

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

ANTHONY PINEDA, *Applicant*

vs.

DATS TRUCKING; STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ3676889 (FRE0237343)
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice" (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on defendant's timely petition within 60 days of its filing on November 4, 2020, through no fault of defendant. Therefore, considering that the

Appeals Board's failure to act on the petition was in error, we find that our time to act on defendant's Petition for Reconsideration was tolled.

Pursuant to Labor Code section 133 the Appeals Board "shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it under this code." The power and jurisdiction conferred on the Appeals Board includes the authority to assign a special master. (See also Lab. Code, § 111.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 7, 2021

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

**ANTHONY PINEDA
KATHERINE AROA
STATE COMPENSATION INSURANCE FUND (2)**

PAG/bea

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**

By timely, verified petition filed on November 4, 2020, defendant seeks reconsideration of the decision filed herein on October 12, 2020, in this case, which arises out of an admitted injury, on January 30, 2006, to a truck driver. The injury rendered Mr. Pineda permanently, totally disabled and in need of considerable medical care. In the decision under study, I found that applicant's guardian, sister and caregiver, Katherine Arao, is entitled to increased compensation for her services, and that the monthly rate estimated as reasonable by a special master I had assigned to assess the matter was in fact reasonable. Petitioner, hereinafter defendant, contends in substance that the decision is not supported by substantial evidence, in that the special master's estimate of a reasonable monthly stipend for the caregiver included no specific breakdown of the services provided, with different pay rates depending on the qualifications necessary for different levels of expertise, and that Ms. Arao is not herself qualified to provide some of those services. Applicant, who is essentially in propria persona,¹ has not filed an answer. I will recommend that reconsideration be denied.

FACTS

The factual background is summarized in the opinion on decision: Applicant's course of treatment has been extensive and complex; this will not be recounted here, except to note that he resides at an assisted-living facility in Fremont, California, and sees multiple physicians. He wears a below-knee prosthesis and suffered an anoxic brain injury. In 2012, Mr. Pineda's sister, Katherine Arao, who lives in Fremont, was appointed his guardian ad litem and has acted in that capacity since. The two are currently not represented by counsel.

[By stipulations of the parties, on February 21, 2013, applicant's

¹ Mr. Pineda had been represented by counsel, both before and after Ms. Arao, his sister, was appointed special master. The attorney was relieved as counsel, and Ms. Arao has since assumed the laboring oar in his legal representation, along with her other duties.

injury was found to have caused 100% permanent disability, and corresponding indemnity was awarded.]

At a hearing on June 17, 2013, the parties stipulated that “home health and mileage issues” were resolved for a retroactive payment and that “future home health and mileage will be adjusted at \$1,100.00/month upon receipt of a monthly invoice.” On October 26, 2015, along with another retroactive payment, the ongoing monthly rate of \$1100 to the guardian ad litem would be paid “for the rest of 2015. Defendant shall provide a detailed list of what care descriptions and reporting are needed beginning 1/1/2016. The parties shall meet before 2016 to assess ongoing payment(s), amounts etc. and rate of future home health services and guardian ad litem services.” On May 23, 2017, the rate was increased to \$2000 per month, retroactive to the first of that year. “The parties shall meet before 2018 to [re-evaluate]/negotiate the rate for guardian ad litem services.” The parties advised at the hearing on March 16, 2020, that the rate was increased to \$3000 in June, 2018, and has not changed since then.

Ms. Arao has contended for some time now that she ought to receive another raise, and that the services she renders to her brother are invaluable. [The issue of her compensation was raised in a declaration of readiness to proceed filed March 21, 2019.] When, at an earlier hearing, I expressed the intent to refer the issue of valuing the services of the guardian ad litem to an expert, as a special master to aid the court, the parties agreed “to field nurse case manager to provide assessment for Anthony Pineda’s needs and care and if sister (GAL) is essential to his care.” (Minutes of hearing, August 6, 2019) Then, on October 22, 2019, the parties again indicated an agreement to have an assessment of applicant’s needs and the value of his care performed by a certain organization; that organization is not named in the minutes of that hearing, on October 22, 2019, but it was agreed upon at that time.

The result of that assessment . . . is titled “pre-admission

evaluation report.” The opening paragraph is headed “request for authorization.” It states: “Authorization requested for participation in a specialized, post-acute, brain injury, inpatient (residential rehabilitation) neuro-rehabilitation program at Centre for Neuro Skills ® (CNS) - Bakersfield.” The “pre-admission evaluation report” outlines a wide variety of reasons why Mr. Pineda needs to be admitted to a facility like CNS, and why CNS is just the place for him. The report concludes with a section titled “recommendations” that begins, “Anthony should participate in an inpatient neuro-rehabilitation treatment program at CNS – Bakersfield for the continued medical management of cognitive, linguistic and physical deficits related to his brain injury and subsequent decline in functional abilities.” It then outlines some guidelines supporting their program and some particulars that they would provide.

This is not what I requested.

When I expressed the need for a neutral expert’s opinion of applicant’s medical needs and the value of the services being provided by his sister and guardian ad litem, it was to address those particular questions. It was not to shop for an alternative, or to commission a study that is quite obviously little more than a sales brochure by an interested entity that has been tailored to the problems of a particular patient.

When that report was presented, at the hearing held February 25, 2020, defendant countered the inquiry by posing issues of whether the services being provided by the guardian ad litem (GAL) constitute medical services and are supported by medical evidence or are duplicated by things others are providing, finally asserting that “the stipulation and order of 5/23/2017 is the only legal determination of GAL payment,” despite the fact that that stipulation and order specifically recited that the parties were to renegotiate the monthly payment by the end of that year. It is also despite the fact that the rate was in fact increased in 2018.

I therefore referred the case to the special master I had been ready to use in August, 2019. I provided instructions for the special master and to the parties, toward the end of arriving at a considered expert opinion of the value of Ms. Arao's services. I needed to know, from someone with expertise in the valuation of medical and other services, whether this guardian deserved the raise she had been seeking and, if so, to what extent.

The result is the report, dated June 9, 2020, by Janice Skiljo Haris, to whom I have entrusted such issues on several occasions over the years.² There, she summarizes some 1900 pages of medical records and reports and other materials submitted for her review by the parties; her interviews of Ms. Arao, Kay Donaldson, R.N., the nurse case manager assigned by defendant, and Jay Garrard, the vice president of the company that employs Ms. Donaldson; and wage data from an Occupational Employment Status survey of healthcare providers in Alameda County in the first quarter of 2020.³ She includes summaries of other research she performed before arriving at a recommendation of how to classify the services of this guardian and how to value that work. Ms. Haris also testified at trial, in further elaboration of her findings and their bases.

Ms. Haris concludes: "Clearly, Ms. Arao is performing duties of a Field Nurse Case Manager..." and that the 25th percentile of the Employment Development Department's reported wages for nurse case managers is most appropriate in this instance. She specifically rejected the rate charged this defendant for Ms. Donaldson's services: "While the CompAlliance rate for Field Case Management is \$105/hour, this is not a reasonable reimbursement rate to consider," because that includes

² Issues that I have referred to Ms. Haris include valuation of liens and medical services generally, as well as of in-home supportive services.

³ The data stem originally from a 2019 survey, updated to 2020 by applying a federal cost index to those numbers.

the company's overhead expenses.

In formulating her recommendation that Ms. Arao's services involving the care of her brother should be classified as those of a nurse case manager, Ms. Harris reviews the totality of those services, as described in detail by the guardian as well as by defendant's assigned R.N. The special master also relied on her own qualifications as a registered nurse and certified life-care planner. In her report and her testimony, Ms. Haris explained that Ms. Arao's work in this case ranges in level of skill and other respects, and that the work of a nurse varies as well. "Under the OES⁴ program, the occupation 'Registered Nurse' is a catchall category. There are many different types of RNs and the different positions can be broken down by specialty, workplace, additional certification, or duties. The salary of an RN varies greatly depending on" such variations. Overall, Ms. Haris concludes: "The central role of RN field nurse case manager is the coordination of proper care. As such, they can be involved in both short and long-term care, and they can work in various different settings."

Following trial, I determined that the special master had thoroughly assessed the tasks being performed by the guardian ad litem in this case, which comprise duties performed by medical professionals, as well as unskilled activities like driving and providing companionship, and matters of legal advocacy and myriad others. It was in aggregating all of those things that Ms. Haris arrived at the nurse case manager analogy as the closest to describing the bulk of this guardian's work in the case. She admits that her assessment of the allocation of time is an estimate: "It is difficult to quantify each task by any definitive time basis being provided since some days Ms. Arao needs to spend more time, some days less time while Ms. Arao performs multi-tasking activities daily and the tasks [overlap]." I also felt comfortable accepting the special master's placement of the value of that work in the lowest tier of field nursing salaries. The result is an award consistent with Ms. Haris's recommendations.

⁴ Occupational Employment Statistics (Exh. A, pg. 41)

DISCUSSION

The case of *Hodgman v. Wrkrs. Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44 [72 Cal.Comp.Cases 1202], cited by defendant, distinguishes between the services being provided by a single person (the employee's mother) as conservator (paid, as such, by the employee's estate) and those performed as his guardian ad litem and caregiver. The former included looking after his personal and financial needs, and the latter constituted medical care for which his employer had responsibility under the Labor Code. The court found that the duties for which the provider (Prokosch) was seeking to be paid, in that case, were those she provided to her son (John) in the role as guardian and healthcare provider, not as conservator:

The care Prokosch provides—monitoring and managing all of her son's health care needs—qualifies as medical care under Labor Code section 4600. When Prokosch makes decisions regarding John's medical needs, she is performing a service similar to that of the nurse case manager, or the registered nurse on duty, or the physician on duty, or the licensed vocational nurse. Prokosch's purpose as John's guardian is to decide what treatment is appropriate—regardless of whether any of these named professionals originally thought of the treatment or realized the need. Concomitant to receiving medical treatment is the ability to decide what treatment to accept or refuse, that is, to weigh one's options. Even though professionals make these recommendations based on their expertise, their purpose is simply to advise the patient, who must make the choice. Prokosch provides this critical service for John.

The court concluded that Prokosch should be paid as a nurse case manager, although she was not trained or licensed as such. Defendant points out the court's observation that Prokosch had not submitted any requests for payment by the employer that did not fall, to some extent, within the umbrella of medical services. Here, as the special master has found, the activities being performed by the guardian are more intermixed, between medical and non-medical realms, but Ms. Haris used her own expertise as well as her research in this case to arrive at a conclusion reflecting the varied nature of those activities.

The second case cited by defendant is *State Farm Ins. Co. v. Wkrs. Comp. Appeals Bd.* (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69].⁵ There, the court rejected a lien claimant's claim for payment for 24-hour-per-day care (reduced by the judge by \$5 per hour but still amounting to over \$1.5 million, retroactively), finding the hours and the hourly rate unsubstantiated and the medical opinion relied upon tainted by ex parte communication. Indeed, there appears from the reported decision to be no rational basis for the hourly rate awarded, and some evidence belying the claim to be paid for every hour of every day; there is also evidence that the medical reporting underpinning the judge's decision was marred by ex parte communication by the lien claimant and his attorney, with no opportunity for involvement by the defendant. Here, however, there is nothing inherently unreasonable about the hours for which this guardian seeks to be paid; these were studied and an average estimated by the special master. The rate of pay was likewise arrived at after considerable study and with the application of professional expertise by someone qualified to provide it. Finally, defendant was explicitly allowed the opportunity to supply documentation and input in the process employed by the special master, Janice Skiljo Haris. The order, issued March 16, 2020, states:

Both parties should endeavor to provide the special master with those documents they feel are necessary for her to formulate her recommendation. At least, these should include the most recent comprehensive medical evaluations. Ms. Arao should provide a brief synopsis of the services she is currently providing. Defendant's assigned nurse case manager, Kay Donaldson, should outline whatever she and others assigned by defendant are doing to aid in Mr. Pineda's care. Ms. Haris should have access to applicant at his skilled-nursing facility, and to both Ms. Arao and Ms. Donaldson, and to any other documentation or individuals she feels would help in her analysis.

It must be emphasized here that the task assigned the special master was neither simple nor easy. The effort, initially, was to determine whether the lump

⁵ There are slight typographical errors in defendant's page citations; those given here are correct.

sum previously negotiated as Ms. Arao's monthly payment for services was sufficient, and, if not, what amount would be reasonable. In order to determine the answers to those questions, Ms. Haris had to determine what services were in fact necessary, using her expertise, and were actually being provided by Ms. Arao (and not, for example, by the staff of Mr. Pineda's residence facility), and to place a value on those services. In fulfilling her role, the special master interviewed both the guardian and defendant's assigned nurse case manager, reviewed extensive medical records and conducted research on earnings for a range of service providers in the Bay Area.

Defendant complains that the result is "'estimated,' 'aggregated,' and 'analogized'" (comma faults corrected) in order to arrive at a reasonable monthly figure, and this is true. However, looking at the history of this case, which is no different from most cases involving catastrophic injuries and resulting attendant care, a monthly figure has been the method for payment since Ms. Arao has been paid anything. As she testified, Ms. Harris encountered what one might expect in a case in which the patient's medical needs are complex: Tuesday might look much like Monday, but it might look quite different. Wednesday might bring something unexpected, or emergent. One example Ms. Arao provided in her own testimony was when her brother was to be released from an acute-care facility following a medical procedure. The facility needed to release him to someone's charge, rather than just to EMTs, so she was there for that. Someone needed to convey instructions to the residence facility to which Mr. Pineda was transported, so she drove along and provided that. Some of that time was spent performing medical tasks, and some of it was spent driving. If she needed to convey the patient's own medical needs and decisions to the doctors and nurses providing the direct care, she might have to wait in a chair in order to do so. If she had to aid in his decisions with respect to medication, that might include standing in line at a pharmacy, waiting to speak with the pharmacist rather than the technician, and discussing options.

Finally, I must point out that there is no evidence or expert opinion contrary to that of the special master assigned in this case. That, of course, does not complete the answer to the question of sufficiency of evidence, but I remain persuaded that

Ms. Haris has thoroughly studied the relevant aspects of this complex matter, including medical and medical-legal reporting, the specific needs of this employee, and the services being provided by his sister and guardian, and has rendered thoughtful and well-reasoned conclusions.

RECOMMENDATION

I recommend that reconsideration be denied.

Respectfully submitted,

Dated: December 2, 2020

Christopher Miller
Workers' Compensation Judge