

Potterf, Tim

BURDEN OF PROOF

New in-home healthcare

PROVIDERS

New in-home healthcare

In an appeal by the claimant to a Department determination rescinding authorization of an in-home healthcare provider to provide care to the claimant, the claimant had the burden to establish by a preponderance of the evidence that the Department should not have rescinded the provider's authority to provide services.*In re Tim Potterf, BIA Dec., 10 18174 (2011)*

Scroll down for order.

1 Department without direction regarding further action it should take; and under Docket
2 No. 10 19277 dismissed the appeal.

3 In its Petition for Review, the Department challenges the Proposed Decision and Order only
4 regarding the issues raised under Docket No. 10 18174. Because Mr. Potterf's appeals remain
5 consolidated for all purposes before the Board, the issues raised by both appeals are before us for
6 final decision. See, *In re Richard Sims*, BIA Dec., 85 1748 (1986).

7 The Board has reviewed the evidentiary rulings in the record of proceedings. The ruling on
8 page 33 in the March 10, 2011 hearing transcript is reversed, and the objection is overruled.
9 Otherwise, the Board finds that no prejudicial error was committed regarding the rulings that were
10 actually rendered. Those rulings are affirmed.

11 We have granted review primarily to clarify that the standard of proof applicable to appeals
12 involving actions the Department has taken related to the provision of in-home care for injured
13 workers is preponderance of the evidence, not abuse of discretion. We also take the opportunity to
14 complete our record.

15 In the deposition of Thomas P. Seib, M.D., taken on March 3, 2011, Mr. Potterf's legal
16 representative moved without objection to admit Deposition Exhibit No. 1, which is a copy of the
17 doctor's curriculum vitae (CV). Our industrial appeals judge concluded that neither party offered to
18 admit the document, and failed to rule on the claimant's motion. In order to complete our record,
19 we grant the claimant's motion, and admit the CV as Exhibit No. 11.

20 Background

21 Mr. Potterf was injured during the course of his employment with Innovative Interiors, Inc.,
22 on March 5, 2002. On August 8, 2005, during the course of a re-training program he was
23 undergoing as a result of his 2002 industrial injury, Mr. Potterf fell down a set of stairs and suffered
24 a severe injury at the C4 level of his spine. As a result, Mr. Potterf was rendered quadriplegic and
25 he has no sensation or ability to control his body below the level of his neck.

26 The American Board of Physical Medicine and Rehabilitation certifies that Barry
27 Goldstein, M.D., Ph.D., is a qualified specialist in that area of medicine as well as an expert in the
28 subspecialty which concerns spinal cord injuries. He has treated Mr. Potterf since December 2005.
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1 Dr. Goldstein said that one of the medical conditions from which the claimant suffers is autonomic
2 dysreflexia, or AD. He described the condition as follows:

3 If a person gets AD what happens is any sort of painful stimulus below
4 the level of their injury causes a reflex response that actually all of us
5 have, but all of us who have an intact spinal cord can modulate this
6 reflex so it doesn't get bad. But people who have a spinal cord injury,
7 their brain can't modulate the reflex, and what the reflex does is it
8 causes the blood pressure to go up.

9 3/9/11 Tr. at 18.

10 Blocked urinary or bowel functions are common causes of AD. Because the extremely high
11 blood pressure that AD produces can be life threatening, the cause of the episode must be quickly
12 found and corrected. While that is being done, Mr. Potterf must be placed in an upright position
13 and his blood pressure must be reduced by means of a topical application of Nitropaste. Because
14 Mr. Potterf cannot predict when an episode of AD may occur, he requires 24 hour per day skilled
15 nursing care, in part to treat the onset of the condition, and to avoid its occurrence by maintenance
16 of regular bowel and urinary functions. The Department is responsible for the provision of the
17 in-home healthcare that Mr. Potterf needs.

18 Neither Mr. Potterf nor his wife, Chris, were satisfied with the care that the two healthcare
19 providers who tended the claimant after August 2005 provided. In February 2008, they contacted
20 AdvisaCare, a home healthcare provider that provides services to 40 or 50 patients who have
21 spinal cord injuries. After a process in which both the claimant and AdvisaCare assessed whether
22 the company should provide Mr. Potterf with care, the claimant hired AdvisaCare.

23 Barbara Hughes is an occupational nurse consultant who works in the Department's
24 collaborative claims unit. In early 2010, she hired Elaine Nerland, who is a nurse consultant, to
25 assess the level of care Mr. Potterf was receiving. Ms. Hughes noted that Mr. Potterf received
26 32 hours of skilled nursing services per day. She testified: "[I]t was just very apparent that the level
27 of care, and that [*sic*] he was receiving was higher than any other injured worker that I was aware
28 [*sic*] at the Department." 3/10/11 Tr. at 33. Ms. Nerland also concluded that the level of care which
29 AdvisaCare provided to Mr. Potterf was excessive.

30 Ms. Hughes and Ms. Nerland were aware that a recent change in the Washington
31 Administrative Code allowed an injured worker to receive home health care under a nurse delegator
32 plan. Under such a plan, two Licensed Practical Nurses provide a worker with in-home care in
twelve-hour shifts, and a Registered Nurse is present for one hour per day. Ms. Nerland

1 recommended that the Department change Mr. Potterf's care to that plan "to reduce the cost of
2 care." Nerland Dep. at 15.

3 A nurse delegator plan cannot be implemented unless the worker's condition is stable and
4 predictable, and it is in the best interest of the patient. RCW 18.79.260. Dr. Goldstein and Thomas
5 P. Seib, M.D., who is a certified rehabilitation and pain specialist who has treated Mr. Potterf since
6 January 29, 2004, declared that Mr. Potterf's AD condition was not stable or predictable and would
7 probably never reach that status. Neither Ms. Nerland nor Ms. Hughes consulted with Dr. Goldstein
8 or Dr. Seib before they determined to change Mr. Potterf's home healthcare plan.

9 Tina Delatorre is the workers' compensation adjudicator at the Department who manages
10 Mr. Potterf's claim. During the entire time that it cared for the claimant, AdvisaCare sent detailed
11 notes to the Department regarding the services its staff provided to Mr. Potterf. The notes reflected
12 that staff performed housekeeping tasks for the claimant when he did not require immediate
13 personal attendance. The record established that from early 2008 through mid 2010, the
14 Department never complained that AdvisaCare should not have provided such services. No
15 evidence challenged Mr. and Mrs. Potterf's assertion that all of the other providers who gave the
16 claimant health care service performed the same activities. Those providers included the company,
17 Visiting Angels, which the Department assigned to care for Mr. Potterf under the nurse delegator
18 plan. Of greater significance, the record also demonstrated that AdvisaCare did not bill the
19 Department extra charges for performance of housekeeping tasks.

20 On July 13, 2010, which was at the time when Ms. Nerland and Ms. Hughes were assessing
21 the level of care Mr. Potterf needed, Ms. Delatorre wrote to AdvisaCare and told the company to
22 forbid its staff from performing household chores. AdvisaCare did so. Nevertheless, on August 6,
23 2010, the Department rescinded AdvisaCare's authorization to provide services to the claimant,
24 effective one week later. The Department's stated reason for the action was a non-specific
25 declaration that AdvisaCare failed to follow Department policies and procedures.

26 Mr. Potterf challenged the rescission of AdvisaCare's authorization to care for him.
27 According to the Department, he was less than cooperative with Visiting Angels. On September 23,
28 2010, Ms. Delatorre wrote to the claimant and advised him that in view of his lack of cooperation,
29 he could elect from three options for provision of his future care: (1) he could cooperate with the
30 nurse delegator plan; (2) personally pay for caregiver services; or (3) enter a skilled nursing facility.
31 The claimant then chose CHC Services as his caregiver.

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1 Mr. Potterf appealed the August 6, 2010, and September 23, 2010 Department letters.

2 While hearings in these appeals were pending, the Department concluded that provision of
3 home healthcare service to Mr. Potterf under a nurse delegator plan was inappropriate because, as
4 Ms. Hughes asserted, Mr. Potterf's medical condition "became less stable and predictable, yes."
5 3/10/11 Tr. at 37. The Department then reinstated the level of care that AdvisaCare provided to
6 Mr. Potterf.

7 Docket No. 10 19277

8 We will first address Mr. Potterf's appeal of the September 23, 2010 letter in which the
9 Department alleged lack of cooperation with the nurse delegator. We are convinced that due to the
10 actions by the Department after the appeal was filed, the case has become moot. A case is moot if
11 a legal tribunal can no longer provide effective relief. *State v. Gentry*, 125 Wn.2d 670 (1995).
12 Effective relief is not available because the Department has instituted a level of care equal to or
13 exceeding the level that had been provided prior to institution of care through the nurse delegator.
14 Because Mr. Potterf's care was no longer being provided by the nurse delegator to which the
15 alleged non-cooperation was directed, there is no relief we could provide other than that which the
16 Department has already provided. The issue of Mr. Potterf's non-cooperation has been rendered
17 moot.

18 We are aware that a court may review an otherwise moot case if it presents an issue of
19 continuing and substantial public interest and that issue will likely recur. *Grays Harbor Paper Co.,*
20 *v. Grays Harbor County*, 74 Wn.2d 570 (1968). In Mr. Potterf's Response to the Department of
21 Labor and Industries' Petition for Review, Mr. Potterf urges us to view the issues that are before us
22 in that light. We are not persuaded that the appeal presents an issue of continuing and substantial
23 public interest or that the issue is likely to arise again.

24 Mr. Potterf's appeal under Docket No. 10 19277 is dismissed.

25 Docket No. 10 18174

26 In its August 6, 2010 letter, the Department declared that effective August 13, 2010,
27 AdvisaCare was no longer authorized to provide Mr. Potterf with healthcare services because it
28 failed "to follow the Department's policies and procedures." It also stated: "Health care services, to
29 include the agency that provides services, are at the Department's discretion." AdvisaCare did not
30 appeal the Department's decision.

1 It appears from the record that our industrial appeals judge accepted the notion that any
2 action the Department took regarding Mr. Potterf's home healthcare program could be successfully
3 challenged only by his production of proof that the Department's action constituted an abuse of
4 discretion. If abuse of discretion were the burden of proof applicable to the appeal, Mr. Potterf
5 would have been held to the standard of establishing that the Department's action was arbitrary and
6 capricious.

7 Unless a statute specifically declares that the Department has sole or absolute discretion to
8 take a challenged action, the standard of proof applicable upon appeal of the action is
9 preponderance of the evidence. *In re Harry Reese*, BIIA Dec., 00 P0044 (2001); *In re St.*
10 *Alphonsus Regional Medical Center*, BIIA Dec., 96 P051 (2000).

11 Our Legislature has given the Director of the Department sole or absolute discretion to take
12 certain actions in matters involving third party liens (RCW 51.24.060), vocational rehabilitation
13 services (RCW 51.32.095), reopening of claims for aggravation of condition (RCW 51.32.160),
14 erroneous payments (RCW 51.32.240), payments for job modifications (RCW 51.32.250),
15 payments for continued medical and surgical treatment (RCW 51.36.010), payments for
16 modifications of motor vehicles or residences (RCW 51.36.020), and waiver of penalties
17 (RCW 51.48.100).

18 Barbara Mickleson, the Department's pension adjudicator who administers Mr. Potterf's
19 claim, declared that: "[W]ith home health agencies we have the right to say who goes in and out of
20 the, to provide care." 3/10/11 Tr. at 74. She was unable to identify the statute or administrative
21 rule that gives the Department that authority.

22 After a careful search, we have been unable to find any language in the statutes related to
23 in-home healthcare services that gives a Department operative sole or absolute discretion to make
24 decisions or take actions regarding the provision of in-home healthcare services. Accordingly, we
25 hold that the burden of proof that Mr. Potterf held in this appeal was to establish by a
26 preponderance of the evidence that the Department should not have rescinded AdvisaCare's
27 authority to provide services to him.

28 We agree with our industrial appeals judge's determination that the Department did not have
29 sufficient cause to remove AdvisaCare as Mr. Potterf's healthcare provider. Although the letter on
30 appeal did not do so, the Department ultimately advanced two reasons for rescinding AdvisaCare's
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1 authority: the performance of housekeeping functions; and employment of unqualified caregivers to
2 tend to Mr. Potterf.

3 AdvisaCare consistently provided the Department with very detailed chart notes in which it
4 described the care it gave to Mr. Potterf. The notes reflected that staff engaged in some
5 housekeeping functions for the claimant. The Department did not offer any evidence to rebut the
6 sworn testimonies of Mr. Potterf and his wife that each of the other companies who provided
7 healthcare services to the claimant engaged in the same activities.

8 The record established that AdvisaCare never billed the Department, and the Department
9 never paid AdvisaCare for the performance of housekeeping functions. The Department
10 acknowledged that had AdvisaCare staff watched television or read when Mr. Potterf was asleep
11 and not in immediate need of attention, the company would have been acting in accordance with its
12 policies and procedures. The record was bereft of any evidence that Mr. Potterf's welfare was
13 endangered or that he lacked adequate health care services in any way because AdvisaCare's staff
14 performed housekeeping activities. We are not persuaded, in view of the foregoing, that the
15 services that AdvisaCare provided to Mr. Potterf were not in his best interest.

16 Moreover, over the course of the two years when the company provided Mr. Potterf with
17 services, the Department never voiced any concern to AdvisaCare about its staff's performance of
18 housekeeping functions. It raised those concerns for the first time only when the Department
19 decided that the level of care which Mr. Potterf received was excessive and that adequate care
20 could be provided to him at less cost.

21 On July 13, 2010, the Department directed AdvisaCare to bar its staff from performing
22 housekeeping functions. The company did so. The record contained no evidence that the
23 Department checked to verify that AdvisaCare's staff was no longer engaged in housekeeping
24 activities. Nevertheless, 24 days later, the Department terminated AdvisaCare's authority to
25 provide the claimant with services.

26 We are convinced that the activities in which AdvisaCare's staff engaged did not constitute
27 sufficient cause for the Department to terminate its provision of services to Mr. Potterf.

28 Krista Bunkowske, who is AdvisaCare's regional manager for the greater Seattle area,
29 acknowledged that neither Colleen Barnett nor Kimberly Burnett, who participated in Mr. Potterf's
30 care, had certificates from the Department of Social and Health Services that they had completed
31 core nurse delegation training. RCW 18.88A.210(3) requires that any nursing assistant to whom
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1 the registered nurse acting under a nurse delegation plan delegates tasks must have such a
2 certificate. Ms. Burnett and Ms. Barnett were not, of course, employed under a nurse delegation
3 plan while they provided services to Mr. Potterf.

4 Ms. Barnett is a certified medical assistant. The Washington State Department of Health
5 does not issue licenses for certified medical assistants. Ms. Bunkowske stated that because she is
6 licensed by the American Association of Medical Assistants, Ms. Barnett is qualified to perform
7 tasks that require more skill than certified nursing assistants have. During the time when
8 AdvisaCare provided services for Mr. Potterf, the Department knew that Ms. Barnett was a certified
9 medical assistant. Ms. Bunkowske declared that in early January 2010, she talked to Marilyn
10 McMahon, who was then apparently the claims manager for Mr. Potterf's claim at the Department,
11 in order to determine how AdvisaCare should bill for Ms. Barnett's services. Ms. Bunkowske said
12 that she and Ms. McMahon agreed that AdvisaCare should bill for Ms. Barnett's services under an
13 LPN fee schedule. She added: "That is what we came up with as the best fee to charge for Colleen
14 as they did not have a medical assistant code in their fee schedule." 3/9/11 Tr. at 62.

15 Despite its knowledge regarding Ms. Barnett's qualifications, the Department did not object
16 to her provision of services to Mr. Potterf until it decided to reduce the level of health care that he
17 would be provided.

18 No evidence suggests that Mr. Potterf's health suffered because Ms. Barnett and
19 Ms. Burnett did not have the DSHS certification necessary to be involved in a nurse delegation
20 plan. We do not view the lack of certification as sufficient cause for the Department to have
21 terminated AdvisaCare's services.

22 We are satisfied that Mr. Potterf produced a preponderance of the persuasive evidence to
23 support his claim that the Department improperly rescinded AdvisaCare's authority to provide him
24 with home health care services. The Department letter in which the Department took that action is
25 reversed and this matter is remanded to the Department with directions to offer Mr. Potterf the
26 option of hiring AdvisaCare to provide him with future health care services.

27 **FINDINGS OF FACT**

- 28 1. On March 5, 2002, the claimant, Tim J. Potterf, filed an Application for
29 Benefits with the Department of Labor and Industries, in which he
30 alleged that he had been injured during the course of his employment
31 with Innovative Interiors, Inc., on October 1, 2001. The Department
32 allowed the claim for benefits on July 23, 2002. On August 6, 2010, the
Department issued a letter in which it rescinded authorization for

1 AdvisaCare to provide healthcare services for Mr. Potterf effective
2 August 13, 2010, for the stated reason that AdvisaCare failed to follow
3 Department policies and procedures. In the letter, the Department
4 further declared that on August 13, 2010, Visiting Angels would provide
5 healthcare services for Mr. Potterf. On August 23, 2010, Mr. Potterf filed
6 an appeal with the Board of Industrial Insurance Appeals from the
7 Department's letter. On September 13, 2010, under Docket
8 No. 10 18174, the Board agreed to hear the appeal and issued an Order
9 Granting Appeal.

10 On September 23, 2010, the Department issued a letter in which it
11 advised Mr. Potterf that it understood that he had elected to not
12 cooperate with a nurse delegator arrangement for his healthcare, and
13 that his options for continued healthcare were to: (1) cooperate with a
14 nurse delegator arrangement; (2) pay for his own caregivers or have his
15 wife provide him with all of his healthcare needs, or; (3) place himself in
16 a skilled nursing facility. On September 27, 2010, Mr. Potterf filed a
17 Notice of Appeal with the Board of Industrial Insurance Appeals from the
18 Department's September 27, 2010, letter. On October 6, 2010, under
19 Docket No. 10 19277, the Board agreed to hear the appeal and issued
20 an Order Granting Appeal.

- 21 2. On August 6, 2010, the Department rescinded authorization for
22 AdvisaCare to provide in-home healthcare services for Mr. Potterf,
23 effective August 13, 2010.
- 24 3. On September 23, 2010, the Department declared that for continued
25 healthcare services, Mr. Potterf had to choose one of the following
26 options: (1) cooperate with a nurse delegator arrangement; (2) pay for
27 his own caregivers or have his wife provide him with all of his healthcare
28 needs, or; (3) place himself in a skilled nursing facility.
- 29 4. Prior to March 9, 2011, the Department rescinded its use of a nurse
30 delegator program to provide Mr. Potterf with healthcare services and it
31 restored the level of healthcare provided to him to the same level which
32 AdvisaCare provided.
5. After the Department rescinded the nurse delegator plan, Mr. Potterf
 hired CHC Services to provide him with the same level of healthcare
 which AdvisaCare previously provided to him.
6. Because Mr. Potterf hired CHC Services to provide him with the same
 level of healthcare that AdvisaCare previously provided to him prior to
 March 9, 2011, the Board of Industrial Insurance Appeals cannot
 provide Mr. Potterf with effective relief regarding the action the
 Department of Labor and Industries took in its September 23, 2010
 letter.
7. AdvisaCare did not bill the Department for the housekeeping functions
 its staff provided to Mr. Potterf.

1 8. AdvisaCare's staff was competent to provide Mr. Potterf with services
2 that were consistent with his needs, abilities, and safety.

3 **CONCLUSIONS OF LAW**

- 4 1. The Board of Industrial Insurance Appeals has jurisdiction over the
5 parties to and subject matter of the appeal assigned Docket
6 No. 10 18174.
7 2. The Board of Industrial Insurance Appeals has jurisdiction over the
8 parties to and the subject matter of the appeal assigned Docket
9 No. 10 19277.
10 3. Under Docket No.10 19277, Mr. Potterf's appeal is moot within the
11 meaning of *State v. Gentry*, 125 Wn.2d 570 (1995).
12 4. The appeal assigned Docket No. 10 19277, is dismissed.
13 5. The Department did not have cause under the authority to
14 RCW 51.36.110 or WAC 296-23-246 to rescind AdvisaCare's authority
15 to provide in-home healthcare services to Mr. Potterf.
16 6. The letter of the Department of Labor and industries dated August 6,
17 2010, is incorrect and it is reversed. This matter is remanded to the
18 Department with directions to allow Mr. Potterf to select AdvisaCare to
19 provide him with future in-home health care services, if he so chooses.

20 Dated: November 7, 2011.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22 /s/
23 DAVID E. THREEDY Chairperson

24 /s/
25 FRANK E. FENNERTY, JR. Member

26 /s/
27 JACK S. ENG Member