WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

KARLA GONZALEZ, *Applicant*

vs.

AC TRANSIT; YORK RISK SERVICES, *Defendants*

Adjudication Numbers: ADJ11005277, ADJ11327025
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the December 21, 2020 Findings and Award issued by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained admitted industrial injury to her right ankle while employed as a janitor on December 10, 2013 (ADJ11327025) and on March 9, 2017 (ADJ11005277). The WCJ made the following additional findings: "(4) Applicant wishes to undergo the procedure at issue, and would like it to be performed by Dr. Paul Hughes at NMCI. Dr. Hughes is not in defendant's medical provider network;" "(5) Defendant first established its entitlement to transfer applicant's care to its medical provider network on July 1, 2020. Dr. Hughes requested authorization for surgery on September 8, 2020. The request was certified through utilization review on September 23, 2020;" and "(6) There is need for medical treatment to cure or relieve from the effects of said injury, specifically including the procedure for which Dr. Hughes requested authorization on September 8, 2020." Based on these findings, the WCJ made an award of medical treatment "consistent with findings of fact number 6."

Defendant contends that the WCJ should have applied Labor Code section 4616.2 to find applicant not entitled to an exception to the transfer of care into defendant's medical provider network (MPN).

Applicant filed an answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision solely to clarify the finding that applicant is entitled to completion of care outside of defendant's MPN and otherwise affirm the WCJ's decision. Because we are amending the WCJ's decision solely for the sake of clarity, we do not adopt and incorporate the report's recommendation that we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 21, 2020 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 21, 2020 Findings and Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

6. Applicant is entitled to completion of care outside of defendant's MPN consisting of right ankle surgery with Paul Hughes, M.D., at NMCI.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2021

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

KARLA GONZALEZ
RATTO LAW FIRM
MICHAEL SULLIVAN & ASSOCIATES

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on January 15, 2021, defendant seeks reconsideration of the decision filed herein on December 21, 2020, in this case, which arises out of an admitted injury, on March 9, 2017, to the right ankle of a 48-year-old janitor. Petitioner, hereinafter defendant, contends in substance that I erred in finding applicant entitled to proceed with surgery through her designated treating physician, who is not in defendant's medical provider network.[1] Applicant has filed an answer. I will recommend that reconsideration be denied.

FACTS

The factual background is summarized in the opinion on decision, as follows:

> The injury took place as applicant was ascending stairs at work while carrying a vacuum cleaner. She tripped but did not fall, and in the process injured her right ankle. She reported the injury on the day it took place (Exh. E, review of records), but defendant, on May 30, 2017, denied liability, stating they did not "have a med/legal report addressing causation. We are awaiting the Medical Unit to issue [sic] a panel list [of qualified medical evaluators (QMEs)]." (Denial letter, May 30, 2017, filed in EAMS.[2]) After several skirmishes over the parties' respective efforts to obtain valid panels in different specialties, a panel of QMEs did issue, from which was selected the name of Jay Glasser, DPM. In his initial report, dated July 9, 2018, Dr. Glasser reviews medical records dating back to before applicant's earlier injury, in 2013, describes his findings on examining her, and concludes that the injury took place as reported and did not constitute "an exacerbation or aggravation of a prior condition." (Exh. A) The case remained in denied status. In a supplemental report dated February 13, 2019, the QME adds nothing of moment. (Exh. B) Defendant still denied liability. Dr. Glasser reëvaluated Ms. Gonzalez on June 17, 2019, reporting that her condition remained industrial, a result of her 2017 injury and would not be permanent and stationary until he could review a CT scan. (Exh. C) The case remained denied. Dr. Glasser examined applicant again on January 20, 2020, reporting that a physician at NMCI had recently proposed surgery, according to Ms. Gonzalez, although he did not have reporting on that prospect and applicant could not identify the specific procedure being discussed. The QME reported that, in the absence of surgery or, at least, a specific surgical recommendation, her condition could be considered

[1] The instant petition comes with many attached documents. At least some of these were not made part of the evidentiary record at trial. Petitioner has not cited newly discovered evidence in seeking reconsideration of the underlying decision, and indeed these documents do not appear to be new. To that extent, the attachments violate Tit. 8, Cal. Code Regs., § 10945(c)(2). To the extent that some may duplicate materials already received in evidence, they violate § 10945(c)(1).

[2] The Electronic Adjudication Management System, known as well by other names.

maximally improved. (He asked for clinical notes and, again, for findings on CT, stating that he would need those things before declaring her condition permanent and stationary.) He again reported that the 2017 injury was work-related and not merely an exacerbation of her previous injury (that arose out of the same employment), and further that it had caused other problems in her foot from an impaired gait. (Exh. D) Defendant continued to deny liability.

It appears that applicant first requested a hearing on compensability on September 25, 2018, relying on Dr. Glasser's first report. Defendant objected, stating "that additional reports or depositions may be needed of the medical doctors on the claim." At the hearing held November 15, 2018, defendant contended, for the first time, that Ms. Gonzalez was not working on the date on which she claimed to be injured, and the case was ordered off calendar. Applicant renewed her efforts to adjudicate the issue of compensability with a declaration of readiness to proceed to priority conference filed May 29, 2020.

In the meantime, NMCI continued to provide treatment. (At one point, applicant filed 173 pages of records as one document. These were not admitted in evidence as they did not bear on the issue currently submitted.)

On June 17, 2020, the day before the priority conference, over three years post-injury, defendant notified Ms. Gonzalez that it was now admitting liability, and (as is relevant here) that some employers "may" have MPNs, in which case injured employees must select physicians in the MPN. (Exh. E) (Applicant is reportedly monolingual in Spanish.) At the priority conference on June 18, 2020, the case was continued to a mandatory settlement conference (MSC), now on other issues. On July 1, 2020, defendant sent to NMCI a notice that "The doctor you have selected, [sic] is not in the MPN." This was copied to applicant and her attorney; again, it is only in English. (Exh. F) On July 15, 2020, NMCI issued a "continuity of care supplemental report," citing section 4600[3] and three regulations. (Exh. H) On August 4, 2020, defendant sent another MPN notice, telling NMCI, "The doctor you have selected, David Kassel, MD, is not in the MPN," without mentioning the July 15 report. (Exh. G) There was evidently no authorization of treatment, and on August 20, 2020, applicant requested an expedited hearing on continuity of care, validity of the MPN and other issues. (That same day, at the MSC, the judge noted the dispute over "MPN vs. continuity of care" and the matter was ordered off calendar with defendant "ordered to comply with LC sec. 4610(g)(8)." I cannot discern whether the declaration of readiness to proceed to expedited hearing came before or after that hearing.) On August 25, 2020, defendant objected to the July 15 continuity-of-care report. (Exh. I) On September 10, 2020, defendant objected to the declaration of readiness to proceed to expedited

[3] All statutory references not otherwise identified are to the Labor Code.

hearing, on various grounds. The following day (the day of the expedited hearing), it petitioned for removal to the appeals board of the earlier order that it comply with section 4610(g)(8), though it cited subdivision (m) of that section. The judge (different, up through this point, from the undersigned), in his report and recommendation on removal, pointed out that he had cited a former subdivision of section 4610 and, also, that the argument raised in the petition was untenable. The judge then retired, and the September 11, 2020, expedited hearing was assigned to the undersigned. The minutes of that hearing, prepared by defendant but based in part on my orders, state, in the "comments" section: "Continuity of care issue will be addressed by QME Glasser pursuant to CCR 9767.9(h). Parties to send their own advocacy letters. NMCI authorized to treat in the interim since 6/17/20 acceptance [i.e., admission of liability]. . . Applicant contends there is a surgical report pending and MPN sufficiency is still at issue." The matter was ordered off calendar.

Meanwhile, the appeals board, on October 27, 2020, granted removal because of the lack of an evidentiary record, returning the case to the trial level.

On the medical front, Dr. Paul Hughes, of NMCI, wrote a report dated September 8, 2020, concluding: "The patient has failed conservative treatment. We are going to pursue right ankle arthroscopy with debridement, endoscopic plantar fascial release, as well as open tenosynovectomy and repair of posterior tibial tendon of the right ankle. The patient understands the risks and benefits. Will discuss this after it gets approved." A request for authorization (RFA), on the requisite form, accompanies that report. (Exh. J) Defendant directed the RFA to its utilization reviewer, and the procedure was approved on September 23, 2020. (Exh. L)[4]

On October 5, 2020, defendant filed its own declaration of readiness to proceed to expedited hearing, contending that the QME "did not find the applicant's injuries to be [sic] meet the standard of a 'serious and chronic condition,'" and that she should therefore transfer into its MPN. Applicant objected, arguing that Dr. Glasser had answered only defendant's inquiry, and that her own had been accompanied by "NMCI's surgical report." Both parties appeared (telephonically) at the expedited hearing held December 3, 2020, as did a representative of the Employment Development Department (EDD), which had paid unemployment compensation disability benefits while applicant was unable to work and liability was denied by the employer. Defendant contended that the only continuity-of-care issue raised in its declaration of readiness to proceed concerned the "serious and chronic

[4] The surgery was certified. The preoperative measures recommended by Dr. Hughes were certified. Postoperative physical therapy was trimmed from 12 visits to ten. An ice machine was not certified. Postoperative visits were certified.

condition" provision, not the surgical provision, of the relevant statute and regulation, and to proceed on the surgical prong would deprive it of due process, despite the fact that applicant had raised a "surgical report" in her objection. (Authorization for the surgery described above had indeed been requested by NMCI, and had in fact been authorized through utilization review.) In the comments in the minutes of hearing, I wrote, "Parties shall e-file all documents pertaining to surgical request and approval, forthwith. Defendant shall review and process EDD reimbursement request, forthwith." The case was continued for a week.

Dr. Glasser's responses to defendant's and applicant's inquiries about continuity of care are in evidence as Exhibits K and M, respectively. In the first, dated September 21, 2020, he introduces the inquiry thus: "One concern is if there is a surgical option for this examinee's present condition. The second concern is whether the examinee's present condition meets the definition of serious chronic condition." He reviews reports from NMCI through and including one dated May 26, 2020. That of May 11, 2020, he states, describes a positive reaction from a plantar fasciitis injection on May 6, 2020. "She states that the pain has resolved completely at this time." As is pertinent here, the QME provides the following:

> Our specific concern is the July 5, 2020, NMCI Medical Clinic letter, which stated that the examinee has a serious chronic condition that entitles her to continue her care. Based on the definition you [defense counsel] have provided, it defines the serious chronic condition as a medical condition due to disease, illness, catastrophic injury or other medical problem or other medical disorder that is serious in nature, and persists without full care and worsens over 90 days, and requires ongoing treatment to maintain remission or prevent deterioration.[5] It is my opinion that this examinee does not have a serious chronic condition using that definition. Her present condition is both treatable and appears to be improving significantly.

Dr. Glasser also states: "Based on the recent information provided, the examinee at this time is not a surgical candidate."

[5] Except for the insertion of "catastrophic injury," it appears that defendant has supplied the doctor with the statutory definition of "serious chronic injury." (See, § 4616.2, at subd. (d)(3)(B).) Based on the QME's repeated qualification that his response is premised on the definition provided by defendant, it is not possible to gauge whether that inaccuracy influenced that response. Likewise, Dr. Glasser's use of "90-day followups" appears to be imported from the inclusion, in the definition of "serious and chronic condition," of the worsening of the condition "over an extended period of time," rather than in the requirement of any particular frequency of follow-up care; it also appears that Ms. Gonzalez had been seen more frequently than every 90 days, despite defendant's refusal to authorize treatment; again, the QME does not state how important those inaccuracies were in his reasoning.

In his second response, dated October 23, 2020, the QME reviews the definition of serious, chronic condition provided by defendant and his application of it to this case, concluding that applicant had not been seen every 90 days, nor would she need to be. He then states:

> At this time, it appears that recommendation for right foot and ankle surgery is being considered by the examinee. The purpose of that surgery would be to relieve a portion of her present symptoms. It is not expected that post-surgery the examinee would require continuing 90-day follow-up treatments, post anticipated healing. Permanent and stationary status should be reconsidered if in fact she does proceed with [surgery]. [¶] Should the examinee not pursue the surgical option, it is similarly not likely that she will require full care every 90 days to manage her residual present foot complaints. . . [¶] . . . It is this 90-day period requiring ongoing treatment to maintain remission or prevent deterioration that remains in question. [¶] The surgical option would not expect continued 90-day followups over an extended period, years nor would a non-surgical option require 90-day followups for this condition, as has been proven in the past, regarding this examinee.

Following trial, I determined that applicant was entitled to continue her course of care with Dr. Hughes at NMCI, including the recommended surgery, because the exception for approved surgery applied to defendant's effort to control medical treatment within its MPN.

I must point out what appears to be a misstatement in the factual presentation provided by defendant (at page 3, number 14), which I believe is relevant to the issue under study: Defendant claims that it authorized the requested surgery and attendant care. It did not. The evidence cited is four UR determinations. These show only that the treatment was found reasonable and was certified through UR. Defendant expressly denied authorization to NMCI for the requested measures, as applicant points out in her answer. Defendant explained at trial that while the treatment was certified, the request to proceed was rejected because it was made by a non-MPN physician. (Applicant was allegedly free to have the surgery within the MPN.) This difference, between certification and authorization, is at the heart of the current dispute, and there would not have been a dispute at all if the representation that surgery was actually authorized were true. The two things are conflated several times throughout the instant petition. (The distinction is not made clear in the statutory or regulatory authorities, and the term "authorized" is used in both senses in the decision, as well.)

DISCUSSION

Defendant contends that the statutory provision for timing relating to a physician terminated from an MPN ought to be extended to the facts at play here, where it was the late admission of liability, rather than a change in the doctor's status, that triggered the events. The

rationale set out in the opinion begins with a recitation of relevant portions of that statute, section 4616.2, before turning to the regulations:

Unlike the statute quoted above, the applicable regulation does not appear to be limited, in addressing exceptions to the MPN obligation, to a situation in which an MPN physician's contract with the MPN is terminated. Cal. Code Regs., Title 8, section 9767.9, provides, in relevant part, at subdivision (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),[6] 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.
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> * * *
>
> (4) Performance of a surgery or other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days from the MPN coverage effective date.
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> Subdivision (h) of that regulation provides:
>
> 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.

[6] Subd. (d) of § 4600 relates to pre-designated personal physicians. There is no claim that it applies to this matter.

Subdivision (j) provides:

> If the treating physician does not agree with the employer's or insurer's determination that the injured covered employee's medical condition does not meet the conditions set forth in subdivisions (e)(1) through (e)(4), the transfer of care shall not go forward until the dispute is resolved.

Applying these authorities to the facts of this case, with particular attention to the timing of events, as defendant urges, I believe the most relevant dates are these: Defendant denied all liability, evidently including for the 2013 injury, until June 17, 2020, and on July 1, 2020, sent its first notice about an MPN. The continuity-of-care request by NMCI issued on July 15, 2020. NMCI requested authorization for surgery on September 8, 2020.[7] The continuity-of- care request was not directed to the QME until after the hearing held September 11, 2020, when that was ordered. The first inquiry, by defendant, included only reporting through May 26, 2020, and not the surgical recommendation. That reporting included indications of improvement from the provision of an injection administered on May 6, 2020. Dr. Glasser's response is dated September 21, 2020. Applicant's own inquiry of the QME brought a response, dated October 23, 2020. I find that response somewhat confusing.

By the time of the hearing on September 11, 2020, applicant's condition had evidently worsened in the 90 days prior: She had gone from being reportedly pain-free on May 11, 2020, to needing surgery on September 8, 2020. (At the time of that hearing, the report describing surgery and requesting its authorization was not available.) Indeed, defendant authorized the surgery, through utilization review, while at the same time denying any liability to NMCI.

Here, I must point out that in defendant's trial brief, it claims to have "authorized non-MPN treatment with NMCI Medical clinic until the dispute regarding continuity of care was decided pursuant to CCR 9767.9(h)." This is plainly false; it is belied by the evidence admitted on defendant's own motion. In fact, had this been true, the surgery requested on September 8, 2020, would have been authorized at NMCI. For all anyone knows, applicant would have recovered from the procedure and returned to work by the time of the trial on December 10, 2020. Rather, this defendant, from the available evidence, appears to have done everything but authorize treatment. There is some indication that it paid some indemnity, chiefly by reimbursing the Employment Development Department for unemployment compensation disability benefits, but none that it authorized any medical treatment at all. Instead, it has ignored the QME's repeated conclusions of industrial liability.

[7] The request for authorization (RFA) includes proof of service on applicant's counsel and the claims administrator. (Defense counsel's notice of representation, filed December 13, 2017, was not served on NMCI, who did not file its lien until two weeks later. There is no indication that I can find showing notice on NMCI of the need to serve any party other than applicant (through counsel) and defendant.)

It has funded seemingly endless litigation, including over QMEs and some appellate efforts, with no indication of an end in sight.[8]

This is all set against the language in section 4616.2 plainly requiring a physician authorized under continuity-of-care provisions applicable to the conditions covered in that statute to adhere to "the same contractual terms" and accept the same "rates and methods of payment" as if in the MPN. (The statute clearly requires that an exception to MPN requirements not prejudice the employer.)

Applicant counters defendant's contentions by pointing out that only one of the continuity-of-care issues that have arisen here is subject to the medical-legal process, while the other is merely factual. This is discussed in the opinion:

> While the question of whether an employee is suffering from a serious, chronic condition is one that I believe section 4616.2 properly directs be put to an AME or QME, under the conditions governed by that statute, section 4062 clearly limits the issues to be addressed by evaluating physicians. That section requires the parties to a workers' compensation case to use such physicians to resolve disputes arising from disagreements with treating doctors' determinations "concerning any medical issues not covered by Section 4060[9] or 4061[10] and not subject to Section 4610." (Emphasis added.) Here, we have two different exceptions to an employee's obligation to transfer her treatment to defendant's MPN, only one of which is subject, statutorily, to determination through the medical-legal process. Instead, questions of the reasonableness and necessity of medical treatment currently recommended must, under section 4610, be determined through the utilization review process outlined in and pursuant to that statute. Defendant, therefore, properly put the surgery recommended by Dr. Hughes, of NMCI, through UR, and the result was that the reasonableness and necessity of the procedure were certified.

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[8] In its petition, defendant requests "correction" of the statement in the opinion that it had not authorized treatment, again pointing to its UR determinations. Once more, however, this appears to be owing to the two different uses of "authorized." It certified the treatment but did not authorize the requesting physician to perform that treatment. I do not believe that I misstated this fact, except perhaps to use that crucial word in both ways. Defendant requests a second correction, to the statement that "By the time of the hearing on September 11, 2020, applicant's condition had evidently worsened in the 90 days prior: She had gone from being reportedly pain-free on May 11, 2020, to needing surgery on September 8, 2020." While the surgeon states in that September report that "review of systems" (typically meaning general health) is "essentially unchanged," he describes pain in the foot and ankle that was not reported in May. Again, I do not believe I have misstated what the reports show. I also believe the implication that the surgery was only requested because it appeared that treatment would be authorized is false: As stated, there is no indication in the record that anyone at NMCI, including the surgeon who saw applicant for the first time on September 8, 2020, was ever authorized to do anything, and several indications to the contrary. (Defendant's reference to a September 1 report may be in error.) Rather, the tactics regarding timing all appear to have been deployed by defendant.

[9] Section 4060 governs disputes over the compensability of a claimed injury.

[10] Section 4061 governs disputes over permanent disability and need for future medical care.

> Therefore, although it had not been answered by the time of the first hearing on September 11, 2020 (when the parties were ordered to ask for the QME's assessment of the seriousness and chronicity of applicant's condition), the question of applicant's entitlement to the proposed surgery was answered by UR on September 12, 2020, and that answer was available by the time of the hearing on December 10, 2020. The applicable regulation provides for continuity of care when surgery has been "recommended and documented by the provider to occur within 180 days from the MPN coverage effective date." The MPN coverage date – i.e., when defendant first acquired the right to transfer applicant's treatment to its MPN – was July 1, 2020. The surgery was requested on September 8, 2020, and approved on September 23, 2020. Those dates are well within 180 days of one another.

I remain persuaded that the process was correctly followed: The surgical consultant reported on September 8, 2020, that surgery was indeed indicated, defendant directed the request for authorization to UR, it was certified through UR, and all of that took place within 180 days of the date on which defendant gained the right to control treatment. Applicant properly invoked the exception to the requirement that she transfer immediately into the MPN, and the exception was found to apply.

RECOMMENDATION

I recommend that reconsideration be denied.

Dated: February 1, 2021

Respectfully submitted,

Christopher Miller
Workers' Compensation Judge