WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

REYNA CONTRERAS, *Applicant*

vs.

NORCAL HARVESTING, LLC; CALIFORNIA FARM MANAGEMENT, *Defendants*

Adjudication Number: ADJ10146583
Salinas 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.

Defendant seeks reconsideration or in the alternative removal of the Second Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on March 25, 2021. By the F&O, the WCJ found that applicant is allowed to treat outside the medical provider network (MPN).

Defendant contends that applicant was provided with notice of the MPN multiple times and there was no denial of care such that she may treat outside the MPN.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration/Removal (Report) recommending that we deny the Petition.

We have considered the allegations of defendant'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 permit applicant to treat outside the MPN from July 20, 2020. Entitlement to treatment outside the MPN prior to July 20, 2020 will be deferred. We will otherwise affirm the F&O.

FACTUAL BACKGROUND

Applicant claims injury to her left shoulder, back, abdomen (hernia) and left hip on August 26, 2015 while employed as a laborer by Norcal Harvesting. The claim has been accepted for the left shoulder, back and abdomen.

Defendant sent letters to applicant in 2018 and 2019 providing her attorney with a link to access the MPN. (Defendant's Exhibit No. D-4, Letter to Spiro Pistiolas from Kathleen Roberts, February 25, 2019; Defendant's Exhibit No. D-5, Letter to Spiro Pistiolas from Kathleen Roberts, May 14, 2018.)

On July 20, 2020, applicant sent a letter to defendant stating as follows in relevant part:

> Also, please assist the injured worker with getting medical treatment per code. At this time she is without an MPN PTP, and asks that she be provided one immediately.
>
> (Applicant's Exhibit No. A-2, Letter to Stander Reubens from Knopp-Pistioloas, July 20, 2020.)

The letter has attached to it a proof of service showing it was sent to defendant's attorney. (*Id.*)

On August 30, 2020, applicant sent another letter to defendant designating NMCI Medical Clinic as the primary treating physician (PTP). (Applicant's Exhibit No. A-1, Letter to Stander Reubens from Knopp-Pistioloas, August 30, 2020.) Defendant objected to this designation as outside the MPN. (Defendant's Exhibit No. D-2, Letter to Spiro Pistiolas from Kathleen Roberts, September 8, 2020; Defendant's Exhibit No. D-3, Letter to Spiro Pistiolas from Kathleen Roberts, September 28, 2020.)

The matter proceeded to trial on December 17, 2020 on the following issues:

> (a) Applicant is treating outside the MPN. Defendant requests an Order requiring Applicant to treat within the MPN.
>
> (b) Applicant asserts the right to treat outside Defendant's MPN, per CCR Section 9767.5 (g), and requests an Order to this effect.
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> (Minutes of Hearing; Summary of Evidence, December 17, 2020, p. 3.)

The WCJ initially issued a Findings and Order on January 25, 2021, wherein he found that applicant is entitled to treat outside defendant's MPN. Defendant sought reconsideration of this decision. In response, the WCJ issued an Order Rescinding Findings and Order and Notice of Conference on February 23, 2021. At a subsequent hearing on March 16, 2021, the caption was changed to correctly reflect the employer and the matter was resubmitted for decision. (Minutes of Hearing, March 16, 2021.)

The WCJ issued the F&O as outlined above. Defendant has again sought reconsideration.

DISCUSSION

Labor Code[1] 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).) 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 parties do not appear to 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, the issue appears to be whether defendant's failure to respond to applicant's July 20, 2020 request for assistance in obtaining treatment constituted neglect or refusal to provide care.

Defendant contends that it did not receive applicant's July 20, 2020 letter. "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." (Evid. Code, § 641.) This rule is well established. (See *Hagner v. United States* (1932) 285 U.S. 427, 430 ["[t]he rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed"].) Application of this rule was also discussed in an en banc decision by the Appeals Board:

> The presumption that a letter mailed was received is rebuttable. (*People v. Smith* (2004) 32 Cal.4th 792, 799.) However, the trier of fact is obligated to "assume the existence of the presumed fact unless and until evidence is introduced to support a finding of its nonexistence." (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 421.) A mere allegation that the recipient did not receive the

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

> mailed document has been found to be insufficient to rebut the presumption. (See *Alvarado v. Workmen's Comp. Appeals Bd.* (1970) 35 Cal.Comp.Cases 370 (writ den.) and *Castro v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 1460 (writ den.).) If the sending party thus produces evidence that a document was mailed, the burden shifts to the recipient to produce "believable contrary evidence" that it was not received. (*Craig*, *supra*, at pp. 421-422, citing *Slater v. Kehoe* (1974) 38 Cal.App.3d 819, 832, fn. 12.) Once the recipient produces sufficient evidence showing non-receipt of the mailed item, "the presumption disappears" and the "trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received." (*Id*.)
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> (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1817 (Appeals Board en banc).)

Attached to applicant's letter was a proof of service signed under penalty of perjury stating that it was served on defendant. This shifted the burden to defendant to produce believable contrary evidence that the letter was not received. No evidence was admitted at trial in support of defendant's contention that this letter was not received. Therefore, applicant's letter is presumed to have been received.

In her letter, applicant requested assistance with obtaining treatment in the MPN. There was no response to this request from defendant. Based on the circumstances here, we conclude that defendant neglected to provide applicant with treatment and applicant is entitled to treat outside the MPN from the date of her letter.[2]

There is insufficient evidence of a neglect or refusal by defendant to provide treatment prior to applicant's July 20, 2020 letter. Therefore, we will amend the F&O to provide for treatment outside the MPN only from July 20, 2020 and defer the issue of entitlement to treatment outside the MPN prior to then. (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"].)

Applicant alleged at trial that she was permitted to treat outside the MPN per AD Rule 9767.5(g) and the WCJ's Report reflects agreement with this contention. This subdivision provides as follows in relevant part:

> 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

[2] The parties are encouraged to communicate and work together in the future in order to facilitate applicant's treatment.

> 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.**
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> (Cal. Code Regs., tit. 8, § 9767.5(g), emphasis added.)

The 20-day time limit for a medical access assistant (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*.[3] The Rule references "specialist services" and "a specialist in an appropriate referred specialty." The Rules distinguish between a specialist and a primary treating physician. (Cal. Code Regs., tit. 8, § 9785(a)(1)-(2); see also *Gorbanwand v. Pacific GIS, Inc.* (September 13, 2019, ADJ10836918) [2019 Cal. Wrk. Comp. P.D. LEXIS 385][4].) 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 v. Fastenal* (February 6, 2013, ADJ8205235) [2013 Cal. Wrk. Comp. P.D. LEXIS 47] 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.)

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[3] 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).)

[4] 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 *Gorbanwand* because it considered a similar 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."

The record does not indicate that applicant was seeking an appointment with a specialist based on a referral; rather, it shows that she was seeking assistance with obtaining treatment generally. Therefore, AD Rule 9767.5(g) does not apply to the facts in this case.

In conclusion, we will amend the F&O as outlined herein.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Second Findings and Order issued by the WCJ on March 25, 2021 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. Applicant is allowed to treat outside defendant's MPN at defendant's expense from July 20, 2020. The issue of entitlement to treatment outside the MPN prior to July 20, 2020 is deferred.

ORDER

IT IS ORDERED that applicant is allowed to treat outside defendant's MPN from July 20, 2020. Entitlement to treatment outside the MPN prior to July 20, 2020 is deferred.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY 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.

KNOPP PISTIOLAS
REYNA CONTRERAS
STANDER REUBENS

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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.
CS