

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

DORA SEGURA, *Applicant*

vs.

**IN-HOME SUPPORTIVE SERVICES,
CALIFORNIA DEPARTMENT OF SOCIAL SERVICES,
legally uninsured, administered by
INTERCARE HOLDING SERVICES, INC., *Defendants***

**Adjudication Number: ADJ8522553
San Francisco 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 and Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

We have given the WCJ's credibility determination great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id.*)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 21, 2024

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

**DORA SEGURA
LAW OFFICES OF JOHN E. HILL
MCINTYRE & WHITE**

PAG/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

Lawrence Keller, Workers' Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

I. INTRODUCTION

The defendant seeks reconsideration of my Findings of Fact, Orders, Award, and Notice of Hearing dated March 4, 2024, that the applicant is entitled to reimbursement in the amount of \$20,070.00 for reasonable and necessary home health services. Filed on March 25, 2024, defendant's Petition for Reconsideration (hereinafter Petition) is timely and verified. Applicant filed her Answer to defendant's Petition on April 2, 2024. Defendant does not dispute the other findings, orders, and award of medical care, issued in my March 4, 2024 decision. The defendant contends the applicant failed to meet her "... burden to provide the reporting required for payment to issue." (Petition, p. 3, line 26 – p. 4, line 1.) Defendant's Petition should be denied on the merits.

II. BACKGROUND

This case proceeded to trial on October 11, 2023, and continued on December 5, 2023 with testimony given by the applicant. The matter was submitted on December 5, 2023. There were numerous issues for trial, including the applicant's entitlement to reimbursement of payments to home health care providers for broken periods during the period July 15, 2016 through January 8, 2017 in the total amount of \$7,724.50, for the period September 1, 2022 through November 1, 2022 in the total amount of \$16,317.00, and for the period January 1, 2023 through January 11, 2023 in the total amount of \$3,753.00. The parties stipulated that there was a need for home health care during these periods. (10/11/2023 Minutes of Hearing (MOH), p. 2, lines 31-33.) The dispute was whether the applicant provided sufficient documentation to support that the services were actually provided, and paid for by the applicant.

A. EVIDENCE AT TRIAL.

Documentary evidence is reviewed in full on pages 2 through 17 of my March 4, 2024 Opinion on Decision. My summaries of Dr. Morley's reporting, and the documents related to applicant's requests for reimbursement, are excerpted here insofar as they are relevant to defendant's Petition.

Applicant's Exhibit 33: Supplemental medical report of Brendan Morley, M.D., dated September 13, 2022.

Defendant's Exhibit B: Reports of Brendan Morley, M.D., dated October 7, 2014 through July 25, 2022.

At an October 7, 2014 examination the applicant was utilizing a wheelchair and continued to have a home health aide for 8 hours per day, 7 days a week. (Defendant’s exhibit B, p. 115.)¹ The applicant was not able to ambulate without assistance. (*Id.* at p. 115.)

Dr. Morley prepared a September 13, 2022 supplemental report in response to the denial of home health aides. (Applicant’s exhibit 33, p. 1.) He stated that the applicant is, “... significantly disabled, and she is unable to perform many activities of daily living.” (*Id.* at p. 6.) Citing the applicant’s height and weight, Dr. Morley opined that two caregivers were required to address the patient’s needs, including bathing, toileting, and dressing. (*Id.* at p. 5.)

“Applicant’s Exhibit 35: Request for reimbursement email dated November 28, 2022.

Applicant’s Exhibit 36: Request for reimbursement fax dated January 17, 2023.

Applicant’s Exhibit 37: Request for reimbursement fax dated February 2, 2023.

Applicant’s Exhibit 38: Updated request for reimbursement email dated February 15, 2023.

[...]

Applicant’s Exhibit 40: Assessment letter of Home Helpers dated February 24, 2016.

Applicant’s Exhibit 41: Email from applicant’s attorney to defense attorney dated November 22, 2022.

On November 28, 2022 Applicant’s attorney emailed defense counsel a request for reimbursement to applicant of \$16,317 in home health care expenses for the period September 1, 2022 through November 1, 2022. (Applicant’s exhibit 35, p. 1.) There are lists in Spanish of hours worked by various careworkers, with the amounts paid by cash, and the amounts paid by check. (Applicant’s exhibit 35, pp. 2-3, 6-8, 14.) Also included are copies of cashed checks, and “receipts” for cash paid. (see for example Applicant’s exhibit 35, pp. 4-5.) An additional fax with a typed breakdown of the hours worked by individual caregivers for the period September 1, 2022 through November 1, 2022 was faxed to the defense attorney and adjuster on January 17, 2023. (Applicant’s exhibit 36, pp. 2-4.)

A typed breakdown of the hours worked by individual caregivers for the period January 1, 2023 to January 11, 2023 was faxed to the defense attorney and adjuster on February 2, 2023. (Applicant’s exhibit 37, pp. 3-4.) On February 15, 2023 the applicant’s attorney emailed defense counsel the previously provided documentation for the 2022 and 2023 periods as well as “caregiver notes.” (Applicant’s exhibit 38.) The “caregiver notes” indicate a date, time, and the name of a caregiver, as well as the services provided by that caregiver. (See for example, Applicant’s exhibit 38, p. 2.)

Home Helpers of San Mateo County prepared a report on the applicant’s care at home, including the need for home healthcare. (Applicant’s exhibit 40.) Among

¹ Page numbers for the Morley exhibits are the PDF page number.

the recommendations is that the applicant have two home healthcare assistants to get the applicant into and out of her wheelchair. (Applicant's exhibit 40, p. 2.)

Helping Hands Senior Services Inc. provided home healthcare services for August 2022, and then again from November 2, 2022 through November 15, 2022. (Applicant exhibit 41, pp. 4-9.)

Applicant's Exhibit 44: Claim summary of York dated May 3, 2017.

This exhibit is a medical benefit printout showing ongoing payments for home healthcare to various providers from 2014.

Defendant's Exhibit G: Letter from defense attorney to applicant's attorney dated December 29, 2022.

Defendant's Exhibit H: Emails between defense attorney and applicant's attorney dated December 29, 2022.

Defendant's Exhibit I: Emails between defense attorney and applicant's attorney dated January 17, 2023 through January 25, 2023.

Defendant's Exhibit J: Emails between defense attorney and applicant attorney's office dated February 2, 2023.

These exhibits reflect that a core of defendant's objection to re-imbursement was that the requests for reimbursement did not contain an attestation or otherwise meet the billing requirements of Labor Code section 4603.2. (See Defendant's exhibit G.)" (3/4/2024 Opinion on Decision, pp. 15-17.

Applicant's Exhibit 43: Home Health Aide notes from Best Living Care, LLC, dated March 1, 2023 through April 30, 2023.

This exhibit reflects reports provided by Best Living Care, LLC that are specifically cited as an example of the type of documentation required by Labor Code section 4603.2(b)(1). (Petition, p. 3, lines 11-13.) These forms include the date of service, the names of each provider, the time arrived, the time departed, and a listing of some services provided and the specific time provided. (see for example, Applicant's exhibit 43, p. 7.) Only the first names of the caregivers are listed, and it is not always indicated when during the day each caregiver was working. (*Ibid.*) The itemized listing of services focusses on food consumed and medication taken. (*Ibid.*)

In contrast the caregiver notes of Applicant's exhibit 38 do not indicate the specific times that actions were taken. They contain the full name of the provider, the overall time worked, and a checklist of activities performed within that time frame. (Applicant's exhibit 38, pp 2-58.) The caregiver notes are not signed by the providing caregiver.

Applicant's Exhibit 39: Email exchange between defendant and applicant attorneys' offices dated September 6, 2022 through February 24, 2023.

Applicant's attorney made demands for a resumption of home health care on September 6, 2022. (Applicant's exhibit 39, p. 2.) Defendant's initial response was that home health care had

been denied by utilization review. (*Id.* at pp. 3-4.) On December 14, 2022, defense counsel emailed the applicant’s attorney that a letter was sent indicating additional information was needed in order to process the home health care bills. (*Id.* at p. 8.) That letter was not submitted as an exhibit. There are several emails, including on December 14, and on December 29, 2022 where defendant asserts the applicant had to prove up her claim for reimbursement under the standards of Labor Code section 4603.2. (see for example *Id.* at pp. 9, 14.) Applicant asserted that *Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.*, (2014) 79 Cal. Comp. Cases 682 (*en banc*) held that Labor Code section 4603.2(b)(1) did not apply to the applicant’s reimbursement claim. (Applicant’s exhibit 39, p. 11.) Applicant’s attorney emailed defense counsel on December 29, 2022, “How do you see me getting all these people to provide invoices?” (*Id.* at p. 15.)

On February 24, 2023 the applicant’s attorney asked defense counsel if the newly provided paperwork (reflected in Applicant’s exhibit 38) was sufficient itemization for reimbursement. (Applicant’s exhibit 39, p. 29.) Defense counsel’s response in its entirety was, “It is the same issue with the other ones, they have them, we object to the form which you have submitted as they do not have the proper supporting documentation.” (*Ibid.*)

The applicant testified on a number of issues, but primarily on the need and provision of home health care. My summary of the applicant’s testimony is excerpted below as relevant to defendant’s Petition.

“Summary of Direct Examination:

[...]

She started receiving home care in July 2012, before her surgery. The home health care then stopped because she was in the hospital for a month and a half. Home health care was resumed when she was out of the hospital.

In a 24-hour period, she has five caregivers, two per 8-hour shift in the day, and one at night. She cannot move herself; her caregivers have to move her. She spends the entire day in bed because she gets a lot of spasms and cannot sit down. She cannot get from the bed to a wheelchair on her own. She has been bedbound for a year and a half. Her condition was a little better before when she could sit in a wheelchair, although she had help getting out of bed. She cannot sit in a wheelchair now because her body is stiff and she cannot move. There are no activities of daily living that she can do without assistance.

In a typical day, her first caregiver makes breakfast. A second caregiver brushes her teeth, cleans her hands and face, and feeds her. She cannot hold a toothbrush. She eats breakfast in a sitting position. She cannot sit up, so her caregivers move the bed and put pillows behind her back. When she eats breakfast, they feed her. She cannot hold a fork or spoon. She started experiencing shaking in her hands nine months ago.

After breakfast, one caregiver washes dishes, and the other prepares her for a bath. She is bathed in the bed with water, using a sponge. For her hair, they put blankets under her and, between the two caregivers, they wash her hair. Bathing takes a long

time, but she doesn't know how long. She is bathed every day. She cannot dry herself, so that is done by the caregivers, and they dress her. They move her every two hours in her bed by kind of turning her around. She cannot brush her hair herself, or hold a brush in her hand. After breakfast and bathing, the aides get lunch ready. She watches TV, which the aides turn on. She cannot operate the remote control, and cannot change channels because she doesn't have strength in her fingers. She just lays in bed the rest of the day. The caregivers sometimes read her books. She cannot turn pages because her fingers don't help her.

She eats three meals a day, with fruit in between. A caregiver grocery shops for her.

She wears a diaper. A caregiver cleans her after toileting. She urinates sometimes every half hour because she drinks a lot of water. She cannot use a bathroom and must use diapers. Aides clean her with sprays and wipes and soap after she uses her diaper.

She only goes outside when she goes to the doctor. That happens every six weeks. She sees a doctor in Redwood City for baclofen injections that help with the spasms. Baclofen is in an implant pump. She has issues with the use of the baclofen pump and her hands and whole body getting "greasy." This happens when she has spasms. The spasms can happen many times a day, and she is having one in her leg while testifying.

She does not do her own laundry; the caregivers do that, as well as the folding of the laundry. The caregivers do the vacuuming and mop in the kitchen. They massage and exercise her two or three times a day. She cannot hold objects in her right or left hands and does not have use of her hands. She cannot use her legs to walk or move. She cannot use her back. She can only sit on the bed for 15 minutes without spasms. Her husband works outside of the house, and does not stay with her during the day.

She does not know why the insurance stopped providing home health care around September 1, 2022. Her condition had not improved. She paid for home health care from September 1, 2022 to November 1, 2022. She was bedbound at that time. She hired Ana Silvia Cabrera, Cristina Elizabeth Ventura, Villamor Servania, Lucrecia Adapon, and Maria Luz Melara to take care of her during that two-month period. She doesn't remember how many hours they worked. She paid \$18 per hour by cash and by check. She paid a total of \$16,317.

The caregivers she hired provided sponge baths in bed, and they washed, dried, and combed her hair. They brushed her teeth, cleaned her face, put lotion on her body, changed her diapers and cleaned her, and assisted with dressing and grooming. They also helped with laundry, changed and washed linens, mopped, vacuumed, swept floors, cleaned the kitchen, cleaned bathrooms, cooked meals for her, heated and warmed her food, helped her with sitting, prepared snacks and provided drinks, helped her change positions, gave her medications, assisted with her oxygen, and put a fan near her so she could cool off. Her Declaration

of Home Health Attendant Services in Exhibit 38 was truthful. She does not use a TENS unit.

For the period January 1, 2023 to January 11, 2023, she remembers Ana Silvia Cabrera, Cristina Elizabeth Ventura, Servania Villamor, and Teresita Lacorte as caregivers during that time. She paid all of these people to take care of her during this period. She paid \$18 an hour by cash and by check. They helped her with personal hygiene; bathing; washing hair; drying her body and hair; combing her hair; brushing her teeth; cleaning her face; putting lotion on her body; assisting with dressing; assisting with bathroom needs; doing laundry; changing linens; vacuuming, mopping, and sweeping the floors; cleaning the kitchen; cleaning the bathroom; preparing meals; setting up meals for her; assisting in feeding her; providing snacks and drinks; giving medications; changing position in bed every few hours; and massaging and exercising her during the day. Her declaration was truthful. She paid them a total of \$3,753.

The applicant doesn't remember if insurance provided home health care for the period July 15, 2016 through January 8, 2017. She had to pay for home health care during that time because she was not able to care for herself during that time. She was wheelchair-bound and her husband worked outside the house. The health care aides assisted with her activities of daily living. She paid \$7,724.50 to caregivers during that time. She paid them by cash at that time. The health care aides helped with personal hygiene, meal preparation, housekeeping, and grocery shopping. She was not reimbursed by insurance for the money she spent on caregivers.

[...]

Summary of Cross-Examination:

[...]

She prepared page 75 of Exhibit 38 with her husband's help. For the period from September through November 2022, she paid by both cash and check.

Receipts to caregivers from September through November 2022 were filled out by her husband in front of her. The caregivers did not fill out their names on receipts. She doesn't remember if her husband filled out the names on receipts. She would give the caregivers a receipt. She cannot see exhibits in detail because her vision is blurry. She paid Villamor Servania in cash. He would sign a receipt when he got the cash. The usual practice was to have the caregiver sign a receipt when paying cash. Referring to receipt number 6 on page 66 of Exhibit 38, she confirmed that this sounds like what she would have done when she would pay them cash.

Caregivers did not give her caregiver notes. She recognizes the caregiver note form on page 39 of Exhibit 38. Although she can see the form, she can't see the

name. Her husband would help her fill out the caregiver notes.” (3/4/2024 Opinion on Decision, pp. 17 – 22.)

B. FINDINGS OF FACT AND AWARD – MARCH 4, 2024.

There were a number of findings of fact, orders and an award for future medical care that were not contested in defendant’s Petition. There was also a status conference set for April 10, 2024 which has now been taken off calendar pending a ruling on the Petition. After consideration of all the evidence I concluded that further development of the record was needed to determine if there was a prescription for home health care for the period July 15, 2016 through January 8, 2017. (3/4/2024 Opinion on Decision, p. 26.) However, I found that there was evidence to support reimbursement to the applicant for home healthcare expenses for the September 1, 2022 through November 1, 2022, and January 1, 2023 through January 11, 2023 periods in the amount of \$20,070.00 less attorney fees. (Findings of Fact, Order, Award and Notice of Hearing, p. 3.)

C. CONTENTIONS ON RECONSIDERATION.

The defendant contends that the applicant has failed to provide the “... itemization of services provided ...” required for reimbursement of home health care expenses by Labor Code section 4603.2(b)(1). (Petition, p. 2, lines 18-24.) Defendant asserts the forms of Best Living Care, LLC that are Applicant’s exhibit 43 are an example of the standard of itemization required by Labor Code section 4603.2(b)(1). (Petition, p. 3, lines 11-13.) Defendant contends that the caregiver notes contained in Applicant’s exhibit 38 are not sufficient to meet the requirements of Labor Code section 4603.2(b)(1) because they were not completed by the actual caregivers and may not have been completed contemporaneously with the services indicated. (Petition, p. 3, lines 14-21.) Defendant asserts that it is only this itemization of services that has prevented reimbursement. (Petition, p. 3, lines 4-9.)

III. DISCUSSION

For payment of home health care services, Labor Code section 4603.2 states in relevant part:

“(b)(1)(A) A provider of services provided pursuant to Section 4600, including, but not limited to, physicians, hospitals, pharmacies, interpreters, copy services, transportation services, and home health care services, shall submit its request for payment with an itemization of services provided and the charge for each service, a copy of all reports showing the services performed, the prescription or referral from the primary treating physician if the services were performed by a person other than the primary treating physician, and any evidence of authorization for the services that may have been received.

[...]

(b)(2) ... 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....” (Labor Code section 4603.2(b)(1)(A) and (b)(2).)

There is not a clear definition of what is required in itemization under Labor Code section 4603.2(b)(1). “Section 4603.2(b)(1) does not specify when the itemized description and billing must be submitted and no other statute refers to an itemized description and billing with respect to section 5307.8 services.” (*Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.*, (2014) 79 Cal. Comp. Cases 682, 696 (*en banc*).)

In the non-binding panel decision of *Acevedo v. Del Mar Die Casting*, 2016 Cal. Wrk. Comp. P.D. LEXIS 82, cited in Applicant’s Answer, the WCAB upheld the workers’ compensation judges’ decision that:

“[A] declaration briefly describing the types of services provided over a prolonged period of time and an estimate of the number of hours per day or per week devoted to such nursing services over the same time period satisfies this "itemization" requirement, particularly during time periods that family members provided services with no help from SCIF and had no inkling of any obligation to track their time as they performed their services.” (*Acevedo v. Del Mar Die Casting*, 2016 Cal. Wrk. Comp. P.D. LEXIS 82, *17.)

In this case the parties stipulated to a need for home healthcare for the periods September 1, 2022 through November 1, 2022, and for the period January 1, 2023 through January 11, 2023. I find that the “caregiver notes” submitted as Applicant’s exhibit 38, in conjunction with applicant’s persuasive testimony, are sufficient evidence to satisfy the itemization requirements of Labor Code section 4603.2.

The range of duties indicated as having been performed by the caregivers, in the caregiver notes of Applicant’s 38, are consistent with the needs of the applicant contained in the medical reporting of Dr. Morley. Although there are not exact breakdown of the specific times that actions were taken, the overall time each caregiver spent with the applicant is indicated for each date of service. From the scope of evidence, and applicant’s testimony, it appears the caregiver notes forms were created sometime after the dates of the services by the applicant’s husband and not by the caregivers. The applicant’s credible testimony also supports that the caregivers were providing the services indicated on the caregiver notes.

I continue to find the applicant’s testimony persuasive that the indicated services were actually provided by various individuals, and that the applicant did pay those individuals as indicated. I believe that the documentation submitted by the applicant, in conjunction with her credible and un rebutted testimony, is sufficient to meet the itemization requirement of Labor Code section 4603.2(b)(1). Additionally, following receipt of the additional itemization on February 24, 2023, there is no evidence that defendant complied with the requirements of Labor Code section 4603.2(b)(2) to provide an explanation of review or statement of what additional information was required to make a decision.

Defendant now concedes that applicant was in need of home health care services during the periods in question. Having abruptly ceased provision of home health care during the periods in question, defendant seeks to impose their definition for itemization as a means to deny the applicant reimbursement for home health care that she was required to furnish for herself. It is unreasonable to expect the applicant to maintain records to the same standard of a company routinely providing home healthcare services. Defendant has offered no evidence which might reasonably indicate that from September 1, 2022 through November 1, 2022 and from January 1, 2023 through January 11, 2023, the applicant and her husband were able to make do without home healthcare. In consideration of the holding in *Acevedo v. Del Mar Die Casting*, 2016 Cal. Wrk. Comp. P.D. LEXIS 82, and that Labor Code section 4603.2(b)(1) does not define the specific itemization required, I find that the applicant has met the itemization requirement of Labor Code section 4603.2(b)(1).

Accordingly, I continue to find the applicant is entitled to reimbursement for the period September 1, 2022 through November 1, 2022 in the total amount of \$16,317.00, less attorney fees. I also continue to find that the applicant is entitled to reimbursement of payments to home health care providers for the period January 1, 2023 through January 11, 2023 in the total amount of \$3,753.00.

IV. RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on March 25, 2024, be DENIED.

DATE: April 8, 2024

LAWRENCE A. KELLER
WORKERS' COMPENSATION JUDGE

OPINION ON DECISION

This matter proceeded to trial on October 11, 2023 and was continued to December 5, 2023 for the testimony of the applicant. The case was submitted for decision on December 5, 2023.

Dora Segura, born [], while employed during the period through October 15, 2011 as a caregiver/in-home care attendant, Occupational Group Number 340, at San Mateo, California, by San Mateo County In-Home Support Services, sustained injury arising out of and in the course of employment to her back, right shoulder, right wrist, psyche, excretory system, and excretory system in the form of incontinence. The employer was legally uninsured at the time of injury.

At the time of injury, the employee's earnings were \$557.50 per week. The employee has been adequately compensated for all periods of temporary disability through November 26, 2013. The last date of temporary disability paid was November 26, 2013. The primary treating physician is Brendan Morley, M.D.

The parties stipulated that there is a need for future medical care. They also stipulated that there was a need for home health care during the periods which are at issue for reimbursement.

The issues for trial were:

1. Permanent disability, with the applicant claiming 100 percent permanent total disability and defendant claiming 83 percent permanent partial disability.
2. The permanent disability rate, with applicant claiming a 15 percent increase applies if the applicant is found not to be permanently totally disabled and defendant asserting that the employer has less than 50 employees for Labor Code section 4658 purposes.
3. Apportionment.
4. Entitlement to reimbursement of payments to home health care providers for broken periods during the period July 15, 2016 through January 8, 2017 in the total amount of \$7,724.50.
5. Entitlement to reimbursement of payments to home health care providers for the period September 1, 2022 through November 1, 2022 in the total amount of \$16,317.00.
6. Entitlement to reimbursement of payments to home health care providers for the period January 1, 2023 through January 11, 2023 in the total amount of \$3,753.00.
7. Payment to applicant's attorney for vocational expert deposit fee in the amount of \$1,000.00.
8. Whether defendant is liable for reimbursement of vocational expert fees to Frank Diaz, with jurisdiction reserved over whether the fee requested is reasonable.
9. Attorney fees with regard to the case in chief.

EVIDENCE

The parties submitted a significant volume of documentary exhibits. This matter had previously proceeded to trial before former Workers' Compensation Judge Colleen Casey and the

exhibits included transcripts of the prior testimony of the applicant. Those transcripts were reviewed but There was one joint exhibit submitted, 38 exhibits submitted by applicant, and 10 by defendant. In addition the applicant testified on her own behalf. Some of the exhibits were relevant to issues that are deferred. Although all exhibits were reviewed, they are summarized here as relevant to the decision herein. For example the prior trial transcripts were relevant to the need for home health care, but that was already stipulated to by the parties. The QME reports are reviewed first, followed by treating physician reports, then vocational expert reports, and then non-medical exhibits.

Joint Exhibit 101: Report of PQME Gary Martinovsky, M.D., dated July 7, 2014.

Applicant's Exhibit 15: Report of PQME Gary Martinovsky, M.D., dated July 17, 2021.

Applicant's Exhibit 16: Report of PQME Gary Martinovsky, M.D., dated February 12, 2018.

Applicant's Exhibit 17: Report of PQME Gary Martinovsky, M.D., dated July 29, 2017.

Applicant's Exhibit 18: Report of PQME Gary Martinovsky, M.D., dated June 24, 2017.

Applicant's Exhibit 19: Report of PQME Gary Martinovsky, M.D., dated October 13, 2015.

Applicant's Exhibit 20: Report of PQME Gary Martinovsky, M.D., dated November 21, 2014.

Applicant's Exhibit 22: Report of PQME Gary Martinovsky, M.D., dated June 17, 2013.

Applicant's Exhibit 23: Report of PQME Gary Martinovsky, M.D., dated May 31, 2013.

Applicant's Exhibit 24: Transcript of the deposition of PQME Gary Martinovsky, M.D., dated February 12, 2015.

Only the June 17, 2013 report is signed by Gary Martinovsky, M.D. (Applicant's exhibit 22, p. 2.) All other reports are signed by "Dora Martinovsky, M.D." (See Applicant's exhibits 15-20, 23.) The signature is very similar or identical on all reports, but is a simple loop. It is impossible to discern if the reports were signed by Gary as opposed to a Dora Martinovsky. The initial report is signed by "Dora" and then the second is signed by "Gary" and all subsequent reports are signed by "Dora." Both of the evaluation reports are signed by "Dora." (Applicant's exhibit 23, p. 24 and Applicant's exhibit 19, p. 13.) Because the name below the signature goes from Dora to Gary to Dora, it does not appear that this was a typographical error in the first report that was simply reproduced in the subsequent reports.

The June 17, 2013 report indicates the applicant is not yet permanent and stationary. (Applicant's exhibit 22, p. 1.) Although Gary Martinovsky, M.D. confirmed in his deposition that he evaluated the applicant on two occasions, he does not make any comments to correct the failure to sign the reports. (Applicant's exhibit 24, p. 5, lines 2-11.)

Reports of an evaluating physician must be signed by the evaluating physician, including declarations required by Labor Code section 4628. A failure to sign the reports with the required declarations is inadmissible. (Labor Code section 4628(e).) Because the reports, with the exception of the June 17, 2013 report, are not signed by Gary Martinovsky, M.D. they are not compliant with the requirements of Labor Code section 4628. Because the reports are not compliant with Labor Code section 4628, they are statutorily inadmissible. Accordingly, I will rescind my admission of Joint exhibit 101, and Applicant's exhibits 15, 16, 17, 18, 19, 20, and 23. Those reports will be excluded from evidence.

The transcript of Dr. Martinovsky was reviewed, but is largely dependent on the reporting, which is inadmissible. Therefore its probative value is voided as it comments on the inadmissible reporting. As discussed below, there is a need for further discovery based on the inadmissibility of this reporting.

Applicant's Exhibit 25: Report of PQME Gerald Besses, M.D., dated June 22, 2019.

Applicant's Exhibit 26: Report of PQME Gerald Besses, M.D., dated March 14, 2019.

The applicant was evaluated by Dr. Besses as QME in internal medicine on March 14, 2019. (Applicant's Exhibit 26, p. 1.) At the time of the evaluation, the applicant was wheelchair bound. (Applicant's Exhibit, p.5.) Dr. Besses' summary of the applicant's history of injury included:

“Ms. Segura states that she started having difficulty walking with body shakes and muscle spasms, one day while at work. She called her husband who came to pick her up, finding her standing on a street corner at the bus stop holding very tightly to a pole. He got her into the car and took her home, but then called an ambulance, and she was taken to the hospital. At the hospital she was told she had sciatica and was sent home, but the spasms increased occasionally affecting her whole body, occasionally just her legs.

She had had a patient who had fallen several times and she had had to lift this heavy person back up. This caused back pain. She was eventually found to have a compression fracture at T12 with spinal stenosis. She needed surgery to relieve the stenosis, at which time a rib was also removed. After surgery, however, the leg spasms and occasionally body spasms continued. In 2013, she experienced a fracture of her left hip and then another fracture of the right hip in 2014. Eventually after the spasms were controlled with use of a spinal pump infusing baclofen into her back, she was able to have surgery to fix each of her hips. At this time she can support herself, but her balance is very poor, and she needs help transferring, walking. She cannot walk by herself. One leg is shorter than the other.” (Applicant's Exhibit 26, pp. 2-3.)

The applicant's complaints included spasms in her legs and occasionally in her whole body, gastritis for at least 10 years, and urinary incontinence. (Applicant's Exhibit 26, p. 3.) She also had constipation. (Applicant's Exhibit 26, p. 5.) She had occasional pain in her back and legs, with spasms in the legs as well. (Applicant's Exhibit 26, p. 5.) Although the applicant was able to stand and support her weight, she experienced “Major problems with stiffness and inability to move her legs very well...” (Applicant's Exhibit 26, p. 6.) In his physical examination of the applicant, Dr. Besses also noted that grip strength was weak. (Applicant's Exhibit 26, p. 25.) Although the applicant was able to do alternate finger touching, she stated that she had given up crocheting because of a lack of manual dexterity. (Applicant's Exhibit 26, p. 25.) Dr. Besses noted a surgical history including a back operation and baclofen pump implantation, and surgeries to both hips. (Applicant's Exhibit 26, p. 4.)

The applicant reported that she mostly stayed at home at the time of the evaluation. (Applicant's Exhibit 26, p. 4.) She had home health workers present for eight hours per day with whom she did exercises daily. (Applicant's Exhibit 26, p. 4.) The applicant's husband cared for the applicant when the home health workers were not present. (Applicant's Exhibit 26, p. 4.) All of the applicant's activities of daily living were limited. (Applicant's Exhibit 26, p. 5.) The applicant was unable to move herself to get to the bathroom which resulted in her need for incontinences supplies. (Applicant's Exhibit 26, p. 5.)

Dr. Besses reviewed over 20 inches of medical records dating as far back as 1996. (Applicant's Exhibit 26, p. 6.) In 2000 the applicant was diagnosed with hypertension, elevated cholesterol, recurrent gastritis, and also had complaints of bilateral neck and back pain. (Applicant's Exhibit 26, p. 6.) The applicant saw doctors on numerous occasions between 2000 and October 2011 for a variety of conditions, including consistent complaints of abdominal pain. (Applicant's Exhibit 26, pp. 6-10.) After the July 26, 2000 mention of leg and back pain there was no further reference to pain in those body parts until September 27, 2011 complaints of leg pain. (Applicant's Exhibit 26, pp. 6, 10.) Dr. Besses noted that January 2014 was the last record of the applicant walking. (Applicant's Exhibit 26, p. 27.)

Dr. Besses diagnosed the applicant with paraplegia, rhinitis, hypertension, hyperlipidemia, GERD, gastritis, asthma with obstructive sleep apnea, and a history of a hysterectomy and cholecystectomy. (Applicant's Exhibit 26, p. 25.) Since January 2014 the applicant has been wheelchair bound and, "... able to support her weight but unable to walk or balance without two-person assist. [¶] It is this inability that has led to Ms. Segura being incontinent. When she has two attendants, she is able to get to the bathroom and control urination." (Applicant's Exhibit 26, p. 27.) However, when she does not have her husband or caregivers to assist, the applicant must soil herself. (Applicant's Exhibit 26, p. 27.) The applicant's movement, in her wheelchair and in bed, are very limited because of her paraplegia, and this leads her to feeling hot and drinking more water which aggravates the incontinence. (Applicant's Exhibit 26, p. 27.) Dr. Besses opined that the applicant's incontinence was a compensable consequence of the industrial injury. (Applicant's Exhibit 26, p. 28.) Besides the incontinence, the applicant's other internal medical conditions are non-industrial. (Applicant's Exhibit 26, p. 27.)

The applicant's incontinence disability was permanent and stationary at the time of the evaluation. (Applicant's Exhibit 26, p. 28.) Dr. Besses stated that the applicant's incontinence impairment was best rated using Table 7-3 of the AMA Guides. (Applicant's Exhibit 26, p. 28.) Dr. Besses found the applicant's impairment to not qualify for a Class 3 impairment. (Applicant's Exhibit 26, p. 28.) He found the applicant best classified as having a Class 2 impairment with 28% whole person impairment (WPI). (Applicant's Exhibit 26, p. 28.) Dr. Besses opined that the incontinence disability should be combined with other disability, as there was no synergistic effect with the orthopedic rating. (Applicant's Exhibit 26, p. 28.)

Apportionment was 100 percent to the orthopedic injury and the "... incontinence should be apportioned to the same degree that the orthopedic injury is apportioned." (Applicant's Exhibit 26, p. 28.) He confirmed this apportionment determination in his June 22, 2019 supplemental report. (Applicant's Exhibit 25, p. 2.) He opined that there was no overlap between the internal

and orthopedic conditions. (Applicant's Exhibit 25, p. 2.) Dr. Besses felt there was a need for future medical care for the incontinence. (Applicant's Exhibit 26, p. 28.)

Applicant's Exhibit 27: Report of PQME Allen Kanner, Ph.D., dated March 26, 2014.

Applicant's Exhibit 28: Report of PQME Teo Ernst, Psy.D., dated May 24, 2020.

The applicant was evaluated by two psychology QMEs, by Dr. Kanner on February 24, 2014 and by Dr. Ernst on May 24, 2020. It is not clear why Dr. Kanner's report was offered by applicant as it questions the applicant's motivation and appears the parties needed to go to a different QME for unknown reasons. Although Dr. Kanner's report was reviewed in full, it will not be summarized extensively here. At the time of her evaluation with Dr. Kanner, the applicant was hopeful of being able to walk again. (Applicant's Exhibit 27, p. 27.) As described by Dr. Besses, the applicant was not able to independently walk again after January 2014. (Applicant's Exhibit 26, p. 27.) Therefore, I will summarize Dr. Ernst's reporting as it is more recent and reflective of the applicant's psychiatric condition at the time of trial. However, it is noted that Dr. Kanner expressed concerns the applicant had, consciously or unconsciously, a secondary gain motivation in her presentation. (Applicant's Exhibit 27, p. 25.) Dr. Kanner indicated that the increasing stress and demands of the applicant's work prior to going off work for her orthopedic condition, may have created a disincentive to return to work. (Applicant's Exhibit 27, p. 25.)

Dr. Ernst did not find evidence of the secondary gain issues discussed by Dr. Kanner. (Applicant's Exhibit 28, p. 23.) He evaluated the applicant by video over three dates. (Applicant's Exhibit 28, p. 15.) Dr. Ernst reviewed the reports of QMEs Dr. Martinovsky, Dr. Besses, and Dr. Kanner. (Applicant's Exhibit 28, pp. 2-8.) There is no reference to Dr. Ernst reviewing any treating physician reports. Dr. Ernst took a psychiatric history from the applicant, including stressors related to a prior husband and her children. (Applicant's Exhibit 28, pp. 8-10.) The applicant did not have mental health treatment prior to her industrial injury. (Applicant's Exhibit 28, p. 11.) In describing her medical history to Dr. Ernst, the applicant reported that her hypertension and use of medication for asthma began after her industrial injury. (Applicant's Exhibit 28, p. 11.) The applicant's only history of psychiatric treatment was in 2020 when she spoke with two psychologists, and was told "... by these psychologists that she was psychiatrically stable and did not need treatment." (Applicant's Exhibit 28, p. 12.)

The applicant reported to Dr. Ernst that she does not experience pain, but experiences spasms multiple times per day. (Applicant's Exhibit 28, p. 14.) Dr Ernst stated that, "The applicant reported that she has been entirely unable to walk since December 2020." (Applicant's Exhibit 28, p. 14.) The applicant also reported being unable to engage in activities of daily living due to her orthopedic conditions. (Applicant's Exhibit 28, p. 14.) Along with his interview with the applicant, Dr. Ernst conducted a number of tests associated with a psychological evaluations, including the Minnesota Multiphasic Personality Inventory-3, Beck Depression Inventory-II, and the Beck Anxiety Inventory. (Applicant's Exhibit 28, pp. 16-17.)

Following his evaluation of the applicant and review of medical records, Dr. Ernst found the applicant credibly reported her psychological conditions but likely minimized non-industrial stressors contributing to her psychiatric condition. (Applicant's Exhibit 28, pp. 18-19.) He found the applicant to have an adjustment disorder which was predominantly caused by the applicant's industrial conditions. (Applicant's Exhibit 28, pp. 19-20.) Dr. Ernst concurred with Dr. Kanner that the applicant's psychiatric condition reached a state of maximum medical improvement on "... approximately 2/24/2014." (Applicant's Exhibit 28, p. 20.) Since the applicant's psychiatric symptoms were mild, there were no permanent work restrictions required on a psychiatric basis. (Applicant's Exhibit 28, p. 21.)

For impairment, Dr. Ernst found the Global Assessment Functioning (GAF) scale to be the most accurate reflection of the applicant's disability. (Applicant's Exhibit 28, p. 21.) He found the applicant to have a GAF score of 63, corresponding to an 11% WPI. (Applicant's Exhibit 28, p. 23.) Dr. Ernst found that 90% of the applicant's disability was attributable to her industrial orthopedic condition, and 10% to non-industrial conditions, "... including osteoporosis, as outlined by Dr. Martinovsky and Dr. Besses." (Applicant's Exhibit 28, p. 23.) There was additionally a provision for future medical care described by Dr. Ernst. (Applicant's Exhibit 28, p. 24.)

Applicant's Exhibit 31: RFA dated August 2, 2022 and report of Brendan Morley, M.D., dated July 25, 2022.

Applicant's Exhibit 32: Treatment denial fax by Brendan Morley, M.D., dated September 6, 2022.

Applicant's Exhibit 33: Supplemental medical report of Brendan Morley, M.D., dated September 13, 2022.

Applicant's Exhibit 34: RFA appeal of Brendan Morley, M.D., dated September 20, 2022.

Applicant's Exhibit 42: Medical report of Brendan Morley, M.D., dated May 11, 2023.

Defendant's Exhibit B: Reports of Brendan Morley, M.D., dated October 7, 2014 through July 25, 2022.

Defendant's Exhibit C: Report of Brendan Morley, M.D., dated September 2, 2014.

It is first noted that these reports of Dr. Morley do not contain a Permanent and Stationary or PR-4 report. Therefore these reports are reviewed primarily for their relevance to the issues of home health care reimbursement.

At an October 7, 2014 examination the applicant was utilizing a wheelchair and continued to have a home health aide for 8 hours per day, 7 days a week. (Defendant's exhibit B, p. 115.)

¹The applicant was not able to ambulate without assistance. (Defendant's exhibit B, p. 115.) Three months of a home health aide had been authorized. (Defendant's exhibit B, pp. 115-116.) In his April 16, 2016 report, Dr. Morley stated that the applicant requires continuous use of home health assistance. (Defendant's exhibit B, p. 65.) He indicated that a prior request for 6 months of home health care was authorized but would need to be renewed in May 2016. (Defendant's exhibit B, p. 65.) An October 10, 2018 report noted that the applicant continued to require continuous home health care. (Defendant's exhibit B, p. 48.)

¹ Page numbers for the Morley exhibits are the PDF page number.

Dr. Morley's July 25, 2022 report noted that the applicant was, "... incapable of toileting, transitioning in and out of her wheelchair, or dressing without the assistance of a caregiver." (Defendant's exhibit B, p. 2.) He also noted that the applicant's husband would be leaving the country between August 26, 2022 and September 19, 2022, and she would require 24-hour care during that period. (Defendant's exhibit B, p. 2.) The report included a "Formal Request for Authorization" section requesting:

"24/7 caregivers x5 from 8/26/22 to 9/19/22 (x2 caregivers for 7am to 3pm shift, x2 caregiver for 3pm-11pm shift, xl caregiver for 11pm-7am shift)

6 month continuation (August 2022 - February 2023) of x2 caregivers, 10 hours/day 5 days per week (Monday-Friday) and 6 month continuation of x2 caregivers 8 hours/day 2 days per week (Saturday-Sunday)" (Defendant's exhibit B, p. 4.)

Dr. Morley also prepared a DWC form Request for Authorization (RFA) on August 2, 2022 for the caregiver request in his July 25, 2022 report. (Applicant's exhibit 31, pp. 1-2.) On August 24, 2022 defendant issued a utilization review decision denying, without modification, the requests for caregivers contained in the August 2, 2022 RFA. (Applicant's exhibit 32, pp. 4-5.)

Dr. Morley prepared a September 13, 2022 supplemental report in response to the denial of home health aides. (Applicant's exhibit 33, p. 1.) He stated that the applicant is, "... significantly disabled, and she is unable to perform many activities of daily living." (Applicant's exhibit 33, p. 6.) Citing the applicant's height and weight, Dr. Morley opined that two caregivers were required to address the patient's needs, including bathing, toileting, and dressing. (Applicant's exhibit 33, p. 5.) Dr. Morley also prepared an RFA form dated September 20, 2022 indicating an appeal of the caregiver denial. (Applicant's exhibit 34, pp. 1-2.) Included with the RFA form were prescriptions for the caregiver services. (Applicant's exhibit 34, pp. 3-4.)

In a May 8, 2023 report, Dr. Morley again noted the need for daily care from a team of 3 health aides working over a 24-hour period. (Applicant's exhibit 42, p. 4.) On May 11, 2023 Dr. Morley signed a DWC form Request for Authorization, including the request for home health aides, with an indication that it was being sent by fax to the Intercare adjuster at 916-780-9789. (Applicant's exhibit 42, pp. 1-2.) Dr. Morley also included a prescription for the home health aides. (Applicant's exhibit 42, p. 11.)

Defendant's Exhibit A: Reports of Fred Naraghi, M.D., dated August 25, 2014; June 25, 2015; and September 14, 2016.

Defendant's Exhibit E: Transcript of the deposition of Fred Naraghi, M.D., dated October 9, 2015.

Defendant's Exhibit F: Transcript of the deposition of Fred Naraghi, M.D., dated February 8, 2017.

The applicant, who had previously been treated by Dr. Naraghi, called him on September 14, 2016 with complaints of increasing lower extremity pain, numbness, and weakness. (Defendant's exhibit A, pp. 1-2.) There is a physical examination in the report of Dr. Naraghi, but it is not clear if this is from prior exams or the applicant was seen by Dr. Naraghi on September 14, 2016 in addition to Dr. Naraghi noted that the applicant's weakness has become worse as she has not been able to ambulate. (Defendant's exhibit A, p. 2.) He noted that it was difficult to

evaluate these complaints, "... because already her baseline is quite limited and she is wheelchair bound." (Defendant's exhibit A, p. 2.) The exam notes the applicant was examined in a wheelchair, and required the help of her caregiver who completely supports her weight when she stands. (Defendant's exhibit A, p. 3.) In his diagnosis, Dr. Naraghi noted a worsening neurologic condition. (Defendant's exhibit A, p. 4.) He went on to state that, "The patient is also getting home care and this is very important for her. Since her home care has been discontinued, she has significantly deteriorated. She should continue to have her home care." (Defendant's exhibit A, p. 5.)

Neither of the earlier reports of Dr. Naraghi provide any discussion of permanent impairment or apportionment. The depositions of Dr. Naraghi focus on issues relating to apportionment. The transcripts are not relevant to the issues of home health care, and as discussed below, further discovery is needed on the issues of permanent disability and apportionment.

Defendant's Exhibit D: Excerpts from subpoenaed records of Kaiser South San Francisco.

These reports relate to treatment in 2013 and are not relevant to the issues at trial.²

Applicant's Exhibit 7: Report of vocational expert Frank Diaz dated July 27, 2021.

Applicant's Exhibit 8: Report of vocational expert Frank Diaz dated May 28, 2021.

The applicant was evaluated by Mr. Diaz on September 14, 2020 via Skype, with the initial interview conducted by Mr. Diaz's assistant, Mr. Cash. (Applicant's Exhibit 8, p. 2.) Mr. Diaz indicated it was observed that the applicant had muscle spasms during the course of the evaluation. (Applicant's Exhibit 8, pp. 2-3.) It is not clear that these were observed by Mr. Diaz, or by his assistant Mr. Cash. Mr. Diaz indicated it was not possible to complete the evaluation because after a lunch break from 12:33pm to 1:15pm, she would need to lie down during the evaluation. (Applicant's Exhibit 8, p. 3.) Mr. Diaz indicated it was necessary to sit for the vocational testing. (Applicant's Exhibit 8, p. 4.) It is not clear if any testing or interviewing was done between 9:30am and 12:12pm were there is a significant break in the timeline provided by the report. (Applicant's Exhibit 8, p. 3.)

Since it was not possible to conclude the evaluation on the initial date, the applicant was again evaluated via Skype on October 21, 2020. (Applicant's Exhibit 8, p. 2.) Mr. Cash again interviewed the applicant to obtain background information, and was also able to administer vocational testing. (Applicant's Exhibit 8, pp. 4-5.) Because of physical difficulty in completing some of the testing, Mr. Diaz waived vocational testing in his evaluation of the applicant. (Applicant's Exhibit 8, pp. 8-9.) Mr. Diaz, "... did not take into account Ms. Segura's subjective physical tolerances in order to determine her amenability to rehabilitation." (Applicant's Exhibit 8, p. 8.)

Mr. Diaz initially reviewed the reporting of Dr. Besses, Dr. Kanner, and Dr. Martinovsky. (Applicant's Exhibit 8, p. 52.) Mr. Diaz focused his vocational analysis on the San Francisco-Oakland-Berkely Metropolitan Statistical Area. (Applicant's Exhibit 8, p. 10.) Mr. Diaz found that

² Defendant's list of excerpted records indicate a 2023 report, but this is a typographical error, as the report is from 2013.

the applicant was previously able to perform work at a very heavy level of physical functioning, but was now limited to sedentary work. (Applicant's Exhibit 8, p. 11.) In discussing limitations noted by Dr. Kanner, Mr. Diaz cites limitations for moderate symptoms, whereas Dr. Kanner identified mild symptoms. (Applicant's Exhibit 8, p. 13.) Mr. Diaz cites to an Ohio case of a production line worker leaving his machine three times in one shift to support his conclusion that no employer could accommodate the work restrictions of Dr. Besses for easy toilet access. (Applicant's Exhibit 8, p. 13-14.) Mr. Diaz also discussed the limitations on activities of daily living and pain found by Dr. Martinovsky. (Applicant's Exhibit 8, pp. 14-17.) He also found that there was a synergistic effect between the functional limitations for the lumbar spine, thoracic spine, and right shoulder. (Applicant's Exhibit 8, pp. 17-18.)

Based on the functional limitations found by Dr. Kanner and Dr. Martinovsky, Mr. Diaz identified no positions that could be performed by the applicant, resulting in a 100% loss of labor market access. (Applicant's Exhibit 8, p. 12.) Although some of the applicant's limitations could be accommodated, the incontinence could not. (Applicant's Exhibit 8, pp. 18-19.) Mr. Diaz also found that the applicant's functional limitations would prevent her from effectively completing a vocational rehabilitation program. (Applicant's Exhibit 8, pp. 21-22.) Mr. Diaz discusses vocational apportionment, explaining that none of the applicant's loss of labor market access is due to her non-industrial conditions. (Applicant's Exhibit 8, p. 26.) He concluded his initial report by summarizing that the applicant had a 100% loss of labor market access and that the loss was exclusively caused by the industrial injury. (Applicant's Exhibit 8, p. 33.)

Mr. Diaz was subsequently provided the May 24, 2020 report of Dr. Ernst. (Applicant's Exhibit 7, p. 1.) Following his review of the report of Dr. Ernst, Mr. Diaz remained of the opinion that 100% of the loss of labor market access was the result of the industrial injury. (Applicant's Exhibit 7, p. 8.) He continued to base this determination on the functional limitations set forth by Dr. Besses and Dr. Martinovsky. (Applicant's Exhibit 7, p.7.)

Applicant's Exhibit 9: Billing statement of Frank Diaz dated July 27, 2021.

Applicant's Exhibit 10: Billing statement of Frank Diaz dated May 28, 2021.

Applicant's Exhibit 11: Email from applicant's attorney to defense attorney dated September 8, 2021.

Applicant's Exhibit 12: Proof of Service dated December 23, 2021.

Applicant's Exhibit 13: Copy of a check from the Law Offices John E. Hill to Diaz & Company dated February 12, 2020.

Applicant's Exhibit 14: Applicant's Petition for Order dated December 23, 2021.

The applicant's attorney issued a check dated February 12, 2020 to Diaz & Company as a retainer for the vocational evaluation by Frank Diaz. (Applicant's exhibit 13.) That retainer fee is reflected in the May 28, 2021 billing statement of Diaz & Company. (Applicant's exhibit 10, p. 2.) Demand for reimbursement of the retainer fee was made by applicant's attorney in an email to defense counsel on September 8, 2021, which attached copies of the two reports of the vocational expert. (Applicant's exhibit 11.) On December 23, 2021, the applicant filed a verified petition for reimbursement of the \$1,000 retainer as well as for payment to Diaz & Company of the remaining balance of fees. ((Applicant's exhibit 14.)

Applicant's Exhibit 35: Request for reimbursement email dated November 28, 2022.
Applicant's Exhibit 36: Request for reimbursement fax dated January 17, 2023.
Applicant's Exhibit 37: Request for reimbursement fax dated February 2, 2023.
Applicant's Exhibit 38: Updated request for reimbursement email dated February 15, 2023.
Applicant's Exhibit 39: Email exchange between defendant and applicant attorneys' offices dated September 6, 2022 through February 24, 2023.
Applicant's Exhibit 40: Assessment letter of Home Helpers dated February 24, 2016.
Applicant's Exhibit 41: Email from applicant's attorney to defense attorney dated November 22, 2022.
Applicant's Exhibit 43: Home Health Aide notes from Best Living Care, LLC, dated March 1, 2023 through April 30, 2023.

On November 28, 2022 Applicant's attorney emailed defense counsel a request for reimbursement to applicant of \$16,317 in home health care expenses for the period September 1, 2022 through November 1, 2022. (Applicant's exhibit 35, p. 1.) There are lists in Spanish of hours worked by various careworkers, with the amounts paid by cash, and the amounts paid by check. (Applicant's exhibit 35, pp. 2-3, 6-8, 14.) Also included are copies of cashed checks, and "receipts" for cash paid. (see for example Applicant's exhibit 35, pp. 4-5.) An additional fax with a typed breakdown of the hours worked by individual caregivers for the period September 1, 2022 through November 1, 2022 was faxed to the defense attorney and adjuster on January 17, 2023. (Applicant's exhibit 36, pp. 2-4.)

A typed breakdown of the hours worked by individual caregivers for the period January 1, 2023 to January 11, 2023 was faxed to the defense attorney and adjuster on February 2, 2023. (Applicant's exhibit 37, pp. 3-4.) On February 15, 2023 the applicant's attorney emailed defense counsel the previously provided documentation for the 2022 and 2023 periods as well as "caregiver notes." (Applicant's exhibit 38.) The "caregiver notes" indicate a date, time, and the name of a caregiver, as well as the services provided by that caregiver. (See for example, Applicant's exhibit 38, p. 2.)

Home Helpers of San Mateo County prepared a report on the applicant's care at home, including the need for home healthcare. (Applicant's exhibit 40.) Among the recommendations is that the applicant have two home healthcare assistants to get the applicant into and out of her wheelchair. (Applicant's exhibit 40, p. 2.)

Helping Hands Senior Services Inc. provided home healthcare services for August 2022, and then again from November 2, 2022 through November 15, 2022. (Applicant exhibit 41, pp. 4-9.)

Applicant's Exhibit 44: Claim summary of York dated May 3, 2017.

This exhibit is a medical benefit printout showing ongoing payments for home healthcare to various providers from 2014.

Defendant's Exhibit G: Letter from defense attorney to applicant's attorney dated December 29, 2022.

Defendant's Exhibit H: Emails between defense attorney and applicant's attorney dated December 29, 2022.

Defendant's Exhibit I: Emails between defense attorney and applicant's attorney dated January 17, 2023 through January 25, 2023.

Defendant's Exhibit J: Emails between defense attorney and applicant attorney's office dated February 2, 2023.

These exhibits reflect that a core of defendant's objection to re-imbusement was that the requests for reimbursement did not contain an attestation or otherwise meet the billing requirements of Labor Code section 4603.2. (See Defendant's exhibit G.)

TESTIMONY OF THE APPLICANT

Summary of Direct Examination:

The applicant worked for IHSS for ten years as a caregiver. She had three clients at the same time. She worked five days a week, nine hours per day, spending about three hours per client. Her duties as a caregiver were to make breakfast, make the bed, go to the pharmacy for medications, shop for groceries, do laundry, clean the bathroom and kitchen, and clean in general.

Her last day worked for IHSS was October 15, 2011, and she has not worked since that time. A doctor took her off work. On that day, she couldn't walk anymore because of spasms, and she had a lot of pain in her back. She started feeling spasms little by little but didn't pay them much attention. She felt they were caused by caring for a patient who had cancer and got radiation and fell down 30 times.

She has gotten a lot of treatment. Her spasms were in her whole body, but more in the legs. She felt, because of so many spasms, that she broke her T12 vertebrae in 2012. She treated at an occupational clinic in Redwood City at that time, but they said they did not cover that. They sent her to Kaiser, and she got treatment through her husband. She had surgery in 2012 to the T12 level in her back, and she had an implant.

She started receiving home care in July 2012, before her surgery. The home health care then stopped because she was in the hospital for a month and a half. Home health care was resumed when she was out of the hospital.

In a 24-hour period, she has five caregivers, two per 8-hour shift in the day, and one at night. She cannot move herself; her caregivers have to move her. She spends the entire day in bed because she gets a lot of spasms and cannot sit down. She cannot get from the bed to a wheelchair on her own. She has been bedbound for a year and a half. Her condition was a little better before when she could sit in a wheelchair, although she had help getting out of bed. She cannot sit in a wheelchair now because her body is stiff and she cannot move. There are no activities of daily living that she can do without assistance.

In a typical day, her first caregiver makes breakfast. A second caregiver brushes her teeth, cleans her hands and face, and feeds her. She cannot hold a toothbrush. She eats breakfast in a sitting position. She cannot sit up, so her caregivers move the bed and put pillows behind her back. When she eats breakfast, they feed her. She cannot hold a fork or spoon. She started experiencing shaking in her hands nine months ago.

After breakfast, one caregiver washes dishes, and the other prepares her for a bath. She is bathed in the bed with water, using a sponge. For her hair, they put blankets under her and, between the two caregivers, they wash her hair. Bathing takes a long time, but she doesn't know how long. She is bathed every day. She cannot dry herself, so that is done by the caregivers, and they dress her. They move her every two hours in her bed by kind of turning her around. She cannot brush her hair herself, or hold a brush in her hand. After breakfast and bathing, the aides get lunch ready. She watches TV, which the aides turn on. She cannot operate the remote control, and cannot change channels because she doesn't have strength in her fingers. She just lays in bed the rest of the day. The caregivers sometimes read her books. She cannot turn pages because her fingers don't help her.

She eats three meals a day, with fruit in between. A caregiver grocery shops for her.

She wears a diaper. A caregiver cleans her after toileting. She urinates sometimes every half hour because she drinks a lot of water. She cannot use a bathroom and must use diapers. Aides clean her with sprays and wipes and soap after she uses her diaper.

She only goes outside when she goes to the doctor. That happens every six weeks. She sees a doctor in Redwood City for baclofen injections that help with the spasms. Baclofen is in an implant pump. She has issues with the use of the baclofen pump and her hands and whole body getting "greasy." This happens when she has spasms. The spasms can happen many times a day, and she is having one in her leg while testifying.

She does not do her own laundry; the caregivers do that, as well as the folding of the laundry. The caregivers do the vacuuming and mop in the kitchen. They massage and exercise her two or three times a day. She cannot hold objects in her right or left hands and does not have use of her hands. She cannot use her legs to walk or move. She cannot use her back. She can only sit on the bed for 15 minutes without spasms. Her husband works outside of the house, and does not stay with her during the day.

She does not know why the insurance stopped providing home health care around September 1, 2022. Her condition had not improved. She paid for home health care from September 1, 2022 to November 1, 2022. She was bedbound at that time. She hired Ana Silvia Cabrera, Cristina Elizabeth Ventura, Villamor Servania, Lucrecia Adapon, and Maria Luz Melara to take care of her during that two-month period. She doesn't remember how many hours they worked. She paid \$18 per hour by cash and by check. She paid a total of \$16,317.

The caregivers she hired provided sponge baths in bed, and they washed, dried, and combed her hair. They brushed her teeth, cleaned her face, put lotion on her body, changed her diapers and cleaned her, and assisted with dressing and grooming. They also helped with laundry, changed and

washed linens, mopped, vacuumed, swept floors, cleaned the kitchen, cleaned bathrooms, cooked meals for her, heated and warmed her food, helped her with sitting, prepared snacks and provided drinks, helped her change positions, gave her medications, assisted with her oxygen, and put a fan near her so she could cool off. Her Declaration of Home Health Attendant Services in Exhibit 38 was truthful. She does not use a TENS unit.

For the period January 1, 2023 to January 11, 2023, she remembers Ana Silvia Cabrera, Cristina Elizabeth Ventura, Servania Villamor, and Teresita Lacorte as caregivers during that time. She paid all of these people to take care of her during this period. She paid \$18 an hour by cash and by check. They helped her with personal hygiene; bathing; washing hair; drying her body and hair; combing her hair; brushing her teeth; cleaning her face; putting lotion on her body; assisting with dressing; assisting with bathroom needs; doing laundry; changing linens; vacuuming, mopping, and sweeping the floors; cleaning the kitchen; cleaning the bathroom; preparing meals; setting up meals for her; assisting in feeding her; providing snacks and drinks; giving medications; changing position in bed every few hours; and massaging and exercising her during the day. Her declaration was truthful. She paid them a total of \$3,753.

The applicant doesn't remember if insurance provided home health care for the period July 15, 2016 through January 8, 2017. She had to pay for home health care during that time because she was not able to care for herself during that time. She was wheelchair-bound and her husband worked outside the house. The health care aides assisted with her activities of daily living. She paid \$7,724.50 to caregivers during that time. She paid them by cash at that time. The health care aides helped with personal hygiene, meal preparation, housekeeping, and grocery shopping. She was not reimbursed by insurance for the money she spent on caregivers.

She does not remember having a Zoom or Skype meeting with vocational expert Frank Diaz.

Summary of Cross-Examination:

She sustained her injury in 2011. She had a burst fracture to her T12 and received surgical intervention for that in July 2012 at Kaiser in San Jose. Following surgery, she could ambulate with a front-wheeled walker. She then broke her left hip in 2013. After her hip broke, it became more difficult to ambulate with a front-wheeled walker. She started using a wheelchair at times after the T12 surgery. After her hip break in 2013, she could no longer use a front-wheeled walker.

She prepared page 75 of Exhibit 38 with her husband's help. For the period from September through November 2022, she paid by both cash and check. Receipts to caregivers from September through November 2022 were filled out by her husband in front of her. The caregivers did not fill out their names on receipts. She doesn't remember if her husband filled out the names on receipts. She would give the caregivers a receipt. She cannot see exhibits in detail because her vision is blurry. She paid Villamor Servania in cash. He would sign a receipt when he got the cash. The usual practice was to have the caregiver sign a receipt when paying cash. Referring to receipt number 6 on page 66 of Exhibit 38, she confirmed that this sounds like what she would have done when she would pay them cash.

Caregivers did not give her caregiver notes. She recognizes the caregiver note form on page 39 of Exhibit 38. Although she can see the form, she can't see the name. Her husband would help her fill out the caregiver notes.

DISCUSSION

Permanent Disability, Apportionment, and the Need to Develop the Record.

It is well established that any decision of the Board must be supported by substantial evidence. (Labor Code § 5952, subd. (d); *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [90 Cal. Rptr. 355, 475 P.2d 451].) The injured employee has the burden of affirmatively establishing the extent of her permanent disability. (Labor Code §§ 3202.5, 5705.) A Workers' Compensation Judge is empowered to obtain additional medical evidence where records are inaccurate, incomplete, or inconsistent. (*McDuffie v. Los Angeles County Metro. Transit Auth.*, (2002) 67 Cal. Comp. Cases 138, 141 (Appeals Board en banc).) The Appeals Board's duty to develop the record must be weighed against each litigant's obligation to conduct discovery diligently. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd.* (McKernan) (1999) 74 Cal. App. 4th 928.)

In this case there is no substantial medical evidence to establish the disability or apportionment for the applicant's permanent disability for her accepted orthopedic conditions. From the totality of evidence it is well established that there is impairment, and thus permanent disability, for the applicant's orthopedic conditions. However, because the reports of Gary Martinovsky, M.D. are inadmissible by statute, there is not substantial medical evidence to support any permanent disability and apportionment determination in this case. The reports of the treating physicians do not contain impairment determinations. For reasons discussed below, the reporting of Frank Diaz is not substantial evidence on disability.

Because of the inadmissibility of the reports of Dr. Martinovsky, and the lack of substantial medical evidence to determine permanent disability for the orthopedic conditions, there is a need to develop the record on the applicant's orthopedic condition. It is noted that Dr. Martinovsky is no longer serving as a QME. Therefore, the parties shall meet-and-confer on the possible use of an Agreed Medical Evaluator (AME). If parties are not able to reach an agreement then I shall order a replacement panel or order an evaluation by a regular physician. This matter will be set for a status conference to discuss development of the record before issuing further orders for a replacement panel or for a regular physician.

I do find the reporting of Dr. Besses and Dr. Ernst to be substantial medical evidence regarding the applicant's internal and psychiatric conditions. Both doctors sufficiently explained their opinions following reviews of the medical record and examinations of the applicant. I find Dr. Ernst's opinion to be more persuasive than Dr. Kanner because his report is more recent, and encompasses a review of more recent treatment reports. Although I find the reporting of Dr. Besses and Dr. Ernst is substantial medical evidence, it is premature to make determinations on the applicant's psychiatric and incontinence conditions. Both conditions are compensable consequences of the orthopedic injury. Since there is a need to develop the record regarding the orthopedic conditions, there may be a need for both doctors to produce supplemental reporting

following further orthopedic evaluation. Accordingly, there is no determination made at this time as to the permanent disability resulting from the internal and psychiatric conditions.

I do not find the reporting of vocational expert Frank Diaz to be substantial evidence of disability. He bases his reporting heavily upon the reports of Dr. Martinovsky, whose reports are now deemed inadmissible. Accordingly, Mr. Diaz's opinion is undermined by relying on inadmissible reports, and the reporting of Mr. Diaz is thus undermined since the medical basis of his opinion cannot be evaluated by myself.

In the recent en banc decision of *Nunes (Grace) v. State of California, Dept. of Motor Vehicles*, (2023) 88 Cal. Comp. Cases 741 (en banc), the Appeals Board decided that vocational evidence may be "... used to address issues relevant to the determination of permanent disability," but "... must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment." (Id. at 744.) The decision went on to state that, "... a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Examples of reliance on facts that are not germane often fall under the rubric of "vocational apportionment," and include assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions, or was able to adequately perform their job, or suffered no wage loss prior to the current industrial injury." (Id. at 754 [internal citations omitted].) Mr. Diaz basis his apportionment decision on vocational apportionment, and is thus not substantial medical evidence.

Entitlement to reimbursement of payments to home health care providers.

The Labor Code provides that:

"Home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of the employee's injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, and subject to Section 5307.1 or 5307.8. The employer is not liable for home health care services that are provided more than 14 days prior to the date of the employer's receipt of the physician's prescription." (Labor Code section 4600(h).)

The prescription required by Labor Code section 4600(h) need not be labelled as a "prescription," but may be "... either an oral referral, recommendation or order for home health care services for an injured worker communicated directly by a physician to an employer and/or its agent; or, a signed and dated written referral, recommendation or order by a physician for home health care services for an injured worker." (*Neri Hernandez v. Geneva Staffing, Inc. dba Workforce Outsourcing, Inc.*, (2014) 79 Cal. Comp. Cases 682, 693 (en banc).)

In this case the defendant has offered no evidence of a change in condition that the applicant would indicate there is no longer a need for home healthcare. On the contrary, all of the medical

reporting supports the ongoing need for home healthcare is reasonable and necessary to cure or relieve the effects of the industrial injury. Additionally the parties stipulated to a need for home healthcare for the periods July 15, 2016 through January 8, 2017, September 1, 2022 through November 1, 2022, and for the period January 1, 2023 through January 11, 2023.

However, liability for home health care only extends back 14 days before the employer's receipt of the physician's prescription. I do not find evidence that there is a prescription or equivalent in the record for the period July 15, 2016 through January 8, 2017. Dr. Morley makes a comment in his April 16, 2016 report that a new request for home healthcare will be needed in May 2016, but there is no other report of Dr. Morley until October 10, 2018. However, it is clear from the QME reporting that the applicant was under Dr. Morley's care in that gap. It is therefore unclear whether a prescription or equivalent exists for the period July 15, 2016 through January 8, 2017. This creates a need to develop the record, pursuant to *McDuffie*, supra, as to whether defendant received a prescription for home healthcare during that period.

In contrast the August 2, 2022 RFA and the September 13, 2022 reports of Dr. Morley are written recommendations for 6 months of home healthcare. Thus, these represent prescriptions for Labor Code 4600(h) purposes, pursuant to the en banc decision in *Neri Hernandez*, supra.

I further find the applicant's testimony persuasive that the services were actually provided by various individuals, and that the applicant did pay those individuals as indicated. I further find that although there is no evidence the caregivers paid by the applicant had any special training, they were able to bathe and dress the applicant, help her into and out of her wheelchair, and assist her in using the toilet or changing diapers. I find that the rate of \$18 per hour is reasonable for this work. It is noted to be half what the providers at Helping Hands charged, and that difference is in keeping with the lack of specialized training.

Accordingly, I find the applicant is entitled to reimbursement for the period September 1, 2022 through November 1, 2022 in the total amount of \$16,317.00, less attorney fees. I also find that the applicant is entitled to reimbursement of payments to home health care providers for the period January 1, 2023 through January 11, 2023 in the total amount of \$3,753.00. Further development is required as to the existence of a prescription received by defendant for the period July 15, 2016 through January 8, 2017.

Whether defendant is liable for reimbursement of vocational expert fees to Frank Diaz.

Defendants are liable for vocational expert fees are:

“[R]eimburseable even though the applicant is unsuccessful in his or her claim, the expert evidence offered by an applicant does not necessarily have to successfully affect the permanent disability rating to be reimbursable. At the same time, however, the WCAB has the discretion to balance the amount of such costs against the benefit obtained. Moreover, as with medical-legal costs, reimbursement will not be allowed if the report and/or testimony is premised on facts or assumptions so false as to render it worthless. Furthermore, as medical-legal costs are not recoverable with respect to reports, for example, that are incapable of proving or disproving a disputed fact, or whose conclusions are

totally lacking in credibility, reports and testimony of a vocational rehabilitation expert must at least have the potential to affect a permanent disability rating in order for their costs to be recoverable.” *Costa v. Diagnostic*, (2007) 72 Cal. Comp. Cases 1492, 1498-1499 (en banc), [internal citations omitted].)

In this case I did not find that Mr. Diaz’s reports were substantial evidence, and did not establish permanent total disability. However, the reports were not “premised on facts or assumptions so false as to render it worthless.” At the time of the evaluations and the reports of Mr. Diaz, the applicant had completed reporting with the QMEs in this matter. The applicant therefore was reasonably attempting to rebut the permanent disability rating schedule at the time the evaluations occurred and the reports were drafted. The reports did not affect permanent disability, but they had the potential to do so. Accordingly, I find that the defendant is liable for reimbursement of reasonable vocational expert fees to Mr. Diaz. However, no determination is made as to whether the fees of Mr. Diaz are reasonable, and jurisdiction is reserved on the reasonable value of Mr. Diaz’s services.

Payment to applicant's attorney for vocational expert deposit fee in the amount of \$1,000.00.

In accordance with the above finding that defendant is liable to Mr. Diaz for the reasonable value of his vocational expert reporting, I find that defendant is liable to the applicant’s attorney for reimbursement of their initial \$1,000.00 deposit to Mr. Diaz. Defendant shall receive full credit for the deposit against any sums later determined to be owing to Mr. Diaz.

Attorney fees

In light of the competent and diligent representation provided the applicant, I find that applicant’s counsel is entitled to a fee consisting of 15% of the home healthcare reimbursement being awarded herein.

DATE: March 4, 2024

LAWRENCE A. KELLER
WORKERS’ COMPENSATION JUDGE