

**James Bishop, Applicant v. Schindler Elevator Company, Zurich  
Insurance Company, Defendants**

**W.C.A.B. Nos. ADJ1768236 (VNO 0353137), ADJ4711027 (VNO  
0353138)--WCAB Panel: Commissioners Moresi, Brass, Caplane  
(concurring in part and dissenting in part)**

**Workers' Compensation Appeals Board (Panel Decision)**

*76 Cal.Comp.Cases 1192*

**OPINION BY:** Commissioner Alfonso J. Moresi

**OPINION**

**OPINION AND DECISION AFTER RECONSIDERATION**

Applicant, newly aggrieved, seeks reconsideration of our April 22, 2011 Opinion and Decision After Reconsideration (Decision). Therein, we granted <sup>1</sup> defendant's Petition for Reconsideration of the March 22, 2010 Supplemental Findings and Award issued by the workers' compensation administrative law judge (WCJ) where, as relevant here, the WCJ awarded "housekeeping assistance 4-hours per day, 3-days per week for an indefinite period of time, pool man once a week, gardener once a week." The WCJ also found that defendant delayed or refused authorization of medical treatment <sup>2</sup>entitling applicant to a 25% penalty pursuant to Labor Code section <sup>3</sup> 5814 for each of the treatment modalities delayed or refused and attorney fees in the amount of \$ 10,000.00 pursuant to *section 5814.5*. In our April 22, 2011 Decision, we amended the WCJ's decision to defer the issue of penalties and *section 5814.5* attorney fees and found that applicant is not entitled to housekeeping services, pool services, and gardening services as part of the March 27, 2006 Award <sup>4</sup>for medical treatment. We otherwise affirmed the WCJ's March 22, 2010 Supplemental Findings and Award.

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

2 The WCJ found that defendant delayed the following treatment modalities: "sleep disorder evaluation, internal medical evaluation for both abdominal pain and circulatory problems, including for evaluation of gastroesophageal reflux, housekeeping assistance 4-hours per day, 3-hours per week for an indefinite period of time, pool man once a week, gardener once a week, and a raised toilet seat and grab bars."

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

4 Previously, a March 27, 2006 Joint Findings and Award issued providing that applicant sustained cumulative trauma from March 1970 to November 27, 1996 (Case No. VN0353137) and specific injury on September 24, 1996 (Case No. VNO0353138) to his

back, both knees, and gastrointestinal system causing 77% permanent disability after apportionment and need for further medical treatment.

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

Defendant filed an Answer.

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

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Alfonso J. Moresi

I concur,

Commissioner Frank M. Brass

I concur in part, and dissent in part,

Commissioner Ronnie G. Caplane

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

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

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

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

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

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

"(1) Prospective or concurrent decisions shall be made in a timely fashion that is appropriate for the nature of the employee's condition, not to exceed five working days from the receipt of the information reasonably necessary to make the determination, but in no event more than 14 days from the date of the medical treatment recommendation by the physician.

\* \* \*

"(5) If the employer, insurer, or other entity cannot make a decision within the timeframes specified in paragraph (1) or (2) because the employer or other entity is not in receipt of all of the information reasonably necessary and requested, because the employer requires consultation by an expert reviewer, or because the employer has asked that an additional examination or test be performed upon the employee that is reasonable and consistent with good medical practice, the employer shall immediately notify the physician and the employee, in writing, that the employer cannot make a decision within the required timeframe, and specify the information requested but not received, the expert reviewer to be consulted, or the additional examinations or tests required. The employer shall also notify the physician and employee of the anticipated date on which a decision may be rendered. Upon receipt of all information reasonably necessary and requested by the employer, the employer shall approve, modify, or deny the request for authorization within the timeframes specified in paragraph (1) or (2)." (*Lab. Code*, § 4610(g), emphasis added.)

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

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

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

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

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

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

"Thus, the *Smyers* Court acknowledged that 'medical treatment' is a broad concept that may encompass housekeeping services depending on the opinion of a physician and what the physician believes is medically necessary to cure or relieve an injured worker from the effects of his or her particular industrial injury. This is necessarily a question of fact and the only procedure for examining that question of fact presently available in workers' compensation law is the utilization review process. Defendant could have challenged the reasonableness and necessity of these modalities through the utilization review process but did not do so.

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

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

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

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

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Ronnie G. Caplane