WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUIS SANTANA, *Applicant*

vs.

COCA-COLA, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Number: ADJ8051313
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, and for the reasons discussed below, we will deny reconsideration.

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).) 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 burden of proof rests upon the party with the affirmative of the issue. (Lab. Code, § 5705.) All parties shall meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Lab. Code, § 3202.5.) In a matter where an injured worker seeks entitlement to

treatment outside a defendant's MPN, the injured worker holds the burden of proof to show a neglect or refusal to provide treatment by the defendant. (See e.g., *Amezcua v. Westside Produce* (March 11, 2013, ADJ8027084) [2013 Cal. Wrk. Comp. P.D. LEXIS 93]; *Cornejo v. Solar Turbines, Inc*. (September 24, 2013, ADJ4111589, ADJ1391390, ADJ2081394, ADJ4372783) [2013 Cal. Wrk. Comp. P.D. LEXIS 479]; see also *San Diego Unified Sch. Dist. v. Workers' Comp. Appeals Bd. (Robledo)* (2013) 79 Cal.Comp.Cases 95, 96 (writ den.) [it is applicant's burden to establish that a failure to provide notice of the MPN resulted in a denial of care].) When a lien claimant litigates the issue of entitlement to payment for industrially related medical treatment, the lien claimant stands in the shoes of the injured employee and the lien claimant must prove by preponderance of the evidence all of the elements necessary to the establishment of its lien. (*Kunz v. Patterson Floor Coverings, Inc*. (2002) 67 Cal.Comp.Cases 1588, 1592 (Appeals Board en banc.)

For the reasons stated in the WCJ's Report, we agree that lien claimant did not meet its burden of proof.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 15, 2023

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

RMS MEDICAL GROUP
NEWHOUSE & CREAGER

PAG/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

I. INTRODUCTION

Applicant, Luis Santana, born on [], while employed on September 30, 2011, as a merchandiser at Downey, California, by Coca-Cola, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC, sustained injury arising out of and occurring in the course of employment to his trunk, back, psyche, and sleep. The case in chief was settled by Compromise & Release on April 30, 2013. A lien trial was held April 17, 2023. No testimony was presented. Trial Briefs were filed by both parties.

II. CONTENTIONS

Petitioner RMS Medical Group contends that the court acted without or in excess of its powers and the evidence does not justify the findings of fact.

III. FACTS

Applicant suffered an admitted specific injury.

Defendant maintained a Medical Provider Network. Defendant served Notice of the Medical Provider Network on applicant October 13, 2011.

Applicant received treatment at US Healthworks on October 4, 2011, October 10, 2011 and October 18, 2011. He was treated by Dr. Giacobetti on October 21, 2011, an MPN doctor.

Applicant retained counsel and filed an Application for Adjudication of Claim on November 1, 2011.

Defendant sent applicant's counsel a demand that applicant treat within the Medical Provider network on January 19, 2012.

An Expedited Hearing took place on March 5, 2012 and applicant's counsel stipulated to treat within the Medical Provider network.

A follow up letter was sent to applicant's counsel regarding the agreement on March 8, 2012.

Applicant selected Dr. Nia, a non-MPN chiropractor, for treatment and began treating on April 26, 2012.

Defendant objected to Dr. Nia's treatment and again reminded applicant to select an MPN physician on May 16, 2012.

The applicant continued to treat with Dr. Nia until August 17, 2012.

Another Expedited Hearing took place on August 28, 2012 and again the applicant stipulated to treat within the MPN.

Lien claimant filed a lien for $2,430.72 on September 25, 2012.

The applicant was seen by Agreed Medical Evaluator, Arthur Garfinkle MD on November 8, 2012.

The applicant's case in chief was resolved by Compromise & Release for $22,500.00 on April 30, 2013.

On October 28, 2014, a Lien Conference was held and lien claimant did not appear. A Notice of Intention to Dismiss Lien for Non-Appearance was issued. No final Order of Dismissal was obtained.

The parties filed Trial Briefs with Points and Authorities and the matter was submitted without testimony at Lien Trial on April 17, 2023.

IV. DISCUSSION

The court found the actions of the applicant demonstrated an acknowledgement and agreement to treat within the Medical Provider Network of defendants as evidenced by applicant's stipulations at Expedited Hearings on March 5, 2012 and August 28, 2012.

The burden of proof to establish a right to treatment outside of the MPN rested on the lien claimant. The lien claimant produced no testimony to support their position. There was no evidence to support lien claimant's assertion that defendant denied medical treatment. To the contrary, the applicant was treated within the Medical Provider Network prior to representation by counsel, and despite stipulating to treat within the MPN on March 5, 2012, the applicant began treatment outside the MPN on April 26, 2012.

The law is well-established that in order to treat outside the MPN, it must be shown that there has been a denial of medical care. No testimony, nor other evidence, was presented at trial to demonstrate that there was a denial of care by defendant at any time in this matter leading up to Applicant's designation of a non-MPN doctor. Rather, the opposite is evidenced by the record including the applicant's stipulations at Expedited Hearings on March 5, 2012 and again on August 28, 2012.

Lien claimant relies on Thomas v. Bakers Burgers, Inc., 2008 Cal. Wrk. Comp. P.D. LEXIS 351 (Cal. Workers' Comp. App. Bd. April 21, 2008). The facts of that case are distinguishable in that both the applicant and the claims examiner testified at Trial in Thomas regarding the delay in care. Here, there was no testimony whatsoever that care was unreasonable refused or delayed by defendants. Lien claimant's interpretation of the Agreed Medical Examiner's report that there was a delay by defendant in authorizing an MRI is mere conjecture and certainly unsupportive of non-MPN chiropractic treatment.

Pursuant to Labor Code Section 4603.2(a)(3):

> If the employer objects to the employee's selection of the physician on the grounds that the physician is not within the medical provider network used by the employer, and there is a final determination that the employee was not entitled to select a physician outside the medical provider network, the employer shall have no liability for treatment provided by or at the direction of that physician or for any consequences of the treatment outside the network.

V. RECOMMENDATION

Based on the foregoing the undersigned WCJ recommends that the petition for reconsideration be DENIED.

DATE: July 24, 2023

Jim Zoellner
WORKERS' COMPENSATION JUDGE