WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PERLA TORRES, *Applicant*

vs.

LITHOGRAPHIX, INC.; INSURANCE COMPANY OF THE WEST, adjusted by ICW GROUP, *Defendants*

Adjudication Number: ADJ13521927
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seek reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on March 16, 2021. By the Findings, the WCJ found that applicant did not sustain her burden of proving a denial of care within the employer's medical provider network (MPN) that would entitle her to treat outside the MPN at the employer's expense. The WCJ further found that the employer may satisfy its responsibility for providing treatment through its MPN.

Applicant contends that she is entitled to treat outside the MPN because defendant did not timely provide her with treatment.

We did not receive 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 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 the Petition.

FACTUAL BACKGROUND

Applicant claims injury to her right wrist, low back, left thigh and left knee through June 18, 2020 while employed as a general laborer by Lithographix, Inc. (Application for Adjudication of Claim, August 20, 2020.)

On August 19, 2020, a DWC-1 claim form for applicant's claim was served on applicant's employer and W.J. Kattar, D.C. (Applicant's Exhibit No. 1, DWC-1 Claim Form, August 12, 2020.)

On August 27, 2020, the insurer on behalf of applicant's employer, Insurance Company of the West, sent applicant a letter regarding its MPN and enclosed a Complete Written Employee Notification Regarding Medical Provider Network in Spanish and English. (Defendant's Exhibit A, Letter to applicant re MPN, August 27, 2020.) Applicant's attorney was copied with this letter. (*Id.* at p. 2.) A separate letter with the same date was also sent to applicant from ICW Group requesting that she sign and return a medical authorization for release of records. (Defendant's Exhibit B, Letter to applicant re medical release, August 27, 2020.)

A delay letter was issued by defendant on August 31, 2020. (Defendant's Exhibit D, Delay letter from Insurance Company of the West, August 31, 2020.) On the same date, defendant sent applicant a letter notifying her of an appointment for treatment at Concentra scheduled for September 14, 2020. (Defendant's Exhibit C, An appointment letter to the applicant, August 31, 2020.) A separate letter was sent to Concentra advising that it had been designated as the treating physician. (Defendant's Exhibit E, Letter to Concentra from Insurance Company of the West, August 31, 2020.)

Defendant sent a letter to applicant's attorney on September 1, 2020, acknowledging her representation of applicant and advising her of the MPN. (Defendant's Exhibit F, Letter to the Garrett Law Firm, September 1, 2020.)

On November 17, 2020, defendant sent a letter to applicant advising her that the following body parts had been accepted as industrial: wrists, back, femur and knees. (Defendant's Exhibit H, Letter to Ms. Torres, November 17, 2020.) The letter advised applicant again that she must treat within the MPN.

Defendant filed a declaration of readiness to proceed to an expedited hearing regarding applicant treating outside the MPN. The matter proceeded to a hearing on January 14, 2021 with the issues identified as follows:

> 1. Has defendant failed to timely provide MPN Medical treatment as required by Labor Code Section 5402 (c) and Labor Code Section 4616, thus allowing applicant to self procure medical treatment outside the claimed MPN at defendant's expense?

> THE MINUTES SHALL REFLECT that applicant's contentions include, and are not necessarily limited to, that defendant did not provide timely treatment within access standards given their knowledge of the claim on 8/27/20, if not earlier.
>
> THE MINUTES SHALL REFLECT that Defendant contends there was no unreasonable delay in providing treatment herein.
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> (Minutes of Hearing (Reporter) (Expedited), January 14, 2021, p. 2.)

The WCJ issued the Findings 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).)[1] 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 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];[2] see also *San Diego Unified Sch. Dist. v. Workers' Comp. Appeals Bd.* (*Robledo*) (2013) 79 Cal.Comp.Cases

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

[2] 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].)

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, applicant contends that defendant failed to provide treatment in the MPN in a timely manner and she is thus entitled to treat outside the MPN.

Section 5402(c) provides as follows:

> Within one working day after an employee files a claim form under Section 5401, **the employer shall authorize the provision of all treatment**, consistent with Section 5307.27, for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars ($10,000).
>
> (Lab. Code, § 5402(c), emphasis added.)

Section 4616.3(a) separately 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.
>
> (Lab. Code, § 4616.3(a); see also Cal. Code Regs., tit. 8, § 9767.6(a).)

Administrative Director (AD) Rule 9767.5 provides in relevant part:

> (c) If a covered employee is not able to obtain from an MPN physician reasonable and necessary medical treatment within the applicable access standards in subdivisions (a) or (b) and the required time frames in subdivisions (f) and (g), then the MPN shall have a written policy permitting the covered employee to obtain necessary treatment for that injury from an appropriate specialist outside the MPN within a reasonable geographic area. When the MPN is able to provide the necessary treatment through an MPN physician, a covered employee treating outside the MPN may be required to treat with an MPN physician when a transfer is appropriate.
> …

> (f) For non-emergency services, the MPN applicant shall ensure that an appointment for the first treatment visit under the MPN is available within 3 business days of a covered employee's notice to an MPN medical access assistant that treatment is needed.
>
> (Cal. Code Regs., tit. 8, § 9767.5(c) and (f).)

Applicant sent her DWC-1 claim form to the employer by mail on August 19, 2020. The insurer sent applicant a letter acknowledging her claim and providing her with information regarding how to obtain treatment in the MPN on August 27, 2020. A second letter was sent to applicant on August 31, 2020 advising applicant of an appointment for her to receive treatment at Concentra.

None of the statutory or regulatory provisions cited by applicant expressly provides the remedy she seeks for an employer's failure to comply with them, i.e., treatment outside of the MPN. Section 5402(c) states that the employer shall authorize all treatment until the claim is accepted or rejected. Defendant sent applicant an acknowledgement of her claim and advised her of how to obtain treatment shortly after she mailed her claim form. A period of approximately 8 days between the date the claim form was served and defendant's letter authorizing treatment does not constitute neglect of defendant's duty to authorize or provide treatment.[3]

Section 4616.3(a) requires the employer to arrange the initial medical evaluation and begin treatment when it is notified of the claim. The record shows that defendant did exactly that in this case. An appointment was scheduled for applicant to receive treatment as reflected in defendant's August 31, 2020 letter. The statute does not provide a specific timeframe within which the initial evaluation must be scheduled and does not provide a remedy for failure to comply with it.

Applicant contends that since the appointment scheduled by defendant was not within 3 business days per AD Rule 9767.5(f), defendant did not timely provide treatment. This is an incomplete reading of the regulation. AD Rule 9767.5(f) mandates ensuring an appointment for the first treatment visit within 3 business days "**of a covered employee's notice to an MPN medical access assistant that treatment is needed**." There is no evidence in the record that applicant ever contacted the MPN's medical access assistant (MAA) and notified the MAA that

[3] Furthermore, it may be presumed that the claim form took at least five days for mailing to be received by the employer. (Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).)

treatment is needed. This regulation consequently does not apply to the facts in this case.[4]

There is insufficient evidence in the record showing a neglect or refusal to provide treatment by defendant. (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*.) Therefore, applicant has not met her burden of showing entitlement to treatment outside the MPN.

In conclusion, we will deny applicant's Petition.

[4] Moreover, AD Rule 9767.5(f) does not provide the remedy of treating outside the MPN for failure to comply with it. AD Rule 9767.5(c) provides for treatment outside the MPN where the employee "is not able to obtain from an MPN physician reasonable and necessary medical treatment within the applicable access standards in subdivisions (a) or (b) **and** the required time frames in subdivisions (f) and (g)…" Applicant has not shown that all of the conditions in subdivision (c) are present in this matter such that she may be permitted to treat outside the MPN per AD Rule 9767.5(c).

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on March 16, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 28, 2021

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

GARRETT LAW GROUP
PERLA TORRES
STANDER REUBENS THOMAS KINSEY

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