

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

KIMBERLY DICATO, *Applicant*

vs.

**GOOD SAMARITAN HOSPITAL permissibly self-insured, administered by ATHENS
ADMINISTRATORS, *Defendants***

**Adjudication Number: ADJ14808720
Van Nuys District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 10, 2022, wherein the WCJ found in pertinent part that defendant's Medical Provider Network (MPN) is not valid, that pursuant to Labor Code sections 4600(c) and 4603.2 applicant has control of her medical treatment, that pursuant to Labor Code section 4600 applicant is entitled to further medical treatment, and that applicant is entitled to select Robert Weber, M.D., as her primary treating physician (PTP).¹

Defendant contends that its MPN complies with the requirements of Administrative Director (AD) Rule 9767.5 and is a valid MPN, that there is no evidence in the trial record to support a finding that applicant has medical control and is entitled to receive treatment from a non-MPN physician at defendant's expense, and that the trial record contains no evidence indicating that defendant's MPN does not comply with the mileage requirements of AD Rule 9767.5.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer and the contents of the

¹ We note that these Findings were included in the "Orders" section of the F&O, but they are properly identified as Findings of Fact.

Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury in the form of COVID-19 with symptoms including shortness of breath, fatigue, headaches, body aches, heart palpitations, sleep loss, coughing, hair loss, loss of smell, loss of taste, numbness in both hands, increased blood pressure, and depression, while employed by defendant as a nurse during the period from November 8, 2020, through December 8, 2020. The COVID-19 exposure injury claim, was accepted on January 13, 2021, and the claim as to additional body parts/conditions was denied on July 26, 2021.

By correspondence dated August 20, 2021, applicant designated Dr. Gary Zagelbaum, as her PTP. Defendant objected to Dr. Zagelbaum being applicant's PTP because he was not in defendant's MPN. (See Def. Exh. J.)

The parties had an ongoing dispute as to whether applicant was required to seek treatment from providers in defendant's MPN. They proceeded to trial on January 27, 2022. The issues submitted for decision were whether applicant was entitled to receive medical treatment from Robert Weber, M.D, at defendant's expense; whether defendant's MPN was valid; and whether applicant had control over her ongoing medical treatment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 27, 2022, p. 2.)

DISCUSSION

An employer is required to provide an injured worker with medical treatment reasonably required to cure or relieve the worker from the effects of an injury arising out of and occurring in the course of employment. (Lab. Code, § 4600.) An employer or insurer may establish an MPN to meet the requirement that it provide timely medical treatment. (Lab. Code, §§ 4616 *et seq.*) As of January 1, 2005, employers who have designated an approved MPN can require its injured workers to be treated by physicians within the MPN. Although injured workers are generally limited to selecting their medical providers from within the employer's MPN, if the employer neglects or refuses to provide reasonably necessary medical treatment as required by section 4600, whether

through an MPN or otherwise, then an injured worker is entitled to self-procure medical treatment at the employer's expense. (*McCoy v. Industrial Accident Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93]; *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423, 1435 [Appeals Board en banc]; See Lab. Code § 4603.2(a)(2).)

In this matter, the issues raised in the Petition appear to be premised primarily on the Finding that defendant's MPN is not valid. (F&O, p. 2.) Although the issue of whether defendant's MPN was valid was raised at trial and submitted for decision, it must be noted that Labor Code section 4616 states in part:

(b) (1) An insurer, employer, or entity that provides physician network services shall submit a plan for the medical provider network to the administrative director for approval. ... Upon a showing that the medical provider network was approved or deemed approved by the administrative director, there shall be a conclusive presumption on the part of the appeals board that the medical provider network was validly formed. ...

(3) Every medical provider network shall submit geocoding of its network for reapproval to establish that the number and geographic location of physicians in the network meets the required access standards.

(4) Approval of a plan may be denied, revoked, or suspended if the medical provider network fails to meet the requirements of this article. *Any person contending that a medical provider network is not validly constituted may petition the administrative director to suspend or revoke the approval of the medical provider network. ... Unless suspended or revoked by the administrative director, the administrative director's approval of a medical provider network shall be binding on all persons and all courts.* A determination of the administrative director may be reviewed only by an appeal of the determination of the administrative director filed as an original proceeding before the reconsideration unit of the workers' compensation appeals board on the same grounds and within the same time limits after issuance of the determination as would be applicable to a petition for reconsideration of a decision of a workers' compensation administrative law judge. ... (Lab. Code, § 4616, emphasis added.)²

As quoted above, section 4616 specifically states that the administrative director's approval of an MPN is binding "on all persons and all courts" and that a dispute as to the validity of an MPN must be submitted to the administrative director. (Lab. Code, § 4616.) The Appeals Board and the WCJ do not have jurisdiction to declare an MPN invalid once the administrative director

²All further statutory references are to the Labor Code unless otherwise noted.

has approved the MPN. Having reviewed the Electronic Adjudication Management System (EAMS) ADJ file, in addition to the trial record, it is clear that applicant did not petition the administrative director to suspend or revoke the approval of the medical provider network. As such, there is no determination by the administrative director that could be appealed, and therefore the issue of the MPN's validity is not properly before the Appeals Board.

Regarding applicant's entitlement to treatment from providers outside the MPN at defendant's expense, if the employer or insurer's failure to provide medical treatment constitutes "the neglect or refusal to provide reasonable medical treatment" then the employer and/or insurer is liable for reasonable medical treatment self-procured by the injured worker. (*Knight v. United Parcel Service, supra* at 1435.) Upon return of this matter to the WCJ it would be appropriate for the WCJ to consider whether defendant's conduct constitutes a refusal to provide medical treatment.

As to applicant "acquiring medical control per 4600(c)," that section states:

(c) Unless the employer or the employer's insurer has established or contracted with a medical provider network as provided for in Section 4616, after 30 days from the date the injury is reported, the employee may be treated by a physician of the employee's own choice or at a facility of the employee's own choice within a reasonable geographic area.
(Lab. Code, § 4600(c).)

Here, defendant has established an MPN that the administrative director deemed valid, so under the circumstances of this matter, the provisions of section 4600(c) are not applicable.

Finally, we must note that other than matters of which judicial notice may be taken (see California Evidence Code, §§450 – 460), a decision "must be based on admitted evidence in the record" (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc) A WCJ may make findings based upon the parties' stipulations (see section 5702) but "off the record" discussions are not evidence. Nor does a WCJ's online/internet search constitute evidence that may be considered in making a decision. Upon return of this matter, when issuing a new decision, these factors must be considered.

Accordingly, we grant reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact and Order issued by the WCJ on March 10, 2022, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 10, 2022 Findings of Fact and Order is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

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 16, 2022

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

**KIMBERLY DICATO
ROWEN, GURVEY & WIN
DAVID JANE & ASSOCIATES**

TLH/pc

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