

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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4
5 **DANIEL BELLING,**

6 *Applicant,*

7 **vs.**

8 **UNITED PARCEL SERVICE, INC.; LIBERTY**
9 **MUTUAL INSURANCE COMPANY,**

10 *Defendants.*

Case Nos. ADJ944426 (VNO 0538295) (MF)
ADJ7895528

OPINION AND DECISION
AFTER RECONSIDERATION

11
12 On September 3, 2015, we issued our Opinion and Order Granting the Petition for
13 Reconsideration filed by UPS through Liberty Mutual Insurance Company (defendant) with regard to the
14 decision filed on June 12, 2015, in order to allow sufficient opportunity to further study the factual and
15 legal issues in these cases and to enable us to issue a just and reasoned decision. This is our Decision
16 After Reconsideration.

17 Defendant seeks reconsideration and, alternatively, removal of the Partial Findings, Award and
18 Orders (PFAO) issued by a workers' compensation administrative law judge (WCJ) on June 12, 2015,
19 wherein it was found that defendant did not overpay temporary disability indemnity; applicant became
20 permanent and stationary as of September 7, 2010; there is insufficient basis upon which to base a
21 finding that Ms. Belling conducted an inappropriate ex-parte communication with the panel qualified
22 medical evaluator (PQME) Dr. Rose; defendant's utilization review dated February 4, 2014 was timely
23 as to the request for approval of an electric wheelchair and the roll in van, but untimely as to the need for
24 home healthcare, a home assessment for required home modifications, a nurse case manager,
25 transportation, and stroke rehabilitation; and treatment in the form of home health care, a nurse case
26 manager, transportation, assessment for home modification, and stroke rehabilitation is reasonably
27 required to cure or relieve the effects of the industrial injury in these cases.

1 Defendant contends that its Petition for Removal is the appropriate mechanism to challenge the
2 WCJ's denial of its request for a replacement PQME on account of the (alleged) improper ex-parte
3 communication between applicant's wife and PQME Dr. Rose. With regard to the Petition for
4 Reconsideration, defendant contends the WCJ erred because its February 4, 2014 utilization review (UR)
5 denial was timely made and communicated as to all treatment requests and, therefore, the denial can only
6 be appealed through independent medical review (IMR). Next, defendant asserts that home health care, a
7 nurse case manager, transportation, assessment for home modification, and stroke rehabilitation are not
8 treatments reasonably required to cure or relieve the effects of applicant's injuries because none of the
9 reporting physicians justified the reasonableness and necessity of such forms of treatment in accordance
10 with the hierarchy of treatment guidelines set forth in Labor Code section 4600(b).¹ Defendant further
11 contends that the WCJ lacked jurisdiction to consider the lien of Mrs. Belling because it was dismissed
12 by operation of law when Mrs. Belling failed to pay the required lien activation fee set forth in section
13 4903(b). Finally, defendant argues that the WCJ erred in concluding that May 23, 2008 is the "start date"
14 of defendant's liability for home health care under section 4600(h) because applicant did not prove when
15 defendant first received Dr. Hirsch's June 9, 2008 report (Exhibit 19.)²

16 We have considered the allegations of the Petition for Removal and Reconsideration (Petition),
17 the contents of the Report and Recommendation on Petition for Reconsideration (Report) of the WCJ
18 with respect thereto, and the Answer to the Petition filed by applicant. Based on our review of the record
19 and for the reasons discussed below, as our decision after reconsideration, we will affirm the June 12,
20 2015 PFAO.

21 **I. FACTUAL STATEMENT**

22 Daniel Belling (applicant), born September 23, 1954, while employed by defendant as a Feeder
23 Manager, sustained two injuries arising out of and occurring in the course of said employment. On
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25 ¹ All statutory references hereinafter are to the Labor Code unless otherwise stated.
26 ² We observe that the PFAO does not find the start date of defendant's liability for home healthcare. The WCJ's Opinion on
27 Decision (OOD) dated June 12, 2015 notes that based on the date of Dr. Hirsch's June 6, 2008 Report (Exhibit 19), the start
date for home healthcare services would be May 23, 2008, but "[t]his issue is deferred until additional medical evidence is
obtained from the reporting physicians in this case." (OOD, June 12, 2015, p. 4.)

1 August 28, 2006, applicant sustained a specific injury (ADJ944426). He also sustained a cumulative
2 injury during the period from March 31, 1975 to August 28, 2006 (ADJ7895528). Both injuries were in
3 the form of an aneurysm and sequelae, including intracranial hemorrhage, internal, hypertension, fatigue,
4 de-conditioning, sleep disorder, aphasia, sexual dysfunction, psyche, and vision.

5 Defendant denied applicant's claims of injury, and several years of litigation ensued. On April
6 12, 2013, a decision issued finding both claims of injury compensable. The April 12, 2013 Findings and
7 Orders was affirmed by our decision denying reconsideration issued on June 21, 2013.

8 More litigation followed the determination of compensability³, and ultimately these cases
9 proceeded to trial on the issues of permanent disability; apportionment; timeliness of defendant's
10 February 4, 2014 UR denial; reasonableness and necessity of medical treatment; defendant's request to
11 strike the reports of PQME Dr. Rose; and the liens of Mrs. Billings for home healthcare services she
12 provided to applicant. Several days of trial were held and the WCJ issued the PFAO on June 12, 2015.
13 It is from that decision that defendant seeks both removal and reconsideration.

14 II. DISCUSSION

15 We first address the Petition as a Petition for Removal. It is defendant's contention that removal
16 is the appropriate remedy to challenge the WCJ's denial of its motion to strike Dr. Rose as the PQME as
17 well as striking his reports from evidence in these cases on account of an alleged improper ex-parte
18 communication with applicant's wife. Section 5310 authorizes the Appeals Board to remove to itself
19 interim and non-final orders and to review and take appropriate action on them. Removal, however, is an
20 extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.*
21 (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers'*
22 *Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The
23 Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable
24 harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10843(a); see also *Cortez, supra*;

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27 ³ As stated, this case has been vigorously litigated. The Electronic Adjudication Management System (EAMS) Filenet record contains nearly 500 documents. To date, 107 documents, several of which are in excess of 100 pages, have been admitted into evidence. Additionally, the WCJ has presided over 25 proceedings.

1 *Kleemann, supra.*) The petitioner also must demonstrate that reconsideration will not be an adequate
2 remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, §
3 10843(a).)

4 Here, defendant argues that it will be substantially prejudiced and suffer irreparable harm because
5 applicant's wife may have provided Dr. Rose with false information and may have been motivated to
6 embellish applicant's limitations so as to increase the value of her lien for the home healthcare services
7 she provided to applicant. We need not address whether or not defendant has demonstrated the
8 appropriateness of removal in this case, however, because the WCJ chose to consider the denial of
9 defendant's motion to strike the PQME as one involving a substantive right for which the instant Petition
10 for Reconsideration provides an adequate remedy. (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187
11 Cal.App.4th 575 [75 Cal.Comp.Cases 817].)

12 **A. Ex-parte Communication between PQME and Applicant's Wife**

13 We next address the merits of defendant's contention. According to defendant, Dr. Rose engaged
14 in an impermissible ex-parte communication with applicant's wife during his initial evaluation of
15 applicant on September 7, 2010. As noted in Dr. Rose's PQME report of the same date, Mrs. Belling
16 attended the appointment with her husband and provided Dr. Rose with the history of the injury, her
17 husband's current complaints, and his medical history. (Exhibit X-4, Report of Dr. Rose, dated
18 September 7, 2010, pp. 1-6.)

19 Section 4062.3(b) requires that information a party intends to provide to a PQME be exchanged
20 with the opposing party 20 days prior to providing the information to the PQME so that the opposing
21 party will have an opportunity to object. Further, subsection (e) requires all "communications" with the
22 PQME to be in writing, and any such written communication must be served on the opposing party 20
23 days prior to the evaluation. Subsection (g) prohibits a party from engaging in ex-parte communications
24 with the PQME, but subsection (f) excepts certain oral communications with the PQME or staff
25 regarding "nonsubstantial" matters, such as scheduling an appointment, from that prohibition. Further,
26 subsection (i) clearly states that the prohibition against ex-parte communications in subsections (e) and
27 (g) does not apply to oral or written communications by the employee or, if the employee is deceased, by

1 his or her dependent.

2 The report prepared by a PQME following the evaluation of the employee must meet the
3 standards set forth in California Code of Regulations, title 8, section 10606. That rule requires the
4 PQME report to include a history of the injury, the employee's complaints, and the employee's medical
5 history.

6 We begin our analysis of whether an improper ex-parte communication took place between Dr.
7 Rose and Mrs. Belling at the time of the September 7, 2010 PQME by consideration of the Maxims of
8 Jurisprudence. Civil Code section 3542 cautions that the interpretation of a statute must be reasonable,
9 and Civil Code section 3531 reminds us that the law never requires impossibilities. In this case,
10 applicant is severely disabled as the result of his industrial injuries. The degree of applicant's limitations
11 was initially described by Jeffrey A. Hirsch, M.D. in his report dated June 9, 2008. (Exhibit 19.) On
12 page 2 of that report under the heading, "History of Present Illness," Dr. Hirsch states, "Mr. Daniel
13 Belling could not provide any history owing to severe expressive neurocognitive deficits. His wife
14 transmitted the information to me during the evaluation." (*Id.*, at p. 2.) On page 3 of the report, Dr.
15 Hirsch notes that applicant "is unable to talk." (*Id.*, at p. 3.) Further, Dr. Hirsch states that applicant is
16 unable to dress himself, eat, brush his teeth, comb his hair, or bathe himself." (*Id.*, at p. 5.) Although Dr.
17 Hirsch does not specifically state that applicant is unable to write, that conclusion is clear from Dr.
18 Hirsch's description of his physical examination findings. (*Id.*, at p. 6.) Since applicant is unable to talk
19 or otherwise communicate, he would be deprived of the opportunity of a PQME without the assistance of
20 someone to transmit the required information (history of injury, complaints, medical history) on his
21 behalf. The assistance applicant's wife provided in this case is akin to the assistance provided by a
22 language interpreter on behalf of a non-English speaking injured employee during such an evaluation.
23 Interpretive services clearly come within the exception set forth in subsection (i) of section 4062.3 in that
24 they are merely transmissions of information on the injured employee's behalf and, thus,
25 communications by the employee. Any other conclusion is contrary to Civil Code section 3531. Further,
26 our conclusion is consistent with the Court of Appeal's acknowledgement that section 4062.3(g)'s
27 prohibition of ex-parte communications between a party and the PQME should not be interpreted or

1 applied "... in a manner that will lead to absurd results." (*Alvarez v. Workers' Comp. Appeals Bd.* (2010)
2 187 Cal.App.4th 575, 590 [75 Cal.Comp.Cases 817].)

3 Defendant next argues that because applicant's wife filed a lien for the home healthcare services
4 she provided and continues to provide to her husband, she is a party to these cases and section
5 4062.3(g)'s prohibition against ex-parte communications applies directly to her as a party. This
6 argument has no merit. California Code of Regulations, title 8, section 10301(x) defines a party as:
7 "Party" means: (1) a person claiming to be an injured employee or the dependent of a deceased
8 employee; (2) a defendant; or (3) a lien claimant where either (A) the underlying case of the injured
9 employee or the dependent(s) of an injured employee has been resolved or (B) the injured employee or
10 the dependent(s) of a deceased employee choose(s) not to proceed with his, her, or their case.' Here,
11 even as a lien claimant, Mrs. Belling has not achieved party status in these matters because applicant's
12 underlying case has not yet been resolved. Furthermore, applicant has chosen to proceed and is
13 proceeding with his cases.

14 Additionally, as the WCJ's Report points out, defendant may have waived the very issue it now
15 wishes to challenge here since it did not raise the issue when Dr. Rose's reports were initially admitted
16 into evidence and relied on by the WCJ in finding compensability in these cases. The Findings and
17 Order regarding compensability issued on April 12, 2013. We do not need to address that issue here,
18 however, because there simply was no improper ex-parte communication between Dr. Rose and
19 applicant's wife.

20 **B. The February 4, 2014 UR Denial**

21 We next address defendant's claim that its February 4, 2014 UR denial was timely made and
22 communicated regarding the requests for home healthcare on a 24 hour/7 day per week basis, an
23 assessment for purposes of necessary home modifications, assignment of a nurse case manager,
24 transportation, and "stroke" rehabilitation and, therefore, the WCJ lacks jurisdiction to decide the
25 treatment issues in these cases. Defendant characterizes each of these treatment requests as
26 "prospective" and argues the WCJ erred in finding them to be "retrospective."

27 Section 4610 requires every employer to establish a UR program to review and approve, modify,

1 delay or deny treatment recommendations made by physicians for treatment reasonably required to cure
2 or relieve the effects of an industrial injury. (See, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*
3 (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981].) Treatment recommendations may be
4 prospective, retrospective or concurrent. (Lab. Code, § 4619(a).) Subsection (g) requires each UR
5 decision be made within specified time frames. Prospective or concurrent decisions are required to be
6 made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five
7 working days from the receipt of the information reasonably necessary to make the determination, but in
8 no event more than 14 days from the date of the medical treatment recommendation by the physician.
9 (Lab. Code, § (g)(1).) Retrospective decisions that result in denial of all or part of the medical treatment
10 provided must be communicated to the individual who received services, or to the individual's designee,
11 within 30 days of receipt of information that is reasonably necessary to make the determination. (*Id.*)
12 Administrative Director Rule 9792.6(s)⁴ defines prospective as, "... any utilization review conducted ...
13 prior to the delivery of the requested medical services." Subsection (u) of the Rule defines retrospective
14 as, "...utilization review conducted after medical services have been provided and for which approval
15 has not already been given."

16 If an employer denies liability for the alleged injury, subsection (g)(7) allows the employer to
17 defer UR until a final decision is made that the employer is liable for the claimed injury. Once the
18 employer's liability is determined, subsection (g)(8) requires the employer to begin UR of retrospective
19 treatment "on the date the determination of the employer's liability becomes final," and to initiate UR for
20 prospective treatment recommendations "from the date of the employer's receipt of a treatment
21 recommendation after the determination of the employer's liability." (Lab. Code, § 4610(g)(8).)

22 The February 4, 2014 UR decision (Exhibit 52, CompPartners Utilization Review Determination,
23 dated February 4, 2014) was in response to a January 21, 2014 request by applicant's treating doctor for
24 authorization of (1) home healthcare on a 24 hour/7 day per week basis, (2) a nurse case manager, (3)
25 transportation services, (4) stroke rehabilitation, (5) home modification assessment, (6) an electric
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⁴ Cal. Code Regs., tit. 8, § 9792.6.

1 wheelchair, and (7) a roll in van. (Exhibit 48, Request for Authorization, Dr. Burstein, January 21,
2 2014.) Whether defendant's UR decision was timely, in which case any disputes must be resolved
3 through the IMR process, or untimely, in which case any disputes are resolved by the WCAB (see,
4 *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 Appeals Board en banc)), turns on
5 whether the treatment is retrospective or prospective.⁵

6 Dr. Burstein became applicant's treating physician on July 22, 2010. His report of the same date
7 describes applicant's condition as follows:

8 [H]e has severe difficulty with self-care, personal hygiene including
9 urinating, defecating, brushing his teeth, combing his hair, bathing,
10 dressing, and eating. He cannot do any of those things. He has severe
11 difficulty communicating, writing, typing, seeing, and speaking. He is
12 unable to sit, stand, recline, walk, or climb stairs. He is blind on the right
13 field of vision so he had severe difficulty with sensory function. He has
14 severe difficulty with nonspecialized hand activities including grasping,
15 lifting, and tactile discrimination. He cannot travel, he cannot ride, he
16 cannot drive, he cannot fly, he cannot have sex, and he does not have
17 restful sleep. (Exhibit 12, Report of Dr. Burstein, dated July 22, 2010, p.
18 13.)

15 Dr. Burstein then reports, "Since his stroke, Mr. Belling has been completely dependent on his
16 wife to perform all activities of daily living..." (*Id.*, at p. 14.) Dr. Burstein elaborates regarding the
17 services provided by applicant's wife. He states:

18 In the morning she prepares and serves breakfast in his bed. It is too hard
19 for him to sit at a table. She was provided a series of exercises by the
20 rehabilitation facility that she then does with him. These are passive
21 exercises for up to an hour and a half. She then gets him into the
22 wheelchair and she helps him with grooming. She gets him back onto bed
23 and gets him dressed. He then gets into the wheelchair and sits in the den.
24 He has a snack and they do chair exercises. She then gets him into a
25 lounge chair and she prepares and serves lunch. She then takes him outside
26 for a little bit if it is a nice day in the wheelchair. They come back in and
27 do more exercises, then it is dinner time. After dinner, they watch TV until
about 8 p.m. and then she wheels him to the bedroom, transfers him into
bed, and puts diapers on him because of urinary incontinence and
incontinence of stool. She checks his diapers three or four times per night.
He usually requires changing three or four times per night. (*Id.*, at p. 7.)

⁵ We note that neither party disputes the WCJ's finding that the February 4, 2014 UR decision was timely with regard to the electric wheelchair and roll in van and, therefore, any dispute must be resolved through IMR. (PFAO, Finding No. 7, June 12, 2015.)

1 Dr. Burstein concludes with the recommendation, “[t]he applicant **requires home health care 24**
2 **hours per day, 7 days per week for safety** because he is at high risk for falling due to poor balance due
3 to the stroke and his right visual field cut. His **home needs to be assessed for safety**. Further, he **needs**
4 **an independent nurse case manager** who on a monthly basis, or more often if needed, will monitor his
5 medications to make sure he is taking his medications properly with a monthly report sent to the parties.
6 Due to his poor vision and severe neuro-cognitive deficits, he cannot drive he **requires transportation**
7 everywhere.” (*Id.*, at p. 14, emphasis in original.)

8 Dr. Burstein examined applicant on May 5, 2011 for the purpose of “ongoing monitoring of
9 medications, coordination of treatment, monitoring home care needs, transportation needs to make sure
10 his needs are being met, and to give consideration for any changes in his functioning and welfare.”
11 (Exhibit 8, Report of Dr. Burstein, May 5, 2011, pp. 1-2.) Dr. Burstein advises that applicant’s blood
12 pressure has been good on his current regimen of medications, but that he continues to have an
13 occasional grand mal seizure, and exercises with his wife’s assistance two hours per morning and two
14 hours in the afternoon. Applicant remains wheelchair-bound and dependent on his wife for all aspects of
15 self-care and personal hygiene. (*Id.*, at p. 2.) Authorization is requested for “home health care 24/7,” a
16 home assessment for safety, an independent nurse case manager, transportation, and stroke rehabilitation,
17 including speech therapy, occupational therapy, and physical therapy. (*Id.*, at p. 4.)

18 In his report dated July 14, 2011, Dr. Burstein, reports that applicant “[i]s disoriented to time,
19 place and person. He is wheelchair-bound with persistent right hemiparesis, expressive and receptive
20 aphasia.” (Exhibit 6, Report of Dr. Burstein, dated July 14, 2011, p. 2.) Dr. Burstein advises defendant
21 that applicant is “dependent on his wife for all aspects of self-care and personal hygiene” and “[h]e is
22 exercising with his wife an hour or two twice a day.” (*Id.*, at p. 2.) Further, he states that applicant is
23 unable to drive and “rides in a passenger van with difficulty.” (*Id.*, at p. 2.) Dr. Burstein then requests
24 that defendant authorize home healthcare, stating, “patient still requires home health care 24/7 for
25 safety.” (*Id.*, at p. 4.) Dr. Burstein also requests defendant authorize a home health assessment for
26 safety, an independent nurse case manager, transportation services, and stroke rehabilitation, including
27 speech therapy, occupational therapy and physical therapy. (*Id.*, at p. 4.)

1 Exhibit 2, Dr. Burstein's report dated July 5, 2012 reiterates the previous requests for home health
2 care on a 24 hour, seven day per week basis, a home assessment for safety, an independent nurse case
3 manager, transportation services and stroke rehabilitation. He explains his rationale as follows:

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5 Dr. Nehorayan notes that Mr. Belling requires total care. He notes that his
6 wife is elderly and is not clear if she will be able to keep up the level of
7 physical requirements to take adequate care of Mr. Belling, particularly as
8 he gets older, which will make everything much more difficult. It is
9 essential that she have the type of intervention and care to help him. Mr.
10 Belling's irritability and agitation stems from his own dependency and
11 guilt regarding his current condition. Thus, anything that is relieving to
12 his wife in terms of caretaking of him is going to be emotionally helpful.
13 If someone helps his wife, in terms of taking care of him, and relieves her
14 of such duties, he is going to be in a better state of mind emotionally.
15 What is indicated is care that will actually keep him comfortable, continue
16 to maintain his activities of daily living, trying to increase as much as
17 possible a sense of independency. (Exhibit 2, Report of Dr. Burstein,
18 dated July 5, 2012, pp. 2-3.)

19 Dr. Burstein examined applicant again on January 24, 2013 and authored a written report of the
20 examination. Dr. Burstein states, "Mr. Belling remains wheelchair-bound. Mrs. Belling exercises her
21 husband daily in the morning and afternoon for about six hours every day total. Mr. Belling remains
22 dependent on his wife for all aspects of self-care and personal hygiene. * * * He does not drive. He rides
23 in a van with difficulty. He is very anxious. He has difficulty getting in and out of the vehicle." (Exhibit
24 VV, Report of Dr. Burstein, January 24, 2013, p. 2.) Dr. Burstein again requests authorization for home
25 health care 24 hours per day, 7 days per week; authorization for assessment of Mr. Belling's home for
26 safety; authorization for an independent nurse case manager; authorization for transportation services;
27 and authorization for stroke rehabilitation. (*Id.*, at pp. 3-4.)

28 PQME Robert Rose opines that applicant "will require a significant amount of medical care into
29 the future." (Exhibit X-2, Report of Robert Rose, dated April 30, 2011, p. 23.) Dr. Rose details each
30 aspect of required care and states:

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32 The patient will also require durable medical devices, such as an
33 appropriate bed that will elevate and lower so that it is easy for him to get
34 in and out of bed and will not require the constant attention from his wife,
35 with the possibility of causing her back injury. Additionally, the patient
36 will require appropriate bars for the toilet and bathtub, appropriate devices

1 for reaching overhead and for lifting himself out of bed and, of course, an
2 appropriate wheelchair and definitely a motorized wheelchair. The patient
3 obviously needs 24-hour, 7-days per week assistance. He is receiving that
4 care from his wife at this time. Not only should she be compensated into
5 the future for her services, but she certainly has to be compensated for her
6 past services, which date back to the time when she first brought the
7 patient home and assumed responsibility for his home care. (*Id.*, at p.24.)

8 During the trial session on December 22, 2014, applicant's wife, Barbara Belling, testified
9 regarding the services she has provided to applicant since "early 2007." (Minutes of Hearing/Summary
10 of Evidence [MOH/SOE], December 22, 2014, 8: 5-6.) She cooks for her husband, bathes him, cleans
11 him, helps him when he has a seizure, drives for him, helps him with medications, helps him in and out
12 of the wheelchair. She also helps him move from one position to the next. She takes him to his doctor
13 appointments. She helps him go to the bathroom. She administers his medications because he cannot
14 manage them on his own. Before the injury, he could do all of these things. (MOH/SOE, December 22,
15 2014, 2:7-20.) She purchased a special toilet so that her husband can more easily slide off his wheelchair
16 onto the toilet. (*Id.*, at 9: 6-8.) Mrs. Belling was instructed by her husband's doctor on how to take care
17 of applicant. She testified, "[t]hey showed her how to take care of the feeding tube, and the physical
18 therapist showed her how to do the workouts. She had to do a test showing that she knew how to move
19 his legs and arms. The rest was that they wanted to make sure she knew how to take care of him." (*Id.*,
20 10: 5-8.) Mrs. Belling helps her husband with his exercises on a daily basis in order to keep him moving.
21 (*Id.*, 9: 21-25.)

22 The medical reports of Dr. Burstein and Dr. Rose, as reviewed above, as well as the testimony of
23 Mrs. Belling, persuade us that Dr. Burstein's January 21, 2014 request for authorization of treatment
24 (Exhibit 48) was a retrospective request that had been reiterated, repeatedly and essentially verbatim,
25 over the years since Dr. Burstein became applicant's treating physician on July 22, 2010. The same
26 reports and Mrs. Belling's testimony confirm that she did provide and continues to provide those
27 requested services to the best of her ability since her husband was released from the hospital and returned
home in 2007. Although defendant was not required to conduct UR of Dr. Burstein's treatment
recommendations while it was disputing liability for applicant's claimed injuries (Lab. Code, §

1 4610(g)(7)), defendant was required to conduct a UR of the treatment requests, initially set forth in Dr.
2 Burstein's July 22, 2010 report (Exhibit 12) and reiterated verbatim thereafter, immediately upon the date
3 the determination of defendant's liability became final because the requested treatment was provided by
4 applicant's wife, making it retrospective. On June 21, 2013, we affirmed the WCJ's determination of
5 defendant's liability in this case. (Order Denying Reconsideration, June 21, 2013.) Defendant, however,
6 did not initiate UR until January 28, 2014. (MOH/SOE, February 26, 2015, 2:19-25.) This is well
7 beyond the permissible time period in section 4610(g)(8), and therefore, defendant's UR denial that
8 issued on February 4, 2014 was untimely.

9 In addition to the mandatory requirements set forth in section 4610(g)(8), section 4600 makes the
10 employer responsible for providing all medical care that is reasonably required to cure or relieve the
11 effects of the industrial injury. This obligation requires the employer to take affirmative steps to
12 investigate the need for and to provide the employee with necessary treatment. (*Braewood Convalescent*
13 *Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566]; *Roque*
14 *Neri Hernandez v. Genia Staffing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Bd. En Banc).) We find
15 defendant's passive reaction to Dr. Burstein's repeated requests for authorization of the treatment
16 recommendations at issue here, both inexcusable and troubling. Certainly after receiving the final
17 determination of its liability for applicant's injury claims, it was incumbent upon defendant to take
18 prudent steps to insure its compliance with its mandatory obligation under sections 4600 and 4610(g)(8).
19 It did not do so.

20 Moreover, defendant was on notice that the requested home-based services were being provided
21 by Mrs. Belling. The numerous medical reports admitted into evidence (Reports of Dr. Rose, Dr.
22 Burstein, Dr. Hirsch, Dr. Nehorayan and Dr. Eng) discuss the various ways in which Mrs. Belling has
23 been required to provide for her husband's care upon his release from the hospital following his stroke.
24 Mrs. Belling's testimony at the October 10, 2012 trial confirms that since her husband's injury she has
25 been required to provide care for him 24 hours per day, seven days per week. (MOH/SOE, October 10,
26 2012, p. 11: 6-9.) Nonetheless, defendant took no affirmative steps to meet its legal obligation to provide
27 applicant with necessary and required treatment following the final determination of compensability in

1 these cases. Instead, it appears that defendant took advantage of the Belling's marriage contract to avoid
2 its responsibilities to provide applicant with reasonable and necessary care. (Lab. Code, § 4600.) As was
3 aptly stated in *American Bridge Division, U.S. Steel Corp. v. Ind. Acc. Com.* (1965) 30 Cal.Comp.Cases
4 159 (Writ. Den.):

5 The obvious care ... required was delegated, foisted on and surcharged
6 upon the injured employee's wife on the theory that an employee's
7 married state creates a reservoir for the transference of the employer's or
8 carrier's responsibility, to provide necessary attention, to the injured
9 employee's spouse.

10 An employer or insurance carrier ... is not a third party beneficiary to a
11 marriage contract and is without right to assume or contend that the spouse
12 of an injured employee ... is under any obligation to exert added physical
13 efforts to attend to the injured spouse's needs which otherwise would be
14 the responsibility of the employer to furnish.

15 The fact that the injured employee is married may lead to an expectation
16 that love and affection may be of therapeutic value in restoring the injured
17 employee's motivation for speedy recovery, but such attitude is personal
18 to the spouse and not a matter which [an employer or insurance carrier]
19 may expand to impose upon the injured employee's spouse a
20 responsibility for care and attendance. The affirmative obligation for
21 providing care and treatment is on the employer [or insurance carrier].
22 (*American Bridge Division, supra*, 30 Cal.Comp.Cases at pp. 160-161.)

23 This type of affirmative omission on the part of an employer or an insurance carrier is conduct
24 that could reasonably lead to a referral to DWC's Audit Unit.

25 **C. Reasonableness and Necessity of Home-Based Medical Treatment**

26 Without waiving its claim that the February 4, 2014 UR denial in these cases was timely as to all
27 of Dr. Burstein's treatment requests, defendant also argues, in the alternative, that applicant failed to
meet his burden of proof as to the reasonableness and necessity of the recommended and requested
treatment. It is defendant's position that applicant failed to meet his burden of proof that retrospective
home health care and the other related, essentially home-based services, are reasonable and necessary
pursuant to the Medical Treatment Utilization Schedule (MTUS) (Lab. Code, § 5307.27), which is
presumptively correct on the issue of the extent and scope of reasonable medical treatment under section
4604.5, *or* that applicant failed to rebut applicability of the MTUS in these cases. Defendant's contention

1 is without merit and its analysis is flawed.

2 Foremost, defendant fails to discuss the import of sections 4600(h), 4603.2(b)(1), and 5307.8,
3 which were all adopted as part of Senate Bill 863 (Stats. 2012 ch. 363.) Our decision in *Neri Hernandez*,
4 *supra*, held that sections 4600(h), 4603.2(b)(1), and 5307.8 “apply to all requests for home health care
5 services and for payment thereof where no final decision on the request had issued by January 1, 2013.”
6 (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at p. 688.) Consequently, those sections apply to the
7 disputed home health care-based treatment at issue in these cases.

8 Section 4600(h) provides, in relevant part, “[h]ome health care services shall be provided as
9 medical treatment only if reasonably required to cure or relieve the injured employee from the effects of
10 his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing
11 with Section 2000) of the Business and Professions Code, and subject to 5307.1 or 5307.8.” As we
12 stated in *Neri Hernandez*:

13 Section 4600(h) makes clear that home health care services are included in
14 the definition of “medical treatment,” but it also limits an employer’s duty
15 to provide that treatment by imposing two additional conditions which are
16 part of an injured worker’s burden of proof. The first condition requires
17 that home health care services be prescribed a physician ... The second
18 condition requires that an employer’s liability for home health care
19 services is subject to either section 5307.1 or section 5307.8. Section
20 5307.1 applies where an official medical fee schedule or Medicare
21 schedule covers the type of home health care services sought. When the
22 type of service sought is not covered by an official medical fee schedule or
23 Medicare Schedule, section 5307.8 applies. (*Roque Neri Hernandez,*
24 *supra*, at p. 689.)

25 In these matters, Dr. Burstein prescribed home health care services in the form of home-based
26 care 24 hours per day, seven days per week; a home assessment for necessary safety-related
27 modifications; the assignment of a nurse case manager to provide monthly monitoring; transportation
28 services; and stroke rehabilitation, including speech therapy and physical therapy. These home-based
29 services were first prescribed by Dr. Burstein in his initial report dated July 22, 2010 (Exhibit 12) and
30 repeatedly re-prescribed in multiple reports thereafter, culminating with Dr. Burstein’s January 13, 2014
31 report (Exhibit 49), as set forth in detail above. Each prescription was written, dated and signed by Dr.

1 Burstein. Thus, section 4600(h)'s requirement that home health care services be prescribed by a
2 physician has been clearly met.

3 The next inquiry in our application of section 4600(h) is whether the prescribed services are
4 covered by section 5307.1 or the Medicare schedule. If not, then section 5307.8 applies. The unrebutted
5 opinion of Dr. Burstein confirms that neither section 5307.1 nor the Medicare schedule apply to these
6 services. In his report dated January 13, 2014, Dr. Burstein provides the rationale for this conclusion.

7 He states:

8 Authorization is again requested for home healthcare 24 hours per day, 7
9 days per week. Mr. Belling is at a high risk for falling due to poor balance
10 due to his stroke and right visual field cut. He cannot call for help. He
11 cannot dial 911 or anything else on the telephone. He cannot get to the
12 telephone. He has no chance of survival on his own or in an emergency,
13 due to hypertension, brain hemorrhage, and neurological residuals.

14 Authorization is requested for an independent nurse case manager. The
15 patient requires an independent nurse case manager to monitor his
16 medication, to make sure he is taking his medications properly with
17 monthly reporting sent to the parties or more often as needed.

18 Authorization is requested for transportation to and from wherever Mr.
19 Belling needs to go. He cannot drive due to his severe physical &
20 cognitive impairments. He does not maintain a driver's license. He
21 cannot use public transportation due to his severe cognitive impairment.

22 Authorization is requested for stroke rehabilitation including speech
23 therapy, occupational therapy, and physical therapy. Initial therapy was
24 discontinued and shortened due to hard to control high blood pressure.

25 Authorization is requested for an electric wheelchair and rolling van to
26 accommodate the wheelchair. He cannot drive. A wheelchair would be
27 locked into place in the back of the van and he requires a driver. He
cannot propel a mechanical wheelchair due to brain damage and
weakness. His wife cannot load/unload a mechanical chair because it is
too heavy.

Authorization is requested for home modifications for safety to
accommodate his disabilities. His home needs a formal inspection. I am
endorsing the needs set forth by Mrs. Belling, which seem reasonable and
necessary to treat and relieve the effects of the applicant's catastrophic
brain injury, home modifications to include widening of wall doors to
accommodate Mr. Belling's wheelchair. They do not accommodate his
current small portable wheelchair and need to be widened to accommodate

1 his electric wheelchair. He requires a walk-in type shower without a step,
2 without stepping up or stepping down. The bathroom has a glass wall that
3 needs to be replaced to accommodate a railing. He needs a new sink and
4 vanity to accommodate his wheelchair. The bars on the windows should
be removed. This would require replacing windows and re-stuccoing the
house around the windows.

5 *The medical treatment utilization schedule (MTUS) guidelines do not*
6 *apply to internal medicine injuries. The MTUS chronic pain guides,*
7 *which allow a maximum of 35 hours per week for patients who are*
8 *homebound on a part time basis, do not apply to Mr. Belling. His*
9 *requirements are not related to chronic pain but to safety and survival. I*
10 *do note that the MTUS guides do not include homemaker services like*
11 *shopping, cleaning, laundry or personal care given by home health aides*
12 *like bathing, dressing, and using that (sic) bathroom. Again, the MTUS*
13 *chronic pain guidelines do not apply to the instant case. **Mr. Belling is***
14 ***completely dependent on others for survival.** (Exhibit 49, report of Dr.*
15 *Burstein, January 13, 2014, pp. 11-13 [emphasis added; final emphasis in*
16 *original].)*

17 We conclude that section 5307.8 applies in these matters, and affirm the WCJ's finding that
18 substantial medical evidence, including the well-reasoned reports of Dr. Rose, Dr. Burstein, and Dr.
19 Hirsch, supports the reasonableness and necessity of home health care, a home assessment for safety
20 modifications, a nurse case manager, transportation, and stroke rehabilitation. (*E.L. Yeager v. Workers'*
21 *Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]; *Smyers v. Workers'*
22 *Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [49 Cal.Comp.Cases 454].)

23 We find defendant's claim that "there is evidence supporting Defendant's position that the
24 requested treatment is not reasonable and necessary"⁶ unpersuasive. Defendant quotes from portions of
25 Dr. Eng's deposition testimony regarding the efficacy of occupational therapy, speech therapy, physical
26 therapy and private duty nursing on applicant's behalf. When read in complete context, Dr. Eng simply
27 states, "In my opinion, as I stated previously, six years post event I do not believe that he would
significantly improve [from such services]." (Exhibit 21, Deposition of Dr. Eng, July 26, 2012, p. 16:
13-15.) Dr. Eng did not opine that Dr. Burstein's treatment requests were unreasonable or unnecessary.

⁶ Petition for Reconsideration, p. 15: 19-20.

1 Further, Dr. Eng testified that applicant cannot administer his own medications and needs someone
2 trained to administer the medications to him. (*Id.*, p. 17:4-25.)

3 **D. Start Date of Home Health Care Treatment and Costs Related thereto**

4 Defendant also disputes the “start date” of its liability for home health care services, alleging that
5 the WCJ found it to be liable for such services beginning on May 23, 2008. We have carefully reviewed
6 the PFAO and observe that the WCJ **did not** make such finding. Therefore, we reject this contention.
7 Furthermore, we observe that the WCJ did not make findings and award thereon with regard to the lien
8 claim of Mrs. Belling. That issue is deferred for further proceedings and decision thereon.

9 **E. WCAB Jurisdiction over Lien Claim of Mrs. Belling**

10 Defendant’s final contention, which it raises for the first time in its Petition, is that the WCAB
11 lacks jurisdiction to consider and award payment on the lien filed by applicant’s wife because there is no
12 proof that she paid the lien activation fee required by section 4903.06 by January 1, 2014, and therefore
13 her lien is dismissed as a matter of law. This argument lacks merit for two reasons. Foremost, any
14 obligation on Mrs. Belling’s part to pay the lien activation fee did not ripen under section 4903.06
15 because to date she has not filed a Declaration of Readiness to Proceed to a Lien Conference, nor has a
16 lien conference been conducted in these matters.

17 Second, DWC was enjoined from collecting the lien activation fee as a result of the preliminary
18 injunction issued by United States District Court Judge George Wu on November 19, 2013. Although
19 defendant’s Petition mentions the recent decision in *Angelotti Chiropractic v. Baker* (2015) 791 F. 3d
20 1075 (Court of Appeals, 9th Circuit 2015), it fails to mention the fact that enforcement of the lien
21 activation fee had been enjoined by the United States District Court since November 19, 2013, and
22 collection of the fee was stayed by the Division of Workers’ Compensation. That Ninth Circuit Court of
23 Appeals’ June 29, 2015 decision upheld the Constitutionality of the lien activation fee. On October 18,
24 2015, the Court denied plaintiff’s Petition for Rehearing and remanded the case back to Judge Wu to
25 vacate the preliminary injunction and dismiss the case. On November 3, 2015, Judge Wu issued an
26 Order vacating the preliminary injunction and permitting lien claimants to pay activation fees required by
27 section 4903.06 from November 9, 2015 until December 31, 2015. **Failure to pay the lien activation**

1 **fee by midnight December 31, 2015, will cause the affected lien to be dismissed by operation of law.**

2 ⁷ Mrs. Belling had no ability to pay the lien activation fee during the pendency of the preliminary
3 injunction and stay. The time within which to pay the lien activation fee has not yet expired, and
4 therefore Mrs. Belling's lien has not yet been dismissed by operation of law, contrary to defendant's
5 assertion.

6 For all the reasons discussed above, as our Decision After Reconsideration, we will affirm the
7 June 12, 2015 Partial Findings, Award and Orders.

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⁷ DWC Newslines No.: 2015-104, November 4, 2015, "DWC Reinstating Lien Activation Fees on November 9."

1 For the foregoing reasons,

2 **IT IS ORDERED** as our Decision After Reconsideration that the June 12, 2015 Partial Findings,
3 Award and Orders is **AFFIRMED**.

4
5 **WORKERS' COMPENSATION APPEALS BOARD**

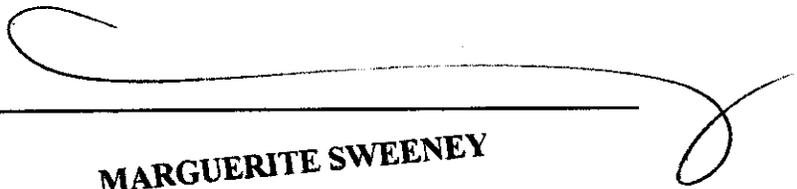
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8 **RONNIE G. CAPLANE**

9 **I CONCUR,**

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11 

12 **DEIDRA E. LOWE**

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16 **MARGUERITE SWEENEY**



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

18 **DEC 21 2015**

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

21 **DANIEL BELLING**
22 **LAW FIRM OF ROWEN, GURVEY & WIN**
23 **MICHAEL SULLIVAN & ASSOCIATES**

24
25 

26 **SVH/ara**