

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

CHARLSTON LOPEZ, *Applicant*

vs.

MODATIVE, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

**Adjudication Number: ADJ11626597
Long Beach District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

Additionally, lien claimaint raises issues for the first time in the Petition for Reconsideration that were not raised at the trial. "Issues not raised in the trial court are generally forfeited for purposes of appeal. 'Issues presented on appeal must actually be litigated in the trial court—not simply mentioned in passing.'" (*Schultz v. Workers' Comp. Appeals Bd.* (2015) 232 Cal.App.4th 1126, 1134 [181 Cal.Rptr.3d 891], quoting *Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1011 [162 Cal.Rptr.3d 367]; see also *Cuevas v. Workers' Comp. Appeals Bd.* (2005) 70 Cal.Comp.Cases 479, 483-484 (writ den.).)

The following were the issues for trial:

1. The lien of Optimal Health Institute for treatment. As to that lien, \$750.38 has been paid, and \$9,677.84 is still claimed as due.
2. The remaining issues are:
 - a) Whether Optimal Health Institute is entitled to recover on its lien for medical services provided to the applicant in the period from October 26, 2018, to May 15, 2019.

- b) Whether Optimal Health Institute, Optimal Health Medical Center, Dr. Shen and/or Dr. Kan were within State Fund's Harbor Health MPN at the time the services were provided.
- c) Whether Optimal Health Institute can recover on its lien, even if it was not within the MPN.
- d) If Optimal Health Institute can recover on its lien, even if it is outside the MPN whether its services and charges were reasonable and necessary.

(7/27/23 Minutes of Hearing/Statement of Evidence, p. 2.) Lien claimant raises issues in its Petition for Reconsideration that were not issues for trial, including the validity of defendant's Medical Provider Network (MPN) and the denial by defendant of some of the claimed body parts. These issues are forfeited as they were not raised at the trial.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER



ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2023

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

**OPTIMAL HEALTH INSTITUTE
LAW OFFICES OF JIE CI DING, INC.
STATE COMPENSATION INSURANCE FUND**

JMR/ara

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

REPORT AND RECOMMENDATIONS

INTRODUCTION

The issue here is the lien claim filed by Optimal Health Institute against Defendant State Compensation Insurance Fund (SCIF) for medical services provided by Dr. Shen, specialty unknown, and Dr. Kan, a chiropractor. The Findings and Order denying recovery on this lien claim was served on October 12, 2023, and Optimal Health Institute has now filed a timely verified Petition for Reconsideration.

Although Optimal Health Institute filed and litigated the lien here, the bills that were sent to SCIF for the services in question were under the name “Optimal Health Medical Center,” and documentation was submitted at trial showing that it is a separate organization from Optimal Health Institute. Issues that were not reached in the Findings and Order because the decision was made on grounds that made reaching them unnecessary included whether these two entities were the same, whether Optimal Health Medical Center had the legal right to bill for the services in issue, whether Optimal Health Institute had the legal right to pursue the lien claim in question, the exact relationship between the two doctors and these two entities, reasonableness and necessity of the treatment provided and whether the amounts billed were per schedule.

No witnesses were called by either party. Both submitted extensive documents in support of their respective positions and submitted based on the documentary evidence.

The Findings and Order denying recovery on the lien here were based on the determination that, as the party with the affirmative of the claim, Optimal on behalf of Dr. Shen and Dr. Kan had the burden of proof to show that there was a legal or factual basis for them to provide treatment outside the MPN as an initial matter, before reaching any issue of reasonableness and necessity of the treatment provided or reasonableness of the amounts billed. The evidence submitted did not show any such basis, and there was therefore no basis for awarding Optimal any of the fees it was seeking.

As discussed in more detail in the Opinion on Decision, the evidence did show that the claim was accepted within days after the injury occurred, treatment was provided, notice of the MPN was given to the applicant and he treated with Kaiser within the MPN. For some reason, the applicant obtained an attorney several months after the injury, Mr. Ng, who immediately sent him to Dr. Shen but, as shown by information in his own reports from the beginning, Dr. Shen knew the claim was accepted, that treatment had been provided, and that SCIF was the carrier.

There is no evidence that Dr. Shen tried to get advance authorization for his initial evaluation, and SCIF advised him long before the second evaluation that there was an applicable MPN, he was not a member, and they therefore did not have liability for any bills for his services. That and subsequent notices were addressed to him and sent to the address on his reports, and there was no claim made that he did not receive them. The evidence showed that Dr. Kan was active in the administration of the medical group, particularly that he was the Secretary, Chief Financial Officer and a Director of Optimal Health Medical Center (Exhibit Q) as well as the doctor that Dr. Shen

designated as the secondary treating doctor, so he knew or should have known that there was an applicable MPN and that they did not belong to it before he first examined the applicant himself on referral from Dr. Shen. The evidence also showed that SCIF continued to offer the applicant treatment through the MPN by subsequent notices to him and his attorney (Exhibits H and I).

NO EVIDENCE OF DENIAL OF BODY PARTS

As reflected in the Reporter's Minutes of Hearing, no issue was raised at time of trial on whether SCIF denied any body parts the applicant claimed were injured in the subject industrial injury or whether SCIF denied treatment to any body parts the applicant claimed were injured in the subject industrial injury. In its Petition for Reconsideration, Optimal raises the claimed denial of body parts as the primary justification for Dr. Shen and Dr. Kan to treat the applicant. There has never been a claim that they were actually in the MPN, so the focus is on whether they could treat the applicant outside of the MPN.

The argument in the Petition for Reconsideration has two sections, the first centered on a claim that Defendant "neglected and/or refused to provide medical care" and the second that the applicant had "a right to self-procure medical treatment" on the body parts that were claimed to be denied. Both of these arguments are centered on the claim that SCIF denied treatment for certain body parts. No documentation of any such denial was submitted as evidence at trial, and nothing that was submitted at trial suggests that documentation supporting Optimal's claim exists.

The primary document that Optimal points to in support of its position is Defendant's Exhibit K, which is a January 29, 2018 letter to Kaiser authorizing it to provide treatment. Optimal claims that this document shows that body parts other than "upper back and thoracic" were denied. The full sentence referencing "upper back and thoracic" in that exhibit is: "State Compensation Insurance Fund, the claims administrator for Modative, Inc., has accepted liability for the industrial injury of Charleston Lopez on January 22, 2018 to his upper back and thoracic." The rest of the letter authorizes Kaiser as the identified Primary Treating Physician of reporting and other responsibilities. There is nothing in the letter stating or implying that the applicant had claimed that other body parts were injured and that those additional body parts were denied. All that can be understood from the reference to "upper back and thoracic" in the context of the only sentence in which body parts are mentioned in this letter is that these were the body parts that the applicant reported as injured at that time and that they were accepted.

No evidence was submitted at trial that the applicant claimed that any part of his body was affected by the subject injury other than the upper back and thoracic area until he first saw Dr. Shen, based on Dr. Shen's October 26, 2018 report (Exhibit 3); and no evidence was submitted at trial that any treatment was denied prior to the applicant's first evaluation by Dr. Shen. SCIF's subsequent objections to Dr. Shen's and later Dr. Kan's treatment were not based on the parts of body treated but on their lack of membership in SCIF's MPN (Exhibits E, F and G). Although Optimal asserts that SCIF did not accept the additional body parts as part of the industrial injury until the QME report on April 5, 2019 (p. 2 of the Petition for Reconsideration, referring to Exhibit 18), it did not submit any evidence at trial showing that to be the case.

It should also be noted that Dr. Shen does not say in any of the histories given in his reports that the applicant was denied treatment (Exhibits 3-9, on p. 1-2 in Exhibit 3 and generally p. 1-2 or p. 2 on the subsequent reports). In the “Discussion” section of his reports (generally on p. 3 or 4 of the reports), he includes a sentence, “Patient wishes to exercise her [sic] right to select a treating doctor of his choice,” with no further elaboration. The histories in Dr. Kan’s reports (Exhibits 10-13) are briefer than Dr. Shen’s but also have no claim that SCIF denied treatment to the applicant. Based on their reports, they had no belief at the time they provided services that SCIF had denied the applicant treatment or that their providing treatment to the applicant was due to a denial of treatment.

In the Petition for Reconsideration, Optimal is claiming that it should be compensated for the treatment provided by Dr. Shen and Dr. Kan because SCIF had denied treatment. It has the affirmative of that issue, as it is foundational to its claim for payment, and therefore has the burden of proof on that issue (Labor Code Section 5705). It has not met that burden of proof, and both of its arguments in the Petition for Reconsideration, which are based on that foundational fact, fail accordingly.

VALIDITY OF THE STATE FUND MPN BY HARBOR HEALTH

At the beginning of the first argument (p. 2 of the Petition), Optimal claims that there is no substantial evidence supporting the validity of SCIF’s MPN, which is formally known as the “State Fund MPN by Harbor Health.” SCIF did submit documentation on the MPN, including the “Employee’s Guide to the State Fund MPN by Harbor Health” (Exhibit T) that had been sent to the applicant and that contains information on the applicant’s rights within the MPN and how to access it.

SCIF is a major Workers’ Compensation insurer in California and its MPN is not an unknown quantity; it would be a significant waste of judicial resources if SCIF had to provide even more extensive documentation on authorization for its MPN every time an MPN issue arises in cases before the Board. However, in retrospect, this judge should have included a finding by judicial notice of information available from the State of California of the authorization of this MPN, which was approved on December 24, 2015, as shown on the state website showing approved MPNs (see link https://www.dir.ca.gov/dwc/MPN/DWC_MP_N_Main.html; see “Current list of approved medical provider networks by name of applicant” and enter “State Fund MPN by Harbor Health” in the “search” window). This MPN has MPN ID Number 2432.

The date of injury here was January 22, 2018, so this MPN was approved before the date of injury.

Optimal also claims in its Petition for Reconsideration that the notices to the applicant regarding the MPN, with specific reference to Exhibits L and O, did not comply with the standards discussed in *Knight v. UPS* (2006) 71 CCC 1423 and 8 CCR Section 9767.12. This judge found that they did comply, particularly when taken in conjunction with Exhibit T (the “brochure” referenced as enclosed in Exhibit O). Regarding notices in Spanish, there is no evidence at all before the Court that the applicant speaks Spanish, and neither Dr. Shen nor Dr. Kan gave any indication in their reports that an interpreter was needed or used, or that they had any problem communicating with the applicant in English.

The other cases cited in the Petition all involve cases where either the claim or certain body parts were denied, as is also reflected in the text of the Petition. As discussed above, there is no evidence here of any such denial, so those cases are irrelevant to Optimal's lien claim.

CONCLUSION

Per the Petition for Reconsideration, the lien claim is based on a claim that the services that were provided were for treatment of body parts that were denied by SCIF. While it might be ambivalent in other areas, on this issue the evidence is clear that there was no denial of treatment of any body part before or during the time that Dr. Shen and Dr. Kan chose to provide treatment, which are the relevant periods here. The evidence is also clear that Dr. Shen and Dr. Kan knew they were treating without authorization, and that they were provided with ample notice that SCIF had an MPN, that they were not within the MPN (a fact they have never disputed) and that SCIF denied any liability to pay for their services. They chose to provide services anyway.

Nothing in the Petition for Reconsideration changes the fact that Optimal did not meet its burden of proof to show a legal or factual basis for Dr. Shen and/or Dr. Kan to treat the applicant outside of SCIF's MPN. It should be denied accordingly.

DATE: 11/15/2023

Barbara Toy
WORKERS' COMPENSATION JUDGE