

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **CHRISTOPHER COCKRELL,**

5 *Applicant,*

6 vs.

7 **FARMERS INSURANCE; LIBERTY
8 MUTUAL INSURANCE COMPANY,**

9 *Defendants.*

Case Nos. **ADJ504565 (SBR 0266567)**
ADJ2584271 (SBR 0297503)

**OPINION AND DECISION AFTER
RECONSIDERATION**

10 In order to further study the factual and legal issues in this matter, on September 11, 2014, we
11 granted defendant's Petition for Reconsideration of a workers' compensation administrative law judge's
12 (WCJ) Findings & Award of June 24, 2014, wherein it was found that, "Reimbursement for self-procured
13 medically recommended marijuana as opposed to providing or paying a supplier of this drug is awarded
14 in a sum not to exceed the lower of the fee schedule for medications being replaced by the medical
15 cannabis or the actual expense of the self-procured item. Reasonableness and necessity under L.C. Sect.
16 4600 is supported by the opinion of the Agreed Medical Examiner herein. The Workers' Compensation
17 insurance carrier is not an entity included in the provisions of Health & Safety Code Sections 11362.785
18 and Section 1342.6 [sic]. Labor Code Section 4600.35 does not apply to the insurance carrier in this
19 context."

20 Defendant contends that the WCJ erred in finding that applicant was entitled to reimbursement
21 for self-procured medical marijuana. We have received an answer, and the WCJ has filed a Report and
22 Recommendation on Petition for Reconsideration.

23 Previously in this matter, in a Findings & Award of June 20, 2012, the WCJ found the applicant
24 entitled to reimbursement for medical marijuana. Defendant sought reconsideration of that decision and,
25 on September 14, 2012, we granted reconsideration of the Findings & Award of June 20, 2012, rescinded
26 the decision, and returned the matter to the trial level so that the parties could consider the application of
27 Health and Safety Code section 11362.785(d), which the parties and the WCJ had not discussed in the

1 trial level proceedings. Health and Safety Code section 11362.785(d) states that, “Nothing in this article
2 [Medical Marijuana Program] shall require a governmental, private, or any other health insurance
3 provider or health care service plan to be liable for any claim for reimbursement for the medical use of
4 marijuana.”

5 However, while the parties and the WCJ analyzed the issue of whether a workers’ compensation
6 insurer constitutes a “health care service plan,” it appears that the parties and the WCJ did not analyze the
7 issue of whether a workers’ compensation insurer constitutes a “health insurance provider” for the
8 purposes of Health and Safety Code section 11362.785(d). Since the parties should be heard on this issue
9 (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805];
10 *Gangwish v. Workers’ Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584])
11 before a decision is rendered, we will return this matter to the trial level for further proceedings and
12 decision on this issue.

13 Without purporting to decide the issue, we note that the “fundamental rule of statutory
14 construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of
15 the law.” (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].)
16 The Medical Marijuana Program does not appear to specifically define the term “health insurance
17 provider.” “Health insurance” is not one of the classes of insurance in the Insurance Code. (Ins. Code,
18 § 100.) It appears that non-occupational health insurance is a type of disability insurance. (See, e.g., Ins.
19 Code, § 10785). Although for purposes of the Insurance Code the term “health insurance” does not
20 include “insurance arising out of a workers’ compensation or similar law” (Ins. Code, § 106), we note
21 that Labor Code section 4600 refers to “health care coverage for nonoccupational injuries or illnesses”
22 (Lab. Code, § 4600, subd. (d)(1)). The fact that the Legislature felt the need to qualify “health care
23 coverage” with “for nonoccupational injuries or illnesses” may signify that coverage for occupational
24 injuries or illnesses also constitutes “health care coverage.” Similarly, the fact that the term “health
25 insurance” specifically excludes workers’ compensation in the Insurance Code may signify that “health
26 insurance” includes workers’ compensation insurance when there is no express statutory exclusion. We
27 take no position on this issue.

1 In considering whether the Legislature sought to include workers' compensation policies
2 providing coverage for occupational injuries and illnesses in the definition of "health insurance provider"
3 for the purposes of Health and Safety Code section 11362.785(d), the parties and the WCJ should
4 analyze whether there is any rational basis for treating occupational and nonoccupational insurers
5 differently with regard to reimbursement for medical marijuana. We take no position on this issue. The
6 parties should brief the above issues, and the WCJ should decide these issues in the first instance. The
7 foregoing is not intended to limit the areas of inquiry regarding the application of Health and Safety Code
8 section 11362.785(d) to this case. After issuance of a final decision by the WCJ, any aggrieved party
9 may file a petition for reconsideration.

10 In reaching this decision, we make no determination regarding the propriety of the WCJ's
11 determination that a workers' compensation insurer does not constitute a "health care service plan"
12 within the meaning of Health and Safety Code section 11362.785(d).

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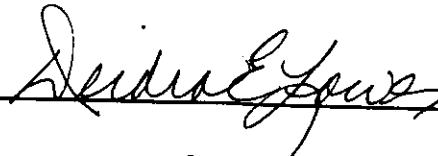
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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings & Award of June 24, 2014 is hereby **RESCINDED** and that this matter is
4 **RETURNED** for further proceedings and decision consistent with the opinion herein.

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6 **WORKERS' COMPENSATION APPEALS BOARD**

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10 DEIDRA E. LOWE

11 I CONCUR,

12 

13 KATHERINE ZALEWSKI

14 CONCURRING, BUT NOT SIGNING

15
16 MARGUERITE SWEENEY



17
18 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

19 MAR 13 2015

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

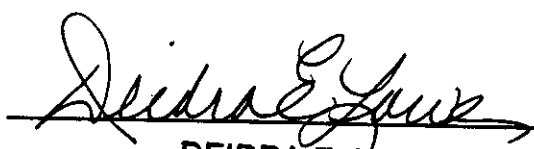
22 CHRISTOPHER COCKRELL
23 MORSE, GIESLER, CALLISTER & KARLIN (2)
24 DIETZ, GILMOR & CHAZEN
25 BOEHM & ASSOCIATES

26 DW:bgr

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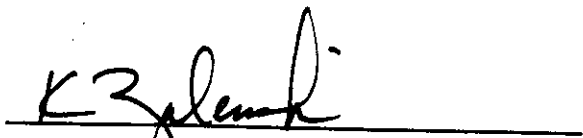
1 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
2 the above matter, all further correspondence, objections, motions, requests and communications shall be
3 filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board
4 at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post
5 Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall not be submitted to any
6 district office of the WCAB and shall not be e-filed in the Electronic Adjudication Management System.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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9 
10 _____
11 DEIDRA E. LOWE

11 I CONCUR,

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13 _____
14 MARGUERITE SWEENEY

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16 _____
17 KATHERINE ZALEWSKI



18
19 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
20 SEP 11 2014

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

23 CHRISTOPHER COCKRELL
24 MORSE, GIESLER, ET.AL. (2)
25 DIETZ GILMOR & CHAZEN
26 BOEHM & ASSOCIATES



27 abs

STATE OF CALIFORNIA
WORKERS' COMPENSATION APPEALS BOARD

Christopher Cockrell

Applicant

vs.

**Farmers Ins. Group; Helmsman
Management Gp./Liberty Mutual Ins.**

Defendants.

Case No. ADJ2584271;ADJ504565

**REPORT AND RECOMMENDATION OF
W.C. JUDGE ON PETITION FOR
RECONSIDERATION**

Introduction:

Timely Petition for Reconsideration has been filed and apparently verified and served herein by defendant on 7/18/14 from the Findings & Award served 6/25/14. Proof of service by mail is on file showing service on applicant.

Summary:

The WCJ does not adopt the statement of facts given by the petitions but relies on the summary herein as well as that set forth in the record of proceedings on file. The Findings and Award served herein provides in material part as follows:

FINDINGS

1. Christopher Cockrell, applicant, born _____, while employed by Farmers Insurance Group; Helmsman Management Svcs/Liberty Mutual Ins. on 9/16/95 as an attorney within California, sustained injury arising out of and in the course of employment to his low back, right elbow and heart. Defendant maintained insurance coverage in accordance with the Labor Code administered by Helmsman Management Services.

2. The minutes of hearing for the hearings on 11/29/11, 2/9/12, 6/20/12, 5/13/14 and 6/24/14 are true and correct except as corrected herein and are incorporated by this reference. The latter date was set for receipt of briefs only.

3. Reimbursement for self-procured medically recommended marijuana as opposed to providing or paying a supplier of this drug is awarded in a sum not to exceed the lower of the fee schedule for medications being replaced by the medical cannabis or the actual expense of the self-procured item. Reasonableness and necessity under L.C.Sect. 4600 is supported by the opinion of the Agreed Medical Examiner herein. The Workers' Compensation insurance carrier is not an entity included in the provisions of Health & Safety Code Sections 11362.785 and Section 1342.6. Labor Code Section 4600.35 does not apply to the insurance carrier in this context. Jurisdiction is reserved as to further disputes concerning the rate of reimbursement.

4. Attorney's fees under L.C.Sect. 5814.5 are not payable herein but a reasonable fee at 15% on and from the reimbursement of medical expense to applicant is ordered payable to counsel for applicant."

RESPONSE TO CONTENTIONS

Contention I: Workers Compensation Insurance carriers are considered health care service plans per appropriate statutory interpretation principles.

Response: The WCJ notes that L.C. Sect. 3202 advises that liberal construction applies to the provision of benefits under the Workers' Compensation statutes. The argument by petitioner does not appear to take this into account. The definition of health care service plans has been considered by the WCJ as noted below and broader scope does not appear warranted.

Contention II and III: Employer control and Utilization review:

Response: These points do not appear to have been properly raised at trial. Defendant has declined to provide the medication on non-medical grounds. The parties agreed to submit the issue of reasonableness and necessity under L.C. Sect. 4600 to the Agreed Medical Examiner who concurred in the use of the medical marijuana given applicant's unique problems. The petitioner should be deemed to have waived these points and be barred from initiating argument on reconsideration.

Contention IV: Legislative intent and public policy; Medical Treatment Utilization Schedule; Federal Law; Equal Protection.

Response: The same points made in the WCJ's response to II and III above apply here. There is expert medical opinion based on the physician's expertise including the points noted in his analysis per the reports by Dr. Levister and otherwise in the medical record relied on by the WCJ. As with any medication the primary treating physician must make regular reports per Reg. 9785 when he renews the prescription. The defense retains the right to revisit the ongoing use of the medication with the AME and to monitor the quantities used. The defense may take the deposition of the prescribing treating physician as well. The petitioner is concerned over "unfettered use" by the applicant but this appears to be unsupported by the testimony of applicant and the danger would appear no greater and perhaps less so than with opiate based medications which have compromised applicant's internal systems. Apparently the petitioner concedes that

not all appropriate treatment has been set forth in the MTUS. The AME's opinion and his review of materials herein qualify as substantial un rebutted evidence under L.C.Sect. 3202.5 and 4600.

The rate of reimbursement has been deferred and the defense retains their right to challenge the sums claimed as un reasonable even in the absence of an OMFS provision so no prejudice can be asserted on that basis. The defense has made no showing that the sum which applicant seeks are unreasonable or higher than the medications the defense had been providing in the past but that issue has been reserved.

As to Federal Law, the petitioner is not being ordered to engage in any of the prohibited acts cited by the petitioner. Reimbursement for out of pocket medical expense permissible under Labor Code Section 4600 has not been shown to violate the federal statutes.

As to Equal Protection, the WCJ may not rule on constitutionality of statutes but the WCJ does not see that the distinguishing between types of insurance by the Legislature would be a denial of equal protection. The Insurance Code for the State of California makes several distinctions amongst the various types of coverage provided by insurance companies which are designed for specific risks and are as varied as automobile insurance, home owners insurance, health care plan carriers, malpractice, etc.

FURTHER RESPONSE TO ALL CONTENTIONS:

The WCJ incorporates in material part his opinion as further response herein, to wit:

“OPINION ON DECISION/ C. COCKRELL/ADJ504565;ADJ2584271

REIMBURSEMENT FOR MEDICAL TREATMENT/L.C.SECT 4600/ORAL SETTLEMENT
AGREEMENT

The defense maintains that even if there was an oral agreement as part of a settlement herein to reimburse applicant for out of pocket expense in the purchase of medical marijuana/cannabis permissible under the laws of the State of California, that the contract is void ab initio because it is in violation of federal statutes and is unenforceable.

It is further argued by the defendant, based on the defense witnesses assertions, that the defendant never agreed to be bound by the determination of the AME but only to return the matter to Dr. Levister for further comment pursuant to the WCJ’s pre-award recommendation to develop the record. Applicant and his attorney formed a different impression of the contacts.

During trial the defense argued that an evidentiary privilege based on confidential communications with an attorney representing the carrier precluded him from being compelled to testify. The defense also argued that the carrier could not be required to produce the claims adjuster for the carrier involved with an alleged oral agreement to settle this case and that the applicant would have to subpoena that person. Applicant argued that neither position was valid and made an offer of proof as to the testimony which would have been given by these witnesses had they attended trial. The offer of proof made by applicant’s counsel was in part through his

sworn testimony as a participant in the discussions with the attorney for the defense involved in the alleged settlement agreement. If the attorney is engaged in negotiation regarding a contract his statements to the other party during said negotiations are not privileged and to the extent the attorney for the other party is relating terms of his client in that negotiation there is no confidential communication on the actual disclosures during the negotiation so testimony by the attorney confirming or denying those statements is not privileged. The defendant's attorney testified at trial regarding his material statements during the negotiations.

Having reviewed the testimony the WCJ is persuaded that the record does not establish a meeting of the minds so as to give rise to an agreement beyond obtaining further discovery to clarify the record in terms of reasonableness and necessity of the disputed treatment under L.C. Sect. 4600. Clearly the AME would not be able to resolve the defense position based on the federal statute or the applicant's assertion of an agreement relating to the issues in these proceedings.

The earlier decision of the Commissioners herein raising the additional statute in the Health and Safety Code was apparently not contemplated by the parties at the time of the first trial on this treatment issue so there was no question of the defendant's waiving that provision if it was applicable.

Applicant contends that the defense is not being required to violate the Federal statute in that the defense is not making a purchase of the controlled substance or supplying it to the applicant.

Applicant also argues per citations to the other provisions of the law cited in Health & Safety Code Section 11362.785, that it does not apply to the Labor Code generally and specifically Workers' Compensation medical benefits under L.C.Sect. 4600. This argument appears to have merit.

As earlier noted the AME herein Dr. Levister has concurred in the medical use of Marijuana in this case in accord with L.C.Sect. 4600.

The Commissioners directed that the provisions of Health & Safety Code Section 11362.785 (d) be considered in the factual setting of this matter. The WCJ notes that a Workers Compensation insurer whether self-insured or as the insurance carrier arguably should not be classified as a medical insurance provider under the Health & Safety Code. In this regard it is noted that the Commissioners also referred the parties to L.C.Sect. 4600.35 which discusses reimbursement to certain providers with licensed status under Health & Safety Code Section 1340. This citation would appear to relate to an entity such as Blue Cross- Blue Shield, etc. as being eligible to receive payments in connection with a Workers Compensation case. It does not appear that a Workers Compensation insurer is such an entity under the Knox-Keene Health Care Service Plan Act of 1976 rather the Workers' Compensation carrier is making the reimbursement under the Labor Code independent of the Knoex-Keene, etc. statutes.

Labor Code Section 4600.35. Any entity seeking to reimburse health care providers for health care services rendered to injured workers on a capitated, or per person per month basis, shall be licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code).

Health & Safety Code Section 1384, located in the Chapter 2.2, etc. specifies, in material part:

As used in this chapter...

(e) "Group contract" means a contract which by its terms limits the eligibility of subscribers and enrollees to a specified group.

(f) "Health care service plan" or "specialized health care service plan" means either of the following:

(1) Any person who undertakes to arrange for the provision of health care services to subscribers or enrollees, or to pay for or to reimburse any part of the cost for those services, in return for a prepaid or periodic charge paid by or on behalf of the subscribers or enrollees.

(2) Any person, whether located within or outside of this state, who solicits or contracts with a subscriber or enrollee in this state

to pay for or reimburse any part of the cost of, or who undertakes to arrange or arranges for, the provision of health care services that are to be provided wholly or in part in a foreign country in return for a prepaid or periodic charge paid by or on behalf of the subscriber or enrollee.

Health & Safety Code Section 11362.785.

(a) Nothing in this article shall require any accommodation of any medical use of marijuana on the property or premises of any place of employment or during the hours of employment or on the property or premises of any jail, correctional facility, or other type of penal institution in which prisoners reside or persons under arrest are detained.

(b) Notwithstanding subdivision (a), a person shall not be prohibited or prevented from obtaining and submitting the written information and documentation necessary to apply for an identification card on the basis that the person is incarcerated in a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained.

(c) Nothing in this article shall prohibit a jail, correctional facility, or other penal institution in which prisoners reside or persons under arrest are detained, from permitting a prisoner or a person under arrest who has an identification card, to use marijuana for medical purposes under circumstances that will not endanger the health or safety of other prisoners or the security of the facility.

(d) Nothing in this article shall require a governmental, private, or any other health insurance provider or health care service plan to be liable for any claim for reimbursement for the medical use of marijuana.

H&S Section 1342.6 reads as follows:

"1342.6. It is the intent of the Legislature to ensure that the citizens of this state receive high-quality health care coverage in the most efficient and cost-effective manner possible. In furtherance of this intent, the Legislature finds and declares that it is in the public interest to promote various types of contracts between public or private payers of health care coverage, and institutional or professional providers of health care services. This intent has been demonstrated by the recent enactment of Chapters 328, 329, and 1594 of the Statutes of 1982, authorizing various types of contracts to be entered into between public or private payers of health care coverage, and institutional or professional providers of health care services. The Legislature further finds and declares that individual providers, whether institutional or professional, and individual purchasers, have not proven to be efficient-sized bargaining units for these contracts, and that the formation of groups and combinations of institutional and professional providers and combinations of purchasing groups for the purpose of creating efficient-sized contracting units represents a meaningful addition to the health care marketplace. The Legislature further finds and declares that negotiations between purchasers or payers of health services, and health care service plans governed by the provisions of this chapter, or through a person or entity acting for, or on behalf of, a purchaser or payer of health services, or a health care

service plan, are in furtherance of the public's interest in obtaining quality health care services in the most efficient and cost-effective manner possible. It is the intent of the Legislature, therefore, that the formation of groups and combinations of providers and purchasing groups for the purpose of creating efficient-sized contracting units be recognized as the creation of a new product within the health care marketplace, and be subject, therefore, only to those antitrust prohibitions applicable to the conduct of other presumptively legitimate enterprises.

This section does not change existing antitrust law as it relates to any agreement or arrangement to exclude from any of the above-described groups or combinations, any person who is lawfully qualified to perform the services to be performed by the members of the group or combination, where the ground for the exclusion is failure to possess the same license or certification as is possessed by the members of the group or combination.

In conclusion it does not appear that the Health & Safety Code nor federal statute precludes reimbursement by a Workers Compensation Insurance carrier of self-procured expenses incurred by an applicant for medical marijuana prescribed by a licensed physician.

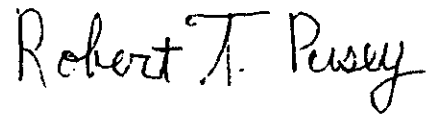
It is further argued by applicant that the Health and Safety Code does not operate to negate the provisions of L.C. Section 4600 (a) and (b). Applicant cites the Medical Treatment Utilization Schedule as neutral with regard to the use of medical marijuana indicating that further study is needed. In this regard the opinion of the AME as substantial expert opinion is deemed controlling.

Applicant's argument on the application of the Knox, etc. statutes to the Labor Code is noted.

The latter provisions do not apply medical treatment pursuant to Labor Code Sect. 4600 as this is not medical insurance but is compensation under the Labor Code for out of pocket self-procured L.C. Section 4600 medical treatment which is legal under the Medical Marijuana initiative and ratified by the AME as reasonable medical treatment.”

RECOMMENDATION

It is recommended that the Petitions for Reconsideration be denied in their entirety.
Executed: 7/18/14



Robert T. Pusey, W.C.Judge

Served by mail through the WCAB
At San Bernardino, California on the necessary
Parties of record herein as follows:
On: 07/21/2014 By: *J. Calcote*

DIETZ FILMOR, US Mail
LIBERTY MUTUAL, US Mail
MORSE GIELSER, US Mail
HARRISON EICHENBERG, US Mail
BEAVER MEDICAL GROUP, US Mail
BOEHM ASSOCIATES, US Mail
REDLANDS COMMUNITY HOSPITAL, US Mail
REDLANDS COMMUNITY HOSPITAL, Us Mail