

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

DEBORAH JOHNSON, *Applicant*

vs.

**ALVARADO HOSPITAL and SAFETY NATIONAL INSURANCE COMPANY,
administered by AMERICAN CLAIMS MANAGEMENT, *Defendants***

**Adjudication Number: ADJ10123051
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award, and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on December 9, 2021, wherein the WCJ found in pertinent part that applicant is in need of future medical treatment, that applicant's injury caused 33% permanent disability, after apportionment, and that applicant is required to be treated by medical providers in defendant's Medical Provider Network (MPN).¹

Applicant contends that the reports from orthopedic qualified medical examiner (QME) Harvey R. Wieseltier, M.D., are not substantial evidence on the issue of apportionment, that she is entitled to continue treating with Scott A. Hacker, M.D., that defendant is required to authorize treatment until the MPN dispute is litigated, and that although there was a Finding that applicant is in need of further medical treatment, the F&O does not include an award of medical treatment.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the F&O to include an award of future medical treatment, and that it otherwise be denied. We received an Answer from defendant.

¹ These Findings are actually in the Award section of the F&O but they are properly identified as Findings.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O except we will amend the F&O to find that the reports from Harvey R. Wieseltier, M.D., are not substantial evidence on the issue of apportionment; to defer the issue of permanent disability caused by applicant's injury; to find that applicant is in need of future medical care and to defer the issue of whether applicant may seek medical treatment at defendant's expense from a physician who is not in defendant's MPN. Based thereon we will amend the Award and we will return the matter to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant claimed injury to her lumbar spine, and right knee, and in the form of headaches while employed by defendant as a phlebotomist/lab technician on June 20, 2015. For the period from 2015, through 2020, applicant underwent a course of right knee treatment by Dr. Hacker including an arthroscopy (September 8, 2008) and a partial knee replacement (October 12, 2012). (App. Exh. 2, Dr. Wieseltier, December 12, 2019, p. 67; see also App. Exh. 12, Dr. Hacker, June 23, 2020 correspondence.)

On December 12, 2019, applicant was evaluated by QME Dr. Wieseltier. The doctor examined applicant, took a history, and reviewed the medical record. Dr. Wieseltier concluded that applicant had reached maximum medical improvement (MMI) and stated that his rating of applicant's disability/impairment was "Pending additional testing." (App. Exh. 2, p. 74.) On the issue of apportionment, Dr. Wieseltier stated:

I concur with Dr. Dodge's apportionment. Namely, in my opinion, this condition would have become symptomatic and disabling/impairing absent the industrial injury. This is based upon reasonable medical probability and my experience in treating thousands of patients with similar degenerative conditions. Furthermore, this disability/impairment would have manifested itself prior to the time she became permanent and stationary/maximally medically improved. ¶ It is my opinion that 35% of her lumbar disability/impairment is secondary to nonindustrial factors (degenerative and developmental spinal stenosis), and 65% is secondary to the industrial injury of 06/20/15. (See enclosure.) ¶ Ms. Johnson is also obese, which does exacerbate lower back pain (see enclosure). ¶ Regarding the right knee, Ms. Johnson has a history of prior right knee injuries. She had two surgeries prior to the 06/20/15 industrial injury and two surgeries following the 06/20/15 industrial injury. In my opinion, this condition would have become symptomatic and disabling/impairing absent the industrial injury.

This is based upon reasonable medical probability and my experience in treating thousands of patients with similar degenerative conditions. Furthermore, this disability/impairment would have manifested itself prior to the time she [sic] became permanent and stationary/maximally medically improved. ¶ It is my opinion that 40% of her right knee disability/impairment is secondary to nonindustrial preexisting and degenerative factors, and 60% is secondary to the industrial injury of 06/20/15.

(App. Exh. 2, p. 75; see also App. Exh. 1, Dr. Wieseltier, June 23, 2020, p. 11.)

On May 28, 2020 applicant was sent correspondence that stated in part:

The Prime Healthcare Medical Provider Network (MPN) ... will no longer be used for injuries after 5/31/2020. You will not continue to use this MPN to obtain care for work injuries occurring before this date. ... ¶ Unless you pre-designate a physician or medical group, your new work injuries arising on or after 6/1/2020 will be treated by providers in a new Medical Provider Network, the Harbor Health Systems MPN...

(Def. Exh. D, CorVel correspondence, May 28 2020.)²

By correspondence to applicant dated November 12, 2020, stated that:

On 10/12/2020 we sent you a letter advising you that we were transferring your medical care for your industrial injury of 06/20/2015 to Prime HealthCare's Medical Provider Network (MPN). That letter advised you that your doctor was not in our MPN, referred you to our MPN website to choose a physician within the network, and told you that you needed to pick a new treating doctor in thirty days. You were advised that your medical condition did not meet the criteria to be treated outside the medical network and referred you to the Transfer of Care section in the Employee Handbook sent with our initial notice of MPN and with that letter. We advised you of your right to dispute our decision to transfer your care to the MPN and how to do so.

(Def. Exh. C, American Claims Management correspondence, November 12, 2020.)

The parties proceeded to trial on August 30, 2021. The WCJ's summary of applicant's testimony includes:

Applicant's current knee doctor is Dr. John Lane. She saw him one time and he advised her that she is going to need a total knee replacement. Applicant has already had a right knee partial knee replacement. She had her partial knee replacement in 2017. However, applicant is no longer allowed to treat with Dr.

² It appears that on an unspecified date between May 28, 2020, and June 29, 2020, American Claims Management replaced CorVel as the administrator for defendant Safety National Insurance Company. (See Def. Exh. B, American Claims Management correspondence, June 29, 2020.)

Hacker. Dr. Hacker treated applicant from 2015 to 2020. At the time, Dr. Hacker was in the MPN. However, he is no longer in the defendant's MPN. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 30, 2021, p. 6.)

The matter was continued and the WCJ's summary of applicant's testimony at the November 8, 2021 trial includes:

Applicant is currently treating with Dr. Dodge for her back and with Dr. Lane for her knee. Both doctors are within the defendant's MPN. Applicant has been treating within the defendant's MPN since 2015. ... Applicant is aware that the medical treatment paid by the defendant requires her to treat within the defendant's MPN. Applicant is aware that she is currently treating within the defendant's MPN. (MOH/SOE, November 8, 2021, p. 3.)

Her understanding is that she did have to see doctors in the MPN when she first started seeing Dr. Hacker. When she first started seeing Dr. Hacker, he was in the defendant's MPN. However, Dr. Hacker left the defendant's MPN so she had to stop seeing him. Applicant testified Dr. Hacker attempted to get authorization to continue seeing her, but he was unsuccessful so she stopped treating with him. (MOH/SOE, November 8, 2021, p. 4.)

The issues submitted for decision included permanent disability/apportionment, and applicant's entitlement to continue receiving treatment from Dr. Hacker, "who is no longer in defendant's MPN." (MOH/SOE, August 30, 2021, p. 3.)

DISCUSSION

Labor Code section 4616.2 (d) states in part:

- (1) At the request of an injured employee, completion of treatment shall be provided by a terminated provider as set forth in this section.
- (2) The completion of treatment shall be provided by a terminated provider to an injured employee who, at the time of the contract's termination, was receiving services from that provider for one of the conditions described in paragraph (3).

Pursuant to Administrative Rule 9767.10, Continuity of Care Policy:

- (a) At the request of a covered employee, an insurer, employer, or an entity that provides physician network services that offers a medical provider network shall

complete the treatment by a terminated provider as set forth in Labor Code sections 4616.2(d) and (e). ...
Cal. Code Regs., tit. 8, § 9767.10.)

As noted above, at the trial applicant testified that when she was being treated by Dr. Hacker, he was in defendant's MPN. "However, he is no longer in the defendant's MPN." (MOH/SOE, August 30, 2021, p. 6.) She also testified that Dr. Hacker left the defendant's MPN so she had to stop seeing him. (MOH/SOE, November 8, 2021, p. 4.) In his November 25, 2020 letter, Dr. Hacker said, "I have been informed that I am no longer within the MPN." (App. Exh. 12.) However, it appears that actually defendant's administrators, CorVel and subsequently American Claims Management, notified applicant that they were no longer using the Prime Healthcare MPN and that she would need to seek treatment from providers in the Harbor Health Systems MPN (Def. Exh. D.) Thus, Dr. Hacker was not "terminated" from defendant's MPN.

Administrative Director Rule 9767.9, Transfer of Ongoing Care into the MPN, states in part that:

(a) If the injured covered employee's injury or illness does not meet the conditions set forth in (e)(1) through (e)(4), the injured covered employee may be transferred into the MPN for medical treatment, unless otherwise authorized by the employer or insurer. ...

(e) The employer or insurer shall authorize the completion of treatment for injured covered employees who are being treated outside of the MPN for an occupational injury or illness that occurred prior to the coverage of the MPN and whose treating physician is not a provider within the MPN, including injured covered employees who pre-designated a physician and do not fall within the Labor Code section 4600(d), for the following conditions: ...

(2) A serious chronic condition. For purposes of this subdivision, a serious chronic condition is a medical condition due to a disease, illness, catastrophic injury, or other medical problem or medical disorder that is serious in nature and that persists without full cure or worsens over 90 days and requires ongoing treatment to maintain remission or prevent deterioration. Completion of treatment shall be authorized for a period of time necessary, up to one year: (A) to complete a course of treatment approved by the employer or insurer; and (B) to arrange for transfer to another provider within the MPN, as determined by the insurer, employer, or entity that provides physician network services. The one year period for completion of treatment starts from the date of the injured covered employee's receipt of the notification, as required by subdivision (f), of the determination that the employee has a serious chronic condition. ...

(f) If the employer or insurer decides to transfer the covered employee's medical care to the medical provider network, the employer, insurer, or entity that provides physician network services shall notify the covered employee of the determination regarding the completion of treatment and the decision to transfer medical care into the medical provider network. The notification shall be sent to the covered employee's address and a copy of the letter shall be sent to the covered employee's primary treating physician. The notification shall be written in English and Spanish and use layperson's terms to the maximum extent possible.

(g) If the injured covered employee disputes the medical determination under this section, the injured covered employee shall request a report from the covered employee's primary treating physician that addresses whether the covered employee falls within any of the conditions set forth in subdivisions (e)(1-4). The treating physician shall provide the report to the covered employee within twenty calendar days of the request. If the treating physician fails to issue the report, then the determination made by the employer or insurer referred to in (f) shall apply.

(h) If the employer or insurer or injured covered employee objects to the medical determination by the treating physician, the dispute regarding the medical determination made by the treating physician concerning the transfer of care shall be resolved pursuant to Labor Code section 4062.
(Cal. Code Regs., tit. 8, §9767.9.)

Review of the record indicates that defendant did not comply with the MPN notice requirements defined in the AD rules. However, applicant testified that she is receiving treatment for her back and knee from doctors in defendant's MPN, and the WCJ is correct that the "letter" from Dr. Hacker does not constitute a "report" as required by 9767.10(d)(2). Also, if applicant's condition was found to be a serious chronic condition, the completion of treatment would be authorized for a period of time up to one year from the date that applicant received notification that she was being transferred to another provider within defendant's MPN. It appears that she received notice on or about May 28, 2020. (See Def. Exh. D.) Further, the record also contains no information indicating that the parties complied with the procedures required to resolve the treating doctor/MPN dispute, (Cal. Code Regs., tit. 8, §9767.9(h), as quoted above); but again, it must be noted that applicant agreed to, and received treatment from Dr. Dodge and Dr. Lane, after she stopped receiving treatment from Dr. Hacker, and both doctors are providers in the Harbor Health Systems MPN, i.e. defendant's MPN.

As discussed above, the record in this matter regarding the issue of whether applicant is entitled to be treated, at defendant's expense, by a physician who is not in defendant's MPN is complex and contains several inconsistencies. An award, order or decision by the Appeals Board must be supported by substantial evidence in light of the entire record. (Lab. Code § 5952; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to fully adjudicate the issues. (Lab. Code, §5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) Under the circumstances of this matter, it is appropriate that it be returned to the trial level for further proceedings. We recommend that the WCJ confer with the parties to determine how to proceed with further development of the record.

Regarding the issue of apportionment, in order to constitute substantial evidence as to the issue of apportionment, the medical opinion must disclose the reporting physician's familiarity with the concepts of apportionment and must delineate the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board *en banc*)). Also, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Id.* at 621)

In his December 12, 2019 report, (as quoted in his June 23, 2020 report), Dr. Wieseltier stated that applicant had two right knee surgeries prior to her June 20, 2015 injury and in his opinion, her right knee condition would have become symptomatic and disabling without the industrial injury. He also stated that the disability would have manifested prior to the time that applicant's right knee condition became permanent and stationary/reached maximum medical improvement. Although his rating of applicant's disability/impairment was "Pending additional testing." (App. Exh. 2, p. 74) he then concluded, "It is my opinion that 40% of her right knee disability/impairment is secondary to nonindustrial preexisting and degenerative factors, and 60% is secondary to the industrial injury of 06/20/15." (App. Exh. 1, p. 11.)

It appears that Dr. Wieseltier speculated that the disability from applicant's pre-existing knee condition would have "manifested" without the June 20, 2015 injury. He did not explain how and why the pre-existing condition was causing permanent disability at the time of the evaluation, nor did he explain how and why those factors are responsible for 40% of applicant's right knee disability. Nor did he explain how he could apportion disability when he had not yet determined applicant's disability. Thus, Dr. Wieseltier's conclusion regarding apportionment, as stated in the December 12, 2019 report and quoted in the June 23, 2020 report, does not constitute substantial evidence.

As we explained above, an award, order, or decision of the Appeals Board must be supported by substantial evidence (Lab. Code, § 5952(d); *Garza v. Workmen's Comp. Appeals Bd.*, *supra*; *LeVesque v. Workmen's Comp. Appeals Bd.*, *supra*) and we have the discretionary authority to further develop the record where there is insufficient evidence to determine an issue that was submitted for decision. (*McClune v. Workers' Comp. Appeals Bd.*, *supra*.) When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Upon return of this matter, it would be appropriate for the parties to request that Dr. Wieseltier submit a supplemental report to address and clarify his conclusions on the issue of apportionment.

Accordingly, we affirm the F&O except we amend the F&O to find that the reports from Harvey R. Wieseltier, M.D., are not substantial evidence on the issue of apportionment; to defer the issue of permanent disability caused by applicant's injury; to find that applicant is in need of future medical care and to defer the issue of whether applicant may seek medical treatment at defendant's expense from a physician who is not in defendant's MPN. We amend the Award based thereon and we return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 9, 2021 Findings, Award, and Order is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

7. The reports from Harvey R. Wieseltier, M.D., are not substantial evidence on the issue of apportionment.
8. The issue of permanent disability caused by applicant's injury is deferred.
9. Applicant is in need of future medical care to cure or relieve from the effects of her injury; the issue of whether applicant may seek medical treatment at defendant's expense, from physicians not in defendant's MPN, is deferred.

AWARD

* * *

1. The award of permanent disability indemnity is deferred pending development of the record.
2. Applicant is awarded further medical treatment to cure or relieve from the effects of the June 20, 2015 injury; the issue of her entitlement to receive treatment from providers outside defendant's MPN, at defendant's expense, is deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the WCJ for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 20, 2022

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

**LAW OFFICES OF DANIEL LEE
DEBORAH JOHNSON
EMPLOYMENT DEVELOPMENT DEPARTMENT
LAW OFFICE OF STEVEN SCHULMAN**

TLH/pc

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

CS