

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CARLOS GARCIA,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD, STATE OF CALIFORNIA,
BAKERSFIELD DISTRICT OFFICE

Respondent,

KEY ENERGY SERVICES, INC. and GALLAGHER BASSETT SERVICES, INC.

Real Parties in Interest.

From Decision of Workers' Compensation Appeals Board, Bakersfield District Office,
Workers' Compensation Judge ("WCJ"), Donald H. Johnson

Case No. ADJ9054986

PETITION FOR WRIT OF REVIEW OR OTHER APPROPRIATE RELIEF

ATTORNEY FOR PETITIONER, CARLOS GARCIA

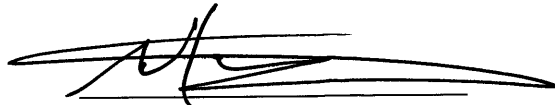
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CERTIFICATE OF INTERESTED PARTIES OR ENTITIES

(California Rule of Court 8.208)

There are no interested entities or persons to list in this certificate. (California Rules of Court, Rule 8.208(e)(3)).

3/12/15
Dated



Michael Burgis, Esq.
Attorney for Petitioner,
Carlos Garcia

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I. INTRODUCTION

This Petition seeks to restore an injured worker's legally mandated benefits via correction of an insufficient Award issued by the Workers' Compensation Judge ("WCJ"), Donald H. Johnson, after a clerical mistake by counsel caused an incorrect earnings rate of Petitioner to be inadvertently entered into a stipulation at the time of trial. Respondents have admitted liability for Petitioner's work-related injury and have agreed to pay Petitioner benefits to which he is legally entitled. Due to the mistake, Petitioner has now been deprived of legally mandated benefits.

The Respondent Court's refusal to correct the Award prejudicially deprives Petitioner of benefits to which he is legally entitled, thereby unjustly enriching the Respondents at the Petitioner's expense.

Writ relief is absolutely essential to correct the Respondent Court's abuse of discretion, to prevent irreparable harm to Petitioner and to uphold the strong judicial and public policy of providing maximum benefits to injured workers.

II. PETITION FOR WRIT OF REVIEW

Petitioner, Carlos Garcia, hereby petitions this Court for a writ of review, and/or other appropriate relief directed to Respondent, Workers' Compensation Board, State of California, Bakersfield District Office, and by this verified Petition alleges:

1. Authenticity of Exhibits.

Each of the exhibits accompanying this Petition is a true and correct copy of the original document filed in Respondent Court on the proceeding which is the subject of this Petition. All exhibits are incorporated by reference as if fully set forth herein. The pages of the exhibits have been numbered consecutively, and page citations refer to this consecutive numbering.

2. Beneficial Interest of Petitioner; Capacities of Respondent and Real Parties in Interest.

The interested parties and whose rights this Petition would affect are Petitioner and the named Respondent. Petitioner and the named Respondent are all parties to the proceeding, and are all the parties who entered an appearance in the proceeding. CARLOS GARCIA ("Petitioner") is an Applicant in a Workers' Compensation action filed in Respondent Court entitled Carlos Garcia v. Key Energy Services Inc. and Gallagher Bassett Services, Inc., WCAB Case No. ADJ9054986. Respondent, Key Energy Services, Inc. was Applicant's employer and Respondent, Gallagher Bassett Services, Inc. is the employer's Workers' Compensation insurance carrier.

3. Timeliness of Petition.

Pursuant to California Labor Code § 5950, the "application for writ of review must be made within 45 days after a petition for reconsideration is denied...." The WCAB denied Petitioner's Petition for Reconsideration on February 2, 2015. (Ex. G, p. 103). This Petition has been filed within 45 days of the WCAB's denial of the Petition for Reconsideration.

4. Venue and Jurisdiction.

Petitioner resides in Lost Hills, California, County of Kern. Accordingly, this Court has proper jurisdiction under Labor Code §5950.

5. Basis of Review.

Petitioner has no right to appeal from the WCAB's decision and has no plain, speedy or adequate remedy other than by Writ of Review. Under Labor Code §5952, Petitioner requests that this Honorable Court issue a Writ of Review on the following grounds:

- (a) The Board acted without or in excess of its power;
- (b) The findings of fact do not support the Order, Decision or Award under review;
- (c) The Order was both unreasonable and unlawful; and
- (d) The Order was not supported by substantial evidence.

6. Prayer for Relief.

Petitioner CARLOS GARCIA, prays that:

- (a) Issue a writ of review to the WCAB commanding it to fully certify to this Court, at a specified time and place, the records and proceedings in this case so that this Court may inquire into them and determine the lawfulness of the Opinion and Decision after Reconsideration dated February 2, 2015;

- (b) The records and proceedings in this case be fully heard and considered by this Court and that the Opinion and Decision After Reconsideration dated February 2, 2015 be annulled, vacated and set aside; and
- (c) Petitioner be granted such other and further relief as is appropriate and just.

IV. STATEMENT OF FACTS/PROCEDURAL HISTORY

On September 4, 2012, Petitioner sustained injury to his cervical spine during the course of and within the scope of his employment as a truck driver with Respondent, Key Energy Services, Inc. Petitioner treated for his injury within Respondent's Medical Provider Network ("MPN") with Dr. Daniel Silver and was found totally temporarily disabled ("TTD") from June 18, 2013 to the present. Nevertheless, Respondents unreasonably refused to pay Petitioner TTD benefits on the improper basis that Dr. Silver was not in the MPN, when in fact, he was.

After numerous requests for payment of TTD benefits to Petitioner proved futile, on September 29, 2014, Petitioner was forced to file a Petition for Penalties due to Respondents' failure to pay TTD benefits owed to Petitioner. Significantly, the Petition requested benefits at the TTD rate of \$778.61, which was based on Petitioner's proper and accurate earnings rate of \$1,167.91. (Ex. A, P. 4, Ln. 14).

On October 1, 2014, the Parties proceeded to an expedited hearing on the limited issue of TTD benefits. During the hearing, the Parties stipulated that Petitioner sustained a work-related injury and properly treated within

Respondent's MPN. **While preparing stipulation documents to submit to the WCJ for purposes of calculating the Award of retroactive TTD benefits, the Parties inadvertently stipulated that the Petitioner's earnings rate at the time of injury was \$778.61 per week (instead of the correct earnings rate of \$1,167.91 per week).** (Ex. B, Pg. 62, Ln. No. 3). This improper rate was based on mistake of the Parties' counsel, because the correct TTD rate is actually \$778.61 per week. Essentially, the TTD rate was inadvertently stipulated to as the earnings rate; a simple, but crucial error which significantly reduces Petitioner's benefits and forms the basis of this Petition. A review of the Stipulations Form which was submitted to the WCJ at the time of trial demonstrates how the sum of \$778.61 could have easily been entered in the improper section under "Earnings Rate" instead of "TTD Rate" as both lines are right next to one another. (See Ex. B, Pg. 62, Ln. No. 3). The Stipulation was then submitted to the WCJ for review.

On October 2, 2014, the Minutes of the October 1, 2014 hearing were served on the Parties. (Ex. C, Pg. 63). Unfortunately, Petitioner's counsel did not notice the calculation error at that time and therefore did not object to the Minutes.

On November 20, 2014, the WCAB issued its Findings, Orders and Award. (Ex. D, Pg. 71). Upon receipt and review of the same, Petitioner's counsel for the first time noticed that the numbers were not making sense as it relates to Petitioner's Award. After rerunning the calculations, Petitioner realized that the Parties inadvertently stipulated to an incorrect earnings rate of \$778.61 per week instead of the correct \$1,167.91 per week. In fact, the TTD rate should have been \$778.61 per week.

Upon discovering the mistake, Petitioner's counsel immediately contacted Respondents' counsel on multiple occasions requesting a stipulated amendment of the Award to reflect Petitioner's true and correct earnings rate. Significantly, Respondent was aware of the true and correct earnings rate at all times based on being in possession of Petitioner's payroll records and W2 (Ex. E, Pg. 91), based on previous correspondence between counsel indicating a TTD rate of \$778.61 per week (Ex. A, Pg. 39, 48), based on Petitioner's previous Petition for Penalties which requested TTD benefits at a rate of \$778.61 per week (Ex. A, Pg. 4, Ln. 14), and based on the Disability Evaluation Unit's Rating Determination indicating an earnings rate at \$1,167.91 per week (Ex. E, Pg. 89). Despite having full knowledge that the earnings rate stipulated to was incorrect and despite a lack of conflicting evidence regarding Petitioner's true and correct earnings rate, Respondents refused to stipulate to an amendment on the basis of not being able to reach their client.

After multiple attempts to correct the misunderstanding with Respondents proved futile, on December 10, 2014, Petitioner was forced to file a "Petition to Correct Earning Calculation Error and/or Petition for Reconsideration on Limited Issue of Earnings." (Ex. E, Pg. 80). Petitioner explained the situation, provided Petitioner's W2 to evidence the correct earning rate and urged the Court to correct the Award to reflect the true earnings rate. Petitioner truly believed that the WCAB without question would correct the Award based on mistake, inadvertence or excusable neglect and accordingly Petitioner did not submit a lengthy or elaborate Petition for Reconsideration. In hindsight, Petitioner recognizes that the arguments in the Petition for Reconsideration could have been more clearly articulated.

On December 19, 2014, the WCJ recommended that the Petition for Reconsideration be denied for various reasons, none of which truly support decreasing the benefits to which Applicant is legally entitled to. (Ex. F, Pg. 95). On February 2, 2015, the WCAB denied the Petition for Reconsideration based on Judge Johnson's recommendations. (Ex. G, Pg. 103).

Petitioner now respectfully requests that this Court show leniency and understand that mistakes occasionally happen, that humans are not perfect and clerical errors may occur from time to time and that an injured worker should not suffer as a result of an honest mistake.

V. VERIFICATION

I, Michael Burgis, Esq., declare as follows:

I am the attorney for the Petitioner herein. I have read the foregoing Petition for Writ of Review and know its contents. The facts alleged in the Petition are within my own personal knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on March 12, 2015 in Sherman Oaks, California.



Michael Burgis, Esq.
Attorney for Petitioner,
Carlos Garcia

VI. MEMORANDUM OF POINTS AND AUTHORITIES

QUESTION PRESENTED: While Petitioner made various valid arguments in its Petition to Correct/Petition for Reconsideration with the Respondent Court (See Ex. D, Pg. __), Petitioner wishes to simplify the matter by focusing this Court's attention to the most significant argument which forms the basis of this Petition. Specifically, whether the Respondent Court erred in refusing to correct an Award based on a stipulation entered into through inadvertence, excusable neglect and mistake of fact and whether special circumstances exist rendering it unjust to enforce stipulation.

I. **RESPONDENT COURT SHOULD HAVE CORRECTED THE AWARD ON THE BASIS OF ERROR, GOOD CAUSE AND EQUITY.**

a) **The WCAB had the Power to Amend the Award for Good Cause.**

Pursuant to Labor Code §5803, "The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division... the appeals board may rescind, alter, or amend any order, decision, or award, **good cause appearing therefor...**" [emphasis added]. Such cause may consist of "any factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award 'inequitable.'" LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 234, 242.

It is well-settled that a Workers' Compensation Award based on an executed stipulation may be reopened and rescinded if the stipulation was

entered into through **inadvertence, excusable neglect, fraud, mistake of fact or law, or where special circumstances exist rendering it unjust to enforce the stipulation.** Brannen v. Workers' Comp. Appeals Bd. (App. 2 Dist. 1996) 53 Cal.Rptr.2d 768. However, '[w]hen there is no mistake but merely a lack of full knowledge of the facts, which ... is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief.' [Citation.]" Huston v. Workers' Comp. Appeals Bd. (1979) 95 Cal.App.3d 856, 865-866. The WCAB may "disregard a stipulation that has been entered into through inadvertence or mistake of fact." See Cnty. of Sacramento v. Workers' Comp. Appeals Bd., 77 Cal. App. 4th 1114, 1121.

b) The Stipulation was Entered into Through Inadvertence, Excusable neglect, fraud or mistake of fact and not due to Lack of Knowledge of Facts or Lack of Diligence.

Here, the WCJ refused to correct the Award due to mistake, inadvertence or excusable neglect on the basis that "Applicant's attorney only recently obtained Applicant's W2" and therefore "have done their discovery on earnings only after the Award" and that "[t]his is not an exercise in due diligence....and does not support granting relief from the stipulation on earnings at the October 1, 2014 trial." (Ex. F, Pg. 98). The Respondent Court discounted the fact that Petitioner's earnings rate was ascertained and recognized by the Parties long before the October 1, 2014 trial irrespective of when Applicant's W2 was obtained. The WCJ's reasoning presupposes that Petitioner's counsel did not have knowledge of the facts as it pertains to Petitioner's earnings rate. Such reasoning is in conflict with the documentary evidence presented to the Court.

In fact, the mistake in the stipulation was absolutely not due to "lack of full knowledge of the facts" or due to "lack of diligence" by Petitioner's counsel. The documentary evidence establishes conclusively that Petitioner's counsel (and Respondent's counsel) were at all times aware of Petitioner's proper earnings rate based on previous correspondence between counsel indicating a TTD rate of \$778.61 per week (Ex. A, Pg. 39, 48), based on Petitioner's previous Petition for Penalties which requested TTD benefits at a rate of \$778.61 per week (Ex. A, Pg. 4, Ln. 14), and based on the Disability Evaluation Unit's Rating Determination indicating an earnings rate at \$1,167.91 per week (Ex. E, Pg. 89).

The mistake/excusable neglect occurred when the wrong monetary sum was inadvertently recorded on the stipulation. A review of the Stipulations Form which was submitted to the WCJ at the time of trial demonstrates how the sum of \$778.61 could have easily been entered in the improper section under "Earnings Rate" instead of "TTD Rate" as both lines are right next to one another. (See Ex. B, Pg. 62, Ln. No. 3). Human errors occur from time to time. It is not that the correct earnings rate was "unknown" to Petitioner's counsel due to "lack of diligence," but rather, that due to the excusable neglect of the appearing representative, the rate of \$778.61 (which is actually the proper TTD rate) was inadvertently recorded as the earnings rate. (Ex. B, Pg. 62, Ln. No. 3). When in reality, the weekly earnings rate should have been recorded as \$1,167.91, which would have amounted to a TTD rate of \$778.61.

The documentary evidence conclusively demonstrates that the stipulation was entered into through inadvertence, excusable neglect or mistake and not due to counsel's lack of diligence. Accordingly, Petitioner respectfully

requests that this Court mandate that the Award be revised to reflect Petitioner's true and correct weekly earnings rate of \$1,167.91.

c) There is a Lack of Conflicting Evidence to Support that Petitioner's Weekly Earnings Rate is \$778.61.

A lack of conflicting evidence with respect to a fact stipulated to supports the conclusion that the stipulation was entered into through inadvertence, excusable neglect, fraud, mistake of fact or law. *See Robinson v. Workers' Comp. Appeals Bd.*, 194 Cal. App. 3d 784, 791 (claimant not entitled to withdraw stipulation because evidence showed that only possible reason parties entered into stipulation was to settle factual issues which could not be easily resolved by evidence).

In *Robinson v. Workers' Comp. Appeals Bd.*, this Court refused to relieve the petitioner from a stipulation entered into in the lower court on the basis that "a substantial conflict existed in the evidence" with respect to medical opinions and "the only possible reason the parties entered into such stipulation was to settle definitely the factual issues which could not be easily resolved by the evidence existing in the record." *Id.* at 791-792. Based on this Court's reasoning, it follows that the lack of conflicting evidence with respect to a "fact" stipulated to supports the notion that the Parties entered into the stipulation due inadvertence, excusable neglect, or mistake and not to settle issues which could not easily be resolved by evidence.

Here, Petitioner's weekly earnings rate is easily ascertainable and not subject to interpretation. Petitioner's earnings at the time of his employment is well-documented in payroll records, W-2s, paycheck stubs, etc. There is no evidence whatsoever to suggest that Petitioner's weekly earnings rate is

anything other than \$1,167.91. In fact, the Parties have at all times recognized Petitioner's earnings rate as \$1,167.91 and that based on this rate, the proper TTD rate is \$778.61. These amounts are easily ascertainable through Petitioner's payroll records and W2 (Ex. E, Pg. 91), previous correspondence between counsel indicating a TTD rate of \$778.61 per week (Ex. A, Pg. 39, 48), Petitioner's previous Petition for Penalties which requested TTD benefits at a rate of \$778.61 per week (Ex. A, Pg. 4, Ln. 14), and the Disability Evaluation Unit's Rating Determination indicating an earnings rate at \$1,167.91 per week (Ex. E, Pg. 89).

Because there is an absolute lack of **any** conflicting evidence regarding Petitioner's earnings rate, it is abundantly clear that inadvertence, excusable neglect or mistake is the **only** possible reason for the stipulation. Accordingly, this Court should relieve Petitioner from the stipulation and direct the Respondent Court to correct the Award made thereon.

d) Decreasing Benefits to which Petitioner is Statutorily Entitled to Renders it Unjust to Enforce the Stipulation.

By refusing to correct the Award based on an incorrect earnings rate, the Court has upheld an Award which robs Petitioner of benefits to which he is statutorily entitled. The result is unjust, inequitable and contrary to public policy of providing maximum benefits to the injured worker.

When a compensable injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of the disability. Labor Code § 4653. The temporary disability rate figures are computed on the basis of **statutory formula** derived by application of Labor Code sections 4453 and 4653. Thrifty Drug Stores Inc., v. Workers' Comp. Appeals Bd., (Ct. App. 1979) 95 Cal. App. 3d 937, 939. "**As with other workers' compensation provisions, statutes regarding temporary**

disability are construed liberally in favor of granting benefits to injured workers." Signature Fruit Co. v. Workers' Comp. Appeals Bd., (2006)142 Cal. App. 4th 790, 795; Lab. Code § 3202 (emphasis added). Labor Code § 3202, providing that provisions of Workmen's Compensation Act shall be liberally construed by the courts with purpose of extending their benefits for protection of persons injured in the course of their employment applies equally to "the courts" and to the workmen's compensation appeals board. Gross v. Workmen's Compensation Appeals Bd. (App. 1 Dist. 1975) 118 Cal.Rptr. 609.

"[T]emporary disability is intended as a substitute for lost wages during a period of transitory incapacity to work. That purpose "is inferable from section 4653, which **requires** temporary total disability be calculated as 'two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market.' Average weekly earnings for purposes of both temporary and permanent disability payments are calculated according to various provisions of section 4453." Signature Fruit Co. v. Workers' Comp. Appeals Bd., (2006) 142 Cal. App. 4th 790, 795-96, (internal citations omitted).

Because to uphold an award which substantially decreases an Applicant's Award based on a mistake of counsel renders the previous findings and award 'inequitable," this Court should mandate that the previous Award be corrected to reflect Petitioner's true and correct earnings rate, which Respondent has previously recognized as \$1,167.91. Issuing an Award which is consistent with the Labor Code's requirements certainly constitutes special circumstances rendering it unjust to enforce a stipulation based on mistake or excusable neglect.

VII. CONCLUSION.

For the foregoing reasons, it is respectfully requested that this court grant this writ and issue a decision in Petitioner's favor.

Respectfully Submitted.

MICHAEL BURGIS & ASSOCIATES

Date: 3/12/15

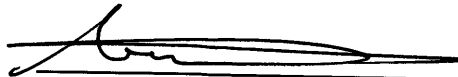


Michael Burgis, Esq.
Attorney for Petitioner,
CARLOS GARCIA

VIII. CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rules 8.486(a)(6) and 8.204(c)

I, Michael Burgis, counsel for Petitioner, certify pursuant to the California Rules of Court, that the word count for this Petition for Writ of Mandate is 13,991 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in Microsoft Word, in 13-point Times Roman font and this is the word count generated by the program for this document. I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Sherman Oaks, California on March 12, 2015.



Michael Burgis, Esq.
Attorney for Petitioner,
CARLOS GARCIA

EXHIBIT A

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2 Michael Burgis & Associates, P.C.
3 5900 Sepulveda Blvd, Suite 215
4 Sherman Oaks, CA 91411
5 Telephone 818-994-9870

6 *Attorney for Applicant,*
7 CARLOS GARCIA

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

10 CARLOS GARCIA,

11 *Applicant,*

12 v.

13 KEY ENERGY SERVICES INC.,
14 GALLAGHER BASSETT SERVICES, INC.,

15 *Defendants*

Case No. ADJ9054986

**PETITION FOR PENALTIES
PURSUANT TO LABOR CODE §5814
FOR DEFENDANT'S
UNREASONABLE DELAY AND
PETITION FOR ATTORNEY FEES
PURSUANT TO LABOR CODE §5814.5**

16 **TO THE WORKERS' COMPENSATION APPEALS BOARD:**

17 COMES NOW, Applicant Carlos Garcia, by and through his attorney of record, Michael
18 Burgis & Associates, P.C. and Petitions for penalties for Defendant's failure to pay temporary
19 disability benefits.

20 **SUMMARY OF FACTS**

21 The applicant sustained an admitted industrial injury on 09/04/2012 while employed by Key
22 Energy Services Inc., insured by Gallagher Bassett Services Inc.

23 Having been previously treated by MPN physician, Dr. Larry Cho, Applicant was declared
24 permanent and stationary on 05/31/13 with the provision of future medical care. Due to increasing
25 symptomology and pain, and his employer's inability to further accommodate modified duty,
26 applicant sought legal counsel and was then transferred to another MPN physician, Dr. Daniel
27
28

1 Silver, who determined Applicant was temporary totally disabled on June 18, 2013. Copy of said
2 report is attached hereto as **Exhibit 1**.

3 Defendant continuously denied authorization for Dr. Daniel Silver's medical treatment
4 stating their position that Dr. Silver was outside their Medical Provider Network. Copies of various
5 denials issued are attached hereto as **Exhibit 2**. They also refused to pay Applicant's Temporary
6 Total Disability benefits, and instead began issuing Permanent Disability Advances. State Disability
7 then began to pay an adjusted difference in his benefit rate with the appropriate credits for PD
8 advances taken into account.

9 In an attempt to resolve the issues here, on 5/23/14 the parties discussed Dr. Daniel Silver's
10 MPN status along with the MPN listing obtained which proved he was in fact in the defendant's
11 MPN (**attached as Exhibit 3**). Defense attorney Tara Morse confirmed discussing this with her
12 client and that PTP Designation Authorization would then be sent to Dr. Silver along with a
13 submission of his request for surgery to Utilization Review. Upon such certification going through,
14 Defense attorney Morse sent electronic communication on 7/3/14 confirming not only that Dr. Silver
15 was in the MPN but that she would postpone Applicant's then scheduled AME appointment with Dr.
16 Sohn until post-surgery. The chain of emailed communication confirming these discussions and
17 agreements is attached as **Exhibit 4**.

18 On 7/7/14 Applicant counsel sent a detailed demand for reinstatement of TTD benefits in
19 accordance with the findings of the MPN Physician Dr. Silver. Copy of said demand with fax
20 confirmation is attached as **Exhibit 5**. After having received no response from defendant, on
21 7/30/14 Applicant counsel once again wrote to Defense Attorney Tara Morse to advise we would be
22 filing a DOR and raising penalties and attorney's fees. Copy of said communication is also attached
23 as **Exhibit 6**. It was only then that Defense counsel responded to communicate she would be
24 discussing this demand with her client (**attached as Exhibit 7**). A revised demand was then sent
25 again on 7/31/14 (**attached as Exhibit 8**).

1 To date, there has been no other communication attempted by defendant to resolve this issue
2 and Applicant continues to be temporarily totally disabled. His most updated medical reports dated
3 7/15/14 and 8/26/14 are attached as **Exhibit 9 and 10**.

4 **ARGUMENT**

5 The Applicant contends that he is entitled to the maximum temporary total disability benefits
6 allowed pursuant to LC§4656(b).

7 Based on the submitted medical evidence from the MPN physician Dr. Daniel Silver, the
8 Applicant alleges that Defendants' failure to pay total temporary disability benefits from 6/18/13 to
9 present is unreasonable and unwarranted. There has been substantial communication between the
10 parties as documented above. Although Applicant admits to having received temporary *partial*
11 disability for the period of 9/24/12-5/31/13, Applicant contends that, pursuant to LC§4656(b), he is
12 owed the remaining maximum temporary total disability from 6/18/13 to present at the rate of
13 \$778.61 per week, totaling \$52,166.87 plus an additional 25% penalty, or in this case, the maximum
14 \$10,000.00 penalty, against the entire amount owed, pursuant to LC §5814 that states in pertinent
15 part:
16

17 **"When compensation has been unreasonably delayed or refused, whether prior to or**
18 **subsequent to the issuance of an award, the amount of the payment unreasonably delayed or**
19 **refused shall be increased up to 25% or up to the ten thousand dollars (\$10,000), whichever is**
20 **less."**
21

22 Thus, the total amount owed to the Applicant for Defendant's unreasonable delay would be
23 \$62,166.87 less 15% as reasonable attorneys' fees, in the amount of \$9,325.03 for the enforcement
24 of benefits and penalties owed.

25 Additionally, the Applicant's attorney respectfully requests a reasonable attorney fee for
26 obtaining the Applicant an increase in benefits by way of LC §5814 resulting from the Defendants'
27 unreasonable delay in payment. Applicant's attorney spent approximately 13.5 hours in preparation
28

of penalty petition, filing Declaration of Readiness to Proceed and anticipated court time. The
breakdown is as follows:


Letters, phone calls, emails to defendant.....	2.5
Penalty Petition.....	2.75
Filing and Service of DOR.....	.25
Anticipated court appearance on October 1, 2014.....	8.00

This amount is equal to \$4,725.00 (13.5 hours x \$350 per hours) that Applicant's attorney is owed as reasonable attorneys' fees to resolve the above captioned matter.

WHEREFORE, the Applicant contends the Defendant unreasonably delayed temporary disability benefits and prays for the following:

- a) Temporary Disability benefits in the amount of \$52,166.87;
- b) A \$10,000.00 maximum penalty against the amount owed, for a total of \$62,166.87, less attorneys' fees of \$9,325.03;
- c) Reasonable attorneys' fees in the amount of \$4,725.00 for efforts involved to resolve issue;
- d) All other relief the court deems just and reasonable.

Dated: September 29, 2014

By: 
Michael Burgis
Attorney for Carlos Garcia
Michael Burgis & Associates, P.C.

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

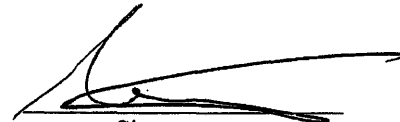
I have read the foregoing and know its contents.

I am an attorney of **Mr. Carlos Garcia** a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true: **PETITION FOR PENALTIES PURSUANT TO LABOR CODE SECTION 5814 FOR DEFENDANT'S UNREASONABLE DELAY AND PETITION FOR ATTORNEY FEES PURSUANT TO LABOR CODE SECTION 5814.5**

Executed on **September 29, 2014**, at Sherman Oaks, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Michael Burgis, Esquire
Type of print your name


Signature

2
3 **DECLARATION OF MAILING**

4 I am employed in the county of Los Angeles, state of California.

5 I am over the age of 18 years and not a party to the within action; my business address is:

6 5900 SEPULVEDA BLVD, SUITE 215
7 Sherman Oaks, CA 91411

8 I am readily familiar with the firm's business practice of processing correspondence for mailing. In
9 the ordinary course of business, the correspondence would be deposited with the United States
10 Postal Service on that same day with postage thereon fully prepaid at my business address above.

11 I am aware that on motion of the party served, service is presumed invalid if postal cancellation date
or postage meter date is more than one day after the date of deposit for mailing as listed.

12 I served the foregoing documents described as:

13 **PETITION FOR PENALTIES PURSUANT TO LABOR CODE §5814 FOR DEFENDANT'S**
14 **UNREASONABLE DELAY AND PETITION FOR ATTORNEY FEES PURSUANT TO**
15 **LABOR CODE §5814.5; VERIFICATION**

16 on the interested parties in this action, by placing a true copy thereof in a sealed envelope with first-
17 class postage thereon fully prepaid, in the United States Mail at my address stated above, addressed
as follows:

18 Workers' Compensation Appeals Board
19 1800 30th Street, Ste. 100
Bakersfield, CA 93301

20 Mullen & Filippi, LLP
21 1800 30th Street, Suite 290
Bakersfield, CA 93301

22 Gallagher Bassett Services, Inc.
23 P.O. Box 255397
Sacramento, CA 95865

24 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
25 and correct.

26 Executed on **September 29, 2014** at Los Angeles, California.


27 
28 _____
Laura Aguilar

EXHIBIT 1

Silver Orthopedic Centers

RECEIVED
6/24/13

DANIEL M. SILVER, M.D.
Diplomate American Board of
Orthopedic Surgery

**Orthopedic Treatment of
Musculoskeletal Disorders**

- Sports injuries
- Performing arts medicine
- Fractures and Trauma
- Joint replacements
- Arthritis
- Mad legs
- Workers' compensation

June 18, 2013

Gallagher Bassett
P. O. Box 255397
Sacramento, CA 95865

Attention: Stephanie Chaen, Adj.

The Law Offices of Chisvin & Associates
5801 E. Washington Blvd
Commerce, Ca 90040

RE: GARCIA, CARLOS (Corrected)

EMP: Key Energy Services
JOB TITLE: Truck Driver
SS #: 615-10-8909
CLAIM #: 004449-000399-WC-01
D/I: September 4, 2012
D/B: February 8, 1959

PRIMARY TREATING PHYSICIAN'S
INITIAL COMPREHENSIVE ORTHOPEDIC CONSULTATION

Dear Ms. Chaen & Attorneys:

Mr. Carlos Garcia is a 53-year-old, right-hand dominant male, who presents for initial comprehensive orthopedic consultation today in my Bakersfield office, with regard to injuries he sustained during the course of his employment

5363 Bellvue Boulevard Suite # 445A Encino, California 91316 • (818) 784-4315 • (818) 784-4594 Fax

2808 F Street, Suite C, Bakersfield, California 93304 • (661) 633-2021 • (661) 633-2170 Fax

PATIENT: GARCIA, CARLOS
June 18, 2013
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with Key Energy Services. He currently resides at P.O. Box 659 Lost Hills, CA 93249.

With the assistance of Cecilia Montalvo-Fregoso of New Age Translations, Inc., the history was taken and confirmed by myself. The following is the summation of my findings.

JOB DESCRIPTION:

Mr. Garcia began employment with Key Energy Services as of 2001 or 2002, in the capacity of a truck driver. The patient worked 10-13 hours per day, 5-6 days per week. His work duties entailed transporting oil mixed with water to a location where it was disposed. He had to hook and unhook hoses, close and open valves. He also connected and unloading hoses at the work site and assisted with other duties.

The physical requirements consist of prolonged standing, walking, driving, gripping, grasping, bending, stooping, squatting, climbing, fine hand manipulation, keeping the head and neck in a fixed position, working at or above shoulder level, frequent lifting of 50 pounds or more, carrying, pushing, pulling, reaching, kneeling, twisting and torquing.

The patient had a prior employment in 2007 and he worked for the same employer. He fell off of a truck and was treated by Dr. Cho and only received medication to his recollection and apparently he had minimal residuals.

The patient is currently not working for his pre-injury employer. He has not worked since 6/4/13. He was fired and he had not received money after he was fired either for his work or for disability. He denies concurrent or subsequent employment.

The patient's pre-injury lifting capacity was 50 pounds or more. He was virtually unlimited with regard to sitting, standing, bending and reaching.

PATIENT: GARCIA, CARLOS
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Page 3 of 19

The patient states that he is presently able to lift 10 pounds, sit for 5-10 minutes, and stand for 20 minutes, without aggravating his symptoms.

CHIEF COMPLAINTS:

1. Severe pain in the back of the neck, which is present frequently, at 7-9/10, on a pain scale of 1 to 10, 1 being the lowest level of pain and 10 being the highest of pain. It radiates to both sides of the neck, base of the head, upper back, bilateral periscapular areas and bilateral shoulders, associated with numbness and tingling sensation in the back of the neck, upper back and shoulders. It is aggravated by physical activities that require him to perform repetitive neck motions, prolonged positioning of the head and sitting with neck flexed, and heavy lifting and carrying.
2. Sharp pain in the shoulders, at 7/10, on a scale of 1 to 10, 1 being the lowest level of pain and 10 being the maximum level of pain, occurring frequently. It is radiating proximally to the both sides of the neck and upper back and distally to the elbows, associated with numbness and tingling sensation in the periscapular regions and upper arms. It is aggravated by physical activities such as pushing, pulling, twisting, torquing, lifting, carrying and reaching above the shoulder level. Putting on clothes, lifting and carrying a bag or a gallon of milk, etc. increases shoulder pain.
3. Severe pain in the lower back, which is present intermittently, at 8-9/10, on a scale of 1 to 10, 1 being the lowest level of pain and 10 being the maximum level of pain, located in the midline and on both sides. It is radiating proximally to the mid back and distally to the buttocks and posterior aspect of both legs causing tingling and numbness. It is aggravated by physical activities such as bending, stooping, twisting, turning, pushing, pulling, lifting, carrying, overhead reaching, sitting, standing, walking and climbing. The patient denies bowel or bladder dysfunction.

PATIENT: GARCIA, CARLOS
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4. The patient notes rectum pain. There is occasional bleeding from the rectum. The pain is described as burning. The doctor pushed the hemorrhoid in, but the hemorrhoid continues to be external. The patient underwent surgery in 2012. He was told he would recover, but he has not recovered.
5. The patient complains of headaches, at 9-10/10, on a scale of 1 to 10, 1 being the lowest level of pain and 10 being the highest level of pain, which are present frequently. The pain is described as pressure and is aggravated by stress and pain.
6. The patient has anxiety, depression, insomnia and nervousness, resulting from work-related trauma and stress.

HISTORY OF PRESENT ILLNESS:

On 9/4/12, Mr. Garcia was connecting a pipe to a well. While pulling the pipe up, the patient experienced a pop in the spine and pressure which indicated that he needed to pass a bowel movement. His pain was so severe, he became dizzy and his vision darkened. He knelt on the ground in the effort to recover. He stood up and continued working. His symptoms worsened and he developed nausea and headache. He reported the accident.

The patient went to the restroom and he noticed a rectal bleeding and protrusion from inside his rectum.

The patient was referred to an occupational clinic on G. Street in Bakersfield. He complained of pressure in the rectum, dizziness, nausea and lower back pain. The doctor performed a rectal examination. The hemorrhoid was pushed into the rectal cavity but the patient experienced severe pain. He was given an ointment and told that he would soon recover. He was prescribed physical therapy.

The patient was sent back to work the following day. He was sent back to perform his regular duties in temperatures over 100 degrees. He states that he developed fevers from working with pain and heat.

PATIENT: GARCIA, CARLOS
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The patient states that the hemorrhoid was not cured. He continued to complain. He was referred to a specialist for an evaluation. The doctor advised surgery because ointments would not cure the condition. The patient underwent hemorrhoid surgery in 2012. He continues with pain and occasional bleeding.

The patient returned to the clinic and he attended physical therapy. He underwent MRIs but he is not entirely familiar with his results.

On 6/4/13, the patient's supervisor asked him to go home. He was told work was no longer available.

Additionally, the patient has developed psychological trauma secondary to his work-related injuries. His complaints include stress, anxiety, depression, nervousness and insomnia because he is not able to work or function without pain.

The patient has been referred to this medical facility today by a friend, for an orthopedic consultation and management of his persistent symptoms.

The patient could not recall having consulted any other physician or having been provided any additional course of treatment other than the above mentioned when he presented to my office.

The patient has selected Dr. Daniel M. Silver as the Primary Treating Physician.

PAST MEDICAL HISTORY:

The patient denies having been involved in any other work related accidents or having work--related injuries.

The patient denies involvement in prior or subsequent motor vehicle accidents, sport injuries, and/or slip and falls.

The patient denies any history of hypertension, diabetes mellitus, lung disease, epilepsy, tuberculosis, collagen

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disease, cancer or arthritis. There is no history of other serious illnesses.

The patient underwent hemorrhoid surgery on 11/12/12.

The patient denies any knowledge of allergies to any medications.

The patient is currently taking medication for pain and muscle relaxant.

The patient is married and he has 5 children.

The patient denies tobacco use or consumption of alcoholic beverages.

FAMILY HISTORY:

Noncontributory.

MPN CHECKLIST QUESTIONS

At the Time of Hire:

1. When you were hired, did your employer give you written notice of your worker's compensation rights?

No

2. When you were hired, did your employer give you written notice that they had their own Medical Provider Network (MPN) of doctors that you would have to use if you were injured?

No

3. When you were hired, did your employer give you written notice that you could pre-designate your personal doctor or any doctor you have treated with before, to treat you if you were injured at work instead of the employer's doctor?

No

PATIENT: GARCIA, CARLOS
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4. If the patient is primarily Spanish speaking, were any of these notices printed in Spanish?

N/A

5. What is your highest level of education?

He last attended the 6th grade.

6. Did anyone help you fill out the paperwork or translate for you when you were hired?

Yes

7. Did you understand the paperwork you filled out when you were hired?

No

8. Did you just sign paperwork when you were hired while the employer filled out the rest for you?

Yes

9. Did the employer just have sign documents without giving you the chance to understand or read the documents when you were hired?

Yes

10. Were you given copies of any paperwork when you were hired?

No

11. Did the employer tell you that you had to sign all the paperwork to get the job?

Yes

12. Does the patient primarily speak another language aside from English or Spanish?

PATIENT: GARCIA, CARLOS
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No

After the Time of Hire:

13. At the workplace, were there any postings of Notice of Worker's Compensation Rights?

No

14. Did any of the postings give specific details about a Medical Provider Network, such as who to call, what the employer will do, or what you can do?

No

15. Were any of the postings posted in a place you go to often?

N/A

At the Time of Injury:

16. When you were injured, (after reporting the injury) did the employer arrange a medical appointment for you?

Yes

17. About the time you were injured, did the employer or insurance company give you notice of their Medical Provider Network and your right to change doctors within that network after the first appointment?

Yes, but he was not allowed to do so.

18. When you reported your injury, did the employer offer you a claim form?

Yes

19. When you reported your injury, were you offered medical treatment?

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Yes

20. When you reported your injury, did your employer deny your injury?

No

21. When you reported your injury, did your employer deny or delay providing treatment of any part of your claim?

No

22. When you reported your injury, did you think it was an emergency for you to get treatment right away?

Yes

At the Time of Treatment:

23. If you self-procured treatment, did the employer of insurance carrier give you notice of the Medical Provider Network?

N/A

24. If you self-procured treatment, was the doctor given notice of the MPN and objection to treatment based on that?

N/A

25. Upon treatment in the MPN, did the MPN doctor refuse or ignore your complaints of pain to certain body parts?

N/A

26. After treatment in the MPN, did the MPN doctor tell you that he/she was not authorized by the insurance carrier/employer to provide any of the treatment recommended by the MPN doctor?

N/A

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27. After treatment in the MPN was an interpreter sent to each appointment so you could adequately explain your complaints of pain in all your body parts so that you could understand the doctor?

N/A

28. After the first treatment with the employer doctor, were you given written notice that you could change doctors as you preferred in the MPN?

N/A

29. Were you given transportation to your appointments after indication that you had no transportation for any reason?

N/A

PAIN DRAWING SCAN:

The patient marks the back of the head and neck, both shoulders, interscapular region, thoracic region, lumbar region, both hip areas, both elbows, both wrists, both hands, both knees, and both heels and ankles with "X's" indicating the areas of problem.

ACTIVITIES OF DAILY LIVING QUESTIONNAIRE (TABLE 18-4):

The patient states that at this time in these areas, he has pain at 8/10, at worst it is 9/10 and on the average is 7/10. The activity aggravates it at 10/10 and the frequency is 8/10.

Activity limitation due to pain: Walking 1 block is affected 6/10. Lifting 10 pounds is affected 6/10. Sitting for 30 minutes is affected 8/10. Standing for 30 minutes is affected 6/10. Sleeping is affected 8/10. Social activities is affected 7/10. Traveling up to 1 hour in a car is affected 7/10. Daily activities is affected 6/10. Limiting activities to prevent pain from getting worse is affected 8/10. Relationships with family is affected 7/10. Doing jobs around the house is not

PATIENT: GARCIA, CARLOS
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answered. Bathing and showering are affected 6/10. Writing and typing are affected 6/10. Dressing is affected 5/10. Sexual activity is affected 6/10. Concentration is affected 8/10.

Effect of pain on mood overall is 7/10, anxious and worried 9/10, depressed 9/10, irritated 7/10, and worried what might make the pain worse 8/10.

EPWORTH SLEEPINESS SCALE:

The Epworth Sleepiness Scale is 7, indicating slight daytime sleepiness.

MEDICAL RECORDS:

The following is the summary of medical records received and reviewed by the undersigned. I have spent 15 minutes of non-direct face-to-face patient contact in reviewing these medical records.

There is only an Alcohol Testing Form that is somewhat difficult to read but it is from Key Energy and the date was 9/4/12. There was a check off of the technician and apparently this was a breathalyzer test and under remarks it is blank. It does indicate that the patient had a 0.000 result apparently which is completely negative.

There is a prescription from the Industrial Medical Group that appears to be signed by John Cates, physician's assistant and it is for Prednisone 20 mg b.i.d. for 7 days.

PHYSICAL EXAMINATION:

The patient's height is 5'3". He weighs 150 pounds. Blood pressure is 124/85 mmHg. He is cooperative. There is no exaggerated pain behavior.

NECK AND SHOULDER EXAMINATION:

The patient has stiffness of posture and guarded movement. He has no tremors, scars and no deformities.

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PALPATION

To palpation of the neck, tenderness 2/2, spasms 2/2, axial compression 2/2, and trigger points 2/2.

The shoulders have tenderness 1+/1+, spasms 0/0, axial compression 0/0 and trigger points 1+/1+.

<u>RANGE OF MOTION (in degrees)</u>	<u>Right</u>	<u>Left</u>	<u>Normal</u>
<u>Neck</u>			
Chin to chest	Lacks 2" creating a 20-degree flexion angle		Full
Extension		10	20
Tilt	10	10	20
Rotation	10	10	60

The patient has 2/4 pain on the right and 2/4 pain on the left.

<u>Shoulder</u>			
Flexion	100	100	180
Abduction	90	90	180
Extension	30	30	40
Internal Rotation	50	50	80
External Rotation	60	60	90

The patient has 2/4 pain on the right and 2/4 pain on the left.

OUTLET TESTS

Adson's Test	Normal	Normal	Normal
Hyperextension Test	Normal	Normal	Normal
Pulses	Normal	Normal	Normal

REFLEXES

Biceps	2	2	2
Triceps	2	2	2
Brachioradialis	2	2	2

PATIENT: GARCIA, CARLOS
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SENSATION

Light touch	Normal	Normal	Normal
Pinprick	Normal	Normal	Normal
Proprioception	Normal	Normal	Normal

MOTOR EXAMINATION

	<u>Right</u>	<u>Left</u>	<u>Normal</u>
Fasciculation	Negative	Negative	Negative

UPPER EXTREMITY MEASUREMENTS (centimeters)

Arms	27	27
Forearms	25	24.5

MUSCLE TESTING

Deltoid	4	4	5
Biceps	4	4	5
Wrist extensors	4	4	5
Triceps	4	4	5
Intrinsics	4	4	5
Rotators	4	4	5

JAMAR

Hand grip 40/55/55 55/53/55

BACK EXAMINATION (UPPER AND LOWER):

The patient's back has stiffness and guarding stance and slow movement. He has no list to the right or the left. No increased lordosis, kyphosis or scoliosis. The iliac crests and shoulders are level. There are no lumbar scars.

PALPATION

To palpation, the patient has tenderness 2/2, trigger points 2/2, spasms 2/2 and offsets none/none.

RANGE OF MOTION (in degrees)

Flexion (fingertips to floor Lacks 30" creating a 0-10"

PATIENT: GARCIA, CARLOS
 June 18, 2013
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- voluntary bending)	40-degree flexion		
	angle		
Extension	10	10	20
Lateral tilt	10	10	40
Lateral rotation	10	10	60

The patient has 2/4 pain on the right and 3/4 pain on the left.

<u>RADICULAR SIGNS</u>	<u>Right</u>	<u>Left</u>	<u>Normal</u>
Lasegue's sign	2+	3+	Negative
Cram's sign	2+	3+	Negative
Sciatic notch	2+	3+	Negative

STRAIGHT LEG RAISING TEST

Sitting straight leg raises	+++90	+++80	-90
Lying straight leg raises	++60	+++50	-70

REFLEXES

Knee	2	2	2
Ankle	2	2	2
Babinski's	Downgoing	Downgoing	Downgoing

Sensory is decreased at L4 through S1 bilaterally.

MOTOR EXAMINATION

Heel Walk	Unable	Unable	5
Toe Walk	Unable	Unable	5
Extensor Hallucis Longus	4	4	5
Gastrocnemius	4	4	5
Peroneals	4	4	5
Hamstrings	4	4	5
Quadriceps	4	4	5

LOWER EXTREMITY MEASUREMENTS (centimeters)

Thighs, 10 cm above	38.5	39.5
Calves	32.5	33
Leg lengths	86	86

PATIENT: GARCIA, CARLOS
June 18, 2013
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X-RAYS:

Four views of the cervical spine show degenerative disc disease with spurring and narrowing sclerosis at C4-5 and C5-6 bilaterally.

Two views of the shoulders bilaterally show post traumatic arthrosis of the acromioclavicular joint with squaring, spurring, and sclerosis.

Four views of the lumbar spine show normal disc spaces, normal facets, and normal lumbar lordosis. No spondylosis or spondylolisthesis.

DIAGNOSES:

1. Cervical degenerative disc disease/degenerative joint disease at C5-6 and C6-7 with chronic sprain/strain, superimposed.
2. Lumbar herniated nucleus pulposus with sciatica, bilaterally.
3. Bilateral shoulder impingement with post traumatic arthrosis of the acromioclavicular joints.
4. Anxiety.
5. Insomnia.
6. Headaches secondary to sun exposure according to the history.

DISCUSSION AND RECOMMENDATIONS:

At this time, this patient does need treatment and further workup. He does have extensive complaints in regard to his neck and shoulders, as well as his back and I need MRIs of these areas to more accurately determine the diagnosis. He also has symptoms suggesting radiculopathy in the upper and lower extremities, and therefore a nerve conduction/EMG is requested of these body areas. He also would be started on physical therapy 3 times a week for 6 weeks to see if that will improve his physical symptoms. He will take medication of Naprosyn 550 mg b.i.d. as an anti-inflammatory, Prilosec 20 mg to protect the stomach,

PATIENT: GARCIA, CARLOS

June 18, 2013

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Tramadol 150 mg extended release for pain, and Flexeril 7.5 mg as a muscle relaxant. If he does have recurrent hemorrhoid or rectal pain, he should be seen either by the original operating surgeon or we can find a general surgeon to the worker's compensation MPN.

The patient will be temporarily totally disabled during these 6 weeks of evaluation and treatment. I will see him back for follow up in 6 weeks. Please authorize all of the above treatment plan as it fits within CA MTUS, ACOEM, and or ODG Guidelines.

CAUSATION:

The causation of this patient's injuries was the reported incident on 9/4/12 when the patient was connecting a pipe to a well and as he pulled the pipe up, he experienced the pop in his spine and he felt pressure. He had the urge to pass a bowel movement and the pain was so severe that he became dizzy and he kneeled on the ground and never to recover. His symptoms worsen and he became nauseated and he had a headache. He did report the incident and it seem to start his problems in the field at work. He then went to the restroom and he noticed rectal bleeding and a protrusion from inside the rectum which was probably hemorrhoids. He was examined and he did have protrusion of hemorrhoids and this was reduced. Since that event, he went back to work and he had to work in temperatures over 100 degrees and he developed fevers from the work, as well as headaches from the sun, and other body areas of complaint. It appears as though with reasonable medical probability that the incident of 9/4/12 started his problems which did include the back pain, the rectal discomfort, neck pain, headaches, and bilateral shoulder pain, as well as the anxiety, stress, depression, nervousness, and insomnia with reasonable medical probability.

All of my opinions are stated with reasonable medical probability. If you have any further questions in regard to this case, please contact me.

PATIENT: GARCIA, CARLOS
June 18, 2013
Page 17 of 19

Sincerely,

A handwritten signature in cursive script that reads "Daniel M. Silver".

Daniel M. Silver, M.D.
Diplomate, American Board
of Orthopedic Surgery

DMS/mge

PATIENT: GARCIA, CARLOS
June 18, 2013
Page 18 of 19

AFFIDAVIT OF COMPLIANCE

Consistent with Rule 10606, I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge and belief, except as to information that I have indicated I received from others. As for that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true.

Pursuant to Section LC5703 and 5737 (A)(1), I declare under penalty of perjury that I have not violated Labor Code Section 139.3 and that I have not offered, delivered, received or accepted any rebate, refund, commission, preference, patronage, dividend, discount or other consideration, whether in the form of money or otherwise, as compensation or inducement for any referred examination or evaluation.

I have not violated Labor Code Section 139.3, and the contents of this report are all true and correct to the best of my knowledge. This statement is made under penalty of perjury.

Please be advised this office is serving copies of this medical report and billings to all parties involved in this action. A primary treating physician has fulfilled his or her reporting duties by sending a copy of a required report to the claims administrator or to the person designated by the claims administrator to be the recipient of the required report. Additional copies of the reports will be provided at an additional cost.

Notice to payors: If you elect to transfer your responsibility of reviewing my charges to an independent review agency, it is your duty to transfer my medical reports and any other pertinent information I am serving attached to my billings to said review agency.

PATIENT: GARCIA, CARLOS
June 18, 2013
Page 19 of 19

Date of Report: June 18, 2013

Dated this 23 day of June,
2013 at LA County, California.

Daniel M. Silver

Daniel M. Silver, M.D.
Diplomate, American Board
of Orthopedic Surgery

EXHIBIT 2



Gallagher Bassett Services, Inc.

RECEIVED
MAY 01 2014

BY:.....

April 23, 2014

Daniel M Silver
Silver Ortho
5363 Balboa Blvd Ste 445
Encino CA 91316

RE: Employer : Key Energy Services
Employee : Garcia Carlos
Insured By: Ace American/Admin by Gallagher Bassett
Date of Injury : 09/04/2012
Claim Number: 004449-000399-WC-01

Dear Dr. Larsen MD:

We have received your report and authorization request dated 03/18/2014

We are unable to authorize interpreter, Urine Tox, mets, interest consult, surgery anterior cervical and pre-op because the above request not authorized as Dr. Silver is not authorized and MPN physician.

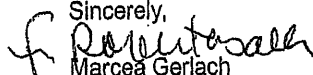
The State of California requires that you be given the following information:

Any dispute shall be resolved in accordance with the provisions of Labor Code section 4062. The objection to the utilization review decision must be communicated by the injured worker or the injured worker's attorney on behalf of the injured worker to the claims administrator in writing within 20 days of receipt of this decision. The injured worker may file an Application for Adjudication of Claim and Request for Expedited Hearing, DWC Form 4, showing a bonafide dispute as to entitlement to medical treatment in accordance with sections 10136(b)(1), 10400, and 10408.

If you want further information, you may contact the local state information and Assistance Office by calling 818-901-5367, or you may receive recorded information by calling 1 (800) 736-7401.

You may also consult an attorney of your choice. Should you decide to be represented by an attorney, you may or may not receive a larger award, but unless you are determined to be ineligible for an award, the attorney's fee will be deducted from any award you might receive for disability benefits. The decision to be represented by an attorney is yours to make, but it is voluntary and may not be necessary for you to receive your benefits.

If you have any questions, please feel free to contact me at the number listed below.

Sincerely,

Marcea Gerlach
Sr. Claims Adjuster/rs

Gallagher Bassett Services, Inc
P.O.Box 255397, Sacramento, CA 95865
916-576-4495-Direct Phone
866-9141421 Fax

UR1 (Rev 9/09)



RECEIVED
MAY 05 2014
BY:.....

MULLEN & FILIPPI, LLP
1800 30TH STREET
SUITE 290
BAKERSFIELD, CA 93301-1930
TELEPHONE (661) 328-0224
FACSIMILE (661) 328-9986
WEBSITE WWW.MULFIL.COM

May 2, 2014

BAKERSFIELD

Michael Burgis
Michael Burgis & Associates
5900 Sepulveda Boulevard, Suite 215
Sherman Oaks, CA 91411

CHICO

FRESNO

LOS ANGELES

RE: **CARLOS GARCIA vs. KEY ENERGY SERVICES, INC. and ACE
AMERICAN INSURANCE, administered by GALLAGHER
BASSETT SERVICES, INC.**

OAKLAND

**WCAB: ADJ9054986
Claim No.: 004449-000399-WC-01
DOI: 09/04/2012
LEX No.: 0705875**

ORANGE

REDDING

RIVERSIDE

Dear Mr. Burgis:

SACRAMENTO

I am corresponding with you today to advise your office that defendants continue to object to treatment by Dr. Daniel Silver as his treatment is outside the Medical Provider Network in this case. Our office specifically objects to the diagnosis found in the report by Dr. Silver dated October 29, 2013, specifically including the shoulder, headaches, anxiety and insomnia. Our office will proceed with requesting an orthopedic panel from the Medical Unit unless we can agree to an agreed medical evaluator in orthopedic surgery in this case.

SAN DIEGO

SAN FRANCISCO

SAN JOSE

If you are agreeable to proceed with an agreed medical evaluator in orthopedic surgery, please propose which AMEs you will be agreeable to proceed with in this case.

SANTA ROSA

STOCKTON

VAN NUYS

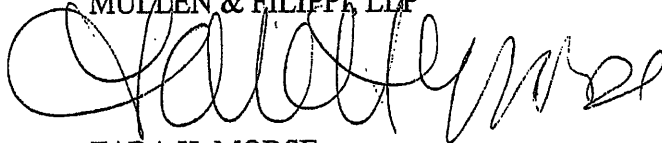
Michael Burgis
Michael Burgis & Associates
May 2, 2014
Page 2

RE: CARLOS GARCIA

Thank you for your kind attention to this matter. Please do not hesitate to contact our office should you have any questions regarding the foregoing.

Very truly yours,

MULDEN & FILIPPI, LLP

A handwritten signature in black ink, appearing to read "Tara H. Morse", written over the printed name.

TARA H. MORSE
Attorney at Law

THM/csh

cc: Marcea Gerlach/Gallagher Bassett Services, Inc.

EXHIBIT 3

PROVIDER DIRECTORY

Prepared For

Lost Hills, CA 93249

IF EMERGENCY MEDICAL CARE IS NEEDED: Call 911, fire or police whenever emergency medical care is needed. This directory is **NOT** intended to identify emergency medical providers.

If you need assistance locating a network Provider, please contact Coventry Workers' Compensation Services at (800) 342-5888 or (800) 937-6824, or via e-mail at WCClientServices@cvty.com.

The following pages are a directory of physicians and medical facilities for your use in obtaining workers' compensation medical care. The physicians and medical facilities listed in this directory are independent contractors and are not the agents or employees of Coventry. The information identifying physicians and medical facilities is intended to assist you in directing the medical care of employees who have injuries or illnesses covered by the workers' compensation system in accordance with state law.

We have endeavored to make the following information complete and accurate as of the date this directory is published. However, the status of providers changes, and new providers join our network. Accordingly, the information contained herein is subject to change without notice, and Coventry does not warrant the completeness or accuracy of the information.

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The torch logo is a registered service mark of Coventry Health Care, Inc.

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(cont)

Paso Robles, CA 93446
805-226-0975

Burgoyne, Chadler R., MD
The Spine & Orthopedic Center
Orthopaedic Surgery
2725 16th St
Bakersfield, CA 93301
661-864-1150

Moelleken, Alan P., MD
The Spine & Orthopedic Center
Orthopaedic Surgery
Orthopaedic Surgery of the Spine
2725 16th St
Bakersfield, CA 93301
661-864-1150

The Spine & Orthopedic Center
Orthopaedic Surgery
2725 16th St Ste 2
Bakersfield, CA 93301
661-864-1150

Gutierrez, Malintze, DO
Malintze Gutierrez DO Inc
Orthopaedic Surgery
2920 F St Ste C5
Bakersfield, CA 93301
661-324-8348

Johnson, David R., MD
Firstline Health Inc
Orthopaedic Surgery
2920 F St
Bakersfield, CA 93301
818-838-1606

Greenspan, Mark, MD
Orthopaedic Surgery
2808 F St Ste C
Bakersfield, CA 93301
818-789-6196

Silver Orthopedic Centers
Orthopaedic Surgery
2808 F St Ste C
Bakersfield, CA 93301
818-784-9593

Alade, Clement O., MD
Pacific Orthopedic Medical
Group
Orthopaedic Surgery
2619 F St
Bakersfield, CA 93301
661-327-1425

Larsen, John M., MD
Downey Orthopedic Medical
Group
Orthopaedic Surgery
1830 28th St
Bakersfield, CA 93301
562-803-0600

Lewis, Marshall S., MD
Marshall S Lewis MD A
Professional Corporation
Pacific Orthopedic Medical
Group
Orthopaedic Surgery
2619 F St
Bakersfield, CA 93301
661-327-1425

**Pacific Orthopedic Medical
Group**
Orthopaedic Surgery
2619 F St
Bakersfield, CA 93301
661-327-1425

Paik, Young N., MD
Pacific Orthopedic Medical
Group
Orthopaedic Surgery
2619 F St
Bakersfield, CA 93301
661-327-1425

Fonseca, Allen S., MD
ASF Orthopaedic Medical Group
Inc
Orthopaedic Surgery
1715 30th St
Bakersfield, CA 93301
562-464-3033

Mack, Joel D., MD
Joel D Mack
Orthopaedic Surgery
1801 28th St
Bakersfield, CA 93301
661-327-2777

Amjadi, Firooz B., MD
Kern Bone & Joint Specialists
Orthopaedic Surgery
Orthopaedic Surgery of the Spine
1921 18th St
Bakersfield, CA 93301
661-324-2491

Brenner, Brian C., MD
Kern Bone & Joint Specialists

(cont)

Orthopaedic Surgery
1921 18th St
Bakersfield, CA 93301
661-324-2491

Grimes, James B., MD
Kern Bone & Joint Specialists
Orthopaedic Surgery
1921 18th St
Bakersfield, CA 93301
661-324-2491

Scheinberg, Richard D., MD
Richard D Scheinberg MD Inc
Orthopaedic Surgery
1914 Truxtun Ave
Bakersfield, CA 93301
661-460-9050

Anel, Manuel S, MD
Manuel S Anel MD APC
Orthopaedic Surgery
3941 San Dimas St Ste 103A
Bakersfield, CA 93301
323-264-6296

Brady, Robert L, PT, MD
San Luis Sports Therapy &
Orthopedic Rehabilitation
Orthopaedic Surgery
350 Posada Ln Ste 103
Templeton, CA 9465
805-434-2050

Sima, William F, MD
William Sima MD
Orthopaedic Surgery
322 Posada Ln Ste A
Templeton, CA 9465
805-434-5555

Smith, Newton Bitrell, MD
N Birrell Smith MD
Orthopaedic Surgery
350 Posada Ln Ste 201
Templeton, CA 9465
805-434-0876

MacArthur, Robert J., MD
WorkMed
Orthopaedic Surgery
2911 Niles St
Bakersfield, CA 93306
888-405-1772

Herron, Larry D, MD
Larry D Herron MD Inc

(cont)

Orthopaedic Surgery
1304 Ella St Ste B1
San Luis Obispo, CA 93401
805-541-4700

Lawler, James W., MD
French Health Center - Peach
Street
Orthopaedic Surgery
1250 Peach St Ste B
San Luis Obispo, CA 93401
805-549-9555

Haronian, Edwin, MD
Edwin Haronian MD Inc
Orthopaedic Surgery
2323 W Caldwell Ave
Visalia, CA 93277
818-788-2400

**Central Coast Ortho Medical
Group**
Orthopaedic Surgery
862 Meinecke Ave Ste 100
San Luis Obispo, CA 93405
805-541-4600

Brady, Robert L., PT, MD
San Luis Sports Therapy &
Orthopedic Rehabilitation
Orthopaedic Surgery
805 Aerovista Pl Ste 104
San Luis Obispo, CA 93401
805-543-7771

Tindall, Mark L., MD
Mark L Tindall MD
Orthopaedic Surgery
108 N D St
Porterville, CA 93257
559-781-7381

Edmonds, Andre P., MD
Visalia Medical Clinic Inc
Orthopaedic Surgery
5400 W Hillsdale Ave
Visalia, CA 93291
559-738-7500

Guadagni, James R., MD
Visalia Medical Clinic Inc
Orthopaedic Surgery
5400 W Hillsdale Dr
Visalia, CA 93291
559-738-7550

Gutierrez, Malintze, DO
Malintze Gutierrez DO Inc

^ = No New WC

THIS LIST IS SUBJECT TO CHANGE.

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Page 2: 48.8 MI to 54.2 MI

EXHIBIT 4

Laura Aguilar

From: Tara H. Morse <tmorse@mulfil.com>
Sent: Thursday, July 3, 2014 4:28 PM
To: Laura Aguilar
Subject: Re: Carlos Garcia vs Key Energy Services Inc

Hi Laura,

I just missed you; I just left a message for you with your staff. I apologize for this confusion. After we spoke about the MPN issue, it was confirmed Dr. Silver is within the MPN. Since scheduling the AME evaluation with Dr. Sohn, the request for cervical spine surgery was certified. I am out of the office right now but I will forward the certification to your office on Monday.

I will postpone the AME evaluation pending surgery.

Please contact our office at your earliest convenience.

Have a great day!

Sincerely yours,

Tara H. Morse
Mullen & Filippi

Sent from my iPhone

> On Jul 3, 2014, at 3:43 PM, "Laura Aguilar" <LAguilar@burgislaw.com> wrote:

>

> Good Afternoon Ms. Morse:

>

> I was returning your call from Monday but seems your office is closed. In your message you said it was regarding the applicant's surgery.

> I've spoken to my client and there seems to be some confusion as to this surgery and Dr. Silver's continued treatment as PTP is really authorized or not.

> He is interested in proceeding with said procedure.

>

> If you recall, when you and I spoke on 5/23/14 you stated that your client was sending the PTP Designation authorization to Dr. Silver and that his cervical surgery was being put through UR.

> Since you were expecting this to be certified, you were hoping to postpone the AME appointment with Dr. Sohn which is now coming up next week to possibly 6-8 months post surgery.

>

> I have not received any UR certifying the surgery. In fact, applicant was scheduled for follow up with Dr. Silver on 6/17/14 and pursuant to the applicant he was told that he could not be seen because they had yet to receive any authorization. Unfortunately I was out of the office for 2 weeks myself and so this is the first I'm learning this.

>

> Can you please look into this and confirm 1) written authorization for Dr. Silver as the PTP, 2) UR certification for cervical surgery, 3) are we postponing AME? 4) TTD benefits per Dr Silver disability status

>

> I hope to hear from you as soon as possible. Have a great day!

>
> Laura Aguilar
> Case Coordinator
> [http://sphotos.xx.fbcdn.net/hphotos-snc7/599710_10150929142862169_1767128129_n.jpg]
> Michael Burgis & Associates, P.C.
> 5900 Sepulveda Blvd., Suite 215
> Sherman Oaks, CA 91411
> www.BurgisLaw.com<http://www.burgislaw.com/>
> (818) 994-9870 Telephone
> (818) 475-1682 Facsimile
> LAguilar@BurgisLaw.com<mailto:LAguilar@BurgisLaw.com>

>
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>
> From: Laura Aguilar
> Sent: Monday, May 19, 2014 12:24 PM
> To: 'Tara H. Morse'
> Subject: RE: Carlos Garcia vs Key Energy Services Inc.
> Importance: High

>
> Hello Ms. Morse: Thank you for providing the AME appointment notice, we did in fact receive it.

>
> Thank you for also providing me with the MPN link and instructions on how to obtain the listing of proper doctors. There seems to be some kind of confusion. Your client continues to send letters objecting/denying authorization for treatment to Dr. Silver stating that he is not in the MPN. Yet, upon running the list on 5/9/14, Silver Orthopedic Centers in Bakersfield, the office of Dr. David Silver, is listed. I've attached the list for your reference. Please contact your client to verify this and to issue authorization for treatment to Dr. Silver as our client's last appointment was cancelled at the last minute due to this. If there is an error or misunderstanding on my part, please advise. But as I see it, Dr. Silver is on the MPN. Thank you for your urgent attention to this matter.

>
> Laura Aguilar
> Case Coordinator
> [http://sphotos.xx.fbcdn.net/hphotos-snc7/599710_10150929142862169_1767128129_n.jpg]
> Michael Burgis & Associates, P.C.
> 5900 Sepulveda Blvd., Suite 215
> Sherman Oaks, CA 91411
> www.BurgisLaw.com<http://www.burgislaw.com/>
> (818) 994-9870 Telephone
> (818) 475-1682 Facsimile
> LAguilar@BurgisLaw.com<mailto:LAguilar@BurgisLaw.com>

>
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EXHIBIT 5

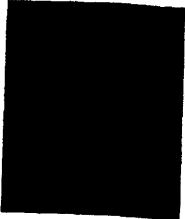


Michael Burgis & Associates, P.C.
Recovery for the Injured

5900 Sepulveda Blvd. Suite 215
Sherman Oaks, CA 91411

E-mail: MBurgis@BurgisLaw.com
1-855-BURGIS1
Telephone: 818-994-9870
Facsimile: 818-475-1682

www.BurgisLaw.com



July 7, 2014

Tara Morse, Esq.
Mullen & Filippi, LLP
1800 30th Street, Suite 290
Bakersfield, CA 93301

Re: Applicant: Carlos Garcia vs. Key Energy Services Inc.
Date of Injury: 09/04/2012
Case No.: ADJ9054986
Claim No.: 004449-000399-wc-01

Dear Ms. Morse:

This will acknowledge communication between our offices in which it has been established that Dr. David Silver is in fact within your client's MPN, and as such, continued authorization for treatment, including most recently the requested cervical surgery has been extended. You have also indicated that you will postpone the currently scheduled AME appointment with Dr. Roger Sohn until such time that he recovers from his surgery and post op care.

We do, however, have the one remaining issue of Temporary Disability benefits due to the applicant. According to our records, your client paid wage loss/temporary partial disability benefits from 9/24/12-5/31/13. Upon applicant's return to treatment with his newly designated MPN physician Dr. Daniel Silver on 6/18/13, he was once again placed on TTD. Your client did NOT pick up TTD benefits, but rather began paying PD and the applicant proceeded to collect State Disability retroactively to 6/1/13-6/1/14 for a total paid to date of \$14,174.58 and continuing.

Our calculations of benefits due are as follows:

6/18/13- present 7/7/14 (and continuing) at \$778.61 TTD rate:	\$42,823.55
<u>Plus Labor Code Sec 5814(a) 25% penalty due:</u>	<u>\$10,000.00 Max</u>
Total Due:	\$52,823.55
<u>Minus 15% attorney fee on total due:</u>	<u>\$ 7,923.53</u>
Total Due Applicant:	\$44,900.02

Demand is made for immediate payment of all retroactive benefits due as well as continuation of TTD benefits as per the reporting of the authorized MPN PTP Dr. Daniel Silver. Of course, your client will also have to reimburse the State Disability Fund for the benefit amount paid to date. Should you wish to discuss, please don't hesitate to contact this office. However, if no payment or response is received within 20 days from the date of this communication, we will have no choice but to file a DOR for benefits and a penalty petition for monies due.

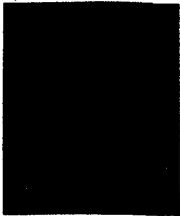


Michael Burgis & Associates, P.C.
Recovery for the Injured

5900 Sepulveda Blvd. Suite 215
Sherman Oaks, CA 91411

E-mail: MBurgis@BurgisLaw.com
1-855-BURGIS1
Telephone: 818-994-9870
Facsimile: 818-475-1682

www.BurgisLaw.com



July 7, 2014
Page 2

Re: Applicant: Carlos Garcia vs. Key Energy Services Inc.
Date of Injury: 09/04/2012
Case No.: ADJ9054986
Claim No.: 004449-000399-wc-01

As always, thank you for your professional attention to this matter.

Sincerely,

Michael Burgis, Esq.



Michael Burgis & Associates, P.C.

MXB/lja

MEMORY TRANSMISSION REPORT

TIME : 07-07-'14 13:07
FAX NO.1 :
NAME :

FILE NO. : 188
DATE : 07.07 13:06
TO : 816613289986
DOCUMENT PAGES : 3
START TIME : 07.07 13:06
END TIME : 07.07 13:07
PAGES SENT : 3
STATUS : OK

*** SUCCESSFUL TX NOTICE ***



5900 Sepulveda Blvd. Suite 215
Sherman Oaks, CA 91411
E-mail: MBurgis@BurgisLaw.com
T-888-614-6181
Telephone: 818-994-8890
Facsimile: 818-423-1882
www.BurgisLaw.com

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To: Mullen & Filippi, LLP
Attention: Tara Morse, Esq. **RUSH**
From: Laura Aguilar, for Michael Burgis, Esq.
Date: July 7, 2014
Fax #: (661) 328-9986

Total pages (including cover sheet): 3

Re: Applicant: Carlos Garcia vs. Key Energy Services Inc.
Date of Injury: 09/04/2012
Case No.: ADJ9054986
Claim No.: 004449-000399-wo-01

Comments: Demand for TTD benefits
RUSH

EXHIBIT 6



Michael Burgis & Associates, P.C.
Recovery for the Injured

5900 Sepulveda Blvd. Suite 215
Sherman Oaks, CA 91411

E-mail: MBurgis@BurgisLaw.com
1-855-8URGIST
Telephone: 818-994-9870
Facsimile: 818-475-1682

www.BurgisLaw.com

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To: Mullen & Filippi, LLP

Attention: Tara Morse, Esq.

From: Laura Aguilar

Date: July 30, 2014

Fax #: (661) 328-9986

Total pages (including cover sheet): 1

Re: Applicant: Carlos Garcia vs. Key Energy Services Inc.
Date of Injury: 09/04/2012
Case No.: ADJ9054986
Claim No.: 004449-000399-wc-01

Comments: Please be advised that after having received no response to our emailed and written requests for reinstatement of TTD benefits in accordance with the opinion of the MPN physician, Dr. Daniel Silver, we will now be filing a DOR / Expedited Hearing and raising penalties and attorneys' fees. Thank you.

MEMORY TRANSMISSION REPORT

TIME : 07-30-'14 09:16
FAX NO.1 :
NAME :

FILE NO. : 324
DATE : 07.30 09:15
TO : 816613289986
DOCUMENT PAGES : 1
START TIME : 07.30 09:16
END TIME : 07.30 09:16
PAGES SENT : 1
STATUS : OK

*** SUCCESSFUL TX NOTICE ***



5900 Sepulveda Blvd. Suite 215
Sherman Oaks, CA 91411
E-mail: MBurgis@SurgisLaw.com
1-855-SURGIS1
Telephone: 818-994-9870
Facsimile: 818-473-4552
www.surgisLaw.com



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To: Mullen & Filippi, LLP
Attention: Tara Morse, Esq.
From: Laura Aguilar
Date: July 30, 2014
Fax #: (661) 328-9986

Total pages (including cover sheet): 1

Re: Applicant: Carlos Garza vs. Key Energy Services Inc.
Date of Injury: 09/04/2012
Case No.: ADJ9054986
Claim No.: 004449-000399-wo-01

Comments: Please be advised that after having received no response to our emailed and written requests for reinstatement of ITD benefits in accordance with the opinion of the MPN physician, Dr. Daniel Silver, we will now be filing a DOR / Expedited Hearing and raising penalties and attorneys' fees. Thank you.

EXHIBIT 7



RECEIVED
AUG 04 2014
BY:.....

MULLEN & FILIPPI, LLP
1800 30TH STREET
SUITE 290
BAKERSFIELD, CA 93301-1930
TELEPHONE (661) 328-0224
FACSIMILE (661) 328-9986
WEBSITE WWW.MULFIL.COM

July 30, 2014

BAKERSFIELD

Michael Burgis
Michael Burgis & Associates
5900 Sepulveda Boulevard, Suite 215
Sherman Oaks, CA 91411

CHICO

FRESNO

RE: **CARLOS GARCIA vs. KEY ENERGY SERVICES, INC. and ACE
AMERICAN INSURANCE, administered by GALLAGHER
BASSETT SERVICES, INC.**

LOS ANGELES

WCAB: **ADJ9054986**
Claim No.: **004449-000399-WC-01**
DOI: **09/04/2012**
LEX No.: **0705875**

OAKLAND

ORANGE

REDDING

Dear Mr. Burgis:

RIVERSIDE

Our office is in receipt of your July 30, 2014 correspondence regarding the issue of retro temporary disability in accordance with the primary treating physician, Dr. Daniel Silver, in this matter.

SACRAMENTO

I will be discussing with my client your demand. I will contact your office shortly so that we can resolve this matter.

SAN DIEGO

SAN FRANCISCO

Thank you for your kind attention to this matter. Please do not hesitate to contact our office should you have any questions regarding the foregoing.

SAN JOSE

Very truly yours,

SANTA ROSA

STOCKTON

VAN NUYS

MULLEN & FILIPPI, LLP

TARA H. MORSE
Attorney at Law
THM/ld/seh

cc: Marcea Gerlach/Gallagher Bassett Services, Inc.

EXHIBIT 8

Laura Aguilar

From: Laura Aguilar
Sent: Thursday, July 31, 2014 8:51 AM
To: 'Tara H. Morse'
Subject: RE: Carlos Garcia - Retro TD Dispute

Importance: High

Good Morning Ms. Morse:

Thank you for contacting us regarding the outstanding issue of TTD benefits. You may or may not have received our DOR for Expedited Trial already.

Allow me to break down our current demand for the retroactive benefits due, and hopefully we can resolve it.

Total TTD owed to date 6/18/13-7/31/14 @ \$778.61= \$45,492.87
25% penalty owed on entire amount per LC 5814a: \$10K max
Total due: \$55,492.87

However, in the spirit of compromise and to minimize future PD credits towards applicant's settlement, we'd be willing to give credit for the total PD paid to date, thereby reducing the penalty owed:

\$45,492.87 TTD - \$13,439.74 PD = \$ 32,053.13
+ LC 5814a 25% penalty due = \$8,013.28
New total due: \$40,066.41
- 15% attorney fee: \$ 6,009.96
Balance to Applicant: \$34,056.45

Of course, at said time defendant can pay said balance directly to the applicant and he will reimburse the SDI fund himself, or you may instruct your client to reimburse SDI directly, with the reduced balance payable to the applicant. Either way, this is a benefit that your client should have been paying all along, rather than shifting the responsibility to the EDD.

We'd be willing to resolve this out of court in order to avoid the appearance in Bakersfield. That would reduce moneys owed by your client because Mr. Burgis would agree to waive any argument to LC5813 fees due to defendant's bad faith tactics in continuing to object and deny medical treatment and benefits based on the false assertion that Dr. Silver was not in the MPN. As you know, it was only recently that your client finally acknowledged their error and authorized Dr. Silver to proceed to the surgery. As such, if we can't resolve this and should Mr. Burgis actually have to drive to Bakersfield, he will be raising said argument along with his request for additional attorneys' fees for the time & travel involved in being forced to file a DOR to resolve the issue.

Please get back to me once you've reviewed and discussed with your client. Upon receipt of the Expedited Trial date, we will send notice as well. Thank you so much Ms. Morse, and I hope to hear from you soon.

Laura Aguilar
Case Coordinator

EXHIBIT 9

Silver Orthopedic Centers

RECEIVED
SEP 05 2014

BY:

DANIEL M. SILVER, M.D.
Diplomate American Board of
Orthopedic Surgery

Orthopedic Treatment of Musculoskeletal Disorders

- Sports Injuries
- Performing arts medicine
- Fractures and Trauma
- Joint replacements
- Arthritis
- Med legals
- Workers' compensation

RECEIVED
SEP 05 2014

BY:

July 15, 2014

Needs Surgery
Needs Surgery

Gallagher Bassett
P.O. Box 255397
Sacramento, California 95865

Attention: Stephanie Chaen, Adj.

Michael Burgis, Esq.
5900 Sepulveda Boulevard Suite #215
Sherman Oaks, California 91411.

RE: GARCIA, CARLOS

EMP: Key Energy Services
JOB TITLE: Truck Driver
SS #: 615-10-8909
CLAIM #: 004449-000399-WC-01
D/I: September 4, 2012
D/B: February 8, 1959

COMPREHENSIVE ORTHOPEDIC RE-EVALUATION

5363 Balboa Boulevard Suite # 445A Encino, California 91316 • (818) 784-9593 •
(818) 784-9594 Fax

2808 F Street, Suite C, Bakersfield, California 93301 • (661) 633-2029 • (661)
633-2170 Fax

PATIENT: GARCIA, CARLOS

July 15, 2014

Page 2 of 6

Dear Ms. Chaen & Mr. Burgis:

Mr. Carlos Garcia comes in today. The patient has neck pain that is severe. He is scheduled soon to have an anterior cervical discectomy and fusion by Dr. Payman at the appropriate levels. He is willing to undergo the risks and complications. He also has residual right shoulder pain that is moderate. I did the surgery on 10/25/13 which was a decompression and partial distal claviclectomy and removal of extensive scar tissue. He feels improvement in his right shoulder. His left shoulder pain is moderate. He has not had surgery there. He has low back pain that is moderate and he has not had surgery there as well.

The patient feels the same as his last visit. He is not on physical therapy. He was terminated because he was not approved. He is currently not working. He takes Tramadol 150 mg twice a day, Prilosec 20 mg twice a day and topical creams of Ketoprofen, Gabapentin and Tramadol.

CLINICAL EXAMINATION:

The patient's height is 5'3". He weighs 155 pounds.

NECK AND SHOULDER EXAMINATION:

The patient has a very rigid neck. He is very guarded with 50% decrease in range of motion with 3/4 pain bilaterally.

<u>Shoulder</u>	<u>Right</u>	<u>Left</u>	<u>Normal</u>
Flexion	120	160	180
Abduction	90	130	180
Internal Rotation	70	60	80
External Rotation	70	80	90

PATIENT: GARCIA, CARLOS

July 15, 2014

Page 3 of 6

The patient has 2/4 pain on the right and 1/4 pain on the left.

<u>JAMAR</u>	<u>Right</u>	<u>Left</u>
Hand grip	40/40/40	40/40/35

DIAGNOSES:

1. Cervical degenerative disc disease/degenerative joint disease at C5-6 and C6-7 with chronic sprain/strain, superimposed.
2. Lumbar herniated nucleus pulposus with sciatica, bilaterally.
3. Bilateral shoulder impingement with post traumatic arthrosis of the acromioclavicular joints.
4. Anxiety.
5. Insomnia.
6. Headaches secondary to sun exposure according to the history.
7. Right shoulder adhesive capsulitis.
8. Status post arthroscopic subacromial decompression and partial distal claviclectomy of the right shoulder.
9. Possible right carpal tunnel syndrome.
10. Left elbow epicondylitis.

DISCUSSION AND RECOMMENDATIONS:

At this time, the patient has renewal of all his medications including Tramadol Extended Release 150 mg #30 dispensed, Prilosec 20 mg #90 dispensed, and topical creams of Ketoprofen, Gabapentin and Tramadol.

In my opinion, the patient should continue with his right shoulder physical therapy 3 times a week for 6 weeks. He is not completely back to where I believe that he should be with his range of motion and strength.

PATIENT: GARCIA, CARLOS
July 15, 2014
Page 4 of 6

An interpreter was needed since the patient is Spanish-speaking. A urinary toxicology screening was performed per the ACOEM Guidelines. He does need the anterior cervical discectomy and fusion at the C5 through C7 as recommended by Dr. Rad Payman. I reviewed the images with the patient today.

The patient will remain temporarily totally disabled for 6 weeks. I will see her back for a follow-up in 6 weeks.

All of my opinions are stated with reasonable medical probability. If you have any further questions in regard to this case, please contact me.

I have not violated Labor Code Section 139.3, and the contents of this report are all true and correct to the best of my knowledge. This statement is made under penalty of perjury.

The following is the summary of medical records received and reviewed by the undersigned. I have spent 30 minutes of face-to-face patient contact in reviewing the MRI as well as the medical records.

Please be advised this office is serving copies of this medical report and billings to all parties involved in this action. A primary treating physician has fulfilled his or her reporting duties by sending one copy of a required report to the claims administrator or to the person designated by the claims administrator to be the recipient of the required report. Additional copies of reports will be provided at an additional cost.

Notice to payors: If you elect to transfer your responsibility of reviewing my charges to an

STATE OF CALIFORNIA
Division of Worker's Compensation
Primary Treating Physician's Report (PR-2)

DATE OF EXAM: JUL 15 2014

<input type="checkbox"/> Periodic Report (Required 45 days after last report)	<input type="checkbox"/> Change in treatment plan	<input type="checkbox"/> Discharged
<input type="checkbox"/> Change in work status	<input type="checkbox"/> Need for referral or consultation	<input type="checkbox"/> Other (Pre Op/Post Op)
<input type="checkbox"/> Change in patient's Condition	<input type="checkbox"/> Need for surgery or hospitalization	

PATIENT INFORMATION

Last: GARCIA First: CARLOS D.O.B.: 2/8/59 Phone: (661) 797-9000
 Address: PO BOX 659 City: LOST HILLS State: CA Zip: 93249
 D.O.I.: 9/4/12 S.S.# 615-10-8909 Attorney: MICHAEL BURGIS, ESQ.

INSURANCE INFORMATION:

Name: GALLAGHER Claim Number: 004449-000399WC01
 Address: PO BOX 255397 City: SACRAMENTO State: CA Zip: 95865
 Phone Number: (800) 262-0811 Fax Number: _____
 Employer Name: KEY ENERGY SERVICES Employer Phone: _____

The information below must be provided. You may use this form or you may substitute or append a narrative report.

SUBJECTIVE complaints:

NECK PAIN - SEVERE LOW BACK PAIN - MODERATE THE SAME TRAMADOL 150 BID
R SHOULDER PAIN - MODERATE NO PHYSICAL THERAPY PRIOR TO 2014
L SHOULDER PAIN - MODERATE NOT WORKING TOPICAL COCREMS

OBJECTIVE findings: (include significant physical examination, laboratory, imaging or other diagnostic findings)

2/4 20/20 160 50% ↓ from convex Wt: 155 40/40
40/40 130/4 40/35

DIAGNOSES:

1. _____ ICD-9: _____
2. _____ ICD-9: _____
3. _____ ICD-9: _____

TREATMENT PLAN:

Physical Therapy: 3 X week 6 week Home Exercises, Splint, crutches, cane, brace Wear all neck
 (Site for physical therapy): _____ R(x): TRAMADOL 150 BID PRIOR TO 2014

AUTHORIZATION for: MRI EMG/NCV Surgery Consult Other

INTERPRETER REQUIRED VIA FAX Needs AEDF by

WORK STATUS; This patient has been instructed to:

Return to work _____ with NO restrictions.

T.T.D. 6 weeks.

May return to modified work _____ with the following restrictions:

<input type="checkbox"/> no prolonged standing or walking	<input type="checkbox"/> No repetitive bending or stooping	<input type="checkbox"/> no squatting or kneeling	<input type="checkbox"/> No stair or ladder climbing
<input type="checkbox"/> no overhead work	<input type="checkbox"/> work at ground level only	<input type="checkbox"/> Semi-sedentary	<input type="checkbox"/> Sedentary

WEIGHT RESTRICTIONS:

<input type="checkbox"/> Light Work 5 lb/10 Lb/ 15 Lb	<input type="checkbox"/> No heavy lifting (up to _____ lbs)	<input type="checkbox"/> No Very Heavy Lifting (up to _____ lbs)
---	---	--

Other: _____

FOLLOW-UP APPOINTMENT 6 WEEKS.

I have not violated Labor Code Section 139.3, and the contents of this report and bill are true and correct, to the best of my knowledge. This statement is made under penalty of perjury, signed and dated in the County of Los Angeles.

X: SILVER RTC 8/26/14 @ 8:45 AM

[Signature]
 Daniel M Silver, M.D. License #C31379
 Diplomate, American Board of Orthopedic Surgery.

5363 Balboa Boulevard #445, Encino Ca 91316 (818) 784-9593

Dr. Neimeyer 729-14 @ 1:30pm

EXHIBIT 10

Silver Orthopedic Centers

DANIEL M. SILVER, M.D.
Diplomate American Board of
Orthopedic Surgery

Orthopedic Treatment of Musculoskeletal Disorders

- Sports Injuries
- Performing arts medicine
- Fractures and Trauma
- Joint replacements
- Arthritis
- Med legals
- Workers' compensation

August 26, 2014

Gallagher Bassett
P.O. Box 255397
Sacramento, California 95865

Needs Surgery

Attention: Stephanie Chaen, Adj.

Michael Burgis, Esq.
5900 Sepulveda Boulevard Suite #215
Sherman Oaks, California 91411

RE: GARCIA, CARLOS (Corrected)

EMP: Key Energy Services
JOB TITLE: Truck Driver
SS #: 615-10-8909
CLAIM #: 004449-000399-WC-01
D/I: September 4, 2012
D/B: February 8, 1959

COMPREHENSIVE ORTHOPEDIC RE-EVALUATION

5363 Balboa Boulevard Suite # 445A Encino, California 91316 • (818) 784-9593 • (818) 784-9594 Fax

2808 F Street, Suite C, Berkeley, California 94704 • (661) 633-2029 • (661) 633-2170 Fax

PATIENT: GARCIA, CARLOS
August 26, 2014
Page 2 of 6

Dear Ms. Chaen and Mr. Burgis:

Mr. Carlos Garcia comes in today. The patient has severe pain in his neck, moderate to severe pain in the right shoulder and moderate pain in the left shoulder. He is also having severe pain in his low back. He stopped physical therapy for his right shoulder, which was operated in 10/2013 because it hurt too much and now he is actually improved with his range of motion. He has been taking Tramadol 150 mg 1 to 2 a day as needed, Prilosec 20 mg 2 a day and the topical creams of Ketoprofen, Gabapentin and Tramadol.

CLINICAL EXAMINATION:

The patient's height is 5'3". He weighs 148 pounds. He is cooperative. He is very apprehensive and overall guarded.

NECK AND SHOULDER EXAMINATION:

The patient's neck has a decreased range of motion of 75%.

<u>RANGE OF MOTION (in degrees)</u>	<u>Right</u>	<u>Left</u>	<u>Normal</u>
<u>Neck</u>			
Chin to chest	Lacks 3 fingerbreadths		Full
Extension	0		20
Tilt	10	10	20
Rotation	10	10	60

The patient states that he has 4/4 pain in all directions.

PATIENT: GARCIA, CARLOS
August 26, 2014
Page 3 of 6

<u>Shoulder (active and passive)</u>	<u>Right</u>	<u>Left</u>	<u>Normal</u>
Flexion	150	150	180
Abduction	130	130	180
Internal Rotation	60	60	80
External Rotation	70	70	90

The patient has 2/4 pain in the operated right shoulder and 1/4 pain in the unoperated left shoulder.

JAMAR

Hand grip 55/50/50 60/50/55

BACK EXAMINATION (UPPER AND LOWER):

The patient's has tenderness, trigger points and spasm of the lumbar spine.

PALPATION

STRAIGHT LEG RAISING TEST

Sitting straight leg raises	+90	+90	-90
Lying straight leg raises	+60	+60	-70

DIAGNOSES:

1. Cervical degenerative disc disease/degenerative joint disease at C5-6 and C6-7 with chronic sprain/strain, superimposed.
2. Lumbar herniated nucleus pulposus with sciatica, bilaterally.
3. Bilateral shoulder impingement with post traumatic arthrosis of the acromioclavicular joints.
4. Anxiety.

PATIENT: GARCIA, CARLOS

August 26, 2014

Page 4 of 6

5. Insomnia.
6. Headaches secondary to sun exposure according to the history.
7. Right shoulder adhesive capsulitis.
8. Status post arthroscopic subacromial decompression and partial distal claviclectomy of the right shoulder.
9. Possible right carpal tunnel syndrome.
10. Left elbow epicondylitis.

DISCUSSION AND RECOMMENDATIONS:

At this time, the patient needs no medication. We used a Spanish interpreter as he is only Spanish speaking. A urine toxicology test is done. My recommendation at this time is for him to go through with the anterior cervical discectomy and fusion now from C4 through C6 that was recommended by Dr. Payman, our spine specialist. He wants to have the surgery, and he understands the risks and complications. Please authorize and expedite the approval for the neck surgery. I will see him back in 6 weeks as the primary treating physician. He will remain temporarily totally disabled during these 6 weeks.

ADDENDUM:

I did review the report dated 8/4/14, from Dr. Payman in which he recommended the proceeding with the anterior cervical discectomy and fusion of C4 through C6, and he outlines the logic in that recommendation. This recommendation fits within CA MTUS Guidelines.

All of my opinions are stated with reasonable medical probability. If you have any further questions in regard to this case, please contact me.

PATIENT: GARCIA, CARLOS
August 26, 2014
Page 5 of 6

I have not violated Labor Code Section 139.3, and the contents of this report are all true and correct to the best of my knowledge. This statement is made under penalty of perjury.

Please be advised this office is serving copies of this medical report and billings to all parties involved in this action. A primary treating physician has fulfilled his or her reporting duties by sending one copy of a required report to the claims administrator or to the person designated by the claims administrator to be the recipient of the required report. Additional copies of reports will be provided at an additional cost.

Notice to payors: If you elect to transfer your responsibility of reviewing my charges to an independent review agency, it is your duty to transfer my medical reports and any other pertinent information I am serving attached to my billings to said review agency.

Sincerely,



Daniel M. Silver, M.D.
Diplomate, American Board
of Orthopedic Surgery

DMS/dcc/car

EXHIBIT B

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. ADJ9054986

STIPULATIONS

THE FOLLOWING FACTS ARE ADMITTED:

1. Carlos Garcia, BORN 02/08/1959

WHILE EMPLOYED ALLEGEDLY EMPLOYED

ON 09/04/2012

DURING THE PERIOD(S) _____

AS A(N) Truck Driver / Loader / Unloader, OCCUPATIONAL GROUP NUMBER _____

AT Bakersfield, CALIFORNIA,

BY Key Energy Services Inc.

SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO Cervical Spine

CLAIMS TO HAVE SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO _____

2. AT THE TIME OF INJURY THE EMPLOYER'S WORKERS' COMPENSATION CARRIER WAS Gallagher Bassett Services, Inc.

THE EMPLOYER WAS PERMISSIBLY SELF-INSURED UNINSURED LEGALLY UNINSURED

3. AT THE TIME OF INJURY, THE EMPLOYEE'S EARNINGS WERE \$ 770⁶⁶ PER WEEK, WARRANTING INDEMNITY RATES OF \$ _____ FOR TEMPORARY DISABILITY AND \$ _____ FOR PERMANENT DISABILITY.

4. THE CARRIER/EMPLOYER HAS PAID COMPENSATION AS FOLLOWS: (TD/PPD/RMA)

TYPE	WEEKLY RATE	PERIOD	TYPE	WEEKLY RATE	PERIOD

THE EMPLOYEE HAS BEEN ADEQUATELY COMPENSATED FOR ALL PERIODS OF T/D CLAIMED THROUGH _____

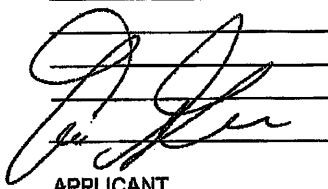
5. THE EMPLOYER HAS FURNISHED ALL SOME NO MEDICAL TREATMENT.

THE PRIMARY TREATING PHYSICIAN IS Dr. Silver

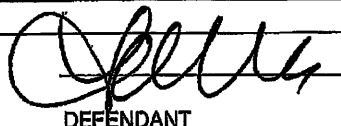
6. NO ATTORNEY FEES HAVE BEEN PAID AND NO ATTORNEY FEE ARRANGEMENTS HAVE BEEN MADE.

7. OTHER STIPULATIONS

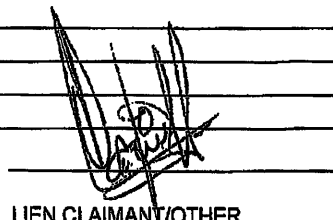
6/24/14



APPLICANT



DEFENDANT



LIEN CLAIMANT/OTHER

PAGE 2

DWC CA form 10253.1 (Rev 9/2010)

EXHIBIT C

RECEIVED
OCT 06 2014

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION BY:-----
WORKERS' COMPENSATION APPEALS BOARD

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CARLOS GARCIA,

Applicant,

vs.

KEY ENERGY SERVICES, INC.; ACE
AMERICAN INSURANCE COMPANY (CARE
OF GALLAGHER BASSETT SERVICES),

Defendants.

CASE NO. ADJ9054986

MINUTES OF HEARING
and
SUMMARY OF EVIDENCE

DISTRICT OFFICE: Bakersfield

LOCATION: 1800 30th Street, Suite 100
Bakersfield, California

DATE AND TIME: October 1, 2014; 3:50 p.m. to 4:40 p.m.

JUDGE: The Honorable DONALD H. JOHNSON

REPORTER: Jonathan S. Takach

APPEARANCES: (refer to Page 2)

WITNESSES: Carlos Garcia

DISPOSITION: This matter is submitted for decision.

1 **APPEARANCES:** Carlos Garcia, Applicant
2
3 Law Offices of Michael Burgis & Associates
4 By: Teresa Garcia
5 Hearing Representative for Applicant
6
7 Law Offices of Mullen & Filippi
8 By: Tara Morse
9 Attorney for Defendants
10
11 Employment Development Department
12 By: Ozy Patino
13 Hearing Representative for Lien Claimant
14
15 Lilia Ortiz-Candela, Interpreter

16
17 **S T I P U L A T I O N S A N D I S S U E S**
18

19 **THE FOLLOWING FACTS ARE ADMITTED:**
20

- 21 1. Carlos Garcia, born February 8, 1959, while employed on
22 September 4, 2012, as a truck driver/loader/unloader, at
23 Bakersfield, California, by Key Energy Services, Inc., sustained
24 injury arising out of and in the course of employment to the cervical
25 spine and claims injury to other body parts (deferred).
26
27 2. At the time of injury, the employer's workers'
28 compensation carrier was Ace American Insurance Company, adjusted
29 by Gallagher Bassett Services, Inc.
30
31 3. The employer has furnished some medical treatment.
32 The primary treating physician is Dr. Silver.
33
34 4. No attorney fees have been paid and no attorney fee
35 arrangements have been made.
36
37 5. The parties stipulate that Dr. Silver is in the defendant's
38 MPN as of June 24, 2014.
39
40 6. The parties stipulate that applicant's earnings at the
41 time of injury were \$778.61 per week.
42

43 **ISSUES:**
44

- 45 1. Temporary disability, with the employee claiming the
46 period from June 18, 2013 to September 29, 2014.
47

- 1 2. Permanent and stationary date.
2
- 3 3. Lien of EDD, who claims to have paid benefits from 6-1-13
4 and continuing at \$652.00 a week, less the work comp rate of \$230.00,
5 for an EDD payment rate of \$422.00 a week.
6
- 7 4. Attorney fees.
8
- 9 5. EDD is requesting TD and PD per Labor Code 4904 and interest
10 per Unemployment Insurance Code 2629.1.
11
- 12 6. Applicant seeks retro TD per Labor Code 4656(b).
13
- 14 7. Defendant alleges the reports of Dr. Daniel Silver lack
15 substantial medical evidence as to the issue of a temporary total
16 disability determination, as well as per Labor Code 4605.
17
- 18 8. Parties require AME per Dr. Roger Sohn to determine periods
19 of temporary total disability.
20
- 21 9. Defendant's objection to the admission into evidence of
22 Applicant's Exhibits 1, 9, and 10 as being not substantial evidence
23 on the issue of temporary disability.
24
- 25 10. Defendant's objection to the admission into evidence of
26 Applicant's Exhibit 3 as being a provider directory for the
27 incorrect MPN.
28
- 29 11. Defendant's objection to the admission into evidence of
30 Applicant's Exhibit 4 as being an email based on the wrong provider
31 network.
32
- 33 **LET THE RECORD REFLECT:** Applicant would like to seek penalties and
34 interest and attorney's fees per Labor Code 5814, but since
35 penalties can't be raised in an expedited hearing, penalties and
36 attorney's fees for those penalties are expressly not submitted for
37 decision and will be deferred.
38
- 39 **EXHIBITS:**
40
- 41 Applicant's 1 - Report of Dr. Silver, dated 6-18-13 (marked
42 for identification purposes only pending resolution of objection)
43
- 44 Applicant's 2 - Letter from defendant to Dr. Silver, dated
45 4-23-14
46
- 47 Applicant's 3 - Provider directory of MPN, dated 5-1-14 (marked

1 for identification purposes only pending resolution of objection)

2
3 Applicant's 4 - Email, dated 7-3-14 (marked for identification
4 purposes only pending resolution of objection)

5
6 Applicant's 5 - Correspondence to defendant, dated 7-7-14

7
8 Applicant's 6 - Fax to defendant, dated 7-30-14

9
10 Applicant's 7 - Correspondence from the defendant, dated
11 7-30-14

12
13 Applicant's 8 - Email to the defendant, dated 7-31-14

14
15 Applicant's 9 - Report of Dr. Silver, dated 7-15-14 (marked
16 for identification purposes only pending resolution of objection)

17
18 Applicant's 10 - Report of Dr. Silver, dated 8-26-14 (marked
19 for identification purposes only pending resolution of objection)

20
21 Defendant's A - Report from Industrial Medical Group, dated
22 5-31-13

23
24 Defendant's B - Payment Summary, dated 10-1-14

25
26 Defendant's C - Approval of surgery from Coventry Workers' Comp
27 Services, dated 5-30-14

28
29 Defendant's D - Report of Dr. Payman, dated 8-4-14

30
31 Defendant's E - Notice from Gallagher Bassett Services, dated
32 9-9-13

33
34 Defendant's F - Notice from Gallagher Bassett Services, dated
35 6-5-13

36
37 Defendant's G - Claim note from Gallagher Bassett Services,
38 dated 10-1-14

39
40 **LET THE RECORD REFLECT:** Without objection, Applicant's Exhibits
41 2, 5, 6, 7, and 8 and Defendant's Exhibits A through G are admitted
42 and received in evidence. Applicant's Exhibits 1, 3, 4, 9, and 10
43 are marked for identification purposes only pending resolution of
44 objections. EDD is requested to file their documentation within
45 10 days with a notation that although the lien, itself, won't be
46 a result in expedited hearing, if benefits are awarded, the amount
47 which would normally be reimbursed to EDD would be withheld and not

1 paid to the applicant so he doesn't receive payment twice.

2 *****

3
4 SUMMARY OF EVIDENCE

5
6 CARLOS GARCIA was called as a witness, sworn, and testified
7 through Lilia Ortiz-Candela, Interpreter, substantially as
8 follows:

9
10 DIRECT EXAMINATION: (by Ms. Morse)

11
12 He confirms he is claiming a date of injury of 9-4-12, and his
13 first period of treatment lasted until May of 2013 by Dr. Larry Cho.
14 Dr. Cho is with the Industrial Medical Group. He did not recall
15 if he had treated at the Industrial Medical Group on 5-31-13. He
16 was asked if there came a point in time when Dr. Cho at the Industrial
17 Medical Group told him he was permanent and stationary, and he could
18 not recall whether this had occurred.

19
20 He was asked if he recalled getting permanent disability checks
21 from Gallagher Bassett, and he said, "No." He was asked if he is
22 currently receiving a check every two weeks from Gallagher Bassett
23 for \$529.00, and he answered, "Yes." He was then asked when he first
24 received that type of check, and he answered that he does not recall.
25 He was asked if this was in June of 2013, and he answered that he
26 does not recall.

27
28 He then did not understand a question involving his change of
29 doctor from Dr. Cho to Dr. Silver. He was asked if he's treating
30 now with Dr. Silver, and he answered, "Yes." He was asked if this
31 had started after treatment by Industrial Medical Group, and he
32 answered, "Yes."

33
34 He was asked if he recalled getting a notice from Gallagher
35 Bassett, dated 9-9-13 in Spanish regarding the MPN for Key Energy,
36 and he responded that he doesn't remember. He was asked if he
37 recalled being told by an adjuster at Gallagher Bassett that Dr.
38 Silver was not in the MPN of Key Energy Group, and he answered that
39 he does not recall.

40
41 He was asked if at some time during his treatment with Dr.
42 Silver, Dr. Silver was requesting cervical spine surgery, and he
43 answered, "Yes." He was asked if he was advised the authorization
44 for this surgery occurred on 5-30-14, and he answered, "Yes." He
45 was asked if he had had the surgery, and he answered, "No." He was
46 asked if it was Dr. Silver or Dr. Payman who intended to do the
47 surgery, and he indicated that it was Dr. Payman. He was asked if

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he had had his pre-op examination, and he answered, "Not yet."

He was asked if he had been treating with Dr. Niemeyer, and he answered, "Yes." He was asked if he had been cleared for surgery, and he answered, "Yes." He was asked if the surgery was scheduled, and he answered, "No."

There was no cross-examination.

DH JOHNSON

DONALD H. JOHNSON
WORKERS' COMPENSATION JUDGE

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION

10-02-2014

PROOF OF SERVICE

Case Number: ADJ9054986

Document Served: Minutes of Hearing and Summary of Evidence

Date Served: 10/02/2014

Served by: Jonathan Takach

BURGIS AND
ASSOCIATES
SHERMAN OAKS
CARLOS GARCIA

Law Firm, 5900 SEPULVEDA BLVD STE 215 SHERMAN OAKS CA 91411,
MBURGIS@BURGISLAW.COM

Injured Worker, PO BOX 659 LOST HILLS CA 93249

CHISVIN LAW GROUP
COMMERCE

Lien Claimant - Other, 5801 E WASHINGTON BLVD SUITE 101
COMMERCE CA 90040

EDD SDI VAN NUYS

Lien Claimant - Other, PO BOX 10402 VAN NUYS CA 91410,
DI.EAMS218@EDD.CA.GOV

GALLAGHER BASSETT
SACRAMENTO

Insurance Company, PO BOX 255397 SACRAMENTO CA 95865

MULLEN FILIPPI
BAKERSFIELD

Law Firm, 1800 30TH ST STE 290 BAKERSFIELD CA 93301

EXHIBIT D

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

RECEIVED
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BY:.....

Case No. ADJ9054986

CARLOS GARCIA,

Applicant,

vs.

KEY ENERGY SERVICES, INC., ACE
AMERICAN INSUR. CO., Adjusted by
GALLAGHER BASSETT SERVICES,

Defendants.

FINDINGS, ORDERS AND AWARD

DONALD H. JOHNSON, Workers' Compensation Administrative Law Judge, Finds,
Orders and Awards as follows:

FINDINGS OF FACT

1. Applicant, Carlos Garcia, born February 8, 1959, while employed on September 4, 2012 as a truck driver/loader/unloader, at Bakersfield, California, by Key Energy Services, Inc., sustained injury arising out of and in the course of employment to the cervical spine, claims injury to other body parts.
2. There is no basis to exclude Applicant's Exhibit 1.
3. There is no basis to exclude Applicant's Exhibit 3.
4. There is no basis to exclude Applicant's Exhibit 4.
5. There is no basis to exclude Applicant's Exhibit 9.
6. There is no basis to exclude Applicant's Exhibit 10.
7. Labor Code §4605 does not preclude relying on Dr. Silver's reports.
8. Dr. Daniel Silver was in the Defendant's Medical Provider Network (MPN) as of June 24, 2014.
9. The Defendant's MPN is "GB MPN" which appears to be an MPN associated with Gallagher Bassett, but is not further identified.
10. Applicant was not permanent and stationary as of August 26, 2014.

11. At the time of injury, Applicant's earnings were \$778.61 per week, warranting \$519.07 per week for temporary disability.
12. The current record shows that the injury caused temporary disability for the period from June 18, 2013 to at least August 26, 2014. This is a period of 435 days, which at \$519.07 per week equals \$32,256.49.
13. Labor Code §4656(b) does not apply to this date of injury.
14. There is insufficient evidence to determine whether any other periods of temporary disability exist.
15. EDD is entitled to recover \$17,963.63 on their lien for the period from June 18, 2013 to August 26, 2014, plus interest per Unemployment Insurance Code §2629.1.
16. There is insufficient evidence to determine whether EDD is entitled to recover on their lien for payment made outside the period from June 18, 2013 to August 26, 2014.
17. The reasonable value of the service of Applicant's attorney is \$4,838.47.

ORDERS

1. Defendant's objection to admission of Applicant's Exhibit 1 is overruled and the exhibit is admitted and received into evidence.
2. Defendant's objection to admission of Applicant's Exhibit 3 is overruled and the exhibit is admitted and received into evidence.
3. Defendant's objection to admission of Applicant's Exhibit 4 is overruled and the exhibit is admitted and received into evidence.
4. Defendant's objection to admission of Applicant's Exhibit 9 is overruled and the exhibit is admitted and received into evidence.
5. Defendant's objection to admission of Applicant's Exhibit 10 is overruled and the exhibit is admitted and received into evidence.

CARLOS GARCIA

ADJ9054986

Findings, Orders and Award... (Continued) Page 3

6. Defendant's objection under Labor Code §4605 is overruled.
7. Defendant's objection under Labor Code §4656(b) is overruled.
8. The issue of whether any additional periods of temporary disability exist is ordered off calendar, with jurisdiction reserved.
9. The issue of EDD's entitlement to recovery on their lien for periods beyond the period from June 18, 2013 to August 26, 2014 is ordered off calendar, with jurisdiction reserved.
10. If any payment of permanent disability indemnity by Defendant for the period from June 18, 2013 to August 26, 2014 is not able to be applied to offset Defendant's liability for temporary disability during this period, that unapplied amount is still available as credit against Defendant's liability for permanent disability, if and when that liability is determined.

AWARD

AWARD IS MADE in favor of Carlos Garcia against Key Energy Services, Inc. as follows:

- (a) Temporary disability indemnity per Finding number 12, less credit for the reimbursement to EDD of \$17,963.63, less credit for attorney fees per Finding number 17, and then allowed credit for any permanent disability payments made during the period from June 18, 2013 to at least August 26, 2014.
- (b) Reimbursement to EDD by Defendant, plus interest, per Finding number 15 with Defendant granted credit for \$17,963.63 of this payment against Defendant's obligation to pay temporary disability as per Award (a.)
- (c) Attorney fees per Finding number 17, to be paid as a lump sum to Law Offices of Michael Burgis & Associates, with Defendant allowed credit against their obligation to pay temporary disability as per Award (a.).

D H JOHNSON

DONALD H. JOHNSON

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

CARLOS GARCIA

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EXHIBIT PAGE NO. 74 ADJ9054986
Document ID: -5995261749459156992

Filed and Served by mail on: November 20, 2014
on all parties as shown on the following Service Roster

By: KATHY NIXON *YN*

Service Roster Case Number: ADJ9054986 – November 20, 2014
– Findings, Orders and Award

BURGIS AND
ASSOCIATES
SHERMAN OAKS

Law Firm, 5900 SEPULVEDA BLVD STE 215 SHERMAN OAKS CA 91411,
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CARLOS GARCIA

Injured Worker, PO BOX 659 LOST HILLS CA 93249

CHISVIN LAW GROUP
COMMERCE

Lien Claimant - Other, 5801 E WASHINGTON BLVD SUITE 101
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EDD SDI VAN NUYS

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Insurance Company, PO BOX 255397 SACRAMENTO CA 95865

MULLEN FILIPPI
BAKERSFIELD

Law Firm, 1800 30TH ST STE 290 BAKERSFIELD CA 93301

CARLOS GARCIA

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ9054986

CARLOS GARCIA,

Applicant,

vs.

KEY ENERGY SERVICES, INC.;
ACE AMERICAN INSUR. CO. Adj'd by
GALLAGHER BASSETT SERVICES,

Defendants.

OPINION ON DECISION

OPINION ON DECISION

Defendant's Medical Provider Network (MPN)

None of the defense exhibits name the MPN being referred to. They use "red de proveedores medicos (MPN)" (Exhibit E, page 1, para. 1,) "esta MPN" (Exhibit E, page 1, para. 2,) "la MPN" (Exhibit E, page 1, para. 4, 5, 8, 9, and 10,) and "GB MPN" (Exhibit G, page 1, para. 1.)

Exhibit G does state that Dr. Silver was in the GB MPN on June 24, 2014 and in the Coventry MPN on July 1, 2012. It states that the URL given with the MPN directory access instruction of September 9, 2013 was www.talispoint.com/cvtv/gbfhmpnselect which would be the GB MPN and not the Coventry MPN. (This appears to be a misspelled URL as it should be "talispoint" rather than "tailispoint.")

Since the parties stipulated that Dr. Silver was in the defendant's MPN as of June 24, 2014, that would indicate that the defendant's MPN is the GB MPN. This appears to be an MPN through Gallagher Basset, although its full name and MPN number cannot be determined.

Objection to Applicant's Exhibit 3

This exhibit is a provider directory dated May 9, 2014 for Lost Hills, CA, listing Dr. Silver. Applicant lives in Lost Hills, CA. Defendant objected to admission of this exhibit on the basis that it is a provider directory to an incorrect MPN.

Exhibit 3 does not list the name of any MPN. It does state that it is protected proprietary information of Coventry Health Care Workers Compensation, Inc. (bottom of page 1.) It lists phone number at Coventry Workers' Compensation Services, and an email (WCCClientServices@cvtv.com) to call to assist in locating a network provider (page 1, paragraph 2.) The URL printed at the bottom of the pages is www.sf.talispoint.com/talispoint/directory_default.pl.

As near as can be determined from the evidence offered, the printout is a listing for one of the Coventry MPNs, and not for any of the Gallagher Basset MPNs. The listing of Dr. Silver as being in the MPN as of May 9, 2014 would be consistent with Defense Exhibit G, which states Dr. Silver was in the Coventry MPN as of July 1, 2014, again implying Exhibit 3 is of a Coventry MPN.

However, the listing being of a Coventry MPN rather than a Gallagher Basset MPN does not make it inadmissible, it limits the use of the exhibit to show Dr. Silver's membership in one MPN rather than the other. Since there appears to have been some initial confusion as to which MPN was the proper one for this claim (still not fully resolved as "GB MPN" is not a proper designation) the exhibit is relevant to document this confusion.

The Defendant's objection is overruled.

Objection to Applicant's Exhibit 4

Exhibit 4 is an e-mail dated July 3, 2014 from defense attorney to Laura Aguilar responding to Laura Aguilar's e-mail, also of July 3, 2014. It states that Dr. Silver was confirmed as being in the MPN, and that the request for cervical spine surgery was certified.

Defendant objected to this exhibit on the grounds that the e-mail was based on the wrong provider network. Which MPN the e-mail refers to is not identified beyond "the MPN." The correct MPN is also not identified in the objection.

In light of the parties' stipulation that Dr. Silver was in the defendant's MPN as of June 24, 2014, and the e-mails date of July 3, 2014, the e-mail's statement that Dr. Silver has been confirmed as being in "the MPN" is correct. There is no basis to find that "the MPN" refers to some unidentified and erroneous MPN.

The Defendant's objection is overruled.

Objection to Applicant's Exhibit 1, 9, and 10

These exhibits are the three reports of Dr. Silver dealing with Applicant's temporary disability status. Exhibit 1 is the June 18, 2013 report, Exhibit 9 is the July 15, 2014 report, and Exhibit 10 is the August 26, 2014 report. Defendant objected to their admission as not being substantial evidence on the issue of temporary disability.

Arguments as to the substantiality of evidence go to the weight of such evidence, not to its admissibility.¹ Defendant's objection is overruled.

Objection to Dr. Silver's Reports under Labor Code §4605

Exhibits 1, 9, and 10 are the only reports from Dr. Daniel Silver. This objection objects to them under Labor Code §4605. That section states that an award of compensation may not be based solely on the report of a consulting or attending physician retained by the Applicant at his or her own expense.

The parties stipulated that Dr. Silver was in the Defendant's MPN as of June 24, 2014. This decision is relying upon Dr. Silver's July 15, 2014 and August 26, 2014 reports, so those report are not consulting or attending reports obtained by the Applicant at his own expense. The decision is not being based solely on consulting or attending reports. The objection under Labor Code §4605 is overruled.

¹. *Ortiz v. WCAB*, 77 CCC 125, 126 (*writ den'd* 2011.)

Permanent and Stationary Date

Based on the August 26, 2014 report of Dr. Daniel Silver, Applicant was not yet permanent and stationary. No permanent and stationary date can currently be determined.

Temporary Disability Rate

The parties stipulated that Applicant's earnings at the time of injury were \$778.61 per week. This would result in the temporary disability indemnity rate being \$519.07 per week.

Temporary Disability

Applicant claimed temporary disability from June 18, 2013 to September 29, 2014. The parties stipulated that the primary treating physician was Dr. Silver. Dr. Daniel Silver's June 18, 2013 report (Exhibit 1) has Applicant temporarily totally disabled for six weeks. Dr. Silver's July 15, 2014 (Exhibit 9) and August 26, 2014 (Exhibit 10) reports also have Applicant temporarily totally disabled for six weeks.

Based on these reports, Applicant has shown a temporary total disability period from June 18, 2013 to at least August 26, 2014, a period of 435 days. At \$519.07 per week, this would equal \$32,256.49. Potential temporary disability beyond August 26, 2014 is not decided.

If Defendant was paying permanent disability indemnity during this period, as the EDD lien states was occurring, Defendant is entitled to credit against their temporary disability liability for the amount of permanent disability paid during this period. Any such credit could not also be claimed against a future liability for permanent disability. Such credit should be applied after payment of the attorney fees, with any remaining credit applied against future permanent disability indemnity.

Retro Temporary Disability per Labor Code §4656(b)

Labor Code §4656(b) limits liability for temporary disability indemnity to 240 weeks within the period five years from the date of injury, provided the date of injury is in the period from January 1, 1979 to April 19, 2004.

The date of injury in this case is September 4, 2012. This date is not in the period for which Labor Code §4656(b) applies. Therefore, Applicant's entitlement to retro temporary disability is not limited under Labor Code §4656(b.)

Lien of EDD

Employment Development Department (EDD) claimed to have paid benefits as state disability indemnity from June 1, 2013 and continuing at \$422.00 per week, which is reduced from the full EDD rate of \$652.00 per week to account for the Defendant's PD payments at \$230.00 per week. Applicant's temporary disability entitlement period is from June 18, 2013 to at least August 26, 2014.

The overlap period is from June 18, 2013 to August 26, 2014, a period of 435 days. What should have happened during this period is that Applicant receive \$519.07 from Defendant and \$132.93 from EDD. EDD would not be entitled to reimbursement of the \$132.93 per week as this amount is above the temporary disability amount that the Defendant should have been paying.

EDD actually paid Applicant at \$422.00 per week. EDD is therefore entitled to reimbursement at \$289.07 per week (\$422.00 minus \$132.93.) Over the 435 days, this would equal \$17,963.63. EDD is entitled to reimbursement of this amount. The reimbursement will be paid by the Defendant, with Defendant allowed credit against their temporary disability obligation to Applicant.

EDD is also entitled to interest under Unemployment Insurance Code §2629.1, but is not entitled to a penalty since Defendant was paying benefits during this period. Defendant is not allowed credit against Applicant for the amount of interest.

Attorney's Fees

Applicant's attorney performed valuable legal services in securing benefits for Applicant, and is entitled to a fee equal to fifteen percent (15%) of the retroactive temporary disability awarded to be subtracted from the Award. Temporary disability of \$32,256.49 is being found. Fifteen percent of this would be \$4,838.47.

DH Johnson

DONALD H. JOHNSON

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on: November 20, 2014
on all parties as shown on the following Service Roster

By: KATHY NIXON *YN*

Service Roster Case Number: ADJ9054986 – November 20, 2014
– Opinion on Decision

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CARLOS GARCIA

4 of 4

EXHIBIT PAGE NO. 79

ADJ9054986
Document ID: 3414446721978073088

EXHIBIT E

1 Michael Burgis, Esq., SBN 258134
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3 5900 Sepulveda Blvd., Suite 215
4 Sherman Oaks, CA 91411
5 Phone: (818) 994-9870
6 Fax: (818) 475-1682

7 Attorney for Applicant,
8 **CARLOS GARCIA**

9
10 **WORKERS' COMPENSATION APPEALS BOARD**
11 **STATE OF CALIFORNIA**

12 **CARLOS GARCIA,**
13 Applicant,
14 vs.
15 **KEY ENERGY SERVICES INC.,**
16 **GALLAGHER BASSETT SERVICES, INC.,**
17 Defendants.

ADJ NO: ADJ9054986
**APPLICANT'S PETITION TO
CORRECT EARNING CALCULATION
ERROR AND/OR PETITION FOR
RECONSIDERATION ON LIMITED
ISSUE OF EARNING**

18 COMES NOW, Applicant Carlos Garcia, by and through his attorney of record, Michael
19 Burgis & Associates, P.C. and petitions the Court to correct an earning calculation error and/or
20 petitions for reconsideration on the limited issue of the earning calculation.

21 **I. STATEMENT OF FACTS**

- 22 1. On September 4, 2012 Applicant, Carlos Garcia, born February 8, 1959, while employed
23 as a truck driver/loader/unloader, by Key Energy Services, Inc. in Bakersfield, California,
24 sustained injury to the cervical spine arising out of and in the course of employment.
25 2. Applicant is treating in Defendant's Medical Provider Network ("MPN") with Primary
26 Treating Physician ("PTP"), Dr. Daniel Silver.
27 3. The MPN PTP found Applicant totally temporarily disabled ("TD") from June 18, 2013
28 to the present and continuing.

- 1 4. Because Defendant failed to pay TD benefits, Applicant requested an expedited hearing
2 on the limited issue of TD and penalties.
- 3 5. On September 29, 2014, Applicant timely filed and served a Penalty Petition which
4 requested benefits at the TD rate of \$778.61.
- 5 6. On October 1, 2014, Applicant proceeded to an expedited hearing on the issue of TD
6 benefits.
- 7 7. On November 20, 2014, Applicant was served with the Honorable WCJ's Findings and
8 Award, which awarded the TD period of June 18, 2013 through August 26, 2014. The
9 Honorable WCJ calculated the amount owed based on the parties' "stipulation" to an
10 earnings rate of \$778.61 warranting a TD rate of \$519.07.
- 11 8. The parties, or the court, inadvertently stipulated to the actual TD rate as the earnings
12 rate. The proper earnings rate was \$1,167.91 which warranted a TD rate of \$778.61.
- 13 9. Defendant previously found Applicant's earnings rate at \$1,167.91 memorialized in the
14 DEU rating of Dr. Larry Cho. (*See EAMS board file attached as Exhibit 12*). This was the
15 basis for the TD rate at \$778.61.
- 16 10. Applicant alleges that the parties stipulated to \$778.61 as the TD rate and not as the
17 earnings rate.
- 18 11. Upon receipt of the Findings and Award, Applicant was able to locate and produce a
19 2012 W2, not previously produced, which confirms the earnings rate was substantially
20 higher than \$778.61. (*See 2012 W2 at Exhibit 13*). **The 2012 W2 shows an average**
21 **weekly wage at \$1096.66.** The W2 corroborates earnings calculations of \$1,167.91 and a
22 TD rate of \$778.61.
- 23 12. Applicant's counsel discussed this error with Defendant on numerous occasions and
24 requested a stipulated amendment. On December 8, 2014 Defendant's counsel refused to
25 stipulate to an amendment on the basis that her client still had not responded to her.
- 26 13. Defendant did not file a Petition for Reconsideration and has not objected to the WCJs
27 TD findings and has subsequently paid the amount awarded. However, Defendant has
28 paid an inaccurate and insufficient amount and knowingly so.

1 14. Accordingly, Applicant now respectfully requests that the Court correct the earnings
2 calculation error to reflect Applicant's true earnings, previously found by Defendant to be
3 \$1,167.91, warranting a TD rate of \$778.61. In the alternative, Applicant requests the
4 court grant further discovery on the limited issue of earnings calculation and that all
5 penalty calculations be deferred until the benefits owed are properly calculated.

6 **II. ARGUMENT**

7 **I. THE HONORABLE WCJ SHOULD AMEND THE FINDINGS AND AWARD TO**
8 **REFLECT THE PROPER EARNINGS RATE OF \$1,167.91 WARRANTING A**
9 **TD RATE OF \$778.61 BASED ON ERROR, GOOD CAUSE AND EQUITY.**

10 Under Labor Code § 5803 the Appeals Board has continuing jurisdiction over all its
11 orders, decisions, and awards. At any time, upon notice and after an opportunity to be heard is
12 given to the parties in interest, the Appeals Board may upon good cause shown, rescind, alter, or
13 amend any order, decision, or award. This power includes the right to review, grant or re-grant,
14 diminish, increase, or terminate any compensation awarded, upon the grounds that the disability
15 of the person in whose favor the award was made has either recurred, increased, diminished, or
16 terminated.

17 WCJ has the duty to develop the record to accomplish substantial justice and may grant
18 reconsideration and direct the taking of additional evidence. Labor Code §§ 5701, 5906;
19 Raymond Plastering v. WCAB, 252 Cal. App. 2d 748, 32 CCC 289; Jablonsky v. WCAB, 54
20 CCC 29; Calhoun v. WCAB, 127 Cal. App. 3d 1, 46 CCC 1333, Glass v. WCAB, 45 CCC 441,
21 Fidelity & Cas Co. v. WCAB, 45 CCC 381, West v. IAC, 12 CCC 86.

22 It is well settled that any factor or circumstance *unknown* at the time of the original award
23 or order was made, which renders the previous finding and award "inequitable," justifies the
24 reopening of a case and amendment of the findings and award if timely filed. See LeBoeuf v.
25 W.C.A.B., (1983) 48 CCC 587 (Published).

26 As Applicant contests that the parties stipulated to \$778.61 as the TD rate and not the
27 earnings rate, the Court has the authority to amend the Findings and Award to reflect the correct
28 rate based on good cause. Applicant does not have the actual trial transcript and does not have

1 independent recollection of whether the Court asked if the parties stipulated to \$778.61 as the TD
2 rate or if the parties did in fact stipulate to the earnings rate at \$778.61 erroneously. Irrespective,
3 the rate is inaccurate and thus good cause exists to warrant the Court to make the appropriate
4 amendment.

5 Defendant also has a duty of candor to the Court and to provide accurate benefits to
6 Applicant. Defendant has previously conceded that Applicant's weekly earnings rate was
7 \$1,167.91, which is memorialized in the Board's DEU rating of Dr. Cho. Nevertheless, even after
8 this inaccuracy was brought to Defendant's attention, Defendant has failed to seek a correction.
9 As such, good cause appearing, the Court should correct the proper earnings rate to \$1,167.91
10 the TD rate accordingly.

11 If the Court does not correct the earnings rate to \$1,167.91, the Court should allow
12 Applicant's W2 into evidence, or further develop the record on the earnings issue, as Applicant's
13 counsel only recently obtained Applicant's W2 and substantial justice warrants further discovery.

14 Lastly, Applicant's counsel has had several discussions with defense counsel regarding
15 this earnings error. Defendant is well aware that the earnings rate is \$1,167.91 and has not
16 stipulated to amending the Stipulations and Issues. To allow the incorrect earnings to stand
17 would not constitute substantial justice and would unjustly enrich Defendant, who is now
18 knowingly failing to provide accurate benefits.

19 **II. REGARDLESS OF WHETHER THE COURT EXERCISES ITS**
20 **AUTHORITY BASED ON GOOD CAUSE, THE WCJ SHOULD RESCIND THE**
21 **EARNINGS "STIPULATION" AS THE STIPULATION WAS BASED ON A**
22 **MISTAKE OF FACT AND IS THEREFORE VOID.**

23 A material term in a contract is void if it is based on a mistake. A mistake need not be
24 mutual. A unilateral mistake is ground for relief where the mistake is due to the fault of the other
25 party or the other party knows or has reason to know of the mistake. Regardless of whether there
26 was a "stipulation" entered into by the parties regarding the TD rate, the stipulation is void as it
27 is based on a mutual mistake of fact. As Defendant previously acknowledged Applicant's
28 earning rate as \$1,167.91, Defendant clearly had knowledge that the earnings rate was not

1 \$778.61. Moreover, Applicant's counsel served a penalty petition prior to the expedited hearing
2 which correctly stated Applicant's TD rate. As both Applicant and Defendant knew the correct
3 earnings rate, the "stipulation" of the TD rate as the earnings rate was a mutual mistake of fact,
4 which voids the stipulation.

5 Moreover, even if Defendant contests "mutual" mistake, the "stipulation" should be void
6 due to a unilateral mistake. Defendant had knowledge of the actual earnings and knew or should
7 have known this was a mistake. Because the DEU rating confirms Defendant's previous earnings
8 calculation, if Defendant now contends that the mistake was not mutual, it would be admitting to
9 violating its duty of candor to the Court and its duty to provide accurate benefits to the injured
10 worker. As such, the WCJ should find the earnings "stipulation" void under mistake of fact and
11 correct the earnings to \$1,167.91 warranting a TD rate of \$778.61.

12 **III. IN THE ALTERNATIVE, THE COURT SHOULD AMEND THE FINDINGS**
13 **AND AWARD TO CORRECT THE PROPER EARNINGS CALCULATION**
14 **BASED ON THE EQUITABLE DOCTRINE OF UNJUST ENRICHMENT.**

15 A court can award restitution based on an equitable principle of unjust enrichment. In the
16 instant case, if Defendant is allowed to pay TD at an improperly lower rate, it is being unjustly
17 enriched to the detriment of Applicant. As such, the Court can correct the earnings calculations
18 error by issuing the proper retroactive award under a theory of unjust enrichment.

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III. CONCLUSION AND REQUEST

Based on the foregoing, Applicant respectfully requests that the Honorable WCJ issue an amended Findings and Award to correct the earnings error and find Applicant's earnings to be \$1,167.9, warranting a TD rate of \$778.61. Accordingly, the retroactive TD award should be \$48,385.05 less attorney fees of \$7,257.76. In the alternative, Applicant requests the Findings and Award be modified on the limited issue of further discovery regarding earnings rate.

Respectfully Submitted.

Dated: December 09, 2014

MICHAEL BURGIS & ASSOCIATES, PC.

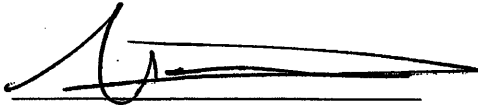
By: 
Michael Burgis, Esq.
Attorneys for Applicant,
CARLOS GARCIA

EXHIBIT 12

EXHIBIT PAGE NO. 87

Department of Industrial Relations
DIVISION OF WORKERS' COMPENSATION
DISABILITY EVALUATION UNIT
4740 Allene Way, Suite 100
San Luis Obispo, Ca 93401
805/596-4157

STATE OF CALIFORNIA
EDMUND G. BROWN, JR., Governor

SUMMARY RATING DETERMINATION

DEU FILE NO: I46196
EAMS CASE NO: DEU9054986

DATE: August 20, 2013

Employee:



Carrier:
004449000399WC-01
GALLAGHER BASSETT 255397
PO BOX 255397
SACRAMENTO, CA 95865

Employee Representative:
PRO PER

Formal Medical Evaluation of:
SEE 2ND PAGE OF RATING dated

THIS PERMANENT DISABILITY RATING DETERMINATION IS BASED ON THE FOLLOWING FACTORS:

Date of Injury (DOI): 09-04-12
Occupation: VACUUM TRUCK DRIVER

Age on DOI: 53

DRE CERVICAL CATEGORY III: 17 WP

DRE LUMBAR CATEGORY III: 10 WP

APPORTIONMENT GIVEN FOR CERVICAL SPINE: 100% NON-INDUSTRIAL.
APPORTIONMENT GIVEN FOR LUMBAR SPINE: 100% INDUSTRIAL.

Department of Industrial Relations
DIVISION OF WORKERS' COMPENSATION
DISABILITY EVALUATION UNIT
4740 Allene Way, Suite 100
San Luis Obispo, Ca 93401
805/596-4157

STATE OF CALIFORNIA
EDMUND G. BROWN, JR., Governor

SUMMARY RATING DETERMINATION

Page 2
DEU #: I46196

EAMS Case #: DEU9054986

LARRY M CHO, MD TX *5/31/2013*

15.03.01.00 - 10 - [5]13 - 350G - 15 - 18 FINAL PD

FUTURE MEDICAL TREATMENT AVAILABLE.

The permanent disability rating is 18%, which is equivalent to 65.50 weeks of disability payments. Based on average weekly earnings of \$1,167.91, the initial weekly rate is \$230.00. Payments commence within 14 days after the date of the last payment of temporary disability indemnity.

IF ALMARAZ/GUZMAN RATING: THE ALMARAZ/GUZMAN RATING IS NOT SUBJECT TO RECONSIDERATION OF THE RATING. THE CORRECTNESS AND APPLICABILITY OF THIS RATING CAN ONLY BE DETERMINED BY A WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE. PERMANENT DISABILITY ADVANCES NOT REQUIRED IF INJURED WORKER IS EMPLOYED PURSUANT TO LABOR CODE SECTION 4650 (b).

By: 
Desiree Shroyer, Disability Evaluator

DEU FORM 102 (NEW 1-91)

L07709

EXHIBIT 13

EXHIBIT PAGE NO. 90

2012 W-2 and Earnings Summary

W-2 2012

This Side Earnings Summary section is provided with your W-2 to help determine your total tax liability. The reverse side includes general information that you may also find helpful.

d Control number 207840 NCN2/KSZ	Dept. 100900	Corp. A	Employer use only 317
e Employer's name, address, and ZIP code KEY ENERGY SERVICES CALIFORNIA 1301 MCKINNEY STREET HOUSTON TX 77010-3031			
Batch #02730			
e/f Employee's name, address, and ZIP code CARLOS GARCIA P.O. BOX 659 LOST HILLS CA 93249			
b Employer's FED ID number 38-3799260	a Employee's SSA number 615-10-8909		
1 Wages, tips, other comp. 26706.76	2 Federal income tax withheld 2053.13		
3 Social security wages 27858.52	4 Social security tax withheld 1170.06		
5 Medicare wages and tips 27858.52	6 Medicare tax withheld 403.95		
7 Social security tips	8 Allocated tips		
10 Dependent care benefits			
11 Nonqualified plans	12a See instructions for box 12 C 52.52		
14 Other 278.06 SDI	12b D 1151.76		
	12c DD 2383.62		
	12d		
13 Stat emp/Ret. plan 3rd party sick pay X			
15 State Employer's state ID no. CA 298-3774 7	16 State wages, tips, etc. 26706.76		
17 State income tax 377.81	18 Local wages, tips, etc.		
19 Local income tax	20 Locality name		

1. The following information reflects your total 2012 pay stub plus any adjustments submitted by your employer:

Gross Pay	28794.00	Social Security Tax Withheld Box 4 of W-2	1170.06	CA State Income Tax Box 17 of W-2 SU/SPI Box 14 of W-2	377.81 278.06
Fed. Income Tax Withheld Box 2 of W-2	2053.13	Medicare Tax Withheld Box 6 of W-2	403.95		

2. Your Gross Pay was adjusted as follows to produce your W-2 Statement:

	Wages, Tips, other Compensation Box 1 of W-2	Social Security Wages Box 3 of W-2	Medicare Wages Box 5 of W-2	CA State Wages, Tips, Etc. Box 16 of W-2
Gross Pay	28,794.00	28,794.00	28,794.00	28,794.00
Plus GTL (C-Box 12)	52.52	52.52	52.52	52.52
Less 401(k) (D-Box 12)	1,151.76	N/A	N/A	1,151.76
Less Other Cafe 125	988.00	988.00	988.00	988.00
Reported W-2 Wages	26,706.76	27,858.52	27,858.52	26,706.76

3. Employee W-4 Profile. To change your Employee W-4 Profile information, file a new W-4 with your payroll dept.

**CARLOS GARCIA
P.O. BOX 659
LOST HILLS CA 93249**

Social Security Number: 615-10-8909
Taxable Marital Status: MARRIED

Exemptions/Allowances:

FEDERAL: 3
STATE: 3

© 2012 ADP, INC.

1 Wages, tips, other comp. 26706.76	2 Federal income tax withheld 2053.13		
3 Social security wages 27858.52	4 Social security tax withheld 1170.06		
5 Medicare wages and tips 27858.52	6 Medicare tax withheld 403.95		
d Control number 207840 NCN2/KSZ	Dept. 100900	Corp. A	Employer use only 317
e Employer's name, address, and ZIP code KEY ENERGY SERVICES CALIFORNIA 1301 MCKINNEY STREET HOUSTON TX 77010-3031			
b Employer's FED ID number 38-3799260	a Employee's SSA number 615-10-8909		
7 Social security tips	8 Allocated tips		
10 Dependent care benefits			
11 Nonqualified plans	12a See instructions for box 12 C 52.52		
14 Other 278.06 SDI	12b D 1151.76		
	12c DD 2383.62		
	12d		
13 Stat emp/Ret. plan 3rd party sick pay X			
e/f Employee's name, address and ZIP code CARLOS GARCIA P.O. BOX 659 LOST HILLS CA 93249			
15 State Employer's state ID no. CA 298-3774 7	16 State wages, tips, etc. 26706.76		
17 State income tax 377.81	18 Local wages, tips, etc.		
19 Local income tax	20 Locality name		

Federal Filing Copy
W-2 Wage and Tax Statement 2012

Employee Reference Copy
W-2 Wage and Tax Statement 2012

Box C for Employee Records

1 Wages, tips, other comp. 27963.75	2 Federal income tax withheld 2288.20
3 Social security wages 29167.89	4 Social Security tax withheld 1125.05
5 Medicare wages and tips 29167.89	6 Medicare tax withheld 422.93
d Control number	Employer use only
e Employer's name, address, and ZIP code KEY ENERGY SERVICES CALIFORNIA, INC. 1301 MCKINNEY STREET SUITE 1800 HOUSTON TX 77010	
b Employer's FED ID number 38-3789280	a Employee's SSA number 615-10-8909
7 Social security tips	8 Allocated tips
9 Advance EIC payment	
10 Dependent care benefits	
11 Nonqualified plans	12a See instructions for box 12 C 52.39
14 Other 1250C CASDI	12b D 1204.14
	12c DD 2383.68
	12d
13 Stat emp/Ret. plan 3rd party sick pay X	
e/f Employee's name, address, and ZIP code CARLOS GARCIA P.O. BOX 659 LOST HILLS CA 93249	
15 State Employer's state ID no. CA 29837747	16 State wages, tips, etc. 27963.75
17 State income tax 435.89	18 Local wages, tips, etc.
19 Local income tax	20 Locality name

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES


I have read the foregoing and know its contents.

I am an attorney of **Mr. Carlos Garcia** a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true: **APPLICANT'S PETITION TO CORRECT EARNING CALCULATION ERROR AND/OR PETITION FOR RECONSIDERATION ON LIMITED ISSUE OF EARNING**

Executed on **December 09, 2014**, at Sherman Oaks, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Michael Burgis, Esquire
Type of print your name


Signature

RE: **Carlos Garcia vs. Key Energy Services Inc.**
WCAB Case No.: ADJ9054986

PROOF OF SERVICE

State of California }
County of Los Angeles } §

I am employed in the county of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within above-entitled action: my business address is 5900 Sepulveda Blvd., Ste 215, Sherman Oaks, CA 91411.

On **December 09, 2014**, I served the foregoing document described as **APPLICANT'S PETITION TO CORRECT EARNING CALCULATION ERROR AND/OR PETITION FOR RECONSIDERATION ON LIMITED ISSUE OF EARNING WITH EXHIBITS VERIFICATION** on all interested parties to this action by placing the true copies thereof enclosed in sealed envelopes as stated on the attached mailing list:

POS the original a true copy thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED MAILING LIST

BY MAIL

As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. Postal Service on the same day with postage thereon fully prepaid at Van Nuys, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date of postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on **December 09, 2014**, at Sherman Oaks, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Laura Aguilar

SERVICE LIST:

**Workers' Compensation Appeals Board
1800 30th Street, Ste. 100
Bakersfield, CA 93301**

**Mullen & Filippi, LLP
1800 30th Street, Suite 290
Bakersfield, CA 93301**

**Gallagher Bassett Services, Inc.
P.O. Box 255397
Sacramento, CA 95865**

**Mr. Carlos Garcia
P.O. Box 659
Lost Hills, CA 93249**

EXHIBIT F

RECEIVED
DEC 22 2014

CASE NO: ADJ9054986

BY:

CARLOS GARCIA v. KEY ENERGY SERVICES, INC.

Workers' Compensation Administrative Law Judge: DONALD H. JOHNSON
Date of Injury: September 4, 2012
Recommendation: Deny

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I. INTRODUCTION:

Petitioner, Carlos Garcia, through his attorneys Michael Burgis & Associates, seeks relief from the November 20, 2014 Findings, Orders and Award (Award) by filing a timely, verified Petition for Reconsideration (Petition.)¹

Applicant, Carlos Garcia, born February 8, 1959, while employed on September 4, 2012 as a truck driver/loader/unloader, sustained injury to the cervical spine arising out of, and in the course of employment by, Key Energy Services. Applicant claims other body parts were injured as well, but these claims remain unresolved by the Award.

The Petition does not list any statutory authority other than a reference to Labor Code §5803.² The Petition's arguments seem to invoke Labor Code §5903, sections (a), (c), (d) and (e.)

The Petition contends generally, that the Award contains an earnings calculation error which should be corrected.³

Specifically, the Petition claims:

that Petitioner does not know if the parties stipulated to an earnings rate or to a temporary disability rate;⁴

that Defendant's failure to seek correction of the earnings mistake justifies correction of the mistake;⁵

that the record should be further developed on the earnings issue by admission of Applicant's only recently obtained W2;⁶

that allowing the incorrect earnings rate to stand would unjustly enrich the Defendant;⁷

¹ . This petition was filed at the Van Nuys District Office on December 10, 2014, but also bears a date stamp of December 12, 2014 for Van Nuys, and one for December 15, 2014 for Bakersfield. A second copy was filed at Bakersfield on December 12, 2014.

² . Petition, p. 3, line 10.

³ . Petition, p. 1, lines 18-20.

⁴ . Petition, p. 3, line 26, to p. 4, line 4.

⁵ . Petition, p. 4, lines 5-10, and p. 5, lines 6-11..

⁶ . Petition, p. 4, lines 11-13.

⁷ . Petition, p. 4 lines 16-18, and p. 5, lines 15-18..

that the stipulation of the temporary disability rate was a mutual mistake of fact which, like in contract law, voids the stipulation;⁸ that the temporary disability award should be raised to \$48,385.05 with attorney fees of \$7,257.76 awarded.⁹

II. FACTS:

Applicant suffered an admitted injury on September 4, 2012 to the cervical spine, and claimed other injured body parts as well, while working as a truck driver/loader/unloader for Defendant.

Applicant obtained medical treatment by Dr. Daniel Silver, who was within the Defendant's Medical Provider Network (MPN) as of June 24, 2014.

Applicant filed for an expedited hearing on the issue of temporary disability on July 31, 2014. Defendant objected to this on August 8, 2014, but Applicant filed another request for an expedited hearing on August 20, 2014, again on the issue of temporary disability.

At the October 1, 2014 expedited hearing, Applicant was represented by Ms. Teresa Garcia, who signed in as a hearing representative with the law firm of Michael Burgis & Associates. The parties filled out a Pre-Trial Conference statement. Paragraph 3 of the statement, under "stipulations," states that at the time of injury, the employee's earnings were \$778.66 per week, with blank amounts for the temporary disability and permanent disability rates. Under "issues" as the earnings issue, it states that the employee claims \$778.61 per week.

Trial was held thereafter.¹⁰ The Applicant was represented by Ms. Teresa Garcia at the trial.¹¹ At trial the parties stipulated that Dr. Daniel Silver was in Defendant's MPN as of June 24, 2014, and that Applicant's earnings at the time of injury were \$778.61 per week.¹²

The minutes of hearing were served on October 2, 2014. There were no objections to the minutes.

A Findings and Award issued on November 20, 2014. It relied upon the reports of Dr. Silver, and the stipulation on earnings to find a temporary disability period from June 18, 2013 to at least August 26, 2014 at \$519.07 per week (2/3 of \$778.61) for a total of \$32,256.49. Attorney fees of \$4,838.47 were found (fifteen percent.)

Applicant filed one copy of their petition for reconsideration on December 10, 2014 in Van Nuys and another copy on December 12, 2014 in Bakersfield.

⁸ . Petition, p. 4, line 23, to p. 5, line 4.

⁹ . Petition, p. 6, lines 4-5.

¹⁰ . Minutes of Hearing and Summary of Evidence (Minutes,) October 1, 2014, p. 1, line 28.

¹¹ . Id. at p. 2, lines 3-5.

¹² . Id. at p. 2, lines 37-41.

CARLOS GARCIA

III. DISCUSSION:

This petition seeks relief from the effects of the earnings rate they stipulated to at the October 1, 2014 trial. Where stipulations are entered into through inadvertence, excusable neglect, fraud, mistake of fact or law, where the facts stipulated have changed or there has been a change in the underlying conditions that could not have been anticipated, or where special circumstances exist rendering it unjust to enforce the stipulation, a court may exercise sound discretion and set aside the stipulation, but when there has been no mistake but merely a lack of full knowledge of the facts, which is due to the failure of a party to exercise due diligence to ascertain them, there is no proper ground for relief.¹³

The Petition states that Applicant's attorney only recently obtained Applicant's W2,¹⁴ when Applicant was able to locate and produce a 2012 W2 after receipt of the Findings and Award.¹⁵ Applicant and his attorney have done their discovery on earnings only after the Award. This is not an exercise in due diligence to obtain evidence on Applicant's earnings and does not support granting relief from the stipulation on earnings at the October 1, 2014 trial.

Nature of Stipulation

The Petition argues that Petitioner does not know if the parties stipulated to an earnings rate or to a temporary disability rate.¹⁶ The Petition claims this lack of knowledge is because they do not have the "actual trial transcript" or independent recollection of what the court "asked" the parties.¹⁷ The Petition fails to acknowledge the existence of the Minutes of Hearing and Summary of Evidence (Minutes) produced for the October 1, 2014 trial, which states the stipulation was to the Applicant's earnings at the time of injury.¹⁸ It also fails to mention that no objection to the accuracy of these minutes was made after their service upon the parties on October 2, 2014.

If petitioner truly does not know what the nature of their own stipulation was, it can only be because they have failed to look at the Minutes. If they are arguing that they only stipulated to the temporary disability rate, the Minutes do not bear this out. Further, even if the Petitioner cannot remember now what they stipulated to, it does not show error in the Award, since the actual stipulation is documented in the Minutes, and was relied on in the Award.

¹³ . *Huston v. WCAB*, 95 Cal. App. 3d 856, 865-866, 157 Cal. Rptr. 355, 44 Cal. Comp. Cases 798, 804 (1979.)

¹⁴ . Petition, p. 4, lines 12-13.

¹⁵ . Petition, p. 2, lines 18-19.

¹⁶ . Petition, p. 3, line 26, to p. 4, line 4.

¹⁷ . Petition, p. 3, line 28, to p. 4, line 2.

¹⁸ . Minutes, October 1, 2014, p. 2, lines 40-41.

CARLOS GARCIA

Defendant's Failure to Correct

The Petition argues that Defendant's failure to seek correction of the earnings mistake justifies correction of the mistake.¹⁹ This argument is based on the assertion that Defendant bears some duty to modify an unfavorable stipulation entered into by their opponent.

While the Defendant is under an obligation not to mis-represent to the Board that the stipulation is the correct earnings if they have knowledge that it is not correct, that does not mean that they have an obligation to take action to correct it. The adversarial system puts that obligation on the party alleging action is needed to correct a mistake.

Defendant's inaction does not mean the Award should be 'corrected.'

Further Development of the Record

The Petition argues that the record should be further developed on the earnings issue by admission of Applicant's only recently obtained W2.²⁰

Under *Tyler*,²¹ the Board is obligated to develop the record as necessary to determine the issues presented to it, if the parties do not offer sufficient evidence.²² The W2 would go to the issue of earnings. The parties stipulated to the Applicant's earnings.²³ The parties have offered sufficient evidence to 'decide' the issue of earnings. There is no need to further develop the record.

Unjust Enrichment of the Defendant

The Petition argues that allowing the incorrect earnings rate to stand would unjustly enrich the Defendant.²⁴

As a general rule, equitable concepts of unjust enrichment dictate that when a payment is made based upon a mistake of fact, the payor is entitled to restitution unless the payee has, in reliance on the payment, materially changed its position.²⁵ Restitution will be denied if the payment is made to a bona fide creditor of a third person, a creditor without fault because it made no misrepresentations to the payor and had no notice of the payor's mistake at the time the payment was made.²⁶ Under that circumstance, if it's your mistake, you

¹⁹ . Petition, p. 4, lines 5-10, and p. 5, lines 6-11..

²⁰ . Petition, p. 4, lines 11-13.

²¹ . *Tyler v. WCAB*, 56 Cal. App. 4th 389, 65 Cal. Rptr. 2d 431, 62 Cal. Comp. Cases 924 (1997, *mod'd* 1997.)

²² . *Id.* at 394-95, CCC at 928.

²³ . Minutes, October 1, 2014, p. 2, lines 40-41.

²⁴ . Petition, p. 4 lines 16-18, and p. 5, lines 15-18..

²⁵ . *City of Hope Nat'l Med'l Ctr. v. Super. Ct.*, 8 Cal. App. 4th 633, 636-37, 10 Cal. Rptr. 2d 465, 467 (1992, *rev. den'd* 1992.)

²⁶ . *Id.*

CARLOS GARCIA

get to pay for it, unless the recipient misled you, or accepted payment knowing you didn't owe it.²⁷

Here, the Petitioner's argument is not developed beyond the claim that Defendant is unjustly enriched by not paying the 'correct' amount of temporary disability. However, the concept of unjust enrichment is triggered when a party mistakenly issues a payment that they do not owe, and the enrichment occurs when the payee receives the mistakenly-issued payment. The party making the mistake is also the party making the payment.

Here, the party (Petitioner) making the mistake is the party that would receive the payment. Further, the unjust enrichment does not occur by receipt of an erroneous payment, but by the retention of a payment not made. And finally, the payment is not made, not due to any decision by the payor to withhold payment, erroneous or not, but was withheld in response to an Award of the Board which indicated the payment need not be made (actually, made for a lesser amount than the 'correct' payment in the view of the Petition.)

Since the claim of unjust enrichment is being made for a payment that has not been made, the principle of unjust enrichment does not apply to this situation, and no error in the Award has been shown under this principle.

Mutual Mistake of Fact

The Petition argues that the stipulation of the temporary disability rate was a mutual mistake of fact which, like in contract law, voids the stipulation.²⁸

First, the contract law handling of a mutual mistake of fact does not turn on the mere fact a mistake occurred, but on the recognition that a mutual mistake of fact means that the parties never actually reached a meeting of the minds on what the contract involved.²⁹ That is why such a mistake can prevent enforcement of a contract.³⁰

The purpose of a stipulation at trial is not to document a meeting of the minds of the litigants, but to simplify the disputes needed to be resolved by the court.³¹ In fact, the parties can properly stipulate to a numerical amount which represents a negotiated middle ground, even though both parties believe the true amount is different (one higher and one lower.)

²⁷ . *Id.*

²⁸ . Petition, p. 4, line 23, to p. 5, line 4.

²⁹ . *Barfield v. Price*, 40 Cal. 535, 542 (1871): "If plaintiff supposed she was selling a different tract of land, but the defendants thought they were purchasing the tract actually conveyed, there was a mutual mistake as to the subject matter of the contract. In that case the minds of the parties never met, and there was really no contract of sale at all. The deed was made under a mutual mistake of both parties, each believing there was an agreement when there was none."

³⁰ . *Id.* at 542: "Under such circumstances the Courts might order a rescission of the sale altogether, but could not compel the defendants to retain and pay for a tract of land they had never contracted for."

³¹ . *Estate of Burson*, 51 Cal. App. 3d 300, 307, 124 Cal. Rptr. 105 (1975): "The stipulation furthers the public policies of settling disputes and expediting trials and is by no stretch of the imagination contrary to the policy of California. On the record here, it simply reflected what the parties agreed the pertinent language meant. The stipulation avoided the necessity of expenditure of the time and money of the parties and the public by removing from the litigation an item not in dispute."

CARLOS GARCIA

The contract treatment of a mutual mistake of fact does not apply to the treatment of stipulations which are alleged to be mutual mistakes, and does not show error in the Award.

Attorney Fees Request

The Petition argues that the temporary disability award should be raised to \$48,385.05 with attorney fees of \$7,257.76 awarded.³²

That is fifteen percent of the 'corrected' temporary disability award sought by the Petition.

Applicant's attorney's office sent a hearing representative to the October 1, 2014 trial where the erroneous earnings stipulation was entered into the minutes. Applicant's attorney's office did not review the minutes of hearing sufficiently to discover the erroneous stipulation on earnings. Applicant's attorney's office did not request a W2 from the Applicant until after receiving the Award.

Applicant's attorney's office now requests a fifteen percent fee for this representation of the Applicant. Considering the care exercised and the results obtained,³³ this request seems excessive.

IV. RECOMMENDATION:

Based on the foregoing, it is recommended that the Petition for Reconsideration be denied.

DH Johnson

DONALD H. JOHNSON
Workers' Compensation Administrative Law Judge

Filed and Served by mail on: December 19, 2014
on all parties as shown on the following Service Roster

By: KATHY NIXON *KN*

³² . Petition, p. 6, lines 4-5.

³³ . Calif. Labor Code §4906(d.)

CARLOS GARCIA

Service Roster Case Number: ADJ9054986 – December 19, 2014
– Report and Recommendation on Petition for Reconsideration

**BURGIS AND
ASSOCIATES
SHERMAN OAKS**

Law Firm, 5900 SEPULVEDA BLVD STE 215 SHERMAN OAKS CA 91411,
MBURGIS@BURGISLAW.COM

CARLOS GARCIA

Injured Worker, PO BOX 659 LOST HILLS CA 93249

**CHISVIN LAW GROUP
COMMERCE**

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COMMERCE CA 90040

EDD SDI VAN NUYS

Lien Claimant - Other, PO BOX 10402 VAN NUYS CA 91410,
DLEAMS218@EDD.CA.GOV

**GALLAGHER BASSETT
SACRAMENTO**

Insurance Company, PO BOX 255397 SACRAMENTO CA 95865

**MULLEN FILIPPI
BAKERSFIELD**

Law Firm, 1800 30TH ST STE 290 BAKERSFIELD CA 93301

CARLOS GARCIA

EXHIBIT G

RECEIVED
FEB 05 2015

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS GARCIA,

Applicant,

vs.

KEY ENERGY SERVICES, INC.;
GALLAGHER BASSETT SERVICES, INC.,

Defendants.

Case No. ADJ9054986
(Bakersfield District Office)

**ORDER DENYING
PETITION FOR
RECONSIDERATION**

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

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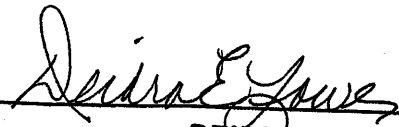
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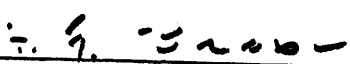
For the foregoing reasons,

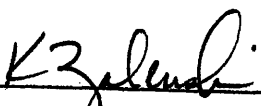
IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD


DEIDRA E. LOWE

I CONCUR,


FRANK M. BRASS


KATHERINE ZALEWSKI



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 02 2015

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

**BURGIS AND ASSOCIATES
CARLOS GARCIA
GALLAGHER BASSETT
MULLEN & FILIPPI**



sry

GARCIA, Carlos