

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

NICOLAS MERCADO,

*Applicant,*

vs.

PARK WEST ENTERPRISES, INC. dba  
CO-WEST COMMODITIES; CALIFORNIA  
INSURANCE GUARANTEE ASSOCIATION through its  
servicing facility PATRIOT RISK SERVICES for  
ULLICO CASUALTY COMPANY in liquidation,

*Defendants.*

Case No. ADJ 8157719  
Anaheim District Office

**FINDINGS, AWARD  
and ORDERS**

The above-entitled matter was heard and submitted at regular hearing on April 2, 2014. The parties stipulated that applicant NICOLAS MERCADO, born October 29, 1960, while employed on December 21, 2011 as a Truck Driver (Group 350) at Riverside, California, by PARK WEST ENTERPRISES, INC. dba CO-WEST COMMODITIES, whose workers' compensation carrier was ULLICO CASUALTY COMPANY (now in liquidation with claims handled by CALIFORNIA INSURANCE GUARANTEE ASSOCIATION through its servicing facility PATRIOT RISK SERVICES), sustained injury arising out of and occurring in the course of employment to his head, neck, back, spine, both upper extremities, chest, ribs, internal organs, neurogenic bowel, neurogenic bladder, both lower extremities, psyche, eyes, jaw, and in the form of sleep deprivation and quadriplegia.

With regard to the issues submitted for decision, the Honorable Paul DeWeese, Workers' Compensation Judge, now decides as follows:

### **FINDINGS OF FACT**

1. Applicant became permanent and stationary on March 2, 2013.
2. Applicant sustained permanent disability of 100%, entitling applicant to permanent total disability indemnity commencing March 3, 2013 at the rate of \$504.20 per week and continuing for life, subject to annual cost-of-living adjustments pursuant to *Labor Code* §4659(c) commencing January 1, 2014.
3. Applicant will require further medical treatment to cure or relieve from the effects of his injuries, including but not limited to home modifications as discussed in detail in the attached Opinion on Decision.
4. Applicant's wife, Linda Mercado, is entitled to payment for attendant care provided to applicant to date as well as reimbursement for mileage in connection with such care.
5. Defendant unreasonably delayed or failed to provide medical treatment in the form of home modifications as certified by its own utilization review, and applicant is entitled to a 25% penalty to be assessed against the value of the benefits that were unreasonably delayed or refused.
6. The reasonable value of the services of applicant's attorney is \$110,997.38, plus 15% of the amount payable pursuant to Paragraph D below.
7. The report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification as Applicant's Exhibit 38) is not admissible.

### **AWARD**

**AWARD IS MADE** in favor of NICOLAS MERCADO against PARK WEST ENTERPRISES, INC. dba CO-WEST COMMODITIES; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION through its servicing facility PATRIOT RISK SERVICES for ULLICO CASUALTY COMPANY in liquidation, of:

A. Permanent total disability indemnity at the rate of \$504.20 per week commencing March 3, 2013 and continuing for the remainder of applicant's life, with annual adjustments pursuant to *Labor Code §4659(c)* commencing January 1, 2014, less credit to defendant for all indemnity benefits paid from March 3, 2013 to date, and less \$110,997.38 in attorney fees pursuant to Paragraph 6 above to be commuted from the lifetime benefits by reducing the weekly payments in an amount sufficient to produce the fee.

B. Future medical treatment reasonably required to cure or relieve from the effects of the injuries herein, including but not limited to home modifications as discussed in detail in the attached Opinion on Decision.

C. Payment to Linda Mercado for attendant care provided to applicant to date together with mileage reimbursement in connection with such care, in an amount to be adjusted between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board.

D. A penalty of 25% of the amount ultimately paid for home modifications unreasonably delayed or refused pursuant to Paragraph 5 above, payable to applicant in an amount to be adjusted between the parties with jurisdiction reserved by the Workers' Compensation Appeals Board, less 15% of the penalty amount for attorney fees pursuant to Paragraph 6 above.

E. Pursuant to Paragraph 6 above, applicant's attorney is awarded a fee of \$110,997.38 plus 15% of the amount payable pursuant to Paragraph D above, payable to Berman More Gonzalez with jurisdiction reserved by the Workers' Compensation Appeals Board.

**ORDERS**

F. The report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification only as Applicant's Exhibit 38) is excluded from evidence.

G. All issues over which the WCAB has continuing jurisdiction are ordered off calendar pending the filing of a Declaration of Readiness to Proceed or further Board order.

DATE: May 21, 2014



**PAUL DeWEESE**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

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ON: 5/22/2014

BY:  \_\_\_\_\_



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

CASE NUMBER: ADJ 8157719

NICOLAS MERCADO

-vs.-

CO-WEST COMMODITIES;  
CIGA for ULLICO

WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE:

Hon. PAUL DeWEESE

DATE:

May 21, 2014

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**OPINION ON DECISION**

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**1. PERMANENT AND STATIONARY STATUS**

Based on the medical report of Shantharam Pai, M.D. dated 3/2/2013 as well as the reports of Ann Vasile, M.D. dated 3/8/2013 and thereafter, all of which were found to be persuasive and substantial medical evidence, it was found that applicant's medical conditions are permanent and stationary as of March 2, 2013.

Defendant asserted that applicant was not yet P&S because he was declared temporarily totally disabled on a psychological basis by Teresita Morales, Ph.D. in a report dated 7/30/2013. However, it is obvious from the medical record that applicant's physical condition has reached maximum medical improvement and that he is 100% permanently totally disabled, whether or not his psychological condition improves with treatment. Applicant's total disability is permanent. Insisting that it is temporary is nonsensical.

**2. PERMANENT DISABILITY**

Based on the medical reports of Dr. Pai and Dr. Vasile as well as *Labor Code* §4662(b) and (c), it was found that applicant sustained permanent disability of 100%, entitling applicant to permanent total disability indemnity commencing March 3, 2013 at the rate of \$504.20 per week and continuing for life, subject to annual cost-of-living adjustments pursuant to *Labor Code* §4659(c) commencing January 1, 2014.

**3. FURTHER MEDICAL TREATMENT / HOME MODIFICATIONS**

As a permanently totally disabled quadriplegic, there is no dispute that applicant will require further medical treatment for the rest of his life as a result of his work injuries. The

real dispute at trial involved the recommendations for home modifications and the extent thereof.

In a report dated 11/14/2013, Dr. Vasile reviewed home evaluation documents that were admitted into evidence at prior hearings (Ex. 19 & 21) and provided a list of home modifications that she believed were necessary in order to allow applicant to be discharged home. Defendant timely submitted that report to utilization review. On 11/25/2103, UR physician Phil Martin, M.D. requested additional information consisting of a rationale for each of the dozens of specific modifications requested. On 12/3/2013, having received no immediate response from Dr. Vasile, Dr. Martin denied the recommended modifications but indicated that on receipt of further information from Dr. Vasile, it would be immediately reviewed and a decision based on reasonable medical necessity would be made.

On 12/7/2013, Dr. Vasile provided a report outlining her rationale for each of the recommended home modifications.

On 12/12/2013, UR Dr. Martin issued his decision. Dr. Martin certified 31 specific home modifications as reasonable and necessary. He modified 9 other specific recommendations, and denied outright 26 more.

Dr. Martin's utilization review decision is materially defective. It was not based on the MTUS, ACOEM guidelines, or any other identifiable objective criteria as required by *Labor Code* §4610. The only rationale given by Dr. Martin for his decision on each specific recommendation was that the decisions "focused on reasonable medical necessity supporting the medical management of the injured worker." Frankly, the court is far more persuaded by the opinions of applicant's primary treating physician regarding the "reasonable medical necessity supporting the medical management of the injured worker" than the opinions of a UR reviewer who has not examined the applicant and who apparently did not have even a fraction of applicant's medical records available for review. Moreover, Dr. Martin's specialty is listed as "Emergency Medicine." There is no evidence that he is competent to evaluate the specific clinical issues involved in the long-term treatment of a seriously injured quadriplegic or that the dozens of recommended home modifications are within his scope of practice, as required by §4610(e). As a result, the UR decision is materially defective and the WCAB has jurisdiction over the dispute regarding home modifications without resort to Independent Medical Review, pursuant to the recent *Dubon* case.

As noted above, there is no dispute that the 31 specific recommendations listed from the bottom of page 1 to the top of page 3 of the 12/12/2013 UR decision are reasonable and necessary; Dr. Vasile recommended them, UR Dr. Martin recommended they be certified, and there is no medical evidence against them.

Turning to the 9 specific recommendations listed as "modified" on page 3 of the 12/12/2013 UR decision, the rationale for the proposed modifications is not persuasive; in fact, there is no actual rationale at all for the first 5 of the items. Based on Dr. Vasile's 11/14/2013 and 12/7/2013 reports, those 9 specific recommendations are found to be reasonable and necessary.

Finally, with regard to the 26 specific recommendations that were "non-certified" by UR Dr. Martin, the record is inadequate to determine the reasonableness and necessity of each specific item. Although the UR decision is defective and cannot be relied upon, it does appear that at least some of Dr. Marin's concerns have merit with regard to at least some of the recommendations, while Dr. Vasile's 12/7/2013 report does not adequately explain the medical need for some of the recommendations. It is the court's intention, once this opinion is final and



if it has not been overturned by the WCAB, to set the matter for status conference solely on the issue of home modifications at a time when the parties will have this judge's undivided attention for a few hours so that the parties and the court can determine how best to proceed on this issue.

Based on the medical reports of Dr. Vasile, it was found that applicant will require further medical treatment to cure or relieve from the effects of his injuries. Based on Dr. Vasile's reports dated 11/14/2013 and 12/7/2013 as well as the fact that the UR decision was found to be defective, it was found that the finding and award of further medical treatment includes but is not limited to the 31 specific recommendations that were certified by the 12/12/2013 UR decision as well as the 9 specific recommendations that were modified (but without modification). A finding regarding the remaining 26 specific recommendations is deferred with jurisdiction reserved by the WCAB.

#### **4. SELF-PROCURED TREATMENT / LIEN OF LINDA MERCADO**

In deposition on 9/11/2012, applicant's prior treating physician David Patterson, M.D. testified that the medical team caring for the applicant discussed the need for a one-on-one nurse in applicant's room versus having a family member provide that level of attention, and it was decided (with Mrs. Mercado's agreement) that applicant's wife, Linda Mercado, could be trained to provide the necessary attention. Mrs. Mercado has previously testified that she has been trained to perform a wide variety of necessary tasks for her husband, and Dr. Patterson testified that the hospital counted on her being there to perform those tasks. Moreover, Dr. Patterson agreed with a consulting psychologist, Dr. Skenderian, that Mrs. Mercado's presence and care was medically reasonable to help reduce applicant's anxiety and calm him down enough to handle the effects of his injuries. In addition, nurse case manager Deborah Moore testified that Mrs. Mercado was actively involved with her husband's care at all times of which Ms. Moore was aware. Based on Dr. Patterson's testimony, it was found that Mrs. Mercado's care was reasonably required to cure or relieve the effects of applicant's injuries, and it was therefore found that Linda Mercado is entitled to payment for attendant care provided to her husband to date as well as reimbursement for mileage in connection with such care, in an amount to be adjusted between the parties with jurisdiction reserved by the WCAB.

Defendant asserted that the Board has no jurisdiction over this issue because Mrs. Mercado has not filed a lien for services rendered. That is incorrect. On 1/28/2014, the Board received a lien dated 1/27/2014 filed by Berman More Gonzalez on behalf of lien claimant Linda Mercado. The lien was accompanied by proof of service on defense counsel and CIGA.

#### **5. PENALTIES**

As discussed in Section 3 above, on 12/12/2013 defendant's utilization reviewer certified 31 specific home modification recommendations made by treating physician Dr. Vasile. There is no genuine medical or legal doubt that defendant is liable to provide those home modifications as medical treatment reasonably required to cure or relieve the applicant from the effects of his very serious injuries. Yet by the time of the MSC on 2/6/2014, defendant had done absolutely nothing with regard to authorizing and arranging for the



provision of that treatment. By the time of trial on 4/2/2014, the only thing that had been done was a home visit by a contractor in February; no work had been authorized or begun almost four months after the home modifications were approved by defendant's UR.

In its post-trial brief, defendant now asserts that the "prudent and responsible course" is to wait for the IMR process to be completed (which is now moot pursuant to Section 3 above) and for each and every recommended home modification to be finally adjudicated before providing any of them. That assertion is outrageous. The "prudent and responsible course," not to mention the legally required course and the only moral and humane one, is to assist Mr. Mercado in returning home forthwith. His doctors have been recommending since 2012 that his home be modified so that he can return to it. He was declared P&S over one year ago and the only reason he has not returned home is defendant's steadfast refusal to make his home accessible to him, as recommended by his physicians and as required by law. As a result, Mr. Mercado is left languishing in various care facilities, unable to return home to the love and care of his family and to be there for all of the family events and milestones that are his reason for living.

The words "prudent" and "responsible" do not just apply to cold financial calculations. They apply equally to human care and compassion; they suggest doing the right thing. Defendant's concern that it might be subject to additional costs if current home modifications must be altered to accommodate subsequent modifications is far, far outweighed by the needs of one of the most seriously injured of workers; needs that defendant is legally obligated to meet. More practically, defendant's concern can be alleviated if, instead of insisting on the "form over substance" process of UR and IMR that was never intended to apply to a situation like this, defendant would simply sit down with the applicant (and this judge, if necessary) and work out an agreement regarding what home modifications will be done as soon as possible so that Mr. Mercado can get on with the rest of his life.

Because there is no genuine medical or legal doubt as to defendant's liability to provide at least 31 specific home modifications recommended by applicant's treating physician and certified by UR, it was found that defendant unreasonably delayed or failed to provide medical treatment in the form of home modifications as certified by its own utilization review, and it was found that applicant is entitled to a 25% penalty pursuant to *Labor Code* §5814 to be assessed against the value of the benefits that were unreasonably delayed or refused, in an amount to be adjusted between the parties with jurisdiction reserved by the WCAB.

## **6. ATTORNEY FEES**

Based on WCAB Rules of Practice and Procedure (Title 8, Cal. Code of Regs. §10775) and the guidelines for awarding attorney fees found in the WCAB Policy and Procedural Manual, section 1.140, a reasonable attorney fee was found to be \$110,997.38. This amount is based on the present value of the lifetime permanent disability award, taking into account the §4659(c) increases as set forth in *Baker*, per the attached calculations from the DEU that are incorporated herein by reference. The fee is to be commuted from the lifetime award and is payable to applicant's attorney forthwith. An additional fee of 15% of the penalty amount pursuant to Section 5 above was also awarded.



## **7. ADMISSIBILITY OF EVIDENCE**

Defendant objected to the admissibility of a report from Ivan Hernandez of Enhanced Living Design dated 2/24/2014 (marked for identification only as Applicant's Exhibit 38) on the grounds that it was obtained after the MSC, it was not served on defense counsel, and is not relevant. At least the first two of defendant's objections were found to have merit, and the 2/24/2014 report was found to be inadmissible and Applicant's Exhibit 38 was excluded from evidence.

DATE: May 21, 2014



**PAUL DeWEESE**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE

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ON: 5/22/2014

BY: 

## COMMUTATION REQUEST

Revised August 2011

Directions: Fill in the section under All Cases as completely as possible. Remaining sections only need to be filled in if you are requesting a commutation of those benefits.

### All cases:

IW: MERCADO, Nicolas  
EAMS Case#: ADJ 8157719

DOI: 12/21/2011  
P&S date: 3/2/2013

Attorney fee% (if applicable) 15%  
Annual SAWW increase (if applicable) 3.50%

Requested by: WCJ DeWeese  
Contact number: \_\_\_\_\_  
FAX Number: \_\_\_\_\_  
Request Date: 5/19/2014

If DOI is o/a 1/1/03, then any LP or  
PTD benefits would be subject to  
annual SAWW-based increases.

Will use 4.6% unless otherwise specified.  
(4.6% is based on a 50 year average)

### Permanent Disability:

PD Rating: \_\_\_\_\_  
PD duration (in weeks): \_\_\_\_\_  
Initial PD weekly rate: \_\_\_\_\_

Is PD subject to +15% adjustment  
under LC 4658(d)? (Y/N) \_\_\_\_\_  
Is PD subject to -15% adjustment  
under LC 4658(d)? (Y/N) \_\_\_\_\_

If DOI is o/a 1/1/05, then PD may be  
subject to adjustment under LC  
4658(d). If applicable, enter the  
effective date of adjustment and rate  
after adjustment in Additional  
Comments section below.

### Life Pension:

Date of birth: \_\_\_\_\_  
PD start date (typically the \_\_\_\_\_  
day after TD ends or P&S date)  
PD duration (in weeks): \_\_\_\_\_  
Initial rate of LP benefits: \_\_\_\_\_  
Gender: \_\_\_\_\_

### Death Benefit:

Average Weekly Earnings: \_\_\_\_\_  
Start date of benefits: \_\_\_\_\_  
Initial benefit rate: \_\_\_\_\_  
Death benefit amt (LC 4702): \_\_\_\_\_  
DOB of youngest child: \_\_\_\_\_

### 100% Permanent Total Disability:

Date of birth: 10/29/1960  
PTD start date (typically the 3/3/2013  
day after TD ends or P&S date):  
Initial rate of PTD benefits: \$504.20  
Gender: Male

All commutations will follow Baker vs. WCAB  
in determining effective date of first SAWW  
increase.

### Additional Comments:

\_\_\_\_\_  
\_\_\_\_\_



IW:	Mercado, Nicolas
WCAB#	ADJ8157719
Date:	5/20/2014

# **ATTORNEY FEE CALCULATION - PERMANENT TOTAL DISABILITY**

DOI:	12/21/11
Date of commutation (DOC):	05/20/14
Attorney fee %:	15.0%
Assumed annual SAWW increase:	3.50%

This calculation utilizes the approach set forth in Baker v. WCAB and X.S. (ADJ1510738/SJO 0251902). This calculation will be invalid unless benefits are paid to applicant in a manner consistent with this decision.

PTD starting rate:	\$504.20
PTD rate on DOC:	\$507.95
PTD start date:	03/03/13
Assumed SAWW increase:	* 3.50%

1) PTD accrued through commutation date.....		\$33,579.54
2) Commuted value of remaining PTD.....	+	\$706,403.00
3) Total basis for attorney fee.....		\$739,982.54
4) Attorney fee percentage.....	x	15.0%
5) Total amount of attorney fee.....		\$110,997.38
6) Weekly deduction from future PTD payments to produce attorney fee:	Method #1*	\$132.91
	Method #2*	\$79.81

Method #1 notes:

Method #1 is the Uniform Reduction Method. The weekly deduction remains constant or uniform for the life of the injured worker. The reduction becomes effective on the day after the date of commutation.

Method #2 notes:

Method #2 is the Uniformly Increasing Reduction Method. The weekly reduction increases every year effective January 1st by the same fixed percentage equal to the "Assumed annual SAWW increase" listed above. The initial reduction becomes effective on the day after the date of commutation. For the convenience of the parties, the reductions for the current year plus the next three years are show below.

Year	Reduction:
2014	\$79.81
2015	\$82.61
2016	\$85.50
2017	\$88.49

\* The claims administrator is cautioned that when calculating the annual increase in PTD pursuant to LC 4659(c), the applicable SAWW adjustment is to be applied to the pre-reduced PTD rate, i.e. the rate before reduction for any prior commutations.

Calculated by: Melanie Tham  
Disability Evaluation Unit

Mercado, Nicolas

ADJ8157719

1) Indemnity total for date range

	Start Date	End Date	#Weeks (inclusive)	Rate of indemnity	Amount of indemnity
1	3/3/2013	12/31/2013	43.4286	\$504.20	\$21,896.69
2	1/1/2014	6/10/2014	23.0000	\$507.95	\$11,682.85
3			0.0000		\$0.00
4			0.0000		\$0.00
5			0.0000		\$0.00
6			0.0000		\$0.00
7			0.0000		\$0.00
8			0.0000		\$0.00
9			0.0000		\$0.00
Sum =			66.4286	Sum =	\$33,579.54

3) SAWW rate calculator

	Indemnity rate	Increase on Jan 1st
2003	\$0.00	NA
2004	\$0.00	0.000000%
2005	\$0.00	1.974700%
2006	\$0.00	4.008138%
2007	\$0.00	4.959328%
2008	\$0.00	3.931818%
2009	\$0.00	4.548436%
2010	\$0.00	2.994144%
2011	\$0.00	0.000000%
2012	\$0.00	2.413512%
2013	\$504.20	5.563250%
2014	\$507.95	0.742887%

	Min/MaxTD Rates	
	Minimum	Maximum
2003	\$126.00	\$602.00
2004	\$126.00	\$728.00
2005	\$126.00	\$840.00
2006	\$126.00	\$840.00
2007	\$132.25	\$881.66
2008	\$137.45	\$916.33
2009	\$143.70	\$958.01
2010	\$148.00	\$986.69
2011	\$148.00	\$986.69
2012	\$151.57	\$1,010.50
2013	\$160.00	\$1,066.72
2014	\$161.19	\$1,074.64



**PRESENT VALUE OF PERMANENT TOTAL DISABILITY**

Name: Mercado, Nicolas  
WCAB#: ADJ8157719  
Date: 5/20/2014

Date of birth:	10/29/1960
Date of commutation	6/10/2014
Rate of PTD benefits on DOC	\$507.95
Assumed annual increase	3.50%
Gender:	Male

**Present Value = \$706,403**

Calculated by: Melanie Tham  
Disability Evaluation Unit

IW:	Mercado, Nicolas
WCAB#	ADJ8157719
Date:	5/20/2014

**F) COMMUTATION OF PORTION OF REMAINING LIFE PENSION  
BY UNIFORM REDUCTION OF LIFE PENSION**

Date of birth:	10/29/60
DOI:	12/21/11
LP starts:	03/03/13
DOC:	06/10/14

Life pension rate:	\$507.95
Gender:	Male
Amount to commute:	\$110,997.38

**1 Determine exact age in years as of date of commutation (DOC).**

1a # of days from DOB through DOC.....	19582
1b Divide by average number of days per year.....÷	365.24
1c Exact age on DOC.....	53.614

**2 Determine PV of life pension as of exact age on DOC.**

	Age	PV
2a Enter PV for age in table below 1c*.....	53	847.65
2b Enter PV for age in table above 1c*.....	54	827.23
2c Difference of 2a and 2b.....		20.42
2d Multiply by fractional portion of 1c.....x		0.614
2e Interpolation adjustment for age.....		12.54
2f PV for age in table below 1c (2a from above).....		847.65
2g Subtract 2e.....-		12.54
2h PV of life pension as of exact age on DOC.....		835.11

**3 Calculate amount of reduction in LP rate necessary to produce lump sum.**

3a Amount to be commuted.....	\$110,997.38
3b Divide by PV for exact age on DOC (2h from above).....÷	835.11
3c Amount of weekly reduction in LP.....	<b>\$132.91</b>

**4 Calculate LP rate after commutation.**

4a LP rate before commutation.....	\$507.95
4b Subtract weekly reduction in LP (3c from above).....-	132.91
4c LP rate after commutation.....	<b>\$375.04</b>

**5 Additional interest due for payment after date of commutation:**

Additional interest due for each day late:.....	<b>\$30.41</b>
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\* Take values from Table 2 - Present Value of Life Pension for a Male, or Table 3 - Present Value of Life Pension for a Female, as dictated by gender.