WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS BELTRAN WITRON, ***Applicant***

vs.

POLYMERIC TECHNOLOGY CORPORATION; CYPRESS INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY, ***Defendants***

Adjudication Number: ADJ13620994
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on April 13, 2021. By the F&A, the WCJ found that there was a delay by defendant in responding to applicant's request for a change of treating physician, but the delay did not constitute a neglect or refusal of medical treatment. The WCJ also found no other compelling reason to allow applicant to treat outside the medical provider network (MPN).

Applicant contends that he is entitled to treatment outside the MPN due to defendant's delay in responding to his request for a treating physician and failure to set a timely initial appointment.

We received an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will deny applicant's Petition.

FACTUAL BACKGROUND

Applicant claims injury to the bilateral shoulders, neck, back and chest on May 5, 2019 while employed as a laborer by Polymeric Technology Corporation.

On August 13, 2019, defendant sent a letter to applicant acknowledging his claim.

(Defendant's Exhibit B, Employee notification of claim with attachments, August 13, 2019.) Enclosed with the letter was a copy of the Complete MPN Notification in English and Spanish. (*Id.* at pp. 6-17.) Defendant subsequently sent applicant a Notice of Acceptance of Claim on August 26, 2019. (Defendant's Exhibit C, Notice of acceptance of claim, August 26, 2019.)[1] An MPN Notification in English and Spanish was enclosed again. (*Id.* at pp. 5-13.)

The parties have stipulated that the claim is accepted for the left shoulder and that applicant initially treated at Concentra in the MPN. (Minutes of Hearing, March 18, 2021, p. 2.)

Applicant's attorney filed an Application for Adjudication of Claim on September 21, 2020. On the same date, applicant's attorney sent a letter to defendant stating as follows:

> I represent Mr. Luis A. Beltran Witron. Applicant requests a change of PTP and nominates NMCI Medical Clinic. If you do not authorize "NMCI" schedule with any new MPN PTP, as applicant objects CMC findings (1/3/20) which failed to properly diagnose the industrial injury. Thank you for you anticipated cooperation.
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> (Applicant's Exhibit No. 1, Letter by applicant attorney to Berkshire requesting change of treater, September 21, 2020.)

Defendant served applicant's attorney with a copy of multiple documents including "All Medical Reports on file to date" on December 17, 2020. (Defendant's Exhibit D, Initial file and letter to applicant's attorney, December 17, 2020, p. 1.) The list of reports includes Concentra from August 2019 and several documents from Occupational Health Centers dated from August 2019 to January 2020. (*Id.* at pp. 1-2.)

On February 10, 2021, applicant's attorney sent a letter to defendant stating in relevant part:

> Please know the applicant will commence treatment with NMCI as the carrier failed to provide the applicant with an MPN PTP per the previous demand.
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> (Applicant's Exhibit No. 2, Letter from applicant attorney to defense attorney, February 10, 2021.)

On the same date, defendant sent an email to applicant's attorney stating:

> The claim is accepted for the left shoulder. If your client is interested in

[1] The Minutes of Hearing state a date of "9/26/2019" for Exhibit C, but review of the document shows that it was dated 08/26/2019. (Minutes of Hearing, March 18, 2021, p. 3.)

> receiving medical treatment for the left shoulder on an industrial basis, he can access the BHHC MPN and designate a treating physician.
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> You can access the MPN by the following link:
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> MPN → htts://www.bhhc.com/workers-com12ensation.as12x (click on "search the CA medical provider network" under "learn more")
>
> (Applicant's Exhibit No. 3, Email from defense attorney to applicant's attorney, February 10, 2021.)

On March 4, 2021, defendant sent Dr. Daniel Hsu a Transfer of Care Authorization to Treat stating that he had been selected to treat applicant from the MPN. (Defendant's Exhibit A, Transfer of Care Authorization to Treat with Daniel Hsu, D.O., March 4, 2021.) The letter advised Dr. Hsu that he was authorized to treat applicant's left shoulder and was copied on applicant and his attorney. (*Id.* at pp. 1-2.) Defendant served Dr. Hsu with a copy of applicant's medical records the following day. (Defendant's Exhibit E, Letter to Dr. Hsu and regarding service of medical records, March 5, 2021.)

The matter proceeded to trial on March 18, 2021 with the issues identified as:

> This is an expedited hearing, and defendant contends that applicant must treat within the BHHC MPN. Applicant contends that he has the right to treat outside the MPN because defendant failed to comply with applicant's demand letter of 9/21/2020 (Exhibit 1) for a change of treating doctor and a request to schedule the initial appointment per CCR Section 9767.5(g).
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> (Minutes of Hearing, March 18, 2021, p. 2.)

The WCJ issued the F&A as outlined above.

DISCUSSION

Labor Code section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).)[2] If an employer has established an MPN, an injured worker is generally limited to treating with a physician from within the employer's MPN. (Lab. Code, §§ 4600(c), 4616 et seq.) However, if the employer neglects or refuses to provide reasonably necessary medical treatment, whether through an MPN or otherwise, then an injured worker may self-procure medical treatment at the employer's

[2] All further statutory references are to the Labor Code unless otherwise stated.

expense. (Lab. Code, § 4600(a); see also *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93] ["the employer is required to provide treatment which is reasonably necessary to cure or relieve the employee's distress, and if he neglects or refuses to do so, he must reimburse the employee for his expenses in obtaining such treatment"].)

The burden of proof rests upon the party with the affirmative of the issue. (Lab. Code, § 5705.) Applicant in this matter seeks entitlement to treatment outside defendant's MPN. Consequently, applicant holds the burden of proof to show a neglect or refusal to provide treatment by defendant. (See e.g., *Amezcua v. Westside Produce* (March 11, 2013, ADJ8027084) [2013 Cal. Wrk. Comp. P.D. LEXIS 93]; *Cornejo v. Solar Turbines, Inc.* (September 24, 2013, ADJ4111589, ADJ1391390, ADJ2081394, ADJ4372783) [2013 Cal. Wrk. Comp. P.D. LEXIS 479];[3] see also *San Diego Unified Sch. Dist. v. Workers' Comp. Appeals Bd.* (*Robledo*) (2013) 79 Cal.Comp.Cases 95, 96 (writ den.) [it is applicant's burden to establish that a failure to provide notice of the MPN resulted in a denial of care].)

Applicant's Petition is not a model of clarity. It appears the parties do not dispute the issue of proper notice to applicant of defendant's MPN. (See e.g., *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc) [an employer's failure to provide required notice to an employee of rights under the MPN that results in a neglect or refusal to provide reasonable medical treatment renders the employer liable for the reasonable medical treatment self-procured by the employee]; see also Lab. Code, § 4616.3(b).) Rather, the issue appears to be whether defendant's delay in responding to applicant's September 21, 2020 request to treat with NMCI constituted a neglect or refusal to provide care.

The record indicates that applicant was treating regularly in the MPN from August 2019 until January 2020. There is no evidence in the record of any treatment after January 2020. Applicant sent his request to treat with NMCI in September 2020. As acknowledged by the WCJ in her Report, there was a delay by defendant in responding to this request until February 2021. However, applicant did not provide evidence at trial of any treatment (or even efforts to obtain treatment) following his September 2020 request. It is unclear why applicant cites to the AD's

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[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

Rules regarding assistance from the MPN's medical access assistant (MAA) when there is no evidence that he sought the MAA's assistance since his letter was addressed to the adjuster and makes no reference to the MAA.

Defendant's delay in responding to applicant's single September 21, 2020 letter asking to treat with NMCI is not substantial evidence of a neglect or refusal to provide treatment such that applicant may treat outside the MPN. There is therefore insufficient evidence in the record to find entitlement to treatment outside the MPN at defendant's expense. (See *Hamilton v. Lockheed Corp.* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) [decisions of the Appeals Board "must be based on admitted evidence in the record"]; see also *Knight*, *supra*.)

Applicant alleged at trial that he was permitted to treat outside the MPN per AD Rule 9767.5(g). This subdivision provides as follows in relevant part:

> For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, **the MPN applicant shall ensure that an initial appointment with a specialist in an appropriate referred specialty is available within 20 business days** of a covered employee's reasonable requests for an appointment through an MPN medical access assistant. **If an MPN medical access assistant is unable to schedule a timely medical appointment with an appropriate specialist within ten business days of an employee's request, the employer shall permit the employee to obtain necessary treatment with an appropriate specialist outside of the MPN.**
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> (Cal. Code Regs., tit. 8, § 9767.5(g), emphasis added.)

The 20-day time limit for an MAA to schedule an appointment per AD Rule 9767.5(g) only applies where the MAA is scheduling an appointment *with a specialist based on a referral*, not to the scheduling of an initial appointment *with a primary treating physician*.[4] The Rule references "specialist services" and "a specialist in an appropriate referred specialty." The Rules distinguish between a specialist and a primary treating physician. (Cal. Code Regs., tit. 8, § 9785(a)(1)-(2); see also *Gorbanwand v. Pacific GIS, Inc.* (September 13, 2019, ADJ10836918) [2019 Cal. Wrk. Comp. P.D. LEXIS 385].) The language of AD Rule 9767.5(g) suggests that it applies where there has been a referral to a specialist, particularly since applying this Rule to an

[4] We are not stating that a referral is required for applicant to see a specialist; we are merely clarifying that this regulatory subdivision only applies where there is a referral to a specialist and applicant requests an appointment through the MAA. (See *Pena v. Aqua Systems* (2019) 84 Cal.Comp.Cases 527 [2019 Cal. Wrk. Comp. P.D. LEXIS 86] (writ den. on a different issue).)

initial appointment with a primary treating physician potentially creates conflicting timeframes within the Rule. (See Cal. Code Regs., tit. 8, § 9767.5(f).) Moreover, this reading comports with the interpretation endorsed by the panel in *Gomez v. Fastenal* (February 6, 2013, ADJ8205235) [2013 Cal. Wrk. Comp. P.D. LEXIS 47] of a previous version of this regulatory subdivision: "Where there has been a referral to a specialist for non-emergency services, the MPN must provide an appointment within 20 days of the referral within the MPN. (AD Rule 9767.5(g).)"[5] (*Gomez*, *supra*, at pp. *9-10.)

The record does not indicate that applicant was seeking an appointment with a specialist based on a referral; rather, it shows that he was requesting treatment generally. Moreover, as noted above, applicant did not request assistance from the MAA. Therefore, AD Rule 9767.5(g) does not apply to the facts in this case.

In conclusion, we will deny applicant's Petition.

[5] At the time of *Gomez*, AD Rule 9767.5(g) stated: "For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, the MPN applicant shall ensure that an appointment is available within 20 business days of the MPN applicant's receipt of a referral to a specialist within the MPN."

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on April 13, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ AMBER INGELS, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 28, 2021

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

KNOPP PISTIOLAS
LAW OFFICES OF RICHARD GREEN
LUIS BELTRAN WITRON

AI/*pc*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*