independent Medical Review (DWC Form IMR-1) within 30 calendar days of receipt of this decision.

You have a right to disagree with decisions affecting your claim. If you have questions about the information in this notice, please call [Tanya Bishop] at []. However, if you are represented by an attorney, please contact your attorney. For information about the workers' compensation claims process and your rights and obligations, go to www.dwc.ca.gov or contact an Information and Assistance (I&A) officer of the state Division of Workers' Compensation. For recorded information and a list of offices, call toll-free (800)736-7401.

Sincerely,



This decision was made by: Phil Martin, MD License #A45448 Specialty: Emergency Medicine

Copies to: See Proof of Service

Utilization Review Appeal Process

The purpose of the appeal process is to review a request for medical treatment that has not been certified, by a Physician Reviewer, who determined that the request did not meet the evidence-based guidelines for medical treatment generally recognized and accepted by the medical community for medical necessity and appropriateness.

Appeal process timelines:

- o Expedited appeals will be processed within three (3) business days following the initiation of the process.
- o Standard appeals will be processed within thirty (30) business days following the initiation of the process.
- o Appeals are in accordance with the state of California Labor Code statutes.

Copies of the medical records containing supportive medical information must be included with the request for a standard appeal. Arissa Cost Strategies will consider all documentation, records or other information submitted by the requesting physician, facility, injured worker or provider pertinent to and relating to the service requested.

APPEAL OF MEDICAL DECISION

1. The physician, facility, injured worker or provider who received the denial may request an appeal of the decision in writing, via facsimile or by telephone, within 30 days of receipt of the denial.
2. The Medical Director or designee will initially review the appeal.
3. The appeal will then be assigned to an appropriate Physician Advisor. The physician advisor must have an active practice in the major clinical area being reviewed; and have admitting privileges and direct patient care responsibilities in medical treatment facilities. The physician advisor is will not be the same physician who rendered the original denial decision.
4. The Physician Advisor will notify the requesting physician via telephone or facsimile within twenty-four (24) hours of the decision.
5. The Physician Advisor will communicate the final decision to the Medical Director in writing.
6. Written notification of adverse appeal determination will include the principal reason for the determination to substantiate a non-certification.
7. The clinical rationale for the non-certification determination will be available to the requesting physician upon request.
8. Record retention:
 - a. Name of the injured worker, requesting provider or facility.
 - b. Copies of all records and other pertinent documentation including correspondence related to the determination and appeal.

Division of Workers' Compensation - Workers' compensation court public information search



Lien Search screen

Lien activation fees are no longer being collected by the Division of Workers Compensation, in compliance with a ruling issued by the US District Court for the Central District of California in the matter of *Angelotti Chiropractic, Inc., et al. v. Baker, et al.*

Lien claimants whose liens were subject to the activation fee are not currently required to pay the fee in order to appear at a hearing or file a Declaration of Readiness to Proceed regarding a lien.

Case Search Lien Search Multiple Lien Activation

* Minimum search criteria: EAMS case number or Lien Reservation Number or Claimants Name only

EAMS Case Number *		Claimant Name (First Name Last Name OR Organization Name)	
<input type="text" value="ADJ8157719"/>		<input type="text"/>	
Lien Reservation Number *		Injury Date	
<input type="text"/>		<input type="text"/>	
Lien File Date (mm/dd/yyyy)		Exempt Indicator	Date Of Hearing (mm/dd/yyyy)
<input type="text"/>		<input type="text" value="v"/>	<input type="text"/>
Lien Status	External Transaction Id		Payment Date (mm/dd/yyyy)
<input type="text" value="v"/>	<input type="text"/>		<input type="text"/>
<input type="button" value="Cancel"/>	<input type="button" value="Reset"/>	<input type="button" value="Search"/>	

Search result

Case Number	Lien Reservation No.	Claimant Name	Lien File Date	Lien Status	Lien Amount	Payment Date	Payment Amount	Exempt DOI Indicator
ADJ8157719	0006242806	ARS LEGAL WHITTIER	11/29/2012	INACTIVE	9728.28			Unpaid
ADJ8157719	0010905758	BERMAN MORE SANTA ANA	01/27/2014	INACTIVE	31000			Unpaid

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PROOF OF SERVICE

RE: CIGA, Petitioner v. WCAB, Nicolas Mercado, Respondents

Court of Appeal (Hand-delivered via courier)
Second Appellate District (Original + 4 Copies)
Ronald Reagan State Building
300 S. Spring Street, 2nd Floor
Los Angeles, CA 90013

Workers' Compensation Appeals Board (2 Copies)
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94142
Attn: Writ Department

Workers' Compensation Appeals Board
1065 N. Pacific Center Drive, Suite 170
Anaheim, CA 92806-2141
Attn: Honorable Paul DeWeese, WCALJ

Patriot Risk Services
c/o California Insurance Guarantee Association
P. O. Box 29066
Glendale, CA 91209-9066
Attn: Tanya Bishop

Berman, More & Gonzalez
2677 N. Main St., Suite 225
Santa Ana, CA 92705

