WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMJAD HUSSAIN, NUZHAT HUSSAIN (Guardian Ad Litem), *Applicant*

vs.

STATE OF FLORIDA DEPARTMENT OF REVENUE, Permissibly Self-Insured, administered by YORK RISK SERVICES GROUP, INC., *Defendants*

Adjudication Number: ADJ7841879
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.[1]

Defendant State of Florida Department of Revenue (Defendant) and lien claimant Agreed Case Manager Richard Dier (lien claimant) seek reconsideration of the Findings Award and Orders (F&A) issued on June 21, 2022 and the Supplemental Finding and Addition to Award Section A (Supplemental F&A) issued on June 28, 2022, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) applicant is in need of case manager services; (2) defendant improperly terminated lien claimant; (3) defendant failed to show that it was reasonable to remove lien claimant as the agreed case manager; (4) the issue of reasonable transportation for activities of daily living is not addressed in the medical treatment utilization schedule (MTUS) and is therefore not subject to Utilization Review (UR); (5) Dr. Lawrence Miller's request for transportation for applicant's activities of daily living is reasonable to cure and relieve him from the effects of his injury; (6) the reasonable rate payable to applicant for the home health care services provided by Nuzhat Hussain is $25.00 per hour, except that the reasonable rate for her services administering injections is $55.00 per hour; (7) applicant failed to show he is entitled to Labor Code section 5814 penalties; (8) the reasonable value of agreed lien claimant's case management services for the years 2017, 2018, 2019, and 2021 is $31,875.00; (9) it is not reasonable to assess sanctions against defendant; and (10) reasonable attorney's fees are payable to the Law Offices of Michael H. Pinchak in the sum of 15 percent of the net awarded increase in

[1] Commissioner Moresi and Commissioner Lowe no longer serve on the Workers' Compensation Appeals Board. Commissioner Razo and Deputy Commissioner Schmitz have been substituted in their places.

the value of home health care benefits provided from October 19, 2016 through June 21, 2022, with attorney's fees not awarded for services performed after June 21, 2022.

The WCJ awarded applicant "a. Home health care payable at the rate of $25.00 per hour, except for those hours where an injection is administered, with the reasonable rate then being $55.00 per hour with credit given for the amount previous paid for dates of service since 10/19/2016, less 15% of that net award for services since 10/19/2016 up to and including 6/21/2022 payable as reasonable attorney fees to the Law Offices of Michael H. Pinchak"; and "b. Reasonable transportation for activities of daily living including transportation to the beach."

The WCJ awarded lien claimant "c. $31,875.00 for his services as agreed case manager."

The WCJ ordered that defendant's petition to stay lien claimant's services be denied, and that applicant's requests for section 5814 penalties and an assessment of sanctions against defendant be denied.

Defendant contends that the record (1) supports lien claimant's removal as the agreed case manager; (2) fails to support an increase in Mrs. Hussain's hourly rates; and (3) fails to support the finding that the reasonable value of lien claimant's services for the years 2017, 2018, 2019, and 2021 is $31,875.00. Defendant further contends that the WCJ erroneously (1) admitted lien claimant's invoices and the deposition transcript of Dr. Lawrence Miller into evidence; and (2) denied defendant's supervisor, Kevin Roberts, from appearing as a trial witness.

Lien claimant contends that the record establishes that he is entitled to sanctions and attorney's fees pursuant to sections 5813, 5814, and 514.5, and penalties and interest pursuant to section 4603.2(b)(2).

We received an Answers from defendant, lien claimant and applicant.[2]

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petitions be denied except that clerical errors in the F&A and Supplemental F&A providing a credit for the amount previously paid as to dates of service since October 19, 2016 should be corrected to provide the credit as to dates of service since June 2, 2018.

We have considered the allegations of the Petitions, the Answers, and the contents of the Report. Based upon our review of the record and for the reasons expressed in the Report, as our Decision After Reconsideration, we will affirm the F&A and Supplemental F&A, except that we

[2] Defendant filed a petition for leave to file an Answer in excess of ten pages accompanied by a fifteen-page Answer. We grant the petition for leave and consider the entire contents of defendant's Answer. (Cal. Code Regs., tit. 8, § 10940(d).)

will amend to correct the clerical errors to provide the credit for the amount previously paid as to dates of service since June 2, 2018, to find that it is not reasonable to impose sanctions against defendant in favor of applicant and that the issue of whether lien claimant is entitled to sanctions and attorney's fees pursuant to sections 5813 and WCAB Rule 10786 is deferred, and to find that lien claimant is entitled to section 4603.2(b)(2) penalties and interest in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

In his Report, the WCJ states:

> The applicant, Amjad Hussain, was employed as a tax auditor for the State of Florida Department of Revenue on 12/10/2010 when he was struck by a motor vehicle. The parties stipulated that the applicant's injury included a traumatic head injury, plus bowel and bladder incontinence, injury to his back, bilateral legs including feet, dental, cardiac, vision, psyche, and diabetes resulting in 100% permanent disability. The Hon. Patricia L. Frisch issued the Award on 10/19/2016, which included an Award of future medical treatment.
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> In 2011, both counsel for the applicant and defendant stipulated that Richard Dier would act as the case manager for this case. This stipulation was reported to the Hon Patricia L Frisch at a hearing on 4/26/2016. Judge Frisch noted the agreement on the Minutes of Hearing.
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> York Risk Services Group unilaterally terminated Mr. Richard Dier as stipulated case manager on 6/21/2017. The defendant has not challenged the Court's finding that the termination was improper. On 4/16/2018, defense counsel filed a petition to terminate Dr. Richard Dier's services. Mrs. Hussain, as the Guardian ad Litem for applicant, wants Mr. Dier to remain as case manager and opposed the petition.
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> A Mandatory Settlement conference was held before Judge Frisch 4/17/2018. Due to multiple requests to continue the trial, the case did not proceed on the record until 9/26/2019. Judge Frisch at the end of 2018 retired. The case was then reassigned to me.
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> . . .
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> Mrs. Hussain was appointed Guardian ad Litem by order of the Hon. Janet M. Coulter on 12/12/2011. The reasonableness of home health care or the number of hours is not at issue. The issue for Mrs. Hussain is her hourly rate for the home health care services. The defendant State of Florida Department of Revenue has been paying Mrs. Hussain the rate of $15.00 an hour since 2015.
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> Mrs. Hussein testified on the second day of the trial hearing . . . that the applicant spends the night at Huntington Terrance. He is transported to their home arriving between 9:00am and 11:00 every morning. He is then picked up and transported

back to Huntington Terrace, an assisted living facility, precisely at 10:00 pm. Mrs. Hussain prepares and serves him his meals. Mr. Hussein is an insulin dependent diabetic who receives three shots a day and additionally one shot of Trulicity on Sunday. Mrs. Hussain was trained how to provide those injections at Huntington Terrace by a nurse who came to the facility one day to teach Mrs. Hussain how to provide the needed injections.

It is undisputed that there are no LVN's or registered nurses on staff at Huntington Terrace. On those few occasions when Mrs. Hussain has been unavailable, such as when she had surgery, Huntington Terrace had to retain a nurse to provide Mr. Hussain his injections. Except for those few exceptions, she has been providing this home health care approximately 84 to 91 hours a week. She has provided this service, with few exceptions, 365 days a year for about 10 years. She has to stay with the applicant when he is home. She cannot go to the grocery store or any other store and leave him at home.

It is undisputed that the applicant's brain injury has resulted in mood swings. Mr. Hussain spends most of the day at home watching television. He also smokes. She takes him to the garage to smoke and stays with him to make sure he doesn't doze off and set himself on fire.

In her 7/23/2020 testimony, Mrs. Hussain testified that she took a day off. A nurse was hired to provide the applicant his injections at Huntington Terrace. Mrs. Hussain spoke to the nurse and asked how much she was paid. The nurse told her she is retained through an agency. The agency was identified as being paid $100.00, of which she was paid $75.00 plus gas. Each injection took only a few minutes.

Defendant argues, in part, that $15.00 an hour is a reasonable rate of compensation for Mrs. Hussain due to her testimony that giving the injections is easy. In light of the many years she has been injecting the applicant, it would seem reasonable that Mrs. Hussain has become proficient at providing injections. Being proficient is not a detriment on the issue of the reasonable rate.

In addition to the information that Mrs. Hussain obtained from the nurse who filled in for her one day, Mr. Richard Dier, the agreed nurse case manager, testified to the rate he thought was reasonable. Mr. Dier gave different figures for the rates paid when injections are being provided and when they weren't being provided. That needed to be clarified at the 10/14/2021 trial hearing. Mr. Dier testified that he had previously testified in workers compensation cases as to the reasonable rate for such services and was accepted as an expert. He testified that $25 to $30.00 as a base rate per hour would be a reasonable rate absent injections. He testified $65.00 an hour for injections would be reasonable but then testified it would be $45.00 to $55.00 an hour when injections were given.

Mr. Dier testified that LVN's are paid about $55.00 per hour of the amount paid to an agency to give an injection.

Defendant did not stipulate that Mr. Dier was an expert for the rates paid for the type of services being provided by Mrs. Hussain but the court accepts his experience as being sufficient to testify as an expert on this issue. Mr. Dier testified that he is an IHSS provider in Orange County for his son. Defense counsel questioned him at the 12/13/2011 hearing about the IHSS rate which Ms. Simanovsky represented was $14.70 an hour. He testified that IHSS is a government plan for poor disabled people that pays less. Mr. Hussain's assets exceed the income level eligible for IHSS services. The Court takes judicial notice that minimum wage in California is $15.00 an hour as of 1/1/2022.

In reaching my decision that the reasonable rate for Mrs. Hussain's home healthcare services, I also considered the 4/21/2014 email exchange marked and admitted as applicant's Exhibit 76, where Ron Robledo, who was adjusting this case at the time, represents that he is paying Huntington Terrace $25.00 per hour for the hours of the day applicant spends at that facility. The services provided at that assisted nursing facility do not include services provided by either an LVN or RN.

It did not seem reasonable to pay Mrs. Hussain less than the $25.00 an hour rate being paid in 2014 for non-nursing services. Mr. Dier's testimony was also considered. $55.00 an hour is reasonable for those 22 hours per week Mrs. Hussain provides the injections that would be provided by at least an LVN in her absence. I also considered the number of hours per day Mrs. Hussain proves care in determining a rate. She provides home health care more than 8 hours a day, 7 days a week.

As indicated by defense counsel, the court erred in using the 10/19/2016 as the date through which the home healthcare rate was resolved. That is the date of Judge Frisch's home healthcare award pursuant to stipulation. When typing, I inadvertently looked at paragraph 3 of the September 26, 2019 Minutes of Hearing and Summary of Evidence skipping right past the previous paragraph that referred to an additional agreement that the reasonable value of home healthcare services was also settled between the parties though 6/2/2018. The court agrees that 6/2/2018 is the correct date. [Applicant's attorney] Mr. Pinchak is not seeking a continuing award of attorney fees, only a fee off the outstanding accrued monies over the $15.00 per hour already paid since 6/2/2018.

. . .

Defense counsel, Jeffrey Hall, took the deposition of Dr Lawrence Miller on 3/15/2022. That deposition transcript was admitted as Applicant's Exhibit 88 over defendant's objection at the 3/24/2022 trial hearing. Dr. Miller's 12/27/2014 and 9/11/2017 reports were marked and admitted into evidence as Applicant Exhibits 12 and 13 without objection. The basis of defendant's objection is that the deposition transcript was not listed as an exhibit at the time the pretrial conference statement was prepared on 4/17/2018.

In his Petition for Reconsideration, defense counsel references the lack of any stipulation to offer the deposition transcript at this trial based on discovery closing at the MSC. [Applicant's attorney] Mr. Pinchak clearly decided by the 3/24/2022

trial day to offer it into evidence. [Lien claimant's attorney] Mr. William Tappin attended the deposition as attorney for case manager Richard Dier. Communication from Mr. Dier was addressed on page 18 of the deposition. The deposition is relevant to some of the issues that were set for trial. Other than to say it was not listed as an exhibit on 4/17/2018, defense counsel offered no basis to not admit the deposition that he took. As cited by defense counsel, there is an exception in Labor code 5502(2)(3) for evidence that could not have been obtained with due diligence. Setting Dr. Miller's deposition, in part, to address Mr. Hussain's living arrangements in March 2022 could not have been reasonably foreseen when the pre-trial conference statement was completed on 4/17/2018.

As defendant counsel set forth no credible basis for prejudice, the 3/22/2022 deposition of Dr. Lawrence Miller, is admissible.

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The court was informed during the pendency of this trial by defense counsel, Olga Simanovsky, that adjustor Dawn Fitzgerald, who attempted to terminate Richard Dier's services, had retired. Ms. Simanovsky indicated that due to Mr. Fitzgerald's retirement she was unavailable to testify. I agreed that due to the passage of time, if Ms. Fitzgerald was unavailable, that yes, I would allow another adjuster to testify in her place.

When the time came for that substitute adjustor to testify on 3/24/2022, counsel for the applicant and Mr. Dier objected. Mr. Hall, who took over for Ms. Simanovsky, argued that he had no way of knowing that Ms. Fitzgerald would retire. She was an employee of Sedgwick CMS on 4/17/2018 when the pre-trial conference statement was competed. I agreed with that argument that he would have no way of knowing she would become unavailable. That is the reason I agreed another adjustor could testify in place of Ms. Fitzgerald.

[Applicant's attorney] Mr. Pinchak and [lien claimant's attorney] Mr. Tappin continued to argue that defendant needed to show evidence of non-availability. Mr. Hall represented he did not know Ms. Fitzgerald's location or of any attempt to locate her for this trial.

After the lunch break, Mr. Hall still had no evidence of any attempt to reach Ms. Fitzgerald. [Lien claimant's attorney] Mr. Tappin represented that using a service to locate witnesses, he was able to locate a telephone number for her in California although he wasn't sure if it would be her husband's number. Mr. Hall was given the telephone number and Ms. Fitzgerald's husband answered. He indicated he didn't believe his wife would be interested in testifying even in this trial which was been conducted remotely since the pandemic. She had not been subpoenaed. I concluded at that time, that I had to grant [applicant's attorney's] and [lien claimant's attorney's] objection to the testimony of Mr. Roberts because there was no evidence Ms. Fitzgerald was legally unavailable to testify.

. . .

Defendant's 4/16/2018 Petition to Terminate Nurse Case Manager is marked and admitted as Defendant's Exhibit A. There is another exhibit also marked and

admitted as Defendant's Exhibit A. It is from a prior trial conducted by Judge Frisch on a dispute as to applicant's earnings.

Defendant's petition alleges that Mr. Dier's relationship is biased in favor of Mrs. Hussain. The petition even references Mr. Dier retaining his own attorney. Petitioner also alleges that no treating physician or medical-legal evaluator "suggested the need for case manager services." (page 3). Mr. Dier retained counsel after receiving the 1/31/2018 letter from adjuster Dawn Fitzgerald of York, which is marked and admitted as applicant's Exhibit 22. In that letter Ms. Fitzgerald declared that she was entitled to terminate his services as an agreed case manager (presumably without agreement from applicant or court approval.) She also threatened legal action against Mr. Dier. Ms. Fitzgerald opined that a nurse case manager was not necessary on this case in a letter dated 1/31/2018 marked and admitted as Applicant's Exhibit 22. York had hired Ms. LeRoy Touchard as a nurse case manager in 2016. Ms. Touchard was reassigned off this case shortly after she testified on 12/21/202.

Not only had Ron Robledo, on behalf of defendant agreed to Mr. Dier as case manager, there was an agreement for the hourly rate for his services. Mr. Dier described Ron Robledo as a manager. Mr. Robledo advised him that this was the only case they were adjusting for the State of Florida, so he kept it for himself.

Richard Dier's resume is marked and admitted as applicant's Exhibit 6. Mr. Dier has a master's degree in social work and rehabilitation from Arizona State University. He has worked extensively with catastrophically injured patients. He is a licensed marriage and family counselor. His work with State Compensation Insurance Fund included cases with spinal cord injuries. (10/8/2020 Minutes of Hearing page 3). In the mid-1980's he started his own business specializing in psychiatrically disabled and spinal cord disabilities. He described the work he performs as an administrative case manager. He has been a case manager on over 40 cases. He has always been an agreed case manager having never worked on a workers compensation case solely retained by the applicant. (12/13/2021 Minutes of Hearing, page 3, line 6).

Any reference to Mr. Dier testifying as a nurse case manager is the Court's error. Mr. Dier's testimony is that he acted as a case manager. He is not a nurse.

Mr. Dier disagreed with defendant's allegation that no physician has recommended the services of a case manager. Mr. Dier represented that both Dr. Patterson of Casa Colima and Dr. Hoang, who then became applicant's primary treating physician after Casa Colima, recommended a case manager. Dr. Hoang later chose not to remain on this case.

Continuation of services by Mr. Dier is also reasonably necessary, in part, due to Mr. Hussain's outbursts. He would have outbursts in doctors' offices. His help was needed to calm applicant down.

Mr. Dier's testimony is credible as it is also based on the 12/27/2014 medical report by Dr. Daniel Zehler, marked and admitted as Applicant's Exhibit 11. On page three, item four Dr. Zehler was asked: Question: "Can a different case manager step in to handle the family needs post-potential settlement?" Answer: "Given the complexity of this case and the family's acceptance and trust in Mr. Dier, I would recommend the consistency in case management be maintained if possible."

As argued by defendant, a case manager was first utilized when applicant when transitioning from Casa Colima Rehabilitation. Mr. Dier denied that in 2016 he was told by defendant he wasn't providing services as a case manager. The parties even represented to Judge Frisch is April 2016 that he was the stipulated case manager.

Mr. Dier testified that when he was retained, he was never told of any requirement for a particular format needed or reporting frequency. His normal custom and practice was to bill for his services annually. There would be an itemization for each of the charges in that annual billing. He would regularly be in touch with defendant including email communication. Some of those emails are marked and admitted into evidence. One of those is an email dated 9/23/2014 from Ron Robledo marked and admitted as Applicant's 69. That email concerned a Life Care Plan. Mr. Robledo advised Mr. Dier to use his best judgement as to what was needed as he trusted his judgment.

There was at least one additional adjuster, but the file was ultimately transferred to be adjusted by Dawn Fitzgerald. Ms. Fitzgerald also interacted with Mr. Dier, including by email. In her 5/19/2017 email to him, marked and admitted as Applicant's Exhibit 30, she sought his help in getting Yorba Linda Pharmacy to correct their billing. Mr. Dier testified to repeated issues with Yorba Linda Pharmacy, which was providing applicant's medication. They would threaten not to provide any more medication to Mr. Hussain because they weren't being paid. Mr. Dier made repeated efforts to try to determine the source of the problem to try to resolve this ongoing issue.

Defendant clearly was upset when it did not receive any written reports or billing for about 5 years. Mr. Dier testified that it was his usual custom and practice to bill for his services once a year with a detailed itemization of the charges. He did not prepare separate reports. Mr. Dier's wife prepared his billing and invoices. He did not learn until sometime after her sudden death that she had never billed defendant for his services. (Applicant's Exhibit 28, 6/19/2017 email from Richard Dier to adjuster Dawn Fitzgerald). The billing submitted on or about 7/11/207 totaled $79,507.50 for services through 6/15/2017.

Defendant never performed a review in response to the billing. Instead, Ms. Fitzgerald sent him an email basically denying he was ever an agreed case manager. Her 6/21/2017 email, marked and admitted as Applicant's Exhibit 5, alleges that the agreement for his services was only with applicant's attorney. This representation was contrary to the stipulation identified to Judge Frisch by defense counsel and written confirmation to Mr. Dier. It is also contrary to defendant's 4/18/2018 petition

to terminate Mr. Dier as case manager. On page 4 of the petition, defense counsel represents that Mr. Dier "was appointed to perform nurse case manager type duties."

When first hired by defendant, Touchard testified was an independent nurse case manager. Later, when the administrator became Sedgwick Claims Management Services, she became an employee.

Ms. Touchard testified that when she was employed as an independent nurse case manager, she would serve a copy of her reports on applicant's counsel. She never telephoned or emailed applicant's counsel. After she became an employee of Sedgwick CMS, she relied on Sedgwick to serve her reports. During the trial, applicant's counsel advised he received the reports from Ms. Touchard that she served, but never received any from Sedgwick. Defense counsel made sure Mr. Pinchak received those reports.

Ms. Touchard also testified she was never provided a copy of the stipulations and award. She did not know what parts of the body applicant injured in this case. She was never provided applicant's complete medical file. (See page 11 of 12/13/2021 Minutes of Hearing)

Ms. Touchard also admittedly performed no nursing services. She made no recommendations as to the reasonableness of any type of treatment. If a doctor submitted a Request for Authorization for treatment, she simply forwarded it to the adjustor. In Ms. Touchard's opinion, it is reasonable for a medical case manager to attend medical appointments (12/21/2022 Minutes of Hearing, page 12, line 9). She attended some of applicant's medical appointments including a psychiatrist and Dr. Miller.

Ms. Touchard coordinated applicant's care, such as making sure he received his medication, if Mrs. Hussain was unavailable. Sedgwick later reassigned her because it considered her services duplicative of those provided by Mr. Dier.

Dr. Lawrence Miller describes Mr. Hussain's condition as precarious but stable. Applicant has anoxic encephalopathy. Dr. Miller had taken over as applicant's primary treating physician. In his 3/15/2022 deposition, Dr. Miller described Mr. Dier's performance "He's very well prepared, very organized, and extremely helpful and vital, and I would not be able, or no one would be able to provide the care that we have been providing without both of their support (referring to Mrs. Hussain) and their input and their observations."

Defendant never argued that Mr. Dier should be removed as case manager due to the quality of the work he performed. Both applicant's physicians and Mrs. Hussain clearly rely on the quality of services he's provided. The dispute mainly arising over Mr. Dier not serving monthly reports and the content of the services in the billing.

The Court agrees that it is reasonable for Mr. Dier to serve monthly reports on defendant for any services provided. Although not requested in the initial years of his services, it is request now and should be provided.

The other issue is for services defendant considers outside the scope of a case manager such as the billing for the time spent with Mrs. Hussain at lunch at Huntington Terrace in early 2017. Mr. Dier testified that he had that meeting at which they had lunch at the request of Dr. Zehler. That is a billing issue. Once defendant received his billing, it should have reviewed the charges. Defendant argues that it couldn't review the charges because the itemization including what services were provided on each date were part of the billing and not a separate report. Defendant has offered no evidence to support that allegation.

As argued by William Tappin, attorney for Richard Dier, this is a moot issue. None of the billing submitted by Mr. Dier had been paid when the reasonableness of the billing was set for trial on 4/17/2018. By the time the trial finally commenced on 9/26/2019, defendant paid the full value of all his billed charges, without exception, for services provided through 6/15/2017. A billing dispute with no Explanation of Reviews is not good cause in this case to remove Mr. Dier as agreed case manager.

Defendant argues he is advocating for Mrs. Hussain. He described himself as sympathetic. Mrs. Hussain's participation is an important part of the applicant's support system.

Dr. Daniel E. Zehler opined in his 5/16/2013 report, marked and admitted as Applicant's Exhibit 68, at page 15 " Mrs. Hussain has remained a key component of the ongoing care of the patient due to the fact that she is the only individual that he will accept for the bulk of his supervision. If Mr. Hussain is to be managed effectively in the community, she will have to remain the central figure providing supervision on an ongoing basis." Dr. Zehler further describes the psychological toll that the stress from her situation has caused as she continues to provide his continued care about half of every day.

. . .

When care is being threatened from being cut off, such as the problems with payment to Yorba Linda Pharmacy, Mrs. Hussain contacts Mr. Dier. He is clearly necessary in helping keep applicant stabilized. The alternative, according to Ms. Touchard, at least in her example, was a nurse case manager who while very educated with lots of experience, had no knowledge of totality of the parts of body applicant injured and who acts when directed by the administrator but doesn't agree with the opinions of applicant's treating or evaluating physician's. Ms. Touchard disagreed with Dr. Miller's recommendation that applicant not move out of half day assisted living and half day at home.

Mr. Dier appeared to be genuinely concerned for the welfare of both the applicant and Mrs. Hussain. This was especially shown by his continuing to provide services even when not being paid. The relationship with Mrs. Hussain is not improper. She clearly relies on him much more than in a more typical case.

It is not reasonable to terminate Mr. Richard Dier as agreed case manager.
. . .
Due to the payment of all dates of services in full, although without interest or penalty as argued by [lien claimant's attorney] Mr. Tappin, the only dates of service at issue are for those services provided after 6/15/2017. Defendant argues that no services after 4/17/2018 can be considered because that the date of the pre-trial conference statement. When deciding that issue, I looked at the pre-trial conference statement. The reasonableness and necessity of the bills were put in issue. For that reason, I did not limit myself to ruling only on billing for services between 6/16/2017 and 4/17/2018. At the 9/26/2019 trial, defendant argued that Richard Dier's services were not reasonable or necessary.

The agreement with defendant as to the reasonable rate for services was $150.00 an hour for professional time and $75.00 an hour for travel (12/13/2021 Minutes of Hearing page 6).

There are five unpaid invoices at issue. Invoice #191201 is for the dates of service 6/16/2017 to 12/31/2017 for a total of $6,007.50. There were no objections to the services coordinating applicant's medical care and attending medical appointments. In spite of there being no objection or Explanation of Review, I did reduce the billing to $5,107.50 as the reasonable value after deducting the half hour trip and one hour spent with applicant's counsel to review case and the charge of 2.5 hours of travel to the hearing in Santa Ana (Anaheim?). The billing for the time at the hearing and the meeting with the attorney are not case manager services. The remaining services are reasonable.

Invoice #191202 is for dates of service in 2018. The services and billing is for $7,087.50. There is no Explanation of Review for these services. The services and billing are reasonable.

Invoice #191231 is for dates of service in 2019. The services and billing of $5,355.00 are reasonable.

The Court has no invoice or billing for 2020.

Invoice #210930 is for dates of service for billing from 1/1/2021 to 9/30/2021. It is marked and admitted as Applicant's Exhibit 86. (EAMS ID No 38607036). The services and billing of $4,530.00 is reasonable.

Invoice #211206 is for dates of service for billing 10/1/2021 to 12/6/2021. It is marked an admitted as Applicant's Exhibit 87. (EAMS ID No. 39330631). The services and billing of $1,545.00 are reasonable.

There is no Explanation of Review recommending nonpayment for any of the charges. The five invoices minus the deleted charges for meeting with applicant's

attorney total $31,875.00. That is the reasonable value of the billing for the services of Richard Dier as agreed case manager that were at issue.

. . .

While the reasonableness of the services and billing of Richard Dier were identified as issues on the 4/17/2018 pre-trial conference statement. Costs and interest were not listed as an issue. [Applicant's attorney] Mr. Pinchak raised the issues of penalties and sanctions on behalf of applicant. I did not impose sanctions or penalties because even though the defendant unilaterally attempted to terminate Mr. Dier, he continued to perform those services. There was no evidence presented of the applicant being denied any services due to this act by defendant. Mr. Dier, while continuing to perform his services, never submitted a report or any billing for over five years leading defendant to wonder what services he was providing. The record clearly documents through emails with defendant some of the services he was providing.

While I did not award sanctions or penalties to applicant, [Lien claimant's attorney] Mr. Tappin is correct that I did not address the remaining issues raised in his petition because they were not clearly identified on the stipulations and issues. The issues are not . . . the same as those raised by [applicant's attorney]. The court will need to address the basis for an award of sanctions to an agreed case manager. . . . The merits of [lien claimant attorney] Mr. Tappin's petition, other that the reasonableness of Mr. Dier's services and billing remain off calendar and may be addressed at another time. These additional issues include interest, sanctions and penalties as they pertain to Mr. Dier in his petition.

. . .

[I]t is recommended that the Petitions for Reconsideration be denied except that the Award should be amended to correct the mistyped date in section (a) of the Award. The credit given should be for the amount previous paid to Ms. Hussain for dates of service since 6/2/2018, not 10/19/2016. Dates of service before 6/2/2018 were not at issue. The same correction should be reflected in the 6/28/2022 Supplemental Award of attorney fees.

(Report, pp. 2-15.)

DISCUSSION

We note preliminarily that the WCJ states that the F&A and Supplemental F&A reflect clerical errors that should be corrected so that they provide a credit for the amount previously paid to Mrs. Hussain for dates of service from June 2, 2018 and not October 19, 2016. (Report, p. 15.) Accordingly, we will amend the F&A and Supplemental F&A so that that credit is given for the amount previously paid for dates of service since June 2, 2018. (*Toccalino v. Workers Comp. Appeals Bd.* (*Sierra Vista Hospital*) (1982) 128 Cal.App.3d 543, 558 [47 Cal.Comp.Cases 145].)

We next address defendant's contention that the record supports lien claimant's removal as the agreed case manager. Here we observe that Labor Code section 4600[3] provides that an

[3] Unless otherwise stated, all further statutory references are to the Labor Code.

employer must provide "[m]edical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury." (§ 4600 (a).) It is well-settled that home health care is an appropriate benefit under section 4600, and that home health care services need not be provided by a nursing professional to be compensable. (*Henson v. Workers' Comp. Appeals Bd*. (1972) 27 Cal.App.3d 452 (awarding compensation to wife of injured worker who provided home healthcare to injured worker); *Smyers v. Workers' Comp. Appeals Bd*. (1984) 157 Cal. App. 3d 36, 42 (housekeeping services reimbursable where they are "necessary and reasonable in order to allow the injured worker to fully comply with the treatment prescribed by [the applicant's] physician").)

In this case, the record shows that the parties stipulated in 2016 that it was reasonable and necessary for lien claimant to act as applicant's case manager, and defendant has presented no evidence demonstrating good cause for his removal. (Report, p. 2.) Specifically, as stated by the WCJ in the Report, the record (1) shows that Drs. Zehler, Miller, Patterson and Hoang have opined that lien claimant's services are reasonably necessary for applicant's treatment; (2) contains no evidence that lien claimant improperly performed any service or could be replaced by another case manager familiar with applicant's medical condition and symptomatology; and (3) reveals defendant is not prejudiced by lien claimant's ongoing service because it retains the right to timely object to any service or billing, including the timeliness thereof, it deems unreasonable. (Report, pp. 7-13.) Accordingly, we are unable to discern support for defendant's contention that the WCJ erroneously failed to find that lien claimant should be removed as agreed case manager.

We next address defendant's contention that the record fails to support an increase in Mrs. Hussain's hourly rate. In this regard, we have explained that home health care is required by section 4600 where appropriate and need not be provided by a nursing professional to be compensable. (*Henson, supra*.) This requirement is not relieved merely because the care is provided by the injured worker's spouse. (*Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44 [72 Cal.Comp.Cases 1202] (mother of injured worker, who was also his conservator, could be reimbursed for monitoring and managing her son's health care needs); see also *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.* (2014) 79 Cal.Comp.Cases 682 (en banc).)

Here, as stated by the WCJ in the Report, the record shows that the services provided by Mrs. Hussain are akin to those of an independent contractor—and that defendant has paid a third party provider $25.00 per hour rate for similar health care services that do not include provision of injections and would have to pay a third party provider $55.00 per hour for services including provision of injections. (Report, pp. 4-5.) Accordingly we are unable to discern merit to defendant's contention that the rates of reimbursement for Mrs. Hussain's services are excessive or unreasonable.

We next address defendant's contention that the record fails to support the finding that the reasonable value of lien claimant's services for the years 2017, 2018, 2019, and 2021 is $31,875.00. Here, as stated by the WCJ in the Report, the value of $31,875.00 reflects the hourly rates defendant and lien claimant agreed upon for lien claimant's services—and does not include lien claimant's time billed for services related to litigation. (Report, pp. 13-14.)

Accordingly, we are unable to discern support for defendant's contention that the record fails to support the finding that the reasonable value of lien claimant's services for the years 2017, 2018, 2019, and 2021 is $31,875.00.

Next, we address the issue of whether the WCJ erroneously admitted lien claimant's invoices. Specifically, defendant contends that because the "mandatory settlement conference took place on 4/17/18 . . . [and lien claimant's] invoices were prepared and served after the MSC", they are barred from admission into evidence under section 5502(d)(3). (Defendant's Petition, pp. 12:14-13:6.)

Section 5502(d)(3) provides:

> If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. 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.
> (§ 5502(d)(3).)

As stated by the WCJ in the Report, as of the April 17, 2018 MSC, defendant had paid for none of lien claimant's services; and as such, the issue raised by the parties was the "reasonableness and necessity" of all of lien claimant's services, regardless of when they were provided and what amount lien claimant charged for them. (Report, pp. 12-13.) Because the

amounts of the individual invoices were not at issue, lien claimant was not required to generate invoices for services rendered before the MSC in time to identify them at the MSC.

Additionally, the invoices generated after the April 17, 2018 MSC for services rendered from June 15, 2017 to the April 17, 2018 MSC were not available and could not have been discovered by the exercise of due diligence because it was lien claimant's practice to bill for services on an annual basis and the MSC took place on a date less than a year after the July 11, 2017 date on which lien claimant issued his first invoice. (Report, p. 10.)

Additionally, bills for services rendered from April 17, 2018 through 2021 were not available and could not have been discovered by the exercise of due diligence before the April 17, 2018 MSC because the transactions they reflect had yet to occur.

Accordingly, we are unable to discern support for defendant's contention that the WCJ erroneously admitted lien claimant's invoices into evidence.

We next address defendant's argument that the WCJ should have excluded the deposition transcript of Dr. Lawrence Miller from evidence. Here we agree with the reasoning of the WCJ, as stated in the Report, that the transcript of the March 15, 2022 deposition concerning applicant's March 2022 living arrangements was unavailable and could not have been discovered through due diligence at the time of the MSC. (Report, p. 6.) Accordingly, we are unable to discern merit to defendant's contention that the WCJ erred by admitting the transcript.

We next address defendant's contention that the WCJ erroneously denied defendant's supervisor, Kevin Roberts, from appearing as a trial witness. Here we agree with the reasoning of the WCJ, as stated in the Report, that the record lacks grounds for defendant to substitute Mr. Roberts for the disclosed witness, Dawn Fitzgerald, because there is no evidence that Ms. Fitzgerald was served with a subpoena and thereafter failed to appear. (Report, pp. 6-7; see Cal. Evid. Code § 240(a)(5) (providing that a witness is legally unavailable when the proponent of his or her testimony has exercised reasonable diligence and has been unable to procure the witness's attendance through court process).) Accordingly, we are unable to discern merit to defendant's contention that the WCJ erred by declining to allow Mr. Roberts to testify at trial.

Turning to lien claimant's contention that the record establishes that he is entitled to sanctions and attorney's fees pursuant to sections 5813, 5814, and 5814.5, we observe that section 5813 provides that the WCJ "may order a party, the party's attorney, or both, to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (§ 5813(a).)

In addition, WCAB Rule 10786 provides that a defendant who fails to comply with the timelines and procedures for paying medical-legal providers set forth in sections 4622, 4603.3 and 4603.6 "shall be liable for the medical-legal provider's reasonable attorney's fees and costs" and for section 5813 sanctions. (Cal. Code Regs., tit. 8, § 10786(i)(1).)

However, sections 5814 and 5814.5 provide for penalties and attorney's fees only where "payment of compensation" to an applicant has been unreasonably delayed or refused. (§ 5814, § 5814.5.) It follows that lien claimant may seek sanctions and attorney's fees pursuant to section 5813 and Rule 10786 but not penalties and attorney's fees pursuant to sections 5814 and 5814.5.

Here the record shows that the WCJ did not address lien claimant's requests for sanctions and attorney's fees in the F&A or Supplemental F&A because the issues were not "clearly identified" at the time of trial; nevertheless, lien claimant may raise the issues at a later time. (Report, p. 15.)

In this regard, the F&A finds that it is not reasonable to assess sanctions against defendant without explicitly stating that this finding pertains solely to applicant's request for sanctions and without stating that lien claimant may raise sanctions and attorney's fees issues at a later time. We therefore conclude that the F&A should be amended to find that it is not reasonable to impose sanctions against defendant in favor of applicant and that the issue of whether lien claimant is entitled to sanctions and attorney's fees pursuant to sections 5813 and Rule 10786 is deferred.

Accordingly, we will amend the F&A find that it is not reasonable to impose sanctions in favor of applicant and against defendant and that the issue of whether lien claimant is entitled to sanctions and attorney's fees pursuant to 5813 and Rule 10786 is deferred.

Next, we address lien claimant's contention that he is entitled to section 4603.2(b)(2) penalties and interest.

Section 4603.2(b)(2) states:

> . . . payment for medical treatment provided or prescribed by the treating physician selected by the employee or designated by the employer shall be made at reasonable maximum amounts in the official medical fee schedule, pursuant to Section 5307.1, in effect on the date of service. Payments shall be made by the employer with an explanation of review pursuant to Section 4603.3 within 45 days after receipt of each separate itemization of medical services provided, together with any required reports and any written authorization for services that may have been received by the physician. If the itemization or a portion thereof is contested, denied, or considered incomplete, the physician shall be notified, in the explanation of review, that the itemization is contested, denied, or considered incomplete, within 30 days after receipt of the itemization by the employer. An explanation of review that states an

> itemization is incomplete shall also state all additional information required to make a decision. *A properly documented list of services provided* and not paid at the rates then in effect under Section 5307.1 within the 45-day period *shall be paid at the rates then in effect and increased by 15 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the itemization*, unless the employer does both of the following:
>
> (A) Pays the provider at the rates in effect within the 45-day period.
>
> (B) Advises, in an explanation of review pursuant to Section 4603.3, the physician, or another provider of the items being contested, the reasons for contesting these items, and the remedies available to the physician or the other provider if the physician or provider disagrees. . . .
> (§ 4602.2(b)(2) [Emphasis added.].

Hence, under section 4603.2(b)(2), defendant is required to pay invoices for properly documented services within forty-five days of receipt, and should it fail to do so the invoices "shall be paid . . . and increased by 15 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the itemization." (See also *Boehm & Associates v. Workers' Comp. Appeals Bd.* (*Lopez*) (1999) 76 Cal.App.4th 513 [64 Cal. Comp. Cases 1350] (holding that under the plain language of the version of section 4603.2(b) then in effect, interest on unpaid medical treatment bills begins to accrue sixty days after the employer's receipt of the bill).)

In the present case, the record shows that (1) as of the April 17, 2018 MSC, defendant had not paid any of lien claimant's invoices notwithstanding that lien claimant issued his first invoice on July 11, 2017; (2) as of the June 21, 2022, defendant had paid all but $31,875.00 of lien claimant's invoices without paying any penalty or interest as to lien claimant's bills; and (3) defendant failed to submit any Explanation of Review as a defense to failing to pay any of lien claimant's invoices. (Report, pp. 10, 12-13.)

Here, as explained above, the record shows that the parties agreed to lien claimant's billing rate, that defendant never objected to any of lien claimant's invoices by submitting an Explanation of Review, and that there is no evidence that any of lien claimant's invoices were paid within forty-five days of receipt. (Report, pp. 13-14.) It follows that section 4603.2(b)(2) penalty and interest attach by operation of law to lien claimant's invoices to the extent that they have not been timely paid. We therefore conclude that lien claimant is entitled to penalties and interest pursuant to section 4603.2(b)(2). Accordingly, we will amend the F&A to find that lien claimant is entitled to

section 4603.2(b)(2) penalties and interest in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

Accordingly, as our Decision After Reconsideration, we will affirm the F&A and Supplemental F&A, except that we will amend to correct the clerical errors to provide the credit for the amount previously paid as to dates of service since June 2, 2018, to find that it is not reasonable to impose sanctions against defendant in favor of applicant and that the issue of whether lien claimant is entitled to sanctions and attorney's fees pursuant to sections 5813 and Rule 10786 is deferred, and to find that lien claimant is entitled to section 4603.2(b)(2) penalties and interest in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings Award and Orders issued on June 21, 2022 and the Supplemental Finding and Addition to Award Section A issued on June 28, 2022 are **AFFIRMED**, **EXCEPT** that they are **AMENDED** as follows:

FINDINGS AWARD & ORDERS

* * *

FINDINGS OF FACT

* * *

9. It is not reasonable to impose sanctions against defendant in favor of applicant. The issue of whether lien claimant Agreed Case Manager Richard Dier is entitled to sanctions and attorney's fees pursuant to section 5813 and WCAB Rule 10786 is deferred.

* * *

AWARD

a. Home health care is payable at the rate of $25.00 per hour, except for those hours where an injection is administered, with the reasonable rate then being $55.00 per hour with credit given for the amount previous paid for dates of service since June 2, 2018.

* * *

SUPPLEMENTAL FINDING AND ADDITION TO AWARD SECTION A

* * *

FINDINGS OF FACT

10. Reasonable attorney fees are payable to the Law Offices of Michael H. Pinchak in the sum of 15% of the net awarded increase in the value of home health care benefits provided from 6/2/2018 to and including 6/21/2022. The award of attorney fees is not continuing for dates of service beyond the 6/21/2022 Award.

11. Lien claimant Agreed Case Manager Richard Dier is entitled to section 4603.2(b)(2) penalties and interest in an amount to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute

THE 6/21/2022 AWARD IS AMENDED IN SECTION A, AS FOLLOWS

AWARD IS MADE in favor of AMJAD HUSSAIN against STATE OF FLORIDA DEPARTMENT OF REVENUE, of

a. Home Health Care payable at the rate of $25.00 per hour, except for those hours where an injection is administered, with the reasonable rate then being $55.00 per hour, with credit given for amounts previously paid for dates of service since 6/2/2018, less 15% of that net award for services since 6/2/2018 up to and including 6/21/2022 payable as reasonable attorney fees to the Law Offices of Michael H. Pinchak**.**

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 28, 2022

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

AMJAD HUSSAIN
LAW OFFICES OF MICHAEL H. PINCHAK
TAPPIN AND ASSOCIATES
HINSHAW AND CULBERTSON

SRO/*ara*/*cs*

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