WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WAYNE BLOSSER, *Applicant*

vs.

RB SPENCER, INC., AIR CONDITIONING AND HEATING; INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Numbers: ADJ17146948; ADJ17146930; ADJ15040609
Sacramento District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the January 21, 2025 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an AC HVAC Commercial Installer on June 18, 2020 (ADJ17146930) and August 25, 2020 (ADJ15040609) sustained industrial injury to his head, neck, back, shoulders, psyche, psychiatric, brain, lungs, bowel, bladder, upper and lower extremities, and in the form of sexual dysfunction per prior 100 percent stipulations. The WCJ found in relevant part that the court retained jurisdiction to decide the present dispute involving home modifications, and that defendant failed to timely investigate applicant's need for treatment to cure or relieve from the effects of his industrial injuries. Pursuant to reporting in evidence, the WCJ awarded home modifications in the form of a mobile home to be constructed on applicant's residential property. The WCJ further awarded interim housing in the form of an Americans with Disabilities Act (ADA) compliant apartment or skilled nursing facility.

Defendant contends that it was denied due process such that it could not marshal timely and responsive evidence to address the home health issues raised by applicant. Defendant further contends that because the present issues are subject to Utilization Review, the court was without jurisdiction to hear and decide the issues. Defendant also asserts the evidentiary record does not support the Award.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons set forth in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

FACTS

Applicant has sustained three industrial injuries. In Case No. ADJ15040609, applicant, while employed on August 25, 2020, sustained industrial injury while employed as an AC HVAC Commercial Installer by defendant RB Spencer, Inc. Applicant sustained further injuries while similarly employed on August 18, 2020 (ADJ17146930), and from August 24, 2019 to August 24, 2020 (ADJ17146948).

On March 25, 2024, the parties entered into Joint Stipulations with Request for Award, in which they stipulated that applicant had sustained injury to his head, neck, back, psyche, upper extremities, arm, shoulder, pulmonary [system], cardiovascular [system], bowel and bladder dysfunction, and sexual dysfunction. (Stipulations with Request for Award, dated March 25, 2024, at pp. 4-5.) The parties further stipulated that applicant was "in need of [adaptive] devices for ADL's [Activities of Daily Living], including a wheelchair, walker and home care assistance." (*Id.* at p. 5.) The parties agreed that applicant was permanently and totally disabled, notwithstanding the fact that applicant was not yet at Maximum Medical Improvement. (*Id*. at p. 7.) As relevant to the present dispute, the parties offered the following stipulation:

> Defendant to pay applicant $1,550.00 per month for housing and utility costs starting 1-1-2024 until the applicant's housing needs are resolved. Discovery is ongoing. Either party may terminate the housing and utility agreement at will. Jurisdiction reserved. Both the defendant and the applicant agree to act expeditiously and in good faith in this regard. Rent increase of $125 starting 4/1/2024 increasing to $1,675 per month.

A WCJ reviewed the proposed stipulations and issued an Award on April 11, 2024. (Award on Amended Stipulations, dated April 11, 2024.)

On July 30, 2024, applicant filed a Declaration of Readiness to Proceed to hearing (DOR), noting that the parties "had a previous hearing on 01/18/2024 re an order for defendant to complete construction of a wheelchair-accessible ADU on applicants pro[p]erty, defendant OTOC the hearing to work on the issue. Applicant remains unable to return to his property due to not having repairs on his property done or the ADU."

On August 5, 2024, defendant objected to applicant's DOR, noting that "Defendant is currently paying for applicant's housing and has tried to work with the applicant regarding new rental housing, possible move to assisted living facility and/or what is required to fulfill his medical housing needs." (Objection to Declaration of Readiness to Proceed, dated August 5, 2024, at p. 1.) Defendant objected to "applicant's demand that a new house be built on the property owned by the applicant, including new septic, new electrical and ground work," and submitted that "an MSC is premature as the remedy sought by the applicant is not possible … in addition, there have not been any estimates or discovery conducted in regard to the above." (*Ibid*.)

On August 15, 2024, a WCJ ordered the matter set for trial over defendant's objection. The pre-trial conference statement reflects, inter alia, defendant's contention that "no estimates, review of legal regs, and municipal inspections on existence resident to date." (Pre-Trial Conference Statement, dated August 15, 204, at p. 3.)

On October 17, 2024, the parties appeared for trial. Following a review of the evidence and discussion with the parties, the WCJ determined to continue the trial to provide for additional discovery, as follows:

> Trial is continued to 12-5-2024. Defendant shall obtain additional bids regarding cost of ADU and cost of remodeling and/or rebuilding [applicant's] current home to make ADA compliant for Mr. Blosser's injuries.
>
> Defendant has been served with [the report of] McIlwain Mobility Solutions, Inc. Applicant shall get further clarification from McIlwain on the issue of rebuilding/remodeling the Ranch House home.

(Minutes of Hearing, dated October 17, 2024.)

On December 5, 2024, the parties proceeded to trial, framing multiple issues including "whether defendant is obligated to provide applicant with a wheelchair/ADA accessible home, including his bedroom, bathroom and kitchen per the reports of Capuchino, Rehab Without Walls or McIlwain Mobility Solutions," and "does defendant have to improve applicant's personal

property/home that he owns and lived in prior to his work injury so that applicant can move back to his property and live on his personal property, or can defendant instead require applicant to move to an ADA apartment in or near his home in Sheridan, California." (Minutes of Hearing and Summary of Evidence (Minutes), dated December 5, 2024, at p. 2:26.) The parties also framed the issue of whether the court retained jurisdiction over the request and whether defendant had been "deprived" of discovery. (*Id.* at p. 3:7.)

The WCJ heard testimony from applicant and witnesses Laura Blosser, Tammy Hulsey Jones, Christopher McIlwain, and Karissa Watson. The WCJ ordered the matter submitted for decision the same day.

On January 21, 2025, the WCJ issued the F&A, determining in relevant part that "Defendant is obligated to provide home modifications to applicant in the form of an ADA apartment or in care health facility while they build all amenities essential for the installation of a mobile home on applicant's property as described in the opinion on decision." (Finding of Fact No. 3.) The WCJ further determined that the court retained jurisdiction over the dispute (Finding of Fact No. 5), and that "[t]he lack of M.D. view of home modification/ADA reports received to date are the fault of defendant's failure to diligently investigate this claim." (Finding of Fact No. 6.) Based on these findings of fact, the WCJ issued an Award for "Home Modifications including the installation of a separate mobile home 3 bedroom/2 bathroom 1,387 square feet with all appropriate site work, up to a cost of $460,000, on applicant's Ranch House Road property in Sheridan, CA." (Award, No. "a".) The Award further provided that "[i]n the meantime, applicant is also entitled to live in an ADA compliant apartment or skilled nursing facility, within 15 miles of his Sheridan, CA home while the proper work is done on his property to make it ADA compliant."

Defendant's Petition contends the WCJ lacked jurisdiction to determine the reasonableness and necessity of the home modifications and is rather subject to the Utilization Review and Independent Medical Review process. (Petition, at p. 16:8.) Defendant's Petition further contends its due process rights were "restricted" when WCJ ordered defendant to obtain specified rebuttal reports to applicant's reporting without permitting defendant to proceed with discovery on its own right. (Petition, at p. 12:24.) Defendant also contends the evidentiary record does not support the WCJ's Award, and is ambiguous, unreasonable, and will likely engender further dispute. (*Id.* at p. 19:20.)

Applicant's Answer responds that the inadequacies in the evidentiary record complained of by defendant are the result of a failure to timely investigate applicant's needs for medical treatment. (Answer, at p. 5:7.) Applicant contends that applicant's desire to return to his home, and for home modifications necessary to accommodate his wheelchair have been substantiated in the medical record since at least November 2, 2020. (*Id.* at p. 6:5.) Notwithstanding this prior notice of the need to investigate, applicant observes that the WCJ delayed trial proceedings to allow defendant additional time to gather information responsive to the issue of the requested home modifications. (*Id.* at p. 7:18.)

DISCUSSION

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on February 25, 2025, and 60 days from the date of transmission is Saturday, April 26, 2025. The next business

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

day that is 60 days from the date of transmission is Monday, April 28, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, April 28, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on February 25, 2025, and the case was transmitted to the Appeals Board on February 25, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on February 25, 2025.

II.

In addition to the reasoned analysis set forth in the WCJ's Report, we observe the following. In *Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227 [35 Cal.Comp.Cases 383] (*Ramirez*), the court of appeal observed that:

> Upon notice or knowledge of a claimed industrial injury an employer has both the right and *duty to investigate the facts* in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he *take the initiative in providing benefits*. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the effects of the industrial injury.

(*Ramirez, supra*, at p. 234, italics added.)

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

In *United States Cas. Co. v. Industrial Acc. Com*. (*Moynahan*) (1954) 122 Cal.App.2d 427, [19 Cal.Comp.Cases 8], the court similarly states:

> Section 4600 of the Labor Code places the responsibility for medical expenses upon the employer when he has knowledge of the injury….The duty imposed upon an employer who has notice of an injury to an employee is not … the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee.

(*Moynahan, supra*, at p. 435.)

In *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (Appeals Board en banc) (*Neri Hernandez*), we reiterated that "when an employer receives other notice that home health care services may be needed or are being provided, an employer has a duty under section 4600 to investigate." (*Neri Hernandez, supra*, at p. 695; see also *Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd*. (*Bolton*) (1983) 34 Cal.3d 59, 165 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal.Comp.Cases 566] (*Braewood Convalescent Hosp*.).)

We also observe that defendant has a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due. Specifically, AD Rule 10109 provides, in relevant part:

> (a) [A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit.
>
> (b) A reasonable investigation must attempt to obtain the information needed to determine and timely provide each benefit, if any, which may be due the employee.
>
> > (1) The administrator may not restrict its investigation to preparing objections or defenses to a claim, but must fully and fairly gather the pertinent information ... The investigation must supply the information needed to provide timely benefits and to document for audit the administrator's basis for its claims decisions. The claimant's burden of proof before the Appeal Board does not excuse the administrator's duty to investigate the claim.
> >
> > (2) The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due.

> (c) The duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due.
>
> …
>
> (e) Insurers, self-insured employers and third-party administrations shall deal fairly and in good faith with all claimants, including lien claimants.

(Cal. Code Regs., tit. 8, § 10109.)

Thus, and upon reasonable notice of the need to treatment necessary to cure or relieve from the effects of industrial injury, the employer has an affirmative obligation to promptly investigate the facts in order to determine its liability for workers' compensation and take the initiative in providing benefits. (*Ramirez, supra,* 10 Cal.App.3d at p. 234.) The duty to seasonably investigate is triggered upon notice that home care or home modification services may be needed or are being provided. (*Neri Hernandez, supra,* 79 Cal.Comp.Cases at p. 695.)

Here, we agree with the WCJ's determination that defendant had ample notice of applicant's desire to live in his own home and that the home might require significant modification to enable applicant, now confined to a wheelchair, reasonable access to his residence. As the WCJ observes in his report:

> Defendant clearly had ample time and opportunity to conduct discovery on the home modification process that was alluded to by Dr. Gupta, the Med-Legal evaluator. His discovery rights on the issue were not closed until 08/15/2024. This was approximately 5 months after the stipulated Award entered into by the parties where they agreed "Defendant to pay applicant $1550 per month for housing and utility costs starting 01/01/2024 until the applicant's housing needs are resolved. Discovery is ongoing." (Emphasis Added). I then reopened discovery for roughly 6 weeks after the initial trial date. There is no violation of Defendant's due process rights here. Defendant cannot raise due process rights as an excuse for failing to conduct discovery in a reasonable and timely manner.

(Report, at p. 3.)

Moreover, as we discussed in *Neri Hernandez*, *supra,* even when a request for treatment may be ambiguous, the employer may not "passively sit by, an employer also has a regulatory duty to conduct a reasonable and good faith investigation to determine whether benefits are due." (*Neri Hernandez, supra*, 79 Cal.Comp.Cases at pp. 693-694; see also *Romano Trust v. Kroger Co.* (April 16, 2013, ADJ1372133 (VNO 0488219)) [2013 Cal. Wrk. Comp. P.D. LEXIS 125].)

Here, we agree with the WCJ that defendant had reasonable notice of the need for a "good faith investigation to determine whether benefits are due" as early as 2022 when treating physician Dr. Gupta reviewed the home assessment evaluation by Julie Salonga dated December 29, 2021, and concluded that applicant's residence "will need some modification." (Ex. 4, Report of Pramila Gupta, M.D., dated February 16, 2022, at p. 34.) Pursuant to Dr. Gupta's request for input from an occupational therapist, the May 8, 2023, reporting of Capuchino Therapy Group confirmed that "it may be more cost effective to build a structure that is fully accessible" and "level without steps" to facilitate wheelchair access. (Ex. 2, Report of Capuchino Therapy Group, dated May 10, 2023.) Moreover, the parties entered into stipulations as of March, 2024, wherein defendant agreed to pay an interim monthly rental reimbursement "until the applicant's housing needs are resolved," and that in this regard, "discovery [was] ongoing" and that "defendant and the applicant agree to act expeditiously and in good faith in this regard." (Stipulations with Request for Award, dated March 25, 2024, at p. 7.) We are thus persuaded that defendant was reasonably on notice of the need to undertake a timely, good-faith investigation into the modifications necessary to allow applicant wheelchair access to his home, and that an ADU was contemplated as a potential alternative.

We also observe that following the initial trial date, the WCJ reviewed the evidence and took appropriate action to allow all parties to be heard on the issues, including providing the defendant the opportunity to obtain and submit competing estimates with respect to the costs and scope of an ADU or structural modifications to applicant's residence. (Minutes of Hearing, dated October 17, 2024.) As the WCJ notes in his report, the record does not reflect any request by defendant for additional time to complete ongoing discovery efforts, and the WCJ ultimately relied on *defendant's* estimates as the basis for the Award. (Report, at p. 3.) Based on the above history, we discern no abrogation of defendant's due process rights.

Defendant further contends that the WCJ lacked jurisdiction to resolve the instant dispute and that the submitted issues may only be resolved through the Utilization Review (UR) process of section 4610 and the Independent Medical Review (IMR) process of section 4610.5. (Petition, at p. 16:8.) We agree with the defendant that UR is the process by which an employer may "review and approve, modify, or deny, based in whole or in part on *medical necessity* to cure and relieve, treatment recommendations by physicians … prior to, retrospectively, or concurrent with the

provision of medical treatment services pursuant to Section 4600." (Lab. Code, § 4610(a), italics added.)

However, we are not persuaded that there is a current dispute as to the *medical necessity* for home modifications as the record reflects no substantive dispute that applicant is confined to a wheelchair and that applicant's home is not wheelchair accessible. We also observe that the parties have agreed to these facts on multiple occasions in the evidentiary record. The Stipulated Award as approved by a WCJ on April 11, 2024 provided for reimbursement of applicant's rent and utilities outside his own home on an ongoing basis "until the applicant's housing needs are resolved." (Stipulations with Request for Award, dated March 25, 2024, at p. 7.) The record reflects no dispute that applicant's lodgings must be ADA compliant, that his home does not meet those minimum standards, and that applicant must live elsewhere until his "housing needs are resolved." (*Ibid*.) Moreover, as defendant concedes in its Petition, it has "paid the applicant's current rent … since January 1, 2024." (Petition, at p. 4:1.)

Additionally, the parties stipulated at trial that, "[a]pplicant is in need of home-care assistance … Applicant requires the use of a wheelchair and requires modifications to allow/accommodate his disabilities including his wheelchair." (Minutes, at p. 2:17.) The record reflects no dispute that applicant's home does not allow reasonable wheelchair access and must be modified, or alternative arrangements made. The issue decided by the WCJ herein was therefore not one of medical necessity. Rather, the issue was one of implementation of a plan by which applicant's "housing needs" would most reasonably and expediently be remediated. (Stipulations with Request for Award, dated March 25, 2024, at p. 7.) The parties have agreed through formal stipulations and subsequent conduct on the need for changes to the applicant's home to allow for wheelchair access and other changes to comply with applicable ADA accommodation standards. In the absence of a dispute regarding the underlying medical necessity of such changes, we conclude the WCJ appropriately exercised his discretion in issuing an F&A that enforces the prior award of treatment in the form of home modification necessary to cure or relieve from the effects of applicant's industrial injuries. (Lab. Code, § 4600(a).)

In summary, we conclude that defendant was reasonably apprised of the pendency of the issue of potential home modifications necessary to allow applicant to live in his own home, giving rise to an affirmative duty on the behalf of defendant to investigate "the extent of [its] obligation and the needs of the employee." (*Moynahan, supra*, 122 Cal.App.2d 427, 435.) Coupled with the

WCJ's active efforts to provide additional opportunities for defendant to present competing bids and approaches to the home modification issues, we discern no abrogation of defendant's due process rights. In addition, because the parties have, through stipulations and conduct, conceded the medical necessity of modifications to allow the wheelchair bound applicant access to his own home, the issues presented were properly decided by the WCJ. We will deny defendant's Petition, accordingly.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2025

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

WAYNE BLOSSER
EASON & TAMBORNINI
D'ANDRE LAW

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

On 02/10/2025, Defendant filed a timely and verified Petition for Reconsideration from the 01/21/2025 Findings and Award, finding that applicant is entitled to home modification in the form of an ADU build. Defendant argues that applicant should not be provided with home modifications consistent with that Award. As of 02/25/2025, Applicant has filed an answer to the Petition for Reconsideration.

FACTS

On or around April 3, 2024, a Stipulation with Request for Award was entered into by the parties. The parties stipulated that applicant is 100% permanently totally disabled and Defendant agreed to pay applicant's rent "until applicant's housing needs are resolved. Discovery is ongoing."

The parties originally proceeded to trial on 10/17/2024, but a surprise exhibit from Mr. McIlwain, dated 10/16/2024, was produced by applicant's counsel. It showed a price breakdown for a rebuild of applicant's home. Objections were raised by defense counsel as he was not aware of the existence of this exhibit. Applicant's counsel informed me that he only recently received it. I continued the matter for "further discovery" as reflected by the minutes of hearing. There was an addendum page to the minutes reflecting preferred discovery to be completed. The new trial was scheduled for and held on 12/05/2024.

From the time of the first trial to the continued trial date, Defense Counsel obtained alternative price quotes for various forms of housing for the applicant, who is confined to a wheelchair. Those price quotes and detailed reports are listed as Defendant Exhibits F through K. Trial was held, where the testimony of various witnesses were taken, including a contractor put forth by Applicant and a home modification witness put forth by Defendant. My Findings and Award with Opinion on Decision issued on 01/21/2025.

On 02/10/2025, Defendant filed their timely and verified Petition for Reconsideration.

DISCUSSION

I reaffirm every aspect of my Findings and Award and recommend the Defendant's Petition for Reconsideration be denied. Defendant has set forth several arguments in his Petition for Reconsideration under the "Points and Authorities" Section, and I respond to each of those below:

1. **The WCJ Deprived Defendant of Due Process by ordering specific discovery to rebut the non disclosed report of applicant rather than taking the matter off calendar and permitting the defendant sufficient time to pursue discovery on its own.**

It is correct that I did continue the matter for approximately 6 weeks rather than taking the matter off calendar. Defendant has not shown that they were unable to depose a relevant witness within that timeframe. Defendant also completed meaningful discovery on the cost of additional housing for the applicant, and I held in favor of their reports. Had defendant set a deposition outside the window of the 6-week period, that could have been an additional discussion on whether or not another continuance was needed. They also could have removed me on the continuance of the original trial date, but they did not.

Defendant references the right to cross examination as essential to due process. That right was afforded to him because Mr. McIlwain was present as a witness at the trial and was cross examined by Defendant. The continuance was meant to alleviate the surprise of the McIlwain report being offered by the applicant and to allow further discovery in regards to that report. Defendant did in fact complete that discovery, thus alleviating any due process issue stemming from the surprise report. Defendant wrongfully characterizes my order as an order for "discovery against their own interest." The McIlwain report, dated 10/16/2024, was for a rebuild project just over 1 million dollars. Defendant had no rebuttal evidence of this, and I allowed them to obtain rebuttal evidence, and found in favor of that evidence.

Bringing Dr. Gupta's review of the home modifications into this as a due process issue reveals Defendant's failure to adequately investigate this matter as I pointed out in my decision. Defense Counsel is referencing a Dr. Gupta report from 02/16/2022, in which Dr. Gupta said, in reference to a review of a home modification report from 12/29/2021, "it is quite evidence that the house will require some modification. It would be helpful to obtain additional input from an occupational therapist." That Occupational Therapist (hereafter OT) report was then obtained on

May 10, 2023 and is listed as Applicant's Exhibit 2. I see no report on record referring the issue back to Dr. Gupta.

Defendant clearly had ample time and opportunity to conduct discovery on the home modification process that was alluded to by Dr. Gupta, the Med-Legal evaluator. His discovery rights on the issue were not closed until 08/15/2024. This was approximately 5 months after the stipulated Award entered into by the parties where they agreed "Defendant to pay applicant $1550 per month for housing and utility costs starting 01/01/2024 **until the applicant's housing needs are resolved. Discovery is ongoing.**" (Emphasis Added). I then reopened discovery for roughly 6 weeks after the initial trial date. There is no violation of Defendant's due process rights here. Defendant cannot raise due process rights as an excuse for failing to conduct discovery in a reasonable and timely manner.

2. <u>The WCJ Failed to develop the record pursuant to Labor Code 5502(d)(3).</u>

Labor Code 5502(d)(3) does not require a development of the record but rather is a standard for exclusion of evidence. That provision says, in relevant part, "Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." The McIlwain build price report, dated 10/16/2024, may have been obtainable prior to the MSC under an exercise of due diligence of the applicant's attorney. I did allow it in, but I balanced that with allowing Defense counsel leave for further discovery and ample time to do so. As stated in <u>Kuykendall v. Workers' Comp. Appeals Bd.</u>, 79 Cal. App. 4th 396 held, "We hold that in order to rebut unanticipated testimony, due process requires protection of the parties' substantial rights. If an unaddressed and determinative issue arises during trial, it is proper for the WCJ to develop the record." The grant for a 6-week continuance for "Further Discovery" was proper for the record to be developed on the price report issue surprisingly presented by applicant's counsel at the trial. I did not fail to develop the record.

Lastly, Defendant's arguments describe the continuance as not affording them an opportunity to "identify the many legal and medical issues central to the despite the applicant's ongoing medical treatment." That is an incorrect assessment of their situation. They have home modification reports suggesting the need for that treatment dating all the way back to December of 2021. The assessment of those issues was not confined to my continuance period alone.

3. **The Reasonableness and Necessity of the Applicant's Medical Housing Falls Under the Jurisdiction of Utilization Review and Independent Medical Review and not Waived as Defendant has Fullfilled its Duty of Care under LC 4600.**

I primarily covered this issue with the first portion of my Opinion on Decision, and defer mostly to that at this time. To address this issue further, relevant case law, per Diaz v. Pacific Coast Framers Inc., 2023 Cal. Wrk. Comp. P.D. LEXIS 211, suggests that once an employer receives notice that medical treatment to cure or relieve the injured worker may be needed, the employer has a duty under Labor Code section 4600 to conduct a reasonable and good faith investigation to determine whether benefits are due. (See Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton) (1983) 34 Cal. 3d 159, 165 [193 Cal. Rptr. 157, 666 P.2d 14, 48 Cal.Comp.Cases 566]; Cal. Code Regs., tit. 8, § 10109; Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc. (2014) 79 Cal.Comp.Cases 682, 694 (en banc).)

I am aware of the utilization review process and it restricting the jurisdiction of the board on medical necessity, save a few exceptions. There have been panel decisions that suggest a defendant can waive their right to defer to the RFA/UR process. The Hernandez case is also an en banc decision that touches on the issue. It notes "when an employer receives other notice that home health care services may be needed or are being provided, an employer has a duty under section 4600 to investigate." I do not see a noteworthy difference between home health care services or home modifications. Defendant had notice of the potential need for home modifications back in December of 2021, and more specific notice in 2023 per the Capuchino Therapy report (See Applicant Exhibit 2). Defendant even entered into stipulations that were approved as of April 11, 2024 stating that they would pay applicant's rent for now "until applicant's housing needs are resolved. Discovery is ongoing." I see no reason why the RFA/UR process would provide a shield to defendants who have a duty to investigate these claims in good faith. A reasonable investigation could have led to them obtaining an RFA that they could have referred to Utilization Review.

Lastly, Defendant pointed to Finding of Fact #6 to suggest that they have acted with proper due diligence and therefore have not waived the RFA/UR process. They appear to be reading and applying that finding much too narrowly. That finding relates to modifications actually done thus far by the defendant, and does not address their duty to investigate further home modifications. The Capuchino Therapy report suggested an ADU or tear down of applicant's home was necessary and that issue was deferred to a contractor, which has been McIlwain and others retained by

defendant. Those reports were never sent to Dr. Gupta or any treaters on this case. Finding of Fact #6 does not suggest otherwise.

4. **There is no Medical Evidence Determining What is Required for Reasonable Housing:**

Many of the issues being raised by Defendant in their petition are similar in that they can be addressed by similar answers. I defer to a lot that I have already said above. Defendant received a report in 2021 on home modifications. It is referenced in the Gupta report from February 16, 2022 (See Applicant's Exhibit 4). The parties obtained a Capuchino Therapy Group report dated May 10, 2023 (See applicant's exhibit 2). That report is a medical report that expressly set forth all the home modifications needed for applicant's home, but deferred to a more qualified assessor the issue of whether or not a separate ADU would be more appropriate. That was assessed by McIlwain in his report from June 4, 2024 (See Applicant's Exhibit 7). I see no exhibits thereafter showing that medical providers were provided with these reports. In their stipulations from April 11, 2024, the parties agreed discovery was ongoing regarding the home modifications. No discovery was conducted on the ADU issue. If the McIlwain, Periscope, and ATF reports are not to be considered "medical evidence," most of them could have been deferred to medical treaters by Defendant. Defendant failed to do so.

Also, I do not agree there is a lack of medical evidence. The Capuchino report is medical evidence from an occupational therapist. It is quite detailed and suggests an ADU may be needed. McIlwain said an ADU is the more reasonable option. We have all the quotes on that now and that is what I awarded. This all flows well and naturally from verifiable medical evidence. I do not agree my award lacks any factual or medical basis as defendant is claiming.

5. **The Order to Build an ADU is Indefinite, Unenforceable, Burdensome, and Leads to Unjust Enrichment.**

Defendant's argument about our alleged inability to oversee construction of a home is incorrect and ignores virtually all home modification cases in existence. No home modification should be awarded for anyone, based on the implications of Defendant's argument. Applicant is legitimately entitled to home modifications, based on all evidence obtained to date. That home modification happens to be an ADU because of the condition of his home. I am not certain it would be unjust

enrichment for his family to receive this benefit because it is a benefit to which he is legitimately entitled, and I doubt this has been a consideration in any other home modification case or for any medical apparatus. If unjust enrichment is the standard alone, then we would have defendant's making several unreasonable demands, like repossessing an applicant's wheelchair or taking medical apparatuses from deceased injured workers homes or from their bodies. It would be just as unreasonable for me to order defendant allowed to rip this ADU out of the ground and take it from the land when applicant passes away. That would likely leave exposed sceptic lines, dangerous electrical wiring and other plumbing. That would likely be an expense/issue for Defendant to pay for and fix, and then they are left with a used mobile ADU unit which likely has decreased in value. The invasiveness of all of this, likely to be done at a time very shortly after the applicant's survivors lose their spouse/father, does not seem reasonable in exchange for the reduced benefit Defendant would receive.

The application of unjust enrichment in this way also potentially creates dangerous precedent that would allow defendants to file DOR's to demand the repossession of prosthetics, dentures, implants, or expanded portion of an applicant's home, shortly after the applicant dies. Applying unjust enrichment in the manner defendant is demanding could open the door to harassment of the surviving family members of recently deceased injured workers, and should not be applied in this situation as doing so may lead to inequitable results in other cases.

6. <u>There is no Legal Authority to Order Defendant to Build a House for the applicant as reasonable medical treatment under LC 4600 as the WCJ's Reliance on Braewood is Misguided.</u>

My reliance on <u>Braewood</u> is mandatory and not misguided. It is a case from the Supreme Court of California, and most of my reliance upon it is based upon general legal theories and statements expressed therein. Defense Counsel's first two arguments can be answered similarly as above. We do not have more detailed medical evidence here because of the failure by Defendant to investigate the ADU or other home modifications aside from an apartment. On their third point, Defense Counsel asserts "weight loss was in fact medical treatment, not ADU construction, which stretches the holding in Braewood to no assessable limit." Defense Counsel appears to be now asserting that ADU construction should not be considered medical treatment under labor code 4600. He is taking a position contrary to his argument above that the matter should be dealt with

via the RFA/UR process. Per Labor Code 4610, the RFA/UR process is required for medical treatment. This point aside, the ADU build, along with all home modifications, are a form of treatment under Labor Code 4600 as they fall under medical apparatuses.

As for legal authority, there is case law on point about allowing home modifications instead of forcing an injured worker to live in an apartment that they do not want to live in. In the case of Castillo v. Pedra's Machine Corp., 2019 Cal. Wrk. Comp. P.D. LEXIS 119, they found, "in *Walker*, as in the present case, it would pose a significant burden on the applicant if a month-to-month rental agreement were to terminate for any of a myriad of reasons, forcing the applicant into limbo while awaiting a potentially years-long process of finding a new home that is safe and suitable." In Castillo, CIGA was ordered to purchase a home for the applicant. I therefore do not agree with defendant's claim that there is no legal authority to require a Defendant to purchase and pay for the install of a mobile ADU.

Therefore, I disagree Braewood is substantially distinguishable from this case. I disagree with Defendant's claim that I do not have any authority to authorize the build of an ADU as it amounts to a medical apparatus under Labor Code Section 4600, Braewood, and Castillo.

Recommendation:

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Date: February 25, 2025

Parker Shelton
Workers' Compensation
Administrative Law Judge