

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

ROBIN HARTMAN, *Applicant*

vs.

**BERBERIAN ENTERPRISES,
dba JONS MARKETPLACE;
THE TRAVELERS COMPANIES, INC., *Defendants***

**Adjudication Number: ADJ9064869
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
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 grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the November 9, 2021 Findings and Order.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the November 9, 2021 Findings and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 9, 2021 Findings and Order is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

8. The fee schedule value of Dr. Burstein's services is \$1,266.13 according to defendants' bill review dated September 8, 2020, which is untimely but used for reference for fee schedule values for treatment.

* * *

ORDER

IT IS ORDERED that defendants BERBERIAN ENTERPRISES dba JONS MARKETPLACE and THE TRAVELERS COMPANIES, INC. pay to lien claimant DARRELL H. BURSTEIN, M.D., A MEDICAL CORPORATION the sum of \$1,266.13, for treatment, increased by 15%, plus 10% annual interest from defendants' date of receipt of each bill for treatment as required by Labor Code section 4603.2(b)(1), plus the sum of \$5,562.50 for medical-legal expenses, increased by 10%, plus 7% annual interest from defendants' date of receipt of each bill for medical-legal services as required by Labor Code section 4622(a)(1), with jurisdiction reserved at the trial level if there is any dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER



/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 31, 2022

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

**DARRELL H. BURSTEIN, M.D.
LORETTA YOUNG, HEARING REPRESENTATIVE
FLOYD SKEREN MANUKIAN LANGEVIN**

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendants Berberian Enterprises dba Jons Marketplace, insured by The Travelers Companies, Inc., have through their counsel of record herein filed a timely, verified petition for reconsideration of the November 9, 2021 Findings and Order Re: Lien Claim of Darrell H. Burstein, M.D. herein, which ordered that defendants pay to lien claimant the sum of \$2,466.50 for treatment, increased by 15%, plus 10% annual interest from defendants' date of receipt of each bill for treatment as required by Labor Code section 4603.2(b)(1), plus the sum of \$5,562.50 for medical-legal expenses, increased by 10%, plus 7% annual interest from defendants' date of receipt of each bill for medical-legal services as required by Labor Code section 4622(a)(1).

The petition contends that the findings were in excess of the undersigned's power, and not justified by the evidence, and that the findings do not support the decision and order. Specifically, the petition contends that the reports of Darrell Burstein, M.D. do not constitute substantial medical evidence because applicant "provided a false history to the doctor" (Petition for Reconsideration 12/1/2021, p. 2, lines 8-9), and the amount ordered was not correct because defendant's bill review reflects a different amount owed for the treatment (Id., p. 2, lines 3-5).

No answer has been received at the time this report was prepared, which is unfortunately overdue under the timeframe prescribed by Rule 10962.

II
FACTS

Based on the stipulations of the parties at the time of lien trial, it was found that Robin Hartman, born [], while employed on April 4, 2013, as a Service Deli Clerk, at Los Angeles, California, by Berberian Enterprises dba Jons Marketplace, sustained injury arising out of and in the course of employment to the lumbar spine. Based on the parties' stipulated Award dated June 28, 2018 herein, it was found that applicant also sustained injury arising out of and in the course of employment to diabetes, hypertension, and psyche, and that applicant required medical treatment to cure or relieve from the effects of the industrial injuries. Based on the unrebutted medical expert opinions of Darrell H. Burstein, M.D., admitted as Lien Claimant's Exhibits 2, 3, and 4, it was found that applicant also sustained injury arising out of and in the course of employment to the upper gastrointestinal system (dyspepsia), and lower gastrointestinal system (IBS), and that applicant required medical treatment to cure or relieve from the effects of industrial injury to these body parts as well.

At lien trial, the parties stipulated that at the time of injury, the employer's workers' compensation carrier was The Travelers Companies, Inc., and the employer has furnished some medical treatment.

Based on the Board's file herein, contained in FileNet in ADJ9064869, it was found that the case-in-chief was resolved by a Stipulated Award of 33% permanent disability to the lumbar spine, diabetes, hypertension, and psyche on June 28, 2018, and later by a Compromise and Release in the amount of \$115,000.00 new money on December 16, 2019, which included a claim of injury to the digestive system and other body parts expressly disputed by defendants.

Based on the un rebutted medical expert opinions of Dr. Burstein, it was found that his treatment and evaluation were reasonable and necessary, and his narrative reports dated January 26, 2015 and June 8, 2018 were found to contain analysis capable of proving disputed issues of treatment and internal body parts, which constitute valid medical-legal expenses under Labor Code section 4620, because they are "capable of proving... a disputed medical fact."

Based on the lack of any compliant Explanation of Review in evidence, it was found that defendant failed to timely respond to the billing statements of Dr. Burstein for treatment under Labor Code section 4603.2, and for medical-legal expenses under section 4622. Accordingly, based on the lack of any timely review or objection in evidence, defendant should be estopped from asserting, and should be deemed to have waived, any objections or defenses, except as to the fee schedule value and whether Dr. Burstein's reports constituted medical-legal expenses, and treatment amounts must be increased by 15%, plus 10% annual interest from 45 days after defendants first received each bill for treatment, and medical-legal expenses must be increased by 10%, plus 7% annual interest from 60 days after defendants first received each bill for medical-legal services.

Based on defendants' bill review dated September 8, 2020, admitted as Defendants' Exhibit A, which is untimely as it was done years after the service of Dr. Burstein's reports and bills, but can still be used for reference for fee schedule values for treatment, it was found that the fee schedule value of Dr. Burstein's services is \$2,466.50.

Based on the above analysis regarding medical-legal expenses, and the work done by Dr. Burstein including evaluation, testing, record review, and report preparation having clearly justified at least 22.25 hours of medical-legal work altogether at the hourly rate of \$250.00, it was found that Dr. Burstein properly and reasonably billed the amount of \$2,000.00 for services in connection with the narrative report dated January 26, 2015, and \$3,562.50 for services in connection with the narrative report dated June 8, 2018.

Because Dr. Burstein's request for payment was non-frivolous and warranted under existing law, it was found that there is no basis for a finding of sanctions against the lien claimant. No sanctions were requested against defendants, and none are found, but defendants are admonished that they appear to have engaged in sanctionable conduct by misrepresenting in the pre-trial conference statement that only the lumbar spine was admitted, when they had previously entered into a stipulated award for industrial hypertension and diabetes.

Accordingly, it was found and ordered that defendants pay to lien claimant the sum of \$2,466.50 for treatment, increased by 15%, plus 10% annual interest from defendants' date of receipt of each bill for treatment as required by Labor Code section 4603.2(b)(1), plus the sum of \$5,562.50 for medical-legal expenses, increased by 10%, plus 7% annual interest from defendants' date of receipt of each bill for medical-legal services as required by Labor Code section 4622(a)(1).

Defendants filed a timely, verified petition for reconsideration of the above findings and order in favor of lien claimant Dr. Burstein, contending that Dr. Burstein's reports do not constitute substantial medical evidence, and that the amount ordered was incorrect as it did not correspond with defendants' bill review.

III DISCUSSION

Defendants are correct that California Labor Code Section 4628 requires that a physician take a complete history, review and summarize medical records, and compose and draft the conclusions of any admissible report. It is also true that any decision of the Workers' Compensation Appeals Board must be based on substantial medical evidence, and that substantial medical evidence must include a correct and germane history (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604). As defendants have pointed out, Dr. Burstein indicated in two narrative reports dated January 26, 2015 and May 8, 2015 that he wanted to review records of Dr. Chan and Antelope Valley Hospital, and the request was made with respect to the issues of diabetes and hypertension.

Based on the subsequent Panel Qualified Medical Evaluator (PQME) reports of James H. Sherman, M.D. dated June 28, 2015 and September 21, 2015, admitted as Defendant's Exhibits B and C, which reviewed Dr. Burstein's reports and found diabetes and hypertension to be industrial, and the lack of review or further request by Dr. Burstein thereafter, including in his later narrative report dated June 8, 2018, the undersigned concluded that the requested records were not provided to Dr. Burstein by either party because diabetes and hypertension ceased to become disputed issues after the PQME found them to be industrial. However, the fact that Dr. Sherman addressed this dispute to the satisfaction of the parties in a substantial report does not negate the fact that Dr. Burstein also addressed what was a bona fide medical dispute as contemplated under Labor Code Section 4620 at the time he provided his reports. In Dr. Burstein's two reports, he provided expert commentary and analysis of the disputed body part issue to the best of his ability, using the facts that were provided to him, and his two reports should not be rendered inadmissible solely because of the parties' failure to comply with Dr. Burstein's request for information. The apparent decision of the parties that it was unnecessary to pursue further development of Dr. Burstein's opinions by honoring his request to review the records of Dr. Chan and Antelope Valley Hospital should not deprive Dr. Burstein of payment for the portion of the medical-legal work and analysis that he did complete, which was of assistance on issues that were disputed when the medical-legal services were performed.

The initial report and evaluation of Dr. Burstein furthermore appears to be a valid medical-legal expense as a foundation for his later narrative report dated June 8, 2018, which was also a valid medical-legal expense, because that report, in connection with the prior reports, is capable of proving, and does in fact prove, that applicant sustained injury arising out of and in the course of employment to her upper and lower gastrointestinal tract in the form of dyspepsia and irritable bowel syndrome (IBS), the mechanism of which Dr. Burstein explains in his June 8, 2018 report. There can be no doubt that these are disputed issues, because defendants expressly dispute the digestive tract and other internal body parts besides diabetes and hypertension in the addendum to their December 16, 2019 compromise and release. Indeed, it appears that the parties agreed to settle this dispute by a six-figure new money compromise and release instead of having

Dr. Sherman review Dr. Burstein's June 8, 2018 report, which could have led to Dr. Sherman expressing agreement with Dr. Burstein's conclusions about the digestive system.

With respect to the other issue raised by defendants' petition, the discrepancy between their bill review and the amount ordered, defendants' petition is correct that the amount ordered for treatment does not correspond with the amount of defendants' bill review, admitted as Defendants' A, as was intended by the opinion on decision. Accordingly, the amount ordered for treatment should be amended to the amount of \$1,266.13, which is the amount correlated to the fee schedule by defendants' bill review, but the separate portion for medical-legal services should remain the same, \$5,562.50, as justified by the evidence. Defendants' petition challenges the substantiality of Dr. Burstein's reports, but the petition does not contest the finding that he spent at least 22.25 hours of time at the rate of \$62.50 per quarter hour, and any issues not raised in the petition are deemed waived under Labor Code Section 5904.

IV RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be granted, and the findings and order be amended to order defendants to pay to lien claimant Darrell Burstein, a Medical Corporation the sum of **\$1,266.13** for treatment, increased by 15%, plus 10% annual interest from defendants' date of receipt of each bill for treatment as required by Labor Code section 4603.2(b)(1), plus the sum of \$5,562.50 for medical-legal expenses, increased by 10%, plus 7% annual interest from defendants' date of receipt of each bill for medical-legal services as required by Labor Code section 4622(a)(1).

DATE: 12/27/2021

Clint Feddersen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE