

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

JOHN GINN, *Applicant*

vs.

**LANCASTER SCHOOL DISTRICT, permissibly self-insured; administered by KEENAN
& ASSOCIATES, *Defendants***

**Adjudication Number: ADJ7932198
Van Nuys 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.

Defendant seeks reconsideration of the Supplemental Findings of Fact and Award Re Home Healthcare (F&A) issued on October 26, 2020,¹ wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that (1) applicant requires home healthcare of eighteen hours per day, seven days per week, consisting of ten hours of Certified Nurse Assistant (CNA) care and eight hours of Licensed Vocational Nurse (LVN) care per day; (2) these services are to be provided by applicant's spouse, Theresa Ginn, a registered nurse; (3) the most appropriate rates of reimbursement for Mrs. Ginn's services are the rates which defendant would otherwise pay a third party health care services provider; and (4) the appropriate reimbursement rates of reimbursement are \$50.00 per hour for LVN care and \$30.00 per hour for CNA care.

The WCJ awarded applicant home healthcare of ten hours of CNA care at the rate of \$30.00 per hour and eight hours of LVN care at \$50.00 per hour, amounting to eighteen hours of home healthcare per day, seven days per week.

Defendant contends that the WCJ erroneously found applicant entitled to eighteen hours per day of home healthcare without accounting for the time Mrs. Ginn spent providing applicant

¹ We note that the WCJ states that a typographical error in an email address delayed defendant's attorney's receipt of the F&A until November 19, 2020, that service was not effected upon defendant until defendant's attorney served it on November 23, 2020, and that defendant's filing of the Petition on December 11, 2020 was timely. Based upon the Report, we concur with the WCJ's conclusion that the Petition was timely and issue our Decision After Reconsideration on the merits. (Report, p. 5; Labor Code § 5903; *Hartford Accident & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193] [finding that where a party has not been properly served with an order, the time limit for filing a petition for reconsideration of the order begins to run when the order is received].)

with personal care services before his injury and that such an accounting would prove that applicant is entitled to twelve hours of home healthcare per day. Defendant further contends that the WCJ erroneously set excessive and unreasonable rates of reimbursement for Mrs. Ginn's services.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations of the Petition, the Answer, and the contents of the Report. Based upon our review of the record, and for the reasons expressed in the Report, which we adopt and incorporate herein, we will affirm the F&A.

FACTUAL BACKGROUND

While employed as a plumber on March 17, 2010, applicant sustained injury to the low back with a compensable consequence injury on May 23, 2010, resulting in ischemic stroke, inter-cerebral hemorrhage, hemi-paralysis, cognitive speech impairment, injury to the upper extremities, lower extremities, circulatory system and spine.

On October 12, 2020, the matter proceeded to trial as to the following issues: "1. The number and type of daily hours of home healthcare to be provided (LVN and CVN hours) . . . [and] 2. The rate of pay for each type of home healthcare." (Minutes of Hearing and Summary of Evidence, October 12, 2020, p. 2:16-18.)

The parties stipulated that "applicant is in need of home healthcare services to be provided by both a Certified Nursing Assistant as well as a Licensed Vocational Nurse . . . [and] that the services are to be provided by applicant's spouse, Mrs. Theresa Ginn." (*Id.*, p. 2:11-14.)

The WCJ admitted an agreement for provision of medical services dated March 9, 2020 into evidence. (*Id.*, p. 3:5-6; Exhibit 24, Agreement for Provision of Medical Services, March 9, 2020.) Prepared in the form of a letter from applicant's attorney and signed by defendant's senior claims examiner, David Wahe, the agreement provides as follows:

AGREEMENT FOR PROVISION OF MEDICAL SERVICES

...

[P]ursuant to RFAs of February 14, 2020 from PIP Bertoldi, defendant and your office authorize the following items of care for one year from the date of start, to be provided on an urgent and expedited basis:

- Homecare by a licensed vocational nurse (L VN) for 8 hrs/day, 7 days per week.
 - Homecare by a certified nursing assistant (CNA) for 10 hrs/day, 7 days per week.
- (Exhibit 24, Agreement for Provision of Medical Services, March 9, 2020, pp. 1-2.)

At trial, Mr. Wahe testified that the parties agreed to resolve the home healthcare issue along the terms set forth in Exhibit 24. (Minutes of Hearing and Summary of Evidence, October 12, 2020, p. 5:22-25.) He further testified that defendant would view the home healthcare services performed by Ms. Ginn as those of an independent contractor, that he is not aware of any improvement in applicant's condition since the parties entered into the March 9, 2020 agreement, and that there has been no reduction in applicant's need for home healthcare due to the pandemic. (*Id.*, pp. 5:25-6:1, 7:1-2.)

Applicant's health care services market expert, David Orłowsky, Ph.D., testified that he made ten telephone calls to health care services agencies in the area where applicant resides and determined that an agency would charge \$50.00 per hour for LVNs and \$30.00 per hour for CNAs provided to at-home patients. (*Id.*, p. 10:15-17.)

In the Opinion on Decision, the WCJ states:

The defendant has previously agreed to pay an outside agency to provide critical home healthcare services to the applicant, 18 hours per day. The ensuing and ongoing public health emergency has forced the applicant's spouse to step into that role. Mrs. Ginn is providing the services that the defendant would otherwise be paying to an outside agency, and she should be reimbursed in similar fashion.

The defendant argues that Mrs. Ginn does not have the same employee costs that a home healthcare agency would have, such as providing insurance or leasing a vehicle. By the same token, however, if Mrs. Ginn works beyond eight hours in a day, defendant does not pay her overtime. If Mrs. Ginn is injured while providing home healthcare services, defendant would likely not pay workers' compensation benefits. Defendant seeks to pay Mrs. Ginn wages at a rate substantially less than the reimbursement it would pay to an outside agency, without providing any of the ancillary employee benefits to Mrs. Ginn. Moreover, Mrs. Ginn is, at present, solely responsible for the care

of the applicant. She directs the care to be provided, sets her own schedule, and determines the best modalities to achieve treatment and rehabilitation goals. Mrs. Ginn acts for all reasonable intents and purposes as an independent contractor, not as defendant's employee. As such, Mrs. Ginn should be reimbursed at the rates of an independent contractor, not the wages of an employee.
(Opinion on Decision, p. 9.)

DISCUSSION

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1].) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel ... ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall, supra*, 77 Cal.App.4th at p. 1119.)

In *Weatherall*, the Court annulled the WCAB's decision to set aside the parties' stipulation that applicant failed to assert a cumulative injury claim because the stipulation lacked evidentiary support and directed the WCAB to consider whether good cause to set aside the stipulation was shown. The Court reasoned:

Stipulations are designed to expedite trials and hearings and their use in workers' compensation cases should be encouraged. . . . If one party could, as a matter of right, withdraw from a stipulation . . . other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for the parties to gather and present evidence on issues thought to have been laid to rest by the stipulation.
(*Weatherall, supra*, Cal. App. 4th 1114, 92 [65 Cal.Comp.Cases 1, 5] (citations omitted).)

In this case, defendant argues that the WCJ found applicant entitled to eighteen hours per day of home healthcare without accounting for Mrs. Ginn's time spent providing applicant with personal care services before he sustained injury. However, as stated in the Report, on March 9, 2020, the parties stipulated that defendant would provide applicant eighteen hours per day of home healthcare services. (Report, p. 6; Ex. 24, Agreement for Provision of Medical Services, March 9, 2020, pp. 1-2.) Additionally, the parties stipulated at trial that applicant was in need of home healthcare in the form of CVA and LVN services and that Mrs. Ginn, a registered nurse who

resides with applicant, would provide both types of services. (Minutes of Hearing and Summary of Evidence, October 12, 2020, p. 2:11-14).

Under *Weatherall, supra*, defendant is bound by these stipulations unless and until it establishes good cause to withdraw from them. However, the issue of whether good cause exists for defendant to withdraw from the stipulations was not framed for trial and defendant has not otherwise proffered evidence or argument that grounds may exist for withdrawal. Rather, as the WCJ states, there is no dispute that applicant is in need of home healthcare services of eighteen hours per day or that Mrs. Ginn is the appropriate provider of these services during the Covid-19 emergency. (Report, p. 6.) Moreover, defendant's senior claims examiner, Mr. Wahe, testified that he is not aware of any improvement in applicant's condition since the March 9, 2020 stipulation that would warrant a reduction his home healthcare. (Minutes of Hearing and Summary of Evidence, October 12, 2020, pp. 5:25-6:1, 7:1-2.) Thus, we are unable to discern support for defendant's contention that the WCJ erroneously found that applicant is entitled to home healthcare of eighteen hours per day.

Turning to defendant's contention that the WCJ erroneously set excessive and unreasonable rates of reimbursement for Mrs. Ginn's services, we concur with the reasoning of the WCJ as set forth the Opinion on Decision: The services provided by Mrs. Ginn are akin to those of an independent contractor; and, inasmuch as the rates of reimbursement defendant is to pay her are substantially equal to those it would pay a third party health care services provider, we are unable to discern merit to the argument that the rates are excessive or unreasonable. (Opinion on Decision, p. 9.)

Accordingly, we will affirm the F&A.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Supplemental Findings of Fact and Award Re Home Healthcare issued on October 26, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 6, 2021

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

**JOHN GINN
ASVAR LAW
MICHAEL SULLIVAN**

SRO/oo

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

Defendant Lancaster School District (hereinafter, “defendant”) has filed a timely, verified Petition for Reconsideration from an October 26, 2020 Supplemental Findings of Fact and Award re Home Healthcare. The Findings of Fact fixed an hourly rate for the home healthcare services provided to the applicant by his spouse, Theresa Ginn, a registered nurse. Defendant Petitions for Reconsideration asserting that the petition is timely, that the award does not account for the time Mrs. Ginn spends on her normal household and personal duties, and that the award is excessive and inequitable. The matter is not on calendar.

This report recommends that the Appeals Board accept and consider the petition as timely filed. This report further recommends that the petition be denied on the merits.

**II.
FACTS**

The factual and procedural background is described in the Supplemental Findings and Award, and is partially excerpted here for ease of reference:

Applicant John Ginn, while employed on March 17, 2010, as a plumber occupational group number 481, at Lancaster, California by Lancaster School District, PSI, administered by Keenan & Assoc., sustained injury arising out of and in the course of employment to the low back with a compensable consequence injury on May 23, 2010 resulting in ischemic stroke, intercerebral hemorrhage, hemiparalysis, cognitive speech impairment, injury to the upper extremities, lower extremities, circulatory system, and spine.

Applicant is permanently and totally disabled. The parties stipulate that the applicant requires daily home healthcare, and that the applicant’s spouse, a registered nurse, is the appropriate provider of home healthcare services as a result of risks arising out of the COVID-19 pandemic. The defendant has previously agreed to provide 18 hours of daily home healthcare (LVN and CNA level care) through its own vendors, and Utilization Review has endorsed the 18 hour daily allotment as medically necessary.

The dispute at bar involves the number of hours of daily home healthcare to be provided by the applicant's spouse, and the rate at which the applicant's spouse is to be reimbursed.

Applicant's primary treating physician is Roger Bertoldi, M.D. The February 15, 2020 report of Dr. Bertoldi found the applicant to be in need of "LVN level care, 8 hours per day, seven days a week and CNA level care 10 hours per day, seven days per week."¹

1 A Request for Authorization was submitted to utilization review. Per the testimony of the claims examiner Mr. David Wahe, there was some dispute as to whether the ensuing Utilization Review determination was timely. Rather than litigate the issue, the parties entered into a stipulation that the defendant would provide "homecare by a licensed vocational nurse (LVN) for 8 hrs/day, 7 days per week," and "homecare by a certified nursing assistant (CNA) for 10 hrs/day, 7 days per week," in addition to a variety of other medical treatment requests.²

The COVID-19 public health emergency arose shortly thereafter. In an April 29, 2020 report of interim evaluation, Dr. Bertoldi updated his treatment plan:

8 hours a day, 7 days a week LVN and 10 hours a day, 7 days a week CNA to be performed by wife who is RN for next 4 months. All home care should be provided by wife to minimize direct and indirect risk of exposure to COVID-19 by patient. Rotating nurses provided by agency is medically contraindicated because patient is immune compromised by prior heart infection causing stroke paralysis of body and loss of lung capacity putting patient in highest risk category of exposed to COVID-19. Wife is an RN who is taking leave of absence to take care of husband (to reduce Secondary risk to patient because of increase[d] risk if she was working due to occupation) and reduce service by outside people, which is a direct risk to patient exposure to COVID-19.³

On May 9, 2020 defendant's Utilization Review endorsed the 18 hour daily home prescription as medically necessary (10 hours daily CNA care, 8 hours daily LVN care).⁴

On August 6, 2020, applicant filed a Declaration of Readiness to Proceed seeking reimbursement for applicant's spouse for the home healthcare services she provides to her husband. The matter was put forward at Expedited Hearing on August 24, 2020. Owing to the complexity of the issues,

¹ Ex. 21, February 14, 2020 report of Roger Bertoldi, M.D.

² Ex. 24, March 9, 2020 Agreement for Provision of Medical Services.

³ Ex. 22, April 29, 2020 Report of Roger Bertoldi, M.D.

⁴ Ex. UU, Authorization Letter dated September 30, 2020.

the court sua sponte reclassified the hearing as a Mandatory Settlement Conference, and set the matter for trial.⁵

On September 30, 2020, the defendant sent a letter to the applicant authorizing daily services to be provided by applicant's spouse, Theresa Ginn.⁶ The defendant unilaterally set the reimbursement rates at \$15.00/hour for CNA services, and \$25.00/hour for LVN services. The defendant further specified the hours each day in which Mrs. Ginn would provide alternating CNA and LVN services, and unilaterally limited the daily hours of reimbursed work to 12 hours.

On October 12, 2020, the matter proceeded to trial. Exhibits were identified and moved into evidence, and the issues framed:

1. The number and type of daily hours of home healthcare to be provided (LVN and CNA hours).
2. The rate of pay of each type of home healthcare.

Testimony was adduced from the claims examiner, David Wahe, and from the applicant's vocational expert, David Orlowski, Ph.D. The matter was submitted for decision the same day. Applicant and defense have both filed trial briefs which were read and considered.

The court rendered its decision by Supplemental Findings of Fact and Awarer re Home Healthcare dated October 26, 2020. The decision found the appropriate rate of reimbursement to the applicant's spouse was agency rates (i.e. the rates the defendant would otherwise be paying an outside home healthcare provider) of \$50/hour for Licensed Vocational Nurse (LVN) equivalent time, and \$25/hour for Certified Nurse's Assistant (CNA) equivalent time. The decision further provided for the daily hourly allotment that was previously certified as medically necessary by utilization review.

The instant Petition for Reconsideration was filed by defendant on December 11, 2020. Therein, defendant submits that the petition is timely, that the home healthcare decision does not appropriately account for time in which applicant's spouse is tending to her own personal and household care, and that the award is excessive. The defendant asks the Appeals Board to rescind this court's October 26, 2020 decision, to set an hourly rate of \$30/hour for LVN equivalent

⁵ August 24, 2020 Minutes at p.2.

⁶ Ex. UU, Authorization Letter dated September 30, 2020.

services, and \$15/for CNA equivalent services, and to further reduce the daily reimbursed hours from 18 hours to 12 hours per day.

III. DISCUSSION

Defendant's Petition for Reconsideration is Timely

Defense counsel, by verified petition, avers the email address used for service of the Supplemental Findings of Fact and Award re Home Healthcare Services (Supplemental F&A) was incorrect, delaying defendant's receipt of the decision until November 19, 2020, when defense counsel obtained the decision directly from Filenet.⁷ Defense counsel served their client four days later on November 23, 2020. Defendant thus asserts that this Petition for Reconsideration, filed on December 11, 2020 was timely based on the date the third-party administrator was served by defense counsel.

Due process requires that the parties be apprised of this court's decision, and afforded reasonable opportunity to seek redress of any grievances arising out of that decision. Here, typographical error in the email address delayed defendant's receipt of the decision, and the defendant should be afforded the opportunity to seek review of that decision before the Appeals Board. Moreover, the petition was filed within twenty days of its service by defense counsel. In light of the due process concerns and the equities generally, the undersigned respectfully recommends that the petition be deemed timely, and considered on its merits.

The Petition is Without Merit

Defendant argues that the award of 18 hours per day of home healthcare services to the totally disabled applicant at the rates the defendant would otherwise pay to an outside agency is excessive. Defendant urges the WCAB to unilaterally reduce the hours reimbursed to applicant's spouse for home healthcare, and to pay Mrs. Ginn the equivalent of the hourly rate of an employee of a home healthcare provider.

There is no dispute that Mr. Ginn is in need of 18 hours home healthcare per day. The defendant agreed to provide daily home healthcare at these levels in a written agreement reached on March

⁷ December 11, 2020 Petition for Reconsideration at 5:3.

9, 2020.⁸ The defendant agreed to provide these services through an outside agency. Utilization Review certified this level of care as medically appropriate in May, 2020.⁹ There is no dispute that during the course of the ongoing COVID-19 public health emergency, the applicant's spouse, who happens to be a registered nurse and a member of the applicant's household, is the appropriate provider of those home healthcare services. There is no dispute that since approximately April, 2020, Mrs. Ginn has been providing all of the daily home healthcare services to Mr. Ginn, both at the LVN and CNA equivalencies.

Defendant now seeks to reduce its obligations to pay for applicant's home healthcare by asserting the award is excessive. However, the record establishes that the services to be provided are medically necessary, that the applicant's spouse is a registered nurse who is fully qualified to provide all those services, and that during the ongoing public health emergency, the introduction of outside healthcare providers to the applicant's home is contraindicated. The record further establishes the rates that an outside agency would charge for LVN and CNA level care, and that the defendant previously agreed to provide 18 hours of daily home healthcare services through an outside agency or agencies. Having established that Mrs. Ginn is the medically appropriate provider of services that the defendant had previously agreed to provide, and at rates of outside agencies that the defendant had previously agreed it would utilize, the defendant's position that the award is excessive finds little support in the record.

Defendant cites to Labor Code § 5307.8 and argues Mrs. Ginn is being reimbursed for services regularly performed in the same manner and to the same degree prior to the date of injury. However, defendant offers no substantive evidence on this point. The issue was not raised with specificity at trial. Defendant did not obtain the deposition testimony of Mrs. Ginn, or call her to testify at trial. The record does not describe what household services, if any, Mrs. Ginn provided prior to the applicant's injuries. As such, the record does not support defendant's position that Mrs. Ginn provided these types of LVN or CNA services, or ancillary activities of daily living, in the same manner and to the same degree as before Mr. Ginn's injuries.

The opinion on decision is clear that the situation is not ideal, and likely not sustainable. There is merit to the defendant's assertion that an award of 18 hours of daily home healthcare to be provided

⁸ Ex. 24, March 9, 2020 Agreement for Provision of Medical Services.

⁹ Ex. UU, Authorization Letter dated September 30, 2020.

by applicant's spouse is simply not viable on an indefinite basis. However, Mrs. Ginn has been solely responsible for her husband's round the clock care for the duration of the COVID-19 public health emergency. Defendant's position that Mrs. Ginn should be reimbursed at a lower rate than it would otherwise be paying an outside agency is without merit. Defendant position that Mrs. Ginn should be paid for less hours than she actually works, and for less hours than defendant's Utilization Review has certified as medically necessary, is similarly without merit. The defendant's Petition for Reconsideration should be denied.

**IV.
RECOMMENDATION**

It is respectfully recommended that the Workers' Compensation Appeals Board accept the December 11, 2020 Petition for Reconsideration as timely filed. It is further recommended the petition be denied on the merits.

Dated: December 21, 2020

SHILOH ANDREW RASMUSSEN
Workers' Compensation Administrative Law Judge