WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA LAZCANO, ***Applicant***

vs.

LUTHERAN HIGH SCHOOL ASSOCIATION; REDWOOD FIRE & CASUALTY COMPANY, c/o BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Numbers: ADJ13514659; ADJ10647989
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the January 21, 2022 Joint Findings and Order after Resubmission (F&O), wherein the workers' compensation administrative law judge (WCJ) found that defendant failed to establish it properly notified the applicant of her right to pre-designate a physician prior to her work injuries, that applicant has been denied care within defendant's medical provider network (MPN), and that the applicant is entitled to treat outside of defendant's MPN.

Defendant contends that notwithstanding the alleged failure of notice, applicant has not met the burden of establishing her requested non-MPN physician would have agreed to pre-designation per Labor Code section 4600, subd. (d), or that there has been a refusal or neglect of medical treatment.[1]

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration, rescind the F&O, and substitute new findings of fact and orders.

---

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

FACTS

In ADJ10647989, applicant claimed injury to the low back, left shoulder, head, depression, neurological system, neck, and right knee while employed as an administrative assistant by defendant Lutheran High School Association, then insured by Cypress Insurance Company, c/o Berkshire Hathaway Homestate Companies (defendant), on January 5, 2016. Defendant admits injury to the low back and left shoulder and disputes injury to all other body parts. (June 15, 2021 Minutes of Hearing and Summary of Evidence (Minutes), at 2:22.)

In ADJ13514659, applicant claimed injury to the low back and other body parts while employed as an administrative assistant by defendant on August 20, 2019. Defendant disputes the nature and extent of the claimed injury. (June 15, 2021 Minutes, at 3:12; 4:1.)

The parties proceeded to Expedited Hearing held on June 15, 2021, and framed issues of whether "applicant's future medical care must remain within the established Medical Provider Network," whether defendant denied or abandoned applicant's treatment between injuries, whether defendant failed to designate the primary treating physician or provide notice of the MPN, whether there had been a failure of "reporting requirements" by defendant's physicians, and whether applicant was entitled to self-procure her medical treatment. (June 15, 2021 Minutes, at 4:1.)

On August 24, 2021, applicant testified to her injury of January 5, 2016, and her complaints of back pain, mid-back pain, mild memory impairment, right knee, neck and left shoulder pain. (August 24, 2021 Minutes, 2:10.) Applicant entered into a Stipulation with Request for Award on October 3, 2017, and petitioned to reopen that award on August 24, 2020. (*Id*. at 2:12.) Applicant continued to experience pain and discomfort in the neck, and underwent a cervical spine MRI. (*Id*. at 2:15.) Applicant's physician recommended physical therapy, which defendant authorized, while a "possible cervical injection" was not. (*Id*. at 3:1.) Applicant sustained a second injury in August, 2019 when a table she was leaning on gave way. (*Id*. at 3:5.) Following the injury, applicant changed her treating doctor from Concentra (formerly U.S. Healthworks) to Kaiser, because she did not like the care she was receiving at Concentra and thought Kaiser might provide a better outcome. (*Id*. at 3:11.) Applicant informed the staff at Kaiser about her symptoms in the neck, left shoulder and lumbar spine, but Kaiser treated the lumbar spine only. Applicant's physician, Dr. Liao, indicated that only the low back was authorized. (*Id*. at 3:14.) Applicant was further told to choose between Kaiser and Concentra. (*Id*. at 3:22.) Applicant attempted to return to Concentra

to treat for her first date of injury, but Concentra refused to treat her because she had a second date of injury. (*Id*. at 3:24.) Kaiser never treated applicant's neck, applicant asked and they refused. (*Id*. at 4:2.) In August, 2020, applicant's attorney referred her to IPM Medical Group for treatment. (*Id.* at 4:16.) Applicant trusts her treating physician and wishes to continue her treatment there. (*Id*. at 4:22.) If applicant knew she could predesignate a physician, she would have predesignated either her family physician Dr. Frisch or her chiropractor Dr. Iverson. (*Id*. at 5:3.) Applicant was informed by Berkshire Hathaway that Dr. Iverson is not in their network. (*Id*. at 5:13.) Applicant has access to an online service at work to coordinate her medical benefits, but she has only used it for her private healthcare, not any workers' compensation related information. (*Id*. at 5:18.) Applicant did not know she could predesignate a physician for workers' compensation injuries. (*Id*. at 5:23.) Applicant only became aware of this after her first injury. (*Id*. at 6:13.)

The WCJ issued a Joint Findings and Order on September 29, 2021. Defendant filed a Petition for Reconsideration citing, *inter alia*, discrepancies in the record with respect to admitted body parts. On October 27, 2021, the WCJ vacated the submission to clarify the contested body parts. (Joint Order Vacating Submission, dated October 27, 2021.) The WCJ conducted a hearing on December 1, 2021, at which time the parties stipulated that the Minutes of Hearing and Summary of Evidence dated June 15, 2021 should "stand as written," and that the nature and extent of the claimed injury to the neck was not being placed in issue at that time. (December 1, 2021 Minutes, at 2:7.) The parties submitted the matter for decision.

The WCJ issued the F&O on January 21, 2022, determining in relevant part that defendant failed to establish they properly notified the applicant of her right to pre-designate a physician prior to her work injuries, that the applicant has been denied care within defendant's MPN, and that "applicant is entitled to treat outside of defendant's MPN, and the Court designates Dr. Offenberger with IPM Medical Group as her Primary Treating Physician." (January 21, 2022 F&O, Findings of Fact Nos. 3 through 6.) In the opinion on decision, the WCJ found applicant's trial testimony she had not been advised of her right to pre-designate a treating physician to be credible and persuasive. (Opinion on Decision, p.4, para.1.) Addressing the issue of whether applicant's medical care must remain with defendant's MPN, the opinion observed that applicant sought treatment at Kaiser because she was dissatisfied with her treatment at U.S. Healthworks/Concentra. (*Id*. at p.4, para. 2.) However, Kaiser would only provide medical treatment for applicant's lumbar spine, and when applicant attempted to return to Concentra, they

declined treatment "because she now had a second date of injury." *(Ibid.)* The WCJ concluded that applicant had been denied proper care by MPN physicians/providers Dr. Liao and Concentra. (*Id*. at 5, first full para.) Accordingly, applicant was entitled treat with IPM Medical Group for both dates of injury.

Defendant's Petition contends that applicant did not prove that she was not notified of her right to pre-designate a physician, because the applicant testified that she was not aware of what information was provided through the Lutheran High Schools Employee website. (Petition, at 3:17.) Defendant further avers that assuming, arguendo, notice was not provided, applicant did not establish the criteria set forth in Labor Code section 4600(d)(2), including evidence that her selected physician would have agreed to be predesignated.[2] (Petition, at 4:11.) Defendant further asserts there is no evidence that defendant neglected or refused medical treatment on the body parts that were the subject of the October 3, 2017 stipulated Award, of low back and left shoulder. (*Id*. at 6:4.)

The WCJ's Report notes the employer's obligations to provide appropriate notice to employees of their rights to pre-designate a physician:

> It is [the employer's] responsibility to effectively communicate the applicant's rights to them, namely Labor Code 4600(d)(2) sections A through C, as outlined in Labor Code 3551(b)(3). Dr. Frisch seems to meet those requirements and would have been an acceptable pre-designation. It is unknown whether Dr. Frisch would have accepted the role of applicant's pre-designated physician, if requested. In the case at bar, the applicant credibly testified under cross examination that there is a computer system set up by Human Resources for medical benefit coordination. The applicant used the system pre-injury to coordinate her benefits for private healthcare. She also credibly testified that she was not provided the information necessary to know that she had the option to pre-designate her personal physician, or she would have done so. There was no evidence provided by defendant that the information was provided to the applicant. Defendant failed to establish that they properly notified the applicant of her rights. (Report, at p.7.)

DISCUSSION

A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case," (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-

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

535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) The term 'final order' includes orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and determining whether the employer has provided compensation coverage." (*Id.*, at p. 1075.) A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues.

If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final orders. Here, the F&O included a finding that applicant was entitled to medical treatment outside the employer's Medical Provider Network. Accordingly, because the WCJ determined that applicant had a right to medical treatment, and because the right to medical treatment and defendant's liability for it is a final order, the decision was a final order. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

An employer must provide an injured worker with medical treatment that is reasonably required to cure or relieve the worker from the effects of an industrial injury. (Lab. Code, § 4600 (a).) An employer may establish an MPN for the provision of medical treatment to its injured employees and may transfer an injured employee's care into an MPN for medical treatment so long as it complies with the applicable statutory and regulatory requirements. (Lab. Code. § 4616, Cal. Code Regs., tit. 8, § 9767.9); (*Bobbitt v. Ow Jing dba National Market* (2007) 72 Cal.Comp.Cases 70 (en banc).) At any time prior to the injury, the employee has the right to predesignate a personal physician for treatment in case of an injury; that physician need not be part of the MPN. (Lab. Code. § 4600 (d); Cal. Code Regs., tit. 8. § 9780.1.)

Section 4600, subd. (d) provides:

> (1) If an employee has notified the employee's employer in writing prior to the date of injury that the employee has a personal physician, the employee shall have the right to be treated by that physician from the date of injury if the employee has health care coverage for nonoccupational injuries or illnesses on

the date of injury in a plan, policy, or fund as described in subdivisions (b), (c), and (d) of Section 4616.7.

(2) For purposes of paragraph (1), a personal physician shall meet all of the following conditions:

(A) Be the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

(B) Be the employee's primary care physician and has previously directed the medical treatment of the employee, and who retains the employee's medical records, including the employee's medical history. "Personal physician" includes a medical group, if the medical group is a single corporation or partnership composed of licensed doctors of medicine or osteopathy, which operates an integrated multispecialty medical group providing comprehensive medical services predominantly for nonoccupational illnesses and injuries.

(C) The physician agrees to be predesignated.

The corresponding Administrative Director rule under California Code Regs., Tit. 8, section 9780.1 provides for an "Employee's Predesignation of Personal Physician" as follows:

(a) An employee may be treated for an industrial injury in accordance with section 4600 of the Labor Code by a personal physician that the employee predesignates prior to the industrial injury if the following three conditions are met:

(1) Notice of the predesignation of a personal physician is in writing, and is provided to the employer prior to the industrial injury for which treatment by the personal physician is sought. The notice shall include the personal physician's name and business address, and the name of the plan, policy, or fund providing the employee with health care coverage for nonoccupational injuries or illnesses as required by subdivision (a)(2) of this section. The employee may use the optional predesignation form (DWC Form 9783) in section 9783 for this purpose.

(2) The employee has health care coverage for nonoccupational injuries or illnesses on the date of injury in a plan, policy, or fund as described in subdivisions (b), (c), and (d) of Labor Code section 4616.7.

(3) The employee's personal physician agrees to be predesignated prior to the injury. The personal physician may sign the optional predesignation form (DWC Form 9783) in section 9783 as documentation of such agreement. The physician may authorize a designated employee of the

> physician to sign the optional predesignation form on his or her behalf. If the personal physician or the designated employee of the physician does not sign a predesignation form, there must be other documentation that the physician agrees to be predesignated prior to the injury in order to satisfy this requirement.
>
> (b) If an employee has predesignated a personal physician prior to the effective date of these regulations, such predesignation shall be considered valid if the conditions in subdivision (a) have been met.

The employer is further obligated to provide all new employees with a variety of notices regarding their rights under the California workers' compensation system, including the provision of "[a] form that the employee may use as an optional method for notifying the employer of the name of the employee's "personal physician," as defined by Section 4600, or "personal chiropractor," as defined by Section 4601." (Lab. Code § 3551(b)(3).)

Here, applicant alleges she was not advised of her rights to predesignate a personal physician. Defendant responds that applicant is not sure what information is contained on the Lutheran High Schools Employee website, or whether the web site provides information regarding applicant's right to pre-designate a treating physician. Defendant thus contends that applicant has not met the burden of establishing a failure to notify her of her right to predesignate a personal physician. However, this contention misapprehends the burden of proof because the defendant has the affirmative of the issue, and thus bears the affirmative burden of establishing that it provided appropriate notice to applicant of her rights to pre-designate. (*Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423, 1434 (Appeals Board en banc), Lab. Code § 5705.) The evidentiary record before us does not *affirmatively* establish the requisite notice. Moreover, the WCJ determined that applicant's testimony that she was not advised of those rights was credible, and we accord to that determination the great weight to which it is entitled. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

However, section 4660, subd. (d), also sets forth the requirements necessary for a physician to be pre-designated. These include being a licensed physician who has previously directed applicant's medical treatment, retention of applicant's medical records and medical history, and agreement to the pre-designation. The word "shall" in the statute indicates the requirements are mandatory. (Lab. Code, § 15 [" '[s]hall' is mandatory and 'may' is permissive"]; see also, *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357 [58 P.3d 367, 127 Cal. Rptr. 2d 516]; *Jones v.*

Tracy School Dist. (1980) 27 Cal.3d 99, 109 [611 P.2d 441, 165 Cal. Rptr. 100]; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 [559 P.2d 606, 136 Cal. Rptr. 251, 42 Cal. Comp. Cas 131].)

Applicant testified at trial that prior to her injury of January 5, 2016, she had seen Dr. Frisch as her family physician, and Dr. Iverson for neck and back pain. (August 24, 2021 Minutes, at 5:1.) However, the record does not establish that Dr. Frisch ever agreed to be pre-designated under section 4600(d)(2)(C), nor did applicant present "other documentation that the physician agrees to be predesignated prior to the injury in order to satisfy this requirement," under AD Rule 9780.1(a)(3). (S*elvitell v. Marinwood Community Services Dist.* (June 25, 2018, ADJ10908349) [2018 Cal. Wrk. Comp. P.D. LEXIS 318] (panel decision).) The WCJ further noted in the report that "it is unknown whether Dr. Frisch would have accepted the role of applicant's pre-designated physician, if requested." (Report, at p.7.) Accordingly, applicant has not established that the requirements of section 4600(d), including the physician's agreement to be pre-designated, have been met.

The Petition further contends that defendant has not neglected or refused medical treatment. In *Knight, supra*, 71 Cal. Comp. Cases 1423, the Appeals Board held "that an employer or insurer'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 or insurer liable for reasonable medical treatment self-procured by the employee." Because the defendant neglected and refused to provide reasonable medical treatment, the defendant was, therefore, liable for treatment applicant self-procured from a doctor outside the MPN. (*Id*. at 1436; see also *Voss v. Workers' Comp. Appeals Bd.* (1974) 10 Cal.3d 583, 588 [516 P.2d 1377, 111 Cal. Rptr. 241] [39 Cal.Comp.Cases 56] (*Voss*); *Zeeb v. Workers' Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501–503 [432 P.2d 361, 62 Cal. Rptr. 753] [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 86 [410 P.2d 362, 48 Cal. Rptr. 858] [31 Cal.Comp.Cases 93] (*McCoy*).)

Here, defendant contends there has been no denial or refusal of medical treatment that would allow applicant to treat outside the MPN at employer expense. We held in *Knight* that "in the event of a dispute about whether the injured worker was provided notice of rights under an MPN, the employer carries the burden of proof." (*Id*. at 1435.) *Knight* did not address the issue of which party carries the burden of proof on the issue of establishing neglect or refusal of medical treatment. However, we are persuaded that it is applicant's burden to show that a defendant's

breach of an MPN duty resulted in a neglect or refusal. (See also, *Lynch v. County of Kern* (October 22, 2014, ADJ9415335) [2014 Cal.Wrk. Comp. P.D. LEXIS 575].)

Applicant asserts that defendant failed to provide medical treatment to her neck through either of the MPN providers, Concentra or Kaiser/Dr. Liao. (August 24, 2021 Minutes, at 2:15; 3:14.) However, the parties have stipulated that the defendant has denied liability for the neck, which remains a contested body part in both pending cases. (December 1, 2021 Minutes, at 2:7.) And while applicant contends she was denied medical treatment for her injuries generally, the record reflects no request for authorization for medical treatment by either her physicians at Kaiser, or at U.S. Healthworks/Concentra that was not acted upon by the defendant. There is no indication that applicant's physicians submitted any request for medical treatment that the defendant did not timely address through Utilization Review or that the defendant otherwise refused or neglected. Moreover, neither the Findings of Fact nor the Opinion makes reference to any specific instance of refusal or neglect. (*Knight, supra*, 71 Cal. Comp. Cases 14wd23; *McCoy, supra,* 64 Cal.2d 82.) We thus find that applicant has not carried the burden of establishing that defendant has neglected or refused her medical treatment, and as a result, is not entitled to non-MPN treatment at employer expense. Accordingly, we will grant defendant's Petition, rescind the January 21, 2022 F&O, and substitute new findings of fact that applicant has not established that defendant has neglected or refused medical treatment, and that applicant is not entitled to treat outside defendant's MPN at employer expense.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Joint Findings and Order After Resubmission of January 21, 2022 is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Order after Resubmission of December 21, 2021 is **RESCINDED**, with the following **SUBSTITUTED** in its place:

JOINT FINDINGS OF FACT

1. The applicant, PATRICIA LAZCANO, alleges industrial injury to her lumbar spine, left shoulder, head, concussion, neurological, neck, and right knee, occurring as a specific trauma on January 5, 2016, while employed by Orange Lutheran High School as an

administrative assistant. The body parts of low back and left shoulder are accepted; all other body parts are in dispute.

2. The applicant, PATRICIA LAZCANO, also alleges industrial injury to her low back, neck, spine, and 'all other body parts,' occurring as a specific trauma on August 20, 2019, while employed by Orange Lutheran High School as an administrative assistant. The body part of low back is accepted; all other body parts are in dispute.
3. Defendant has a properly established Medical Provider Network, and the applicant was properly notified of the MPN subsequent to her injuries.
4. Applicant has not met the burden of establishing that defendant refused or neglected her medical treatment.
5. Applicant is not entitled to treat outside defendant's MPN at employer expense.

ORDER

a. Applicant's Exhibits 1-7 are admitted into evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2022

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

PATRICIA LAZCANO
THOMAS F. MARTIN, PLC
MULLEN & FILIPPI

SAR/abs

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