WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCES STEVENS, ***Applicant,*** **vs.** **OUTSPOKEN ENTERPRISES, INC.; STATE COMPENSATION INSURANCE FUND,** ***Defendants.***	**Case No. ADJ1526353 (SFO 0441691)** **OPINION AND DECISION AFTER REMITTITUR**

This matter returns to the Workers' Compensation Appeals Board (Appeals Board) on Remittitur from the Court of Appeal, First Appellate District, Division One, following the issuance of its decision on October 28, 2015, the Order of the California Supreme Court denying applicant's Petition for Review, issued February 17, 2016, and the Order of the Supreme Court of the United States denying applicant's Petition for Writ of Certiorari on October 31, 2016.

In its October 28, 2015 decision, the Court of Appeal remanded this matter to the Appeals Board to consider whether applicant Frances Stevens' request for housekeeping and personal care services was denied without authority.[1] (Labor Code § 4610.6, subd. (h)(1) & (5).)[2]

For the reasons set forth below, we conclude that the Independent Medical Review (IMR) determination upholding denial of the request for a home health aide was "adopted without authority" by the Administrative Director of the Division of Workers' Compensation because the portion of the 2009 Medical Treatment Utilization Schedule (hereinafter "MTUS") Chronic Pain Medical Treatment Guideline

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[1] The court held that "...[our] authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. ***These grounds are considerable and include reviews of both factual and legal*** questions. ..." (*Stevens v. Workers' Comp. Appeals. Bd.* (2015) 241 Cal.App.4th 1074, 1100, 80 Cal.Comp.Cases 1262.) (Emphasis added.)

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

(hereinafter "2009 Guideline") applied in this case[3] provides that housekeeping and personal care services are not forms of medical treatment. This provision is contrary to long standing workers' compensation law, which recognizes that such types of non-medical care are forms of medical treatment that may be reasonably required to cure or relieve the effects of an industrial injury. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 49 Cal.Comp.Cases 454; [rejecting the blanket prohibition on "housekeeping" services unrelated to nursing care, as reimbursable medical treatment under section 4600 in *Keil v. State of California* (1981) 46 Cal.Comp.Cases 696 [Appeals Bd. en banc]; *Henson v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 452, 37 Cal.Comp.Cases 564; *Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44, 54 72 Cal.Comp.Cases 1202, 1208.)

Therefore, we conclude that the 2009 Guideline is unlawful and invalid since it fails to address the medical treatment in the form of personal home care services sought by Ms. Stevens.

We note that requested treatment may be authorized based on recommendations outside of an MTUS guideline where the MTUS' presumption of correctness has been controverted by a preponderance of scientific medical evidence establishing that the treatment is reasonable and necessary to cure or relieve the effects of the industrial injury. (§ 4064.5, subd. (a)[4]; Cal. Code Regs., tit. 8, § 9792.21.1, subd. (d)(2)[5].) We further note that in the review of a utilization review decision, expert opinion may be considered in the determination of whether a requested mode of treatment is "medically necessary." (§ 4610.5, subd. (b)(2).)[6] Here, the IMR determination relied on a guideline that is invalid, and there was no consideration

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[3] The MTUS Chronic Pain Medical Treatment Guideline applied here to evaluate the request for a Home Health Aide states: *Home health services: Recommended only for otherwise recommended medical treatment for patients who are homebound, on a part-time or "intermittent" basis, generally up to no more than 35 hours per week.* ***Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed.*** (CMS, 2004.) (Emphasis added.)

[4] This subdivision provides: The recommended guidelines set forth in the medical treatment utilization schedule adopted by the administrative director pursuant to Section 5307.27 shall be presumptively correct on the issue of extent and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury. The presumption created is one affecting the burden of proof.

[5] This paragraph essentially repeats the language of section 4064.5 (a) above, adding: "...Therefore, the treating physician who seeks treatment outside of the MTUS bars the burden of rebutting the presumption of correctness by preponderance of scientific medical evidence."

[6] This paragraph provides:

"(2) 'Medically necessary' and 'medical necessity' mean medical treatment that is reasonably required to cure or

of scientific medical evidence or expert opinion[7] intended to demonstrate the necessity of the recommended treatment. For these reasons, we conclude that the Administrative Director exceeded her authority when she adopted the IMR determination in this case. Because this conclusion is contrary to the WCJ's finding that the Administrative Director had not exceeded her authority when she adopted the IMR determination, we will rescind the WCJ's Findings and Order denying applicant's IMR appeal and return this matter to the trial level for further proceedings in accordance with our decision.

We recognize that the 2009 Guideline has been revised since the court issued its decision in this matter, and the current guideline includes requirements that address the need for personal home health care services.[8] However, the scope of our determination is limited to the present record and the 2009 Guideline,

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relieve the injured employee of the effects of his or her injury and based on the following standards, which shall be applied as set forth in the medical treatment utilization schedule, including the drug formulary, adopted by the administrative director pursuant to Section 5307.27:

(A) The guidelines, including the drug formulary, adopted by the administrative director pursuant to Section 5307.27.

(B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.

(C) Nationally recognized professional standards.

(D) Expert opinion.

(E) Generally accepted standards of medical practice.

(F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious." (Emphasis added.)

[7] We point out that the record in this case is replete with expert medical opinion from physicians with specialties in internal medicine, pain management, psychiatry and podiatry, as well as vocational and occupational therapy specialists. For example, Exhibit 20 is a report assessing Frances Stevens' home health care needs prepared by an occupational therapist. (Exh. 20, Rehab Without Walls, April 18, 2013.)

[8] The revised MTUS Guideline, which became effective July 28, 2016, provides that home health care services encompass both medical and non-medical personal care and domestic services deemed medically necessary for industrially injured patients who are essentially homebound. Thus, under the new MTUS, home health care and domestic and personal care services are forms of medical treatment that may be medically necessary to cure or relieve the effects of an industrial injury. The full text of the MTUS Chronic Pain Treatment Guideline pertaining to Home Health Care Services provides as follows:

as it is the version applied in the proceedings below and reviewed by the Court. While we do not consider the merits or the effect of the current guideline, we recognize that it may be applied by a different IMR reviewer in the event there is a remand to the administrative director. (§ 4610.6 (i)[9].)

I. PROCEDURAL BACKGROUND

In our prior determination in this matter, we denied applicant's Petition for Reconsideration and affirmed the May 27, 2014 Findings and Order of the workers' compensation administrative law judge (WCJ), holding that the Appeals Board lacks the power to review an IMR determination of medical

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Recommended on a short-term basis following major surgical procedures or in-patient hospitalization, to prevent hospitalization, or to provide longer-term nursing care and supportive services for those whose condition is such that they would otherwise require inpatient care. Home health care is the provision of medical and other health care services to the injured or ill person in their place of residence. Home health services include both medical and non-medical services deemed to be medically necessary for patients who are confined to the home (homebound) and who require one or all of the following: 1) Skilled care by a licensed medical professional for tasks including, but not limited to, administration of intravenous drugs, dressing changes, occupational therapy, physical therapy, speech-language pathology services, and/or 2) Personal care services for health-related tasks and assistance with activities of daily living that do not require skills of a medical professional, such as bowel and bladder care, feeding, bathing, dressing and transfer and assistance with administration of oral medications, and/or (3) Domestic care services such as shopping, cleaning, and laundry that the individual is no longer capable of performing due to the illness or injury that may also be medically necessary in addition to skilled and/or personal care services. Domestic and personal care services do not require specialized training and do not need to be performed by a medical professional (citations omitted). A prescription or request for authorization for home health services must include justification for medical necessity of the services. Justification for medical necessity requires the physician's documentation of (1) The medical condition that necessitates home health services, including objective deficits in function and the specific activities precluded by such deficits; (2) The expected kinds of services that will be required, with an estimate of the duration and frequency of such services; and (3) The level of expertise and/or professional licensure required to provide the services. Homebound is defined as "confined to the home." To be homebound means:

- The individual has trouble leaving the home without help (e.g., using a cane, wheelchair, walker, or crutches; special transportation; or help from another person) because of the occupational illness or injury **OR** Leaving the home isn't recommended because of the occupational illness or injury **AND**
- The individual is normally unable to leave home and leaving home is a major effort (citation omitted).

Evaluation of the medical necessity of home health care services is made on a case-by-case basis. For home health care extending beyond a period of 60 days, the physician's treatment plan should include referral for an in-home evaluation by a Home Health Care Agency Registered Nurse, Physical Therapist, Occupational Therapist, or other qualified professional certified by the Centers for Medicare and Medicaid in the assessment of activities of daily living to assess the appropriate scope, extent, and level of care for home health care services. (citation omitted). The treating physician should periodically conduct re-assessments of the medical necessity of home health care services at intervals matched to the individual patient condition and needs, for example, 30, 60, 90, or 120 days. Such reassessments may include repeat evaluations in the home. (Emphasis in original.)

[9] This section provides: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. In no event shall a workers compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization."

necessity absent a showing by clear and convincing evidence that establishes the grounds for appeal under one or more of the five categories listed in section 4610.6(h).[10]

In the proceedings below, the WCJ denied applicant's appeal of the IMR determination following a hearing pursuant to section 4610(h). In her Findings and Order issued on May 27, 2014, the WCJ held that "(1) [t]he appeals Board does not have jurisdiction to determine the constitutionality of Labor Code sections 4610.5 and 4610.6, (2) [t]he IMR determination dated February 20, 2014 [that the home health aide and four medication prescriptions requested by applicant's treating physician, Babak Jamasbi, M.D., are not medically necessary and appropriate] does not constitute a plainly erroneous express or implied finding of fact on a matter of ordinary knowledge not subject to expert opinion, (3) [t]he Administrative Director did not act without or in excess of her powers in the IMR determination, (4) [a]pplicant [did not prove] a basis for appeal under Labor Code section 4610.6(h), and (5) [a]s there is no basis for an appeal of the IMR determination [the WCAB does not] have jurisdiction to determine the medical necessity of the treatment addressed in said determination or whether error of law has been made in the determination."

In her Petition for Reconsideration, Applicant argued that section 4610.6 is in violation of the

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[10] This section provides:

> A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:
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> (1) The administrative director acted without or in excess of the administrative director's powers.
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> (2) The determination of the administrative director was procured by fraud.
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> (3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
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> (4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.
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> 5) The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

United States and California Constitutions, and that the WCJ erred by failing to address the medical necessity of the treatment that was denied by the IMR process.

In our decision denying applicant's petition, we agreed with the WCJ that we had no authority to determine the constitutionality of the IMR statutes. Furthermore, while we acknowledged the longstanding obligation of a defendant under section 4600 to provide an injured worker with home health care services when reasonably required to "cure or relieve" the effects of the industrial injury[11], and that those services may include attendant services to help with bathing, dressing, housekeeping and shopping, we found an absence of statutory authority to address whether the IMR determination correctly applied the MTUS, stating:

> In this case, the IMR determination states that that "Medical treatment does not include home maker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed." In that applicant's condition requires "care" other than homemaker services it is uncertain why the quoted statement was included in the IMR determination. It is also unclear if it is the basis for the IMR determination. However, "uncertainty" and "lack of clarity" are not listed in section 4610(h) as grounds for appealing an IMR determination to the WCAB and we have no statutory authority to address those concerns in this case. Moreover, even if such an appeal was available, the only remedy allowed by section 4610.6 is to order another IMR.
> (Opinion and Order Denying Petition for Reconsideration, 8/11/14, p. 5.)

While rejecting applicant's arguments that the IMR process violates an injured worker's state and federal constitutional protections, including rejection of the right of appeal as essential to due process, the Court clarified the Appeals Board's scope of review of the IMR determination:

> But even more to the point, and contrary to Stevens's contention, IMR determinations are subject to meaningful further review even though the Board is unable to change medical-necessity determinations. The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§ 4610.6, subd. (h)(1) & (5).) These grounds are considerable and include reviews of both factual and legal questions. If, for example, an IMR determination were to deny certain medical treatment because the treatment was not suitable for a

[11] § 4600 subd. (h) provides "Home health care services shall be provided as medical treatment only if reasonably required to cure or relieve the injured employee from the effects of his or her injury and prescribed by a physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code, and subject to Section 5307.1 or 5703.8. The employer shall not be liable for home health care services that are provided more than 14 days prior to the date of the employer's receipt of the physician's prescription." See also discussion, infra, pp. 11-12.

> person weighing less than 140 pounds, but the information submitted for review showed the applicant weighed 180 pounds, the Board could set aside the determination as based on a plainly erroneous fact. Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually is permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and would thus be reviewable.
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> Here, the Board failed to appreciate this latter point. In its final order, it ruled that it was powerless to review the IMR determination categorically denying Stevens the services of a home health aide, even though it concluded that Stevens's "condition requires 'care' other than homemaker's services" and considered puzzling the determination's statement that "[m]edical treatment does not include ... personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed." But whether home health services are authorized when bathing, dressing, and using the bathroom is the only care needed is a question to be resolved by reviewing and interpreting the MTUS. If the Board were to conclude that the IMR determination incorrectly affirmed the denial of these services by wrongly interpreting the MTUS, and it were to find there are no other reasons supporting the denial, it would have the power to conclude that the determination was adopted without authority. (§ 4610.6, subd. (h).) We therefore disagree with Stevens that the IMR process provides "no means to address conflicts about what constitutes medical treatment" and no "meaningful appeal to challenge an IMR decision based on an erroneous interpretation of the law." (*Stevens, supra*, 241 Cal.App.4th 1074 at 1100-1101.)

Thus, the Court held that the Appeals Board has considerable authority to review both factual and legal questions in its determination of whether an IMR determination was adopted without authority or based on a plainly erroneous fact not subject to expert opinion[12]. We conclude that the 2009 Guideline is contrary to California law and the IMR determination that relied on it was therefore adopted without authority. The basis for our conclusion is set forth in the following discussion of the relevant facts and applicable law.

II. RELEVANT FACTS

As summarized by the Court, applicant:

> . . . fractured her right foot in October 1997 while working as a magazine editor for Outspoken Enterprises. Between 1999 and 2002, she underwent

[12] We do not find the determination is based on erroneous facts, since the particular facts concerning Ms. Stevens' need for personal home health care services were not addressed by the 2009 Guideline. Our decision deals primarily with a legal assessment of the IMR determination, in that we conclude it is contrary to California law and on that basis it was adopted without authority.

> three surgeries on the foot. In 1999, she began to have pain in her left foot, marking the onset of a condition that was ultimately diagnosed as complex-regional-pain syndrome (CRPS) involving both feet. Stevens worked intermittently until 2002, but she was unable to return to work after the third surgery. As a result of the pain in her feet, she was forced to use a wheelchair and that, in turn, caused low-back and bilateral-shoulder pain. Eventually, she became severely depressed. Following a trial in May 2013, a workers' compensation judge determined that she was permanently totally disabled. (*Stevens*, *supra*, 241 Cal.App.4th 1074 at 1082.)

Dr. Jamasbi, applicant's treating physician, submitted a Request for Authorization (RFA) for home health care services on July 22, 2013. In a July 19, 2013 report, Dr. Jamasbi indicated that for the previous three to four years applicant had required the services of a home health aide for eight hours per day, five days a week to assist her with bathing and dressing, transferring from her wheelchair, preparing meals, and picking up medication from the pharmacy and shopping.

Though the RFA at issue first raised home health care services in 2013, the medical record shows that applicant had been in need of, and received, home care services since 2006, often as assistance provided by her friends. As reported by Dr. Michael Goldfield, M.D., the Agreed Medical Examiner in psychiatry, in his September 26, 2006 report, applicant relied upon her housemate for "physical housework and the laying out of clothes" for applicant, who was then able to dress and shower herself. (Exh. 11, p. 5.)

In her report of October 10, 2006, Ann E. Allen, M.D., stated that on a daily basis applicant is assisted by a friend who "helps her shower and get dressed" and "also helps her with food preparation." (Exh. A, p. 4.) Dr. Allen also noted that applicant "needs someone to take her if she goes somewhere." (*Id.*)

In his November 19, 2008 report, Dr. Goldfield concurred with the findings of a September 14, 2007 vocational feasibility report from Helen Elmer, M.S., that applicant is unable to live alone and requires daily assistance for dress, bathing and self-care, as well as needing her meals delivered to her. (Exh. 9.)

Dr. Goldfield again confirms that assessment in his August 11, 2010 report in which he stated, "[i]t is noted that she is not able to live alone and requires daily assistance for dressing, bathing, self-care and she is not able to cook for herself and she has to receive meals on wheels." (Exh. 8, p. 2.) He also commented that applicant is "limited to the use of a wheelchair or special walker." (*Id.*, p. 1.)

Leslie Schofferman, M.D., the Agreed Medical Examiner in pain medicine, notes in his initial

October 2, 2008 report that applicant has a caretaker living with her at home providing assistance with her self-care and cooking. (Exh. AA.)

In his October 18, 2010 evaluation, Dr. Goldfield reported that applicant "is dependent on others to do the basic necessities of daily living. She also is dependent on a wheelchair and an electric scooter." He noted that applicant's spouse, into whose home she moved in 2009, hired a caretaker to provide applicant with housekeeping, shopping and cooking services eight hours per day, five days a week. (Exh. 7, p. 9.)

In his supplemental report of February 2, 2011, Dr. Goldfield advised that applicant continues to be "dependent on others in order to do the basic necessities of daily living." She is assisted by a "helper that does the cooking, housework, and laundry," and she remains "dependent on a wheelchair and an electric scooter." (Exh. 5, p. 1.)

In her July 26, 2011 report, Dr. Allen noted that applicant "has an in-home aide who comes in at 8:00 a.m. and leaves at 4:00 p.m., five days a week." (Exh. B, p. 4.)

A 2013 "Occupational Therapy Home Accessibility Evaluation and Functional Evaluation" performed by Rehab Without Walls documented applicant's need for assistance:

> In regards to basic self-care skills, she needs assistance for lower body dressing to ensure that the pant legs do not touch her feet as she is donning them. She is independent with toileting and supervised for bathing with the hand held shower hose. However, she occasionally needs moderate assistance with upper body dressing and bathing when her shoulders are in pain. For bill paying, cooking, housecleaning, and laundry, Ms. Stevens is dependent for these tasks. She does occasionally assist her spouse with meal preparation while sitting in her wheelchair. (Exh. 20, p. 4.)

In a status report dated April 9, 2013, Dr. Jamasbi confirmed that applicant "has been wheelchair bound for several years." He also noted applicant's report of her appointment with a representative from Rehab Without Walls, who recommended a home health aide. (Exh. 16, pp. 1-2.)

Rehab Without Walls conducted a home evaluation to assess, among other things, applicant's caregiver needs and concluded that she would benefit from having a caregiver five days a week, four to eight hours per day. In formulating applicant's caregiver needs, the occupational therapist applied accepted standards from *The Functional Living Scale*, 1997, by Chris Hagen, Ph.D. The evaluation noted that

applicant uses a wheelchair and scooter to assist with mobility and "needs assistance for lower body dressing ... and occasionally needs moderate assistance with upper body dressing and bathing..." and "for bill paying, cooking, housecleaning, and laundry ... is dependent for these tasks." (Exh. 20, p. 4.)

Dr. Jamasbi's RFA for home health care services was initially considered through the Utilization Review (UR) process by a physician specializing in pain management. The physician denied the request on the grounds that the services were not warranted because the record did not establish applicant was homebound or that she required home medical care, since most of the aide's tasks were not medical in nature.

On August 14, 2013, Dr. Jamasbi prepared a report in support of applicant's appeal of the UR denial. In response to the reasons given for the UR denial of his request for home health care services, Dr. Jamasbi sought to justify applicant's need for home health services, stating:

> Regarding the denial of Home health aid [sic], please acknowledge that she continues to be wheelchair-bound and uses a motorized wheelchair as she cannot stand or walk due to her burning pain in feet. She has been wheelchair bound for several years. She has a home health aid [sic] worker to help her at home. However, this worker recently hurt herself and will not be able to help the patient for some time. The patient does require assistance for transferring from wheelchair to the shower/toilet/bed, and tasks such as going to the pharmacy, going grocery shopping, and reaching/carrying, and meal preparation. The patient is unable to carry out these activities herself due to risk of falling. The patient does have a history of frequent falls when she tries to do these activities herself.
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> Therefore, we requested authorization for replacement of home health aid (sic) to assist the patient with personal hygiene tasks including bathing and dressing, transferring from her chair to the shower/toilet/bed, and tasks such as going to the pharmacy for the patient's medications and meal preparation.

Despite Dr. Jamasbi's articulation of his medical justification for applicant's continued need for home health care services, the request was denied by defendant's UR. Applicant then sought review of the denial through IMR.

The IMR physician issued a determination on February 20, 2014, concluding that the request for a home health aide was not medically necessary and appropriate, based upon the following summary of the case:

> The claimant is a 45-year-old female patient, s/p injury 10/28/97. The patient most recently (7/19/13) presented with lower extremity pain. She has

> a history of right foot fracture with the development of complex pain regional syndrome in the right leg. The pain then spread to her left leg. She has severe burning pain in both feet and lower legs. She has been wheelchair bound for several years due to the pain. She has difficulty sleeping due to the pain. The patient has required home health aide for the past 3-4 years. The aide helps for 8 hours a day, 5 days per week, and assists her with personal hygiene tasks, wheelchair transfer, and grocery shopping. The patient is unable to carry out these tasks due to risk of falling. Physical examination revealed the patient is well developed, well-nourished, and in no cardiorespiratory distress. She is alert and oriented x3. The patient comes to the exam room in a motorized scooter. Plan indicates replace home health aide as the current aide injured herself and will not be able to come in. Current diagnosis includes reflex sympathetic dystrophy, insomnia, and CRPS. Treatment to date includes medications and PT. Treatment requested is Home Health Aide, 8 hrs/day, 5 day/week, Ativan 2mg #15, Cyclobenzaprine-Flexeril7.5mg #90, Diclofenac Sodium 1.5% Cream, 60 grams, and Hydrocodone/APAP l 0/325rng#24.

The rationale for denying continued home health care services was based upon the 2009 Guideline and stated as:

> Recommended only for medical treatment for patients who are homebound, on a part-time or "intermittent" basis, generally up to no more than 35 hours per week. Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed.

III. DISCUSSION

Home health care services, including housekeeping services, have long been held to be subject to reimbursement under section 4600 as medical treatment reasonably required to cure or relieve from the effects of the injury, if there is a medical recommendation or prescription that certain housekeeping services be performed, i.e., that there is a "demonstrated medical need" for such services. (*Smyers, supra*, 157 Cal.App.3d 36, 42.) "The coverage of section 4600 extends to any medically related services that are reasonably required to cure or relieve the effects of the industrial injury, even if those services are not specifically enumerated in that section." (*Patterson v. The Oaks Farm* (2014) 79 Cal.Comp.Cases 910, 916-917.)

> Care provided by a family member to monitor and manage the industrially injured worker's health care needs may qualify in some cases as medical care under section 4600. (*Hodgman v. Workers' Comp. Appeals Bd.* (2007) 155 Cal.App.4th 44, 54 [65 Cal. Rptr. 3d 687] [mother of injured worker, who was also his conservator, could be reimbursed for monitoring and managing her son's health care needs].) In *Henson v. Workmen's Comp.*

> *Appeals Bd.* (1972) 27 Cal.App.3d 452 [103 Cal. Rptr. 785], the worker's treating physician knew that practical nursing services were required and that the worker's wife was providing them. Henson found that the wife could be compensated for those services. (*Id.* at pp. 461–462.) *Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36 [203 Cal. Rptr. 521] held that when a physician recommended or prescribed, for medical reasons, that housekeeping services be performed for the injured worker, those services could be reimbursed under section 4600 as medical treatment reasonably required to cure or relieve the effects of the injury. (157 Cal.App.3d at pp. 41–43.)
> (*State Farm Ins. Co. v. Workers' Comp. Appeals. Bd.* (*Pearson*) (2011) 192 Cal.App.4th 51 [76 Cal.Comp.Cases 69].)

In 2004, the Legislature's mandate that uniform medical treatment guidelines be implemented to evaluate requests for medical treatment led to the development of the MTUS. (SB 228, effective 1/1/2004.) Determinations as to whether medical treatment requests were reasonable and necessary would be based upon specified standards (see § 4610.5, subd. (c)(2)), as reflected in the treatment guidelines in the utilization schedule.)

Section 5307.27 directs that the Administrative Director of the Division of Workers' Compensation, "in consultation with the Commission on Health and Safety and Workers Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers compensation cases."

The MTUS is based upon the application of evidence-based medicine to ensure that clinical decision making is guided by the integration of the best available research evidence with clinical expertise and patient values. (Cal. Code Regs, tit. 8, § 9792.20, subd. (d), and § 9792.21, subd. (b).) At issue here is the 2009 Guideline, which was applied by the IMR reviewer to determine the medical necessity of the RFA for a home health aide. In relevant part, the guideline provides, "Medical treatment does not include homemaker services like shopping, cleaning, and laundry, and personal care given by home health aides like bathing, dressing, and using the bathroom when this is the only care needed." Because that directive is contrary to California law and is invalid, the presumption of correctness cannot apply to the 2009

Guideline. (§ 4064.5, subd. (a).)

The medical evidence supporting Ms. Steven's need for home health care appears to be compelling. Nevertheless, we are precluded from determining the medical necessity of a home health aide in this case[13]. We observe that the case record[14] contains extensive expert opinion regarding the medical necessity of home health care services to cure or relieve Frances Stevens from the effects of her industrial injury, which is evidence that may be considered in lieu of the invalid Guideline applied here. (§ 4610.5, subd. (b)(2).)

In the proceedings below, the WCJ found that the "Administrative Director did not act without or in excess of her powers in the IMR determination dated February 20, 2014" as a basis for denying applicant's appeal. Because we now reach a contrary conclusion, we will rescind the WCJ's Findings and Order denying applicant's IMR appeal and return this matter to the trial level for further proceedings in accordance with our decision. The WCJ may determine whether further hearing is necessary on issues not reached herein, and consider whether, given the passage of time, further development of the record may be necessary. In the event that the WCJ finds that the Administrative Director's determination is reversed, the WCJ may determine what evidence, if any, should be provided to the new IMR reviewer when submitted for review pursuant to §4610.6(i).[15]

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[13] Section 4610.6, subd. (i) provides in pertinent part: "...In no event shall a worker's compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.

[14] As discussed herein, the evidentiary record includes relevant reports from Dr. Jamasbi, Dr. Goldfield, Dr. Allen, Dr. Schofferman, Mr. Malmuth, and Rehab Without Walls.

[15] To this end, we note that Cal. Code Regs., tit. 8, § 9791.10.5(b)(3) provides: "Any newly developed or discovered relevant medical records in the possession of the employee, if represented the employee's attorney, or any party identified in section 9792.10.1(b)(2), after the documents identified in subdivision (b) are provided to the independent review organization shall be forwarded immediately to the independent review organization. The employee, if represented the employee's attorney, or any party identified in section 9792.10.1(b)(2), shall concurrently provide a copy of medical records required by this subdivision to the claims administrator, unless the offer of medical records is declined or otherwise prohibited by law." Although this subdivision does not specifically address the submission of "newly" discovered evidence following an IMR appeal, the same rationale—i.e., ensuring that the IMR review be conducted on a current medical record—would apply here.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Remittitur of the Workers' Compensation Appeals Board that the Findings and Order that issued on May 27, 2014 are **RESCINDED**, and that this matter is **RETURNED** to the trial level for further proceedings in accordance with this decision.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

KATHERINE ZALEWSKI

DEPUTY

RICHARD L. NEWMAN

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 19 2017

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

FRANCES STEVENS
LAW OFFICE OF JOSEPH C. WAXMAN
STATE COMPENSATION INSURANCE FUND

SVH/ara