WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VIDAL MURILLO, *Applicant*

vs.

WESTERN NATIONAL GROUP; TRAVELERS INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ12031213
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration or in the alternative removal of the Findings of Fact and Orders (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 10, 2020. By the F&O, the WCJ found that "[a]pplicant's request for referral to a pain management specialist constituted a request for care under [Administrative Director (AD) Rule] 9767.5(g)." The WCJ also found that applicant failed to select a physician from the list of three physicians provided by the medical access assistant (MAA). Applicant's petition to allow treatment outside the medical provider network (MPN) was ordered denied.

Applicant contends that he is entitled to treat outside the MPN because defendant's MPN does not meet the required access standards and the MAA failed to set a timely appointment.

We did not receive an answer from defendant. The WCJ issued a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that we dismiss the Petition as one seeking reconsideration and deny the Petition as one seeking removal.

We have considered the allegations of applicant's Petition for Reconsideration/Removal 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 amend the F&O to replace the two findings of fact with

one finding of fact that applicant did not show entitlement to treat outside the MPN. We otherwise affirm the F&O.

FACTUAL BACKGROUND

Applicant claims injury to his neck, back, bilateral shoulders, bilateral upper extremities, bilateral knees, headaches, hypertension, diabetes and psyche through December 12, 2018 while employed as a maintenance worker by Western National Group.

The claim was originally denied by defendant, but was then accepted for certain body parts with medical treatment being provided. The chiropractic qualified medical evaluator (QME) Hungchiao Lisa Wu, D.C. opined that applicant sustained a cumulative trauma injury to his neck, low back, shoulders, wrists, hands and knees. (Court's Exhibit X, PQME report of Hungchiao Wu, D.C., May 3, 2020, p. 3.) Dr. Wu recommended various treatment modalities in her May 3, 2020 report including a "pain management consultation." (*Id.*)

Sam Tabibian, M.D., a physical medicine physician, was providing treatment to applicant as his primary treating physician (PTP) until he retired. (Minutes of Expedited Hearing, July 23, 2020, p. 2.)

On June 13, 2020, applicant's attorney emailed a request to defendant's MAA for "3 MPN Pain Management physicians who are willing to serve as PTP, and are accepting new patients, will provide an appointment within 20 days (w/ telehealth or in person), and are within 30 miles of Applicant's residence." (Defendant's Exhibit B, Multiple emails, June 13, 2020, exh. pp. 17-18.)

On June 17, 2020, the MAA replied to applicant's attorney's email listing three physicians and stating: "the following 3 MPN Pain Management providers within 30 miles of **8603 Walker Street, Apt 1 Cypress, CA 90630** are willing to review records to determine if willing to treat Mr. Murillo. Please notify the MAA and the claim professional, Kirt Harrison, who I have copied on the email, of your selection." (Defendant's Exhibit B, Multiple emails, June 17, 2020, exh. pp. 16-17.)

Applicant's attorney responded on the same date (June 17, 2020) as follows via email:

> So you do not have 3 pain management doctors who can be PTP and set an appointment. All options below are "potential/contingent" after review of meds.

> Also Dr Williams does not accept serve as PTP he only does consults. You can reconfirm.
>
> We will permit you additional time to redo your search and provide 3 names of pain management who are able to accept case as PTP without contingencies.
>
> (Defendant's Exhibit B, Multiple emails, June 17, 2020, exh. pp. 15-16.)

Defendant's attorney emailed applicant's attorney on June 22, 2020 asking that he advise on the status of selecting a new PTP in the MPN and noting that it is common that doctors would like to review reports prior to determining if they can be designated as the PTP. (Defendant's Exhibit B, Multiple emails, June 22, 2020, exh. p. 14.) Applicant's attorney responded on the same date stating: "Can't pick one, because none are available to accept that role for me to select them. Selecting one for that doc to wait, get records, then review, then decide if they will accept boils down to not having 3 pain management docs that are 'available.' The MPN needs more docs. If your client won't authorize a non MPN doc, we will need a DOR." (*Id.*)

Applicant filed a declaration of readiness to proceed (DOR) for an expedited hearing and identified the issue as:

> MAA FAILED TO PROVIDE 3 PAIN MANAGEMENT DRS WHO ARE WILLING TO SERVE AS PTP CONFIRMING INVALIDITY OF MPN. AUTHORIZATION NEEDED TO ELECT NON MPN PTP.
>
> (Applicant's DOR, July 7, 2020, p. 2.)

Defendant filed an objection to applicant's DOR and attached a list of 23 pain management physicians in the MPN within 30 miles of applicant's residence. (Defendant's Objection to DOR, July 17, 2020.)

The matter proceeded to an expedited hearing on July 23, 2020 on the sole issue of "[a]pplicant's entitlement to treat outside the MPN." (Minutes of Expedited Hearing, July 23, 2020, p. 2.) The Minutes of Hearing state:

> LET THE MINUTES REFLECT that Applicant makes the following offer of proof:
>
> In an effort to select a new PTP, Applicant's counsel contacted the Medical Access Assistant (MAA) Jill Barry, and requested three doctors in pain management. Counsel was informed by the MAA that none of the physicians

could set an appointment until the medical records in this case were provided to determine if they were willing to see the patient or treat the patient. Upon contacting the physicians, one of the three no longer was accepting patients. Counsel maintains that no pain management physician of the three was willing to treat the patient without reviewing the medical records beforehand.

LET THE MINUTES FURTHER REFLECT that Defendants make the following offer of proof:

Per Exhibit A, Travelers' MPN provides as many as 20 pain management physicians within a 30-mile radius of the applicant's residence. In addition, there are as many as 140 orthopedic surgeons within 30 miles of the applicant's residence. Defendant maintains that the physicians who were contacted did not need to review the records to set an appointment. They merely needed to possess them. Defendant maintains that Applicant has only contacted three physicians. No additional pain management physicians were sought.

(*Id.* at p. 3.)

The WCJ issued the F&O as discussed above.

DISCUSSION

I.

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.)

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. Therefore, applicant holds the burden of proving that he is entitled to treat outside the MPN.

The MPN is required to have "an adequate number and type of physicians…to treat common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged, and the geographic area where the employees are employed." (Lab. Code, § 4616(a)(1).) Section 4616.3(d)(1) provides that "[s]election by the injured employee of a treating physician and any subsequent physicians shall be based on the physician's specialty

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

or recognized expertise in treating the particular injury or condition in question." (Lab. Code, § 4616.3(d)(1).) Thus, an MPN must have available an adequate selection of physicians of specialties or expertise appropriate to the particular injury or condition in question to undertake the role of primary treating physician within a specified geographic area.

Whether an injured worker is entitled to select a specialist as a primary treating physician is not specifically addressed in the statutory provisions authorizing the implementation of the MPN scheme. The Legislature expressly delegated responsibility to the AD to adopt regulations implementing section 4616. (Lab. Code, § 4616(h).)

The rules promulgated by the AD require an MPN to have available within specific geographic limits an adequate number of physicians with a "specialty or recognized expertise in treating the particular injury or condition in question." Specifically, AD Rule 9767.6(e) provides in relevant part:

> At any point in time after the initial medical evaluation with an MPN physician, the covered employee may select a physician of his or her choice from within the MPN. Selection by the covered employee of a treating physician and any subsequent physicians shall be based on the physician's specialty or recognized expertise in treating the particular injury or condition in question.
>
> (Cal. Code Regs., tit. 8, § 9767.6(e).)

The specified geographic area, or "access standards" for selecting physicians within the MPN are set forth in AD Rule 9767.5, which provides:

> (a) A MPN must have at least three available physicians of each specialty to treat common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged and within the access standards set forth in (1) and (2).
>
> (1) An MPN must have at least three available primary treating physicians and a hospital for emergency health care services, or if separate from such hospital, a provider of all emergency health care services, within 30 minutes or 15 miles of each covered employee's residence or workplace.
>
> (2) An MPN must have providers of occupational health services and specialists who can treat common injuries experienced by the covered injured employees within 60 minutes or 30 miles of a covered employee's residence or workplace.
>
> (Cal. Code Regs., tit. 8, § 9767.5(a)(1)-(2).)

Thus, the rules provide different access standards for accessing care depending on whether the care is provided by a "primary treating physician" or by a "specialist," indicating that these roles serve different purposes. A primary treating physician is defined as the physician "who is primarily responsible for managing the care of an employee, and who has examined the employee at least once for the purpose of rendering or prescribing treatment and has monitored the effect of the treatment thereafter," and is "selected…in accordance with the physician selection procedures contained in the medical provider network pursuant to Labor Code section 4616." (Cal. Code Regs., tit. 8, § 9785(a)(1).) The AD Rules do not define a "specialist," but that role appears to come within the definition of a "secondary treating physician," who is defined as "any physician other than the primary treating physician who examines or provides treatment to the employee, but is not primarily responsible for continuing management of the care of the employee." (Cal. Code Regs., tit. 8, § 9785(a)(2).) The AD Rules recognize the role of the primary treating physician essentially as a gatekeeper, responsible for referring an injured worker to a specialist pursuant to Rule 9767.5(i), which states:

> If the primary treating physician refers the covered employee to a type of specialist not included in the MPN, the covered employee may select a specialist from outside the MPN.
>
> (Cal. Code Regs., tit. 8, § 9767.5(i).)

The MPN system is required to provide a method for injured workers to identify and access physicians based upon their availability to provide either primary or specialist treatment. In order for an MPN's plan to be approved by the AD, it must submit a list of all of the physicians providing services through the MPN. The list must designate a "provider code" for each physician that identifies their specialty, including whether they are available to be selected as a "primary treating physician." (Cal. Code Regs., tit. 8, § 9767.3(c)(2).) Since a physician may be listed under more than one provider code, it is possible for a physician to be available to provide treatment as a primary treating physician and under a separately listed specialty.

The MPN must give notice to an injured worker of his or her right to be treated by a physician of his or her choice within the MPN after the initial visit to an MPN physician set up by the employer, as well as additional notices including information necessary to assist the injured worker in obtaining medical treatment through the MPN, how to choose a physician within the

MPN (AD Rule 9767.12(a)(2)(G)), and how to "obtain a referral to a specialist within the MPN or outside the MPN, if needed." (Cal. Code Regs., tit. 8, § 9767.12(a)(2)(J).)

Further, AD Rule 9767.5(c) provides, in pertinent part:

> 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.
>
> (Cal. Code Regs., tit. 8, § 9767.5(c).)

Under these rules, the MPN must provide a list identifying at least three physicians who are identified as primary treating physicians willing to serve in that role who are within the 15 mile/30 minute radius of applicant's residence or workplace. These MPN-identified primary treating physicians must be competent to treat "common injuries experienced by injured employees based on the type of occupation or industry in which the employee is engaged, and the geographic area where the employees are employed." (Labor Code, § 4616(a)(1).) Thus, the MPN must have at least three physicians available and able to provide treatment for the type of injury sustained.

When choosing a primary treating physician from the MPN, an applicant must contact, with the assistance of the MAA, if requested, the available primary treating physicians to determine if the physician is willing to treat applicant's specific medical condition. If applicant contacts the offices of the listed primary treating physicians within a 15 mile/30 minute radius, but is unable to identify three primary treating physicians willing to provide applicant's primary care, then defendant's MPN will not meet the access standards for provision of medical treatment.

The applicable statutory and regulatory scheme for the implementation of MPNs does not preclude an injured worker from selecting a specialist as his or her primary treating physician. As long as the MPN has at least three primary treating physicians of any specialty within the 15 mile/30 minute access standard who are available to undertake the role of primary treating physician, the MPN will have satisfied its obligation to provide medical treatment.

The rules require the MPN to have available at least three specialists "to treat common injuries experienced by injured employees based on the type of occupation or industry in which

the employee is engaged," within a 30 mile/60 minute radius of applicant's residence or workplace. If applicant selects a physician who is identified as a specialist, but who has not listed their availability as a primary treating physician, then the greater access standards for specialists in AD Rule 9767.5(a)(2) will apply, so that if that specialist's medical practice is not within the 15 mile/30 minute radius mandated by Rule 9767.5(a)(1), the MPN will not be in violation of the access standards for primary treating physicians.

This issue was previously addressed in a panel decision: *Gomez v. Fastenal* (February 6, 2013, ADJ8205235) [2013 Cal. Wrk. Comp. P.D. LEXIS 47].[2] In *Gomez*, an Appeals Board panel held that the refusal by a specialist to assume the role of primary treating physician did not, by itself, permit the injured worker to obtain medical treatment outside the MPN:

> It is not a reasonable interpretation of the requirements of Labor Code section 4616.3, that an injured worker is entitled to select a specialist outside the MPN, if a specialist selected from within the MPN is unwilling to assume the role of primary treating physician, provided there are other MPN physicians that meet the access standards available who are able to assume the role of primary treating physician. In most non-emergent cases, an applicant will select a primary treating physician to provide necessary medical treatment within his area of expertise. The primary treating physician may then refer to a specialist to provide a consultation or treatment as a secondary treating physician. The refusal of a specialist to assume the responsibility of a primary treating physician will not negate the validity of the MPN or necessarily give applicant the right to obtain medical treatment outside the MPN. While a specialist in an appropriate medical specialty may agree to assume the role of a primary treating physician, the refusal of a specialist to do so will not allow applicant to go outside the MPN, if there are other physicians within the geographic area who are willing to assume that role.
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> (*Gomez*, *supra*, at pp. *13-14.)

In this matter, applicant has determined that he would like to have a pain management physician as his primary treating physician. Defendant is not obligated to have three pain management specialists within the closer radius in the access standards, but the MPN must have

[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).) Here, we refer to *Gomez* because it considered a similar issue.

within the 15 mile/30 minute radius three physicians in an appropriate specialty to provide ongoing primary care for applicant's injury and who are willing to serve as his primary treating physician. If a physician who is not trained in applicant's preferred specialty or sub-specialty, is selected as a primary treating physician, the MPN must provide an adequate selection of specialists within a 30 mile/60 minute radius of applicant's residence or workplace, or the MPN must permit applicant to seek such care outside the MPN.

Applicant cites to two panel decisions from 2015 in support of his contention that defendant's MPN does not meet the access standards for PTPs because one of the three pain management physicians identified by the MAA does not accept the role of PTP. It is acknowledged that there are inconsistent panel decisions regarding whether an MPN must have three physicians of a specific specialty available to act as the primary treating physician within the requisite access standards contained in AD Rule 9767.5(a). This panel finds the reasoning outlined above and contained in more recent panel decisions to be the most persuasive regarding this issue. (See e.g., *Gorbanwand v. Pacific GIS, Inc.* (September 13, 2019, ADJ10836918) [2019 Cal. Wrk. Comp. P.D. LEXIS 385]; *Puente v. Napa Valley Unified School District* (February 24, 2017, ADJ8911659) [2017 Cal. Wrk. Comp. P.D. LEXIS 100].) As stated above, as long as the MPN has at least three primary treating physicians of *any specialty* within the 15 mile/30 minute access standard who are available to undertake the role of PTP, the MPN will have satisfied its obligation to provide medical treatment.

Applicant not only incorrectly restricted the analysis of whether defendant's MPN meets the access standards for primary treating physicians by his preferred specialty of pain management, but also solely by consideration of the three physicians that the MAA identified in its email. The three identified physicians are not the only physicians within defendant's MPN. Applicant did not provide sufficient evidence that there were not at least three physicians available in any appropriate specialty from within the 15 mile/30 minute access standard in defendant's MPN. Defendant produced a list of 23 pain management doctors in the MPN within the 30-mile radius requested by applicant.[3] Defendant also reported at trial that there are "as many as 140 orthopedic surgeons

[3] It is acknowledged that the access standard for primary treating physicians is 15 miles/30 minutes. Applicant specifically requested pain management physicians within 30 miles of his residence in his request for assistance from the MAA.

within 30 miles of the applicant's residence." Both specialties would be appropriate to provide applicant with treatment for the accepted body parts of neck and back.

Applicant therefore failed to meet his burden of proof to establish that there is not a properly established MPN.

II.

AD Rule 9767.5 also provides as follows in relevant part:

> (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.
>
> (g) For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, **the MPN applicant shall ensure that an initial appointment with a specialist in an appropriate referred specialty is available within 20 business days** of a covered employee's reasonable requests for an appointment through an MPN medical access assistant. **If an MPN medical access assistant is unable to schedule a timely medical appointment with an appropriate specialist within ten business days of an employee's request, the employer shall permit the employee to obtain necessary treatment with an appropriate specialist outside of the MPN.**
>
> (Cal. Code Regs., tit. 8, § 9767.5(f)-(g), emphasis added.)

Applicant also contends that he is entitled to treat outside the MPN because the MAA could not schedule an appointment with a primary treating physician within 20 business days per AD Rule 9767.5(g). Preliminarily, the record reflects that applicant never selected a primary treating physician from either the list offered by the MAA or otherwise from amongst the other physicians within the MPN. There is consequently insufficient evidence to conclude the MAA did not meet the asserted 20-day timeframe because applicant never selected a physician for the MAA to attempt to schedule an appointment.

Furthermore, the 20-day time limit for an MAA to schedule an appointment per AD Rule 9767.5(g) only applies where the MAA is scheduling an appointment *with a specialist based on a*

referral, not to the scheduling of an initial appointment *with a primary treating physician*.[4] The Rule references "specialist services" and "a specialist in an appropriate referred specialty." As discussed above, the Rules distinguish between a specialist and a primary treating physician. The language of AD Rule 9767.5(g) suggests that it applies where there has been a referral to a specialist, particularly since applying this Rule to an initial appointment with a primary treating physician potentially creates conflicting timeframes within the Rule. (See Cal. Code Regs., tit. 8, § 9767.5(f).) Moreover, this reading comports with the interpretation endorsed by the panel in *Gomez* of a previous version of this regulatory subdivision: "Where there has been a referral to a specialist for non-emergency services, the MPN must provide an appointment within 20 days of the referral within the MPN. (AD Rule 9767.5(g).)"[5] (*Gomez*, *supra*, at pp. *9-10.)

It is noted that the QME recommended that applicant receive a pain management consultation.[6] However, applicant's email requesting assistance from the MAA stated that he was seeking a primary treating physician in pain management, not a consultation with a specialist based on the QME's report. Therefore, AD Rule 9767.5(g) does not apply to the facts in this case.

The sole issue at trial was framed as "[a]pplicant's entitlement to treat outside the MPN." However, the two findings of fact discuss AD Rule 9767.5(g) and applicant's failure to select a physician from the list provided by the MAA. We will therefore amend the F&O to substitute these findings of fact with one finding of fact that applicant did not show entitlement to treat outside the MPN in order to correlate the trial issue with the findings. We otherwise affirm the F&O.

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[4] We are not stating that a referral is required for applicant to see a specialist; we are merely clarifying that this regulatory subdivision only applies where there is a referral to a specialist and applicant requests an appointment through the MAA. (See *Pena v. Aqua Systems* (2019) 84 Cal.Comp.Cases 527 [2019 Cal. Wrk. Comp. P.D. LEXIS 86] (writ den. on a different issue).)

[5] At the time of *Gomez*, AD Rule 9767.5(g) stated: "For non-emergency specialist services to treat common injuries experienced by the covered employees based on the type of occupation or industry in which the employee is engaged, the MPN applicant shall ensure that an appointment is available within 20 business days of the MPN applicant's receipt of a referral to a specialist within the MPN."

[6] We expressly do not comment on whether a referral to a specialist from a QME may be considered a valid treatment recommendation because that issue is not before us, we merely acknowledge that the record in this matter reflects that recommendation by the QME.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Orders issued by the WCJ on August 10, 2020 is **AFFIRMED** except that Findings of Facts Nos. 1-2 are **AMENDED** to be one Finding of Fact as follows:

FINDING OF FACT

1. Applicant did not show entitlement to treat outside defendant's MPN at defendant's expense.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 29, 2021

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

KARGOZER & ASSOCIATES
KJT LAW GROUP
VIDAL MURILLO

AI/*pc*

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