WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EUN JAE KIM, ***Applicant,*** **vs.** **B.C.D. TOFU HOUSE, INC.; CYPRESS INSURANCE COMPANY, et. al,** ***Defendants.***	**Case No. ADJ9086333** **(Los Angeles District Office)** **OPINION AND ORDER GRANTING REMOVAL ON MOTION OF THE APPEALS BOARD, ORDER DISMISSING DEFENDANT'S PETITION FOR REMOVAL, AND DECISION AFTER REMOVAL**

This case is removed to the Appeals Board on our own motion pursuant to Labor Code section 5310, and we hold as our Decision After Removal that during the 90-day period described in Labor Code section 5402(b) a party is entitled to an expedited hearing pursuant to Labor Code section 5502(b) to address the provision of reasonable medical treatment through the employer's medical provider network (MPN).[1]

A Petition For Removal (Petition) was filed by Berkshire Hathaway Homestate Companies (BHHC) on behalf of Cypress Insurance Company, to challenge the November 13, 2013 decision of the workers' compensation administrative law judge (WCJ) that an expedited hearing was "not appropriate" to address defendant's provision of medical treatment through its MPN because "[d]efendant confirms that case is not admitted."[2] We conclude that the WCJ erred by ordering the case off calendar instead of

[1] The Appeals Board has designated this as a significant panel decision. Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); 25 Cal. Workers' Comp. Rptr. 197 [News Brief, August 1997].)

[2] Quotations are from the November 13, 2013 minute order. An answer to defendant's Petition was received from applicant, and the WCJ provided a Report And Recommendation On Petition For Removal (Report) recommending that removal be denied.

proceeding with the expedited hearing on November 13, 2013. However, defendant's Petition challenging that action is dismissed as moot because the 90-day period described in Labor Code section 5402(b) has expired and there is no remedy to apply.[3] Questions concerning the provision of medical treatment through defendant's MPN must now be addressed at the trial level in light of the current status of the case.

BACKGROUND

On September 9, 2013, applicant filed an Application for Adjudication of Claim alleging that she sustained cumulative industrial injury to her back and other body parts while working for B.C.D. Tofu House, Inc. (BCD) as a waitress manager during the period September 1, 1999 to September 7, 2013, and identifying BCD's "Claims Administrator" as "Berkshire Hathaway San Diego."

In its Petition, BHHC avers that "immediately" upon receipt of the claim a "complete MPN package" was sent to applicant on September 18, 2013.[4] However, in a letter under the letterhead of "Tower Group Companies" and dated September 19, 2013, adjuster Cecelia Santos for Preserver Insurance Company notified applicant that "Tower Group Companies is handling your workers' compensation claim" on behalf of BCD and that "we are denying liability" for the claimed injury "as there is no policy in effect at the time of alleged injuries."[5] Ms. Santos further states in her letter that there was no "medical proof to substantiate whether your alleged injuries were due to your employment with BCD Tofu House."

The parties appear to acknowledge in their pleadings that applicant at some point thereafter identified non-MPN physician Gabriel Rubanenko, M.D., as her primary treating physician.

Both parties state in their pleadings that a delay notice was sent to applicant on September 30, 2013. In her answer, applicant asserts that the delay letter identified "Dr. David Heskiaoff" as primary

[3] Further statutory references are to the Labor Code.

[4] None of the attachments described in defendant's Petition were found in EAMS, but our review of those attachments is unnecessary to decide the legal issue we address at this time.

[5] It appears from the EAMS record that "Tower National Insurance" filed a copy of the September 19, 2013 letter by Ms. Santos on December 3, 2013. The relationship of that entity to this case is unclear from the current record.

treating physician, but did not schedule an initial medical evaluation. Applicant further avers in her answer that the next day on October 1, 2013 she was "informed that defendant" had selected Richard Feldman, M.D., as her new primary treating physician and had scheduled an initial evaluation for October 23, 2013.[6]

As shown by the clerk's date stamp, defendant filed a Declaration of Readiness to Proceed on October 11, 2013, with the following statement:

> "Claim is in delay mode. Applicant has been advised of treatment within the MPN. Defendant is attempting to provide medical tretment [*sic*] within the delay period, within the MPN. Applicant's attorney has selected a non-MPN physician as primary treactmng [*sic*] physician. Defendant seeks an order for treatment and transfer of care into the MPN, and an order regarding no liability for non-MPN treatment with Dr. Rubanenko"

An expedited hearing was calendared for November 13, 2013, and the attorneys for applicant and defendant appeared at that time. However, the expedited hearing did not go forward. Instead, the case was ordered off calendar by the WCJ, who wrote on the Minutes of Hearing: "As of 11/13/13 defendant confirms that case is not admitted. Not appropriate for [Expedited Hearing]."

In his Report, the WCJ confirms that the case was taken off calendar "because the [d]efendant confirmed on the day of hearing that it had not admitted or denied liability for the alleged injury, and the 90-day time frame permitted [by section 5402(b)] to make such a decision had not yet elapsed."[7] The WCJ further writes in the Report that the decision to not proceed with the expedited hearing is supported by Rule 10252 of the Rules of the Court Administrator, which provides that a party is entitled to an

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[6] Defendant submitted a response to applicant's answer that contests applicant's averments and includes a request for imposition of sanctions and an award of attorney's fees. Defendant's response is not accepted for filing because leave to file the response was not requested as required by the WCAB Rule 10848, which provides as follows: "When a petition for reconsideration, removal or disqualification has been timely filed, *supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board*. Supplemental petitions or pleadings or responses other than the answer, except as provided by this rule, shall neither be accepted nor deemed filed for any purpose and shall not be acknowledged or returned to the filing party." (Cal. Code Regs., tit. 8, § 10848, emphasis added.)

[7] Section 5402(b) provides as follows: "If liability is not rejected within *90 days after the date the claim form is filed under Section 5401*, the injury shall be presumed compensable under this division. The presumption of this subdivision is rebuttable only by evidence discovered subsequent to the 90-day period." (Emphasis added.) Defendant avers in its Petition that in this case the last day of the 90-day period described in section 5402 is December 15, 2013.

expedited hearing and decision on the issue of "the employee's entitlement to medical treatment pursuant to Labor Code section 4600" when "injury to any part or parts of the body is accepted as compensable by the employer." (Cal. Code Regs., tit. 8, § 10252.) In sum, the WCJ reasoned that Court Administrator Rule 10252 precluded an expedited hearing on the issue of applicant's medical treatment in the MPN because defendant had not accepted any part of the claimed injury as compensable even though the 90-day period allowed by section 5402(b) to make such a decision had not yet elapsed.

DISCUSSION

The reasoning given by the WCJ in his Report for not conducting an expedited hearing on November 19, 2013 is incomplete because it does not take into account the amendment of section 5502(b)(2) by Senate Bill 863 to provide for an expedited hearing to address the question of, "Whether the injured employee is required to obtain treatment within a medical provider network…"[8] The amendment to section 5502(b)(2) does not take into account the pre-existing Rule 10252, which requires that at least one part of the body be accepted as industrially injured in order to obtain an expedited hearing. However, to the extent the amendment to section 5502(b) is inconsistent with Rule 10252, the statutory provision prevails.

The WCJ also did not address Rule 9767.6(c) of the Rules of the Administrative Director, which requires an employer to provide up to $10,000 of medical treatment within its MPN "until the date that liability for the claim is rejected."[9] Administrative Director Rule 9767.6(c) is consistent with the employer's limited obligation to provide medical treatment under section 5402(c), which provides in pertinent part that, "Until the date the claim is accepted or rejected, [an employer's] liability for medical treatment shall be limited to ten thousand dollars ($10,000)." It is also consistent with the defendant's

[8] Section 5502(b)(2) provides in pertinent part as follows: "The administrative director shall establish a priority calendar for issues requiring an expedited hearing and decision. A hearing shall be held and a determination as to the rights of the parties shall be made and filed within 30 days after the declaration of readiness to proceed is filed if the issues in dispute are any of the following, provided that if an expedited hearing is requested, no other issue may be heard until the medical provider network dispute is resolved:…(2) Whether the injured employee is required to obtain treatment within a medical provider network…"

[9] Rule 9767.6(c) now provides in full as follows: "The employer or insurer shall provide for the treatment with MPN providers for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is rejected. Until the date the claim is rejected, liability for the claim shall be limited to ten thousand dollars ($10,000)."

right to establish an MPN for the provision of medical treatment to injured employees (Lab. Code, §§ 4616, 4600(c)) and, in particular, with section 4616.3(a), which provides: "If the injured employee *notifies the employer of the injury or files a claim for workers' compensation with the employer*, the employer shall arrange an initial medical evaluation and begin treatment as required by Section 4600." (Italics added.) Thus, section 4616.3(a), which is one of the MPN statues, requires a defendant to commence treatment within its MPN when the employer receives notice of the injury from the employee, even if the claim has not been accepted or denied and is within the 90-day delay period allowed by section 5402(b).

It is apparent from the plain language of section 5502(b)(2) and Administrative Director Rule 9767.6(c) that an expedited hearing is available to address the provision of medical treatment through an MPN during the 90-day period described in section 5402(b), and that this applies even if the employer has not accepted liability for the claim as described in Court Administrator Rule 10252.

Accordingly, we find that the WCJ erred when he decided not to proceed with the expedited hearing on November 13, 2013 as requested by defendant. Instead, the WCJ should have conducted an expedited hearing to determine whether defendant had met its obligation to provide reasonable medical treatment through its MPN pursuant section 5402(c) and as described in Administrative Director Rule 9767.6(c), or whether defendant was liable for the reasonable cost of medical treatment self-procured by applicant. (See, Lab. Code, § 4616.3(b) ["The employer's failure to provide notice as required by this subdivision or failure to post the notice as required by Section 3550 shall not be a basis for the employee to treat outside the network unless it is shown that the failure to provide notice resulted in a denial of medical care."]; *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc).)

We conclude that the WCJ erred in determining that the case and the MPN issue raised by defendant were "not appropriate" for expedited hearing on November 13, 2013. However, we dismiss defendant's Petition as moot because the 90-day period allowed by section 5402(b) has elapsed, and there is no appropriate remedy we can provide at this time. Instead, the case is returned to the trial level

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where any issue regarding defendant's obligation to provide medical treatment can be addressed in light of its current status.

For the foregoing reasons,

IT IS ORDERED that this case is **REMOVED** to the Appeals Board on our own motion pursuant to Labor Code section 5310.

IT IS FURTHER ORDERED as the Decision After Removal that the Petition filed by defendant on November 21, 2013, for removal of the case to the Appeals Board is **DISMISSED.**

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IT IS FURTHER ORDERED as the Decision After Removal that the case is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Alfonso J Moresi

I CONCUR,

/s/ Ronnie G. Caplane

/s/ Frank M. Brass

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

2/7/2014

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

EUN JAE KIM
SOLOV AND TEITELL
GRANCELL STANDER ET. AL.

JFS/abs