WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTOR CANAS, ***Applicant***

vs.

BAKKAVOR FOODS USA, INC.;
BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Number: ADJ12399048
Van Nuys 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, except as to the discussion of lien assignment at section III-B, we will deny reconsideration.

Lien claimant Medvantage Orthocare LLC, through its representative Liening Edge, seeks reconsideration of the WCJ's July 18, 2022 Findings and Order, which determined in relevant part that lien claimant failed to establish applicant's right to self-procure treatment outside of defendant's Medical Provider Network (MPN) due to a neglect or refusal of medical treatment. (Findings of Fact No. 4; Opinion on Decision, dated July 18, 2022, at p. 3.)

Pursuant to *Knight v. United Parcel Service* (2006) 71 Cal. Comp. Cases 1423 [2006 Cal. Wrk. Comp. LEXIS 323] (Appeals Board en banc), an employer or insurer'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 or insurer liable for reasonable medical treatment self-procured by the employee. (*Id*. at 1434.) Here, lien claimant offers no documentary evidence and interposes no witnesses to establish that an alleged failure of timely notice on the part of defendant resulted in either delay or refusal of medical treatment. Additionally, the WCJ has observed that defendant provided appropriate notice to applicant within ten days of service of

the claim regarding how to access medical treatment through the employer MPN. (Ex. E, Medical Provider Network Notice, dated August 6, 2019.)

Lien claimant asserts that defendant neglected medical treatment because the notice of delay and notice of medical appointment were not accompanied by a proof of service. (Petition for Reconsideration (Petition), at 8:1.) We observe, however, that Administrative Director (AD) Rule 9812 does not require that a proof of service accompany a notice of delay. (Cal. Code Regs., tit. 8, § 9812(g).) Moreover, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641; see also *Minniear v. Mt. San Antonio Community College District* (1996) 61 Cal. Comp. Cases 1055, 1059 [1996 Cal. Wrk. Comp. LEXIS 3570] (Appeals Board en banc) [typical presumption affecting the burden of producing evidence "is the presumption that a mailed letter was received"].)

Additionally, lien claimant offers no evidence that applicant did not receive the claim delay notice or the medical evaluation appointment notice, or that the alleged delay resulted in neglect or refusal of medical treatment. (*Knight v. United Parcel Service, supra,* 71 Cal.Comp.Cases 1423, 1434.) We further observe that the defendant's Medical Provider Network notice, which included information on how to access medical treatment through the MPN, was in fact accompanied by a proof of service on both applicant and employer. (Ex. E, Medical Provider Network Notice, dated August 6, 2019, at p. 32.)

Accordingly, we agree with the WCJ that lien claimant has not met its burden of establishing that applicant was entitled to self-procure medical treatment at employer expense. (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113 [2012 Cal. Wrk. Comp. LEXIS 160] (Appeals Bd. en banc); *Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338 [2008 Cal. Wrk. Comp. LEXIS 279] (Appeals Bd. en banc); *Kunz v. Patterson Flooring Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588 [2002 Cal. Wrk. Comp. LEXIS 1605] (Appeals Bd. en banc).)

In light of our determination that lien claimant has not met its burden of establishing applicant's entitlement to self-procured treatment at employer expense, we need not reach the issue lien assignment.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 11, 2022

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

MEDVANTAGE ORTHOCARE, LLC
LIENING EDGE
ROSENBERG, YUDIN & PEATMAN
DORIAN CHIROPRACTIC CORPORATION
INNOVATIVE MEDICAL MANAGEMENT, LLC

SAR/abs

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

The Workers' Compensation Administrative Law Judge ("WCALJ") issued an Opinion on Decision and Findings and Order, on July 18, 2022. Lien claimant Medvantage Orthocare LLC, hereinafter, "Petitioner," has filed a timely and verified Petition for Reconsideration on the following grounds pursuant to Labor Code § 5903 / Rule 10843:

1. The evidence does not justify the Findings of Fact and Order.
2. That the WCJ acted without or in excess of her powers, and
3. That the findings of fact do not support the order, decision, or award.

I. CONTENTIONS

That there was a denial of care by defendant, and lien claimant is entitled to payment pursuant to L.C. § 5402, and that defendant failed to prove that the lien was assigned.

II. FACTS

The matter herein proceeded to lien trial on June 23, 2022, on the liens of Medvantage OrthoCare LLC, and Dorian Chiropractic. The date of injury involves a cumulative trauma pled from August 1, 2016 through July 11, 2019, to various body parts, filed in EAMS on July 25, 2019. Application for Adjudication of Claim, EAMs DOC ID number 29821272. In addition, a proof of service was filed, reflecting service of the application on both defendant carrier and the employer, dated July 26, 2019 (EAMS reflects that it was received and filed on "July 25, 2019").

Following the filing of the Application, defendant sent an MPN notice packet, consisting of 32 pages, in English and Spanish, dated August 6, 2019, to the applicant. Defense Exhibit E. On the first page of the packet, defendant advised the applicant that they were aware of the claim for injury and provided information on how the applicant could obtain medical treatment. Id. at page 1.

On August 19, 2019, defendant sent a delay letter to the applicant, indicating that they could not make a determination regarding his claim, and needed additional information. Defense Exhibit C. The delay notice was also sent in both English and Spanish.

Defendant then sent the applicant a medical appointment letter dated August 21, 2019, both in English and Spanish, indicating they had scheduled an appointment for him at Kaiser on September 10, 2019. Defense Exhibit A. It appears the applicant failed to appear for said exam as indicated in defendant's subsequent denial letter dated October 29, 2019, also in both English and Spanish. Defense Exhibit D.

All of the notices sent by defendant to the applicant were directed to the same address; 2412 E. 108th St., Los Angeles, CA 90059. This same address was used in the Compromise and Release for the applicant's claims and is recorded in EAMS as the applicant's address. There was no evidence submitted at trial that the applicant had not received defendant's various notices.

The applicant had two attorneys; Telleria and Telleria, who filed the applicant's application, and then Mr. William Barth, who filed a "Substitution of Attorney" dated September 3, 2019, on October 15, 2019 in EAMS. (EAMS DOC ID 71339162)

The applicant's first attorney, the law firm Telleria and Telleria, sent an L.C. § 4600 letter to the employer on July 19, 2019, before the filed claim and Application and Adjudication of claim on July 25, 2019. Lien Claimant's Dorian Chiropractic Exhibit 1. The letter designated Dr. Mohamed Hassanin as the PTP, however it is unclear if the applicant was ever examined by him as none of his reports were submitted into evidence.

The applicant's second attorney, Mr. Barth, selected a different doctor for the applicant pursuant to L.C. § 4600; Lien Claimant Dr. Dorian. Specifically, said letter was sent directly to Dr. Dorian, dated September 24, 2019, advising him that he had been selected as the PTP pursuant to L.C. § 4600. Lien Claimant Dorian Chiropractic, Exhibit 9. It is unclear if the letter was served on defendant, as the letter did not reflect a "CC' to any additional party, and there was no proof of service attached. Further, the letter was issued after defendant had advised the applicant of the MPN, that his claim was in delay, and the defense scheduled medical appointment for September 10, 2019.

Pursuant to lien claimant's itemized bill, the applicant treated with Dr. Dorian from September 25, 2019 through October 24, 2019. Lien Claimant Dorian Chiropractic, Exhibit 6. It appears that Dr. Dorian referred the applicant to Petitioner Medvantage Orthocare on October 4,

2019, for one date of service, pursuant to their bill. Lien Claimant Medvantage Orthocare, Exhibit 1.

Approximately one month following Dr. Dorian treating the applicant, the matter was resolved via Compromise and Release, approved on October 30, 2019. The Compromise and Release included two additional claims that were not submitted at the lien trial; ADJ12463918, for date of injury March 11, 2019, and ADJ12675586, for date of injury August 14, 2018.

On page 7 of the Compromise and Release document, in the "Comments" section, the parties included the following language in support of their settlement:

> "The parties are settling while the claims remain in delay in order to buy their peace for a lump sum certain…Applicant stipulates that his employment was terminated on 07/12/2019…".

Following submission of the lien trial, the undersigned judge found that there had not been a denial of care, and that both lien claimants were not entitled to payment pursuant to L.C. § 5402. Further, it was found that lien claimant Medvantage Orthocare had been assigned, and could not recover payment.

Petitioner's timely and verified Petition for Reconsideration was filed thereafter. Neither defendant or lien claimant Dorian Chiropractic have filed responses to same.

III. DISCUSSION

A. LIEN CLAIMANT IS NOT ENTITLED TO PAYMENT PURSUANT TO L.C. § 5402 AS THERE WAS NO DENIAL OF CARE

Petitioner argues that some of the notices sent to the applicant did not include a proof of service confirming service on the applicant and his attorney, and thus "defendants failures relating to their Notice of Delay (Exhibit C, DEFENDANT, 08/19/2019, EAMS ID: 40349555) could amount to a neglect of treatment, based on the analysis in Knight." Petition for Reconsideration, page 8, lines 1-3.

Petitioner does not call into question that defendant served the applicant with the MPN notice on August 6, 2019, however argues that defendant "allegedly" served the delay notice dated August 19, 2019 and the medical appointment letter dated August 21, 2019 on the applicant,

because the notices did not have a proof of service attached. Petition for Reconsideration, page 2, lines 12-25.

There was no evidence submitted by either lien claimant that defendant had served the applicant at the wrong address, or that one of the applicant's attorneys made contact with defendant requesting medical treatment and had not received any notices.

In fact, applicant's attorney and defendant included as a basis for their settlement in the Compromise and Release the following:

> "The parties are settling while the claims remain in delay in order to buy their peace for a lump sum certain…Applicant stipulates that his employment was terminated on 07/12/2019…". Compromise and Release, October 30, 2019, page 7.

Thus, applicant and his attorney confirmed in the settlement documents that the claims were in delay, and was a basis for settlement. For lien claimant to argue that two out of the three notices submitted as evidence were not received by the applicant, including the delay letter, ignores the fact that applicant and his attorney were aware, and acknowledged that the claims were in delay. Thus, it is presumed the applicant received the three notices in question.

Petitioner's argument that the court's findings in the case of *Bruce Knight v. United Parcel Service*, 71 CCC 1423 (2006), hereinafter referred to as "Knight," support finding that defendant's actions resulted in neglect or refusal of medical treatment is not valid.

Specifically, petitioner argues that defendant's "failures relating to their Notice of Delay…could amount to a neglect of treatment, based on the analysis of *Knight*." Petition for Reconsideration, page 8, lines 1-3. Petitioner notes that the court in *Knight* found that a "defendant's failure to provide timely notices to the Applicant can result in a neglect or refusal to provide medical treatment." Id. at page 7, lines 19-21.

The facts in *Knight* are different than the case herein, and are not comparable to support finding a "neglect or refusal to provide medical treatment" by defendant herein.

In *Knight*, applicant's attorney made extensive efforts to obtain an MPN list from the adjustor, after being advised that the initial doctor he had selected for his client was outside of the

MPN. *Knight*, 71 CCC 1423, 1425-1426. After not being provided with the MPN list, applicant's attorney selected a different doctor to treat his client, and defendant responded with a letter dated June 14, 2005, indicating that the selected doctor was outside of their MPN. Id. at 1426-1428. The court noted that the June 14, 2005 letter "did not explain where and how applicant was to obtain medical treatment…" among other rights. Id. at 1428.

Further, the court noted the following in regards to defendant's actions in Knight:

> "Information about how to access medical treatment, how to choose and change physicians, how to obtain independent medical review, and, thus, how to generally and specifically "use" the MPN, are all crucial to the provision of reasonable medical treatment. In this case, defendant failed to tender reasonable medical care through the MPN and failed to provide required notice to applicant of his rights under the MPN." Id. at 1435.

Based on the record submitted herein, defendant was proactive in providing various notices to the applicant, including the 32 page MPN packet, and scheduling an examination with a provider. These actions do not amount to a neglect or refusal of medical care, like the defendant's actions in Knight.

Finally, petitioner argues that the undersigned "improperly found that DEFEDANT timely provided medical treatment, because DEFENDANT'S first approval and notice of medical treatment lacks a proof of service, and wasn't even drafted until 27 days after DEFENDANT'S notice of injury." Petition for Reconsideration, page 9, lines 18-22.

Petitioner ignores that defendant sent the applicant an MPN packet of information on August 6, 2019, before the medical appointment letter dated August 21, 2019. Thus, there was no delay of "27 days."

Accordingly, there was no neglect or refusal of medical treatment, and petitioner is not entitled to payment pursuant to L.C. § 5402.

B. ASSIGNMENT OF LIEN PURSUANT TO L.C. § 4903.8:

The undersigned found that petitioner's lien had been assigned pursuant to L.C. § 4903.8, based on Defense Exhibit G, a UCC Financing Statement. The statement listed petitioner as a "debtor," and that their assets had been assigned to "Golden Financial Solutions."

Petitioner states that defendant did not meet its burden in showing the lien was assigned, arguing that pursuant to L.C. § 4903.8(a)(1) it must be proven "that 1.) PETITIONER 'has "ceased doing business in the capacity held at the time the expense were incurred,' and that 2.) PETITIONER 'has assigned all right, title and interest in the remaining accounts received to the assignee'." Petition for Reconsideration, page 4, lines 19-21.

Petitioner argues that the "sole piece of evidence" submitted by defendant was Exhibit G, the UCC Financial Statement, and that there "was no testimony, nor any evidentiary documentation admitted at trial that PETITIONER has 'ceased doing business'…A UCC Financial Statement actually establishes the opposite, and infers that PETITIONER is likely still doing business, and that PETITIONER merely (or possibly) owes a debt of some kind. Since DEFENDANT failed to prove that PETITIONER has 'ceased doing business,' the WCALJ'S finding that PETITIONER is not entitled to award is clear error of law wherein the evidence does not justify the finding of fact, and must be immediately reversed and remanded to the trial court for further proceedings." Id. at page 5, lines 1-10.

In arguing that defendant has not established that petitioner has "ceased doing business," they never confirm that they are in fact still in business. Instead, petitioner argues that the UCC Financial Statement "infers (emphasis added) that PETITIONER is likely (emphasis added) still doing business." Petition for Reconsideration, page 5, lines 4-8. Said statement is not a confirmation that petitioner is in fact "still doing business," but a suggestion that it is a possibility. This is an invalid argument.

Petitioner makes a similar argument regarding debt, when stating that the UCC Financial Statement only shows that petitioner "merely (or possibly) owes a debt of some kind." This is also found to be an invalid argument.

Pursuant to the UCC Financial Statement, petitioner is listed as a "debtor," which supports they owe a debt. Secondly, the statement indicates that petitioner's assets have been assigned to "Golden Financial Solutions," thus supporting a finding that the lien has been assigned.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety.

DATE: August 23, 2022

SANDRA ROSENFELD
Workers' Compensation
Administrative Law Judge