WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS VALDIVIEZO, ***Applicant***

vs.

THE OLYMPIC CLUB;
THE NORTH RIVER INSURANCE COMPANY, administered by CRUM & FORSTER,
Defendants

Adjudication Number: ADJ10885532
San Francisco 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 and the Opinion on Decision 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 and the Opinion on Decision, both of which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

We note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

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

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on September 29, 2025 and 60 days from the date of transmission is Friday, November 28, 2025, the day after Thanksgiving which is a holiday. The next business day that is 60 days from the date of transmission is Monday, December 1, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, December 1, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on September 29, 2025, and the case was transmitted to the Appeals Board on September 29, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on September 29, 2025.

For the foregoing reasons,

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[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 1, 2025

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

CARLOS VALDIVIEZO
LAW OFFICES OF NADEEM MAKADA
LAW OFFICES OF DANIEL K. LEE, P.C.

PAG/bp

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

Report and Recommendation on
Petition for Reconsideration and Notice of Transmission to WCAB

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the Petition for Reconsideration filed herein.

Introduction

On September 18, 2025 defendant through its attorney of record, filed a Petition for Reconsideration of my August 28, 2025 Findings and Award, served on August 29, 2025.

Petitioner asserts that by the order, decision or award, the board acted without or in excess of its powers; the evidence does not justify the findings of fact; petitioner has discovered new evidence material to him which he could not with reasonable diligence have discovered and produced at the hearing; and that the findings of fact do not support the order, decision or award. The petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). To date, I am not aware of an answer having been filed by applicant.

Facts

Carlos Valdiviezo sustained an accepted injury to the bilateral wrists and elbows while employed during the period of May 2, 2016 through May 2, 2017 as a groundskeeper by The Olympic Club. The matter resolved with stipulations, and an Award on Amended Stipulations was issued on December 5, 2023

Applicant's primary treating physician ("PTP") was David Smolins, M.D. Defendant wrote to the applicant on October 3, 2023 with a Notice of Terminated Provider which was copied on, among other parties, Remedy Medical Attn: Dr. Smolins. The address for Dr. Smolins was "PO Box 6917 Redwood City CA 94063-9998." Applicant's counsel wrote to Dr. Smolins on November 1, 2023 asking him to advise in writing if any of the conditions under Labor Code section 4616.2(d)(1) apply.

David Smolins wrote a letter to the adjuster in response to a notification that he was no longer in defendant's Medical Provider Network ("MPN") in which he stated that as the patient's primary treating physician he believed that continued medical treatment for the patient's serious medical or serious chronic condition was necessary and that he would continue as the primary treating physician under Regulation 9767.9

Applicant's attorney filed a petition for penalties on January 26, 2024 that alleged that applicant's treating physician issued a medical report addressing continuity of care finding the applicant to be eligible based on a serious and chronic medical condition. Defendant did not authorize continued treatment with Dr. Smolins, and deferred requests for authorization on the basis.

This matter proceeded to trial on July 23, 2025 on the applicant's claim he was entitled to continue to treat with Dr. Smolins, penalties, attorneys' fees and whether applicant was required to designate a new PTP in defendant's medical network.

On August 28, 2025 I issued my Findings and Award in which I found that defendant did not comply with Cal. Code Reg. title 8, section 9769.10(d)(1) and therefore applicant was entitled to treat outside defendant's MPN with Dr. Smolins at defendant's expense. I also found that defendant unreasonably delayed the provision of medical care. I awarded Labor Code section 5814 penalty and applicant attorney fees under Labor Code section 5814.5. I also found that Applicant was not required to designate a primary treating physician within defendant's Medical Provider Network.

It is from that Findings of Fact and Award that petitioner seeks reconsideration.

Petitioner's Contentions

Petitioner contends that it was not relevant that the notice that Dr. Smolins was no longer in the MPN did not comply with the regulations, that Dr. Smolins' response that he believed he should continue as the applicant's PTP was untimely, a letter and not a medical report, that it was not substantial medical evidence and that there was no delay in the provision of medical treatment to warrant the award of penalties and attorneys' fees.

For the reasons discussed below, petitioner's contentions are without merit, and do not provide sufficient basis to grant reconsideration.

Discussion

Defendant did not comply with the statutory requirements for notifying an injured worker and his PTP that the doctor was terminated from defendant's MPN. I found that defendant's October 3, 2023 notification of the continuity of care plan in this case did not comport with the requirements of Cal. Code Regs. tit. 8, section 9767.10(d)(1). The letter was sent to the injured worker, however the letter was only in English and did not contain the requisite notice in Spanish. (Joint Exhibit 102.) The applicant did require a Spanish language interpreter at trial, so the requirement that the notice be sent to the injured worker is particularly apt in this case. In addition, the copy of the letter sent to the PTP, Dr. Smolins, was sent to "PO Box 6917 Redwood City CA 94063-9998." (Id. at page 2.) This is not the address for Dr. Smolins that was listed in his address within the MPN, nor is it the address on his letterhead, or any of the other correspondence in evidence used by defendant to correspond with Dr. Smolins, all of which use "1900 O'Farrell St. Ste. 90 San Mateo CA 94403." Both the failure to provide the required notices in both English and Spanish and the failure to send the notification to the PTP at the correct address mean that the defendant failed to meet its burden of proof that it complied with the notice requirements. (*See, Charon v. Ralphs Grocery Co.,* 2013 Cal. Wrkl. Comp. P.D. Lexis 100.; *Roque v. Louise's Trattoria*, 2008 Cal. Wrk. Comp. P.D. Lexis 349.)

Failure to provide required MPN notices that results in a failure to provide reasonable medical treatment, as what happened in this case, makes a defendant liable for reasonable self-procured medical care. (*Knight v. UPS* (2006) 71 Cal. Comp. Cases 1423 (*Appeals Board en banc*.); *Babbit v. Ow Jing* (2007) 72 Cal. Comp. Cases 70 (*Appeals Bd. en banc*.).) It was on this basis that I found the applicant was entitled to treat with Dr. Smolins outside of defendant's MPN at defendant's expense.

Petitioner mistakenly believes that I found that the applicant was entitled to treat outside of the MPN under WCAB Rule 9767.12. However, my findings were based on a different regulation. I found that defendant did not meet the requirements of WCAB Rule 9767.10 "continuity of care policy." That regulation governs the transfer of care when a PTP was terminated from defendant's MPN, which were the circumstances in this case. The issue of applicant's right to treat under "continuity of care" was raised in both the pretrial conference statement and framed as an issue for trial, so defendant had sufficient notice of the issue.

I do note that prior defense counsel raised on the pretrial conference statement WCAB Rule 9767.9, which governs transfer of care in circumstances where an applicant is treating outside of defendant's MPN, in support of the contention that applicant was required to pick a new physician within the MPN. However, I found no basis for applicant to have to choose a new provider within defendant's MPN.

Even if defendant had complied with the notification requirements, there is sufficient evidence to support my finding that applicant was entitled to continue to treat with Dr. Smolins at defendant's expense under the continuity of care policy. Applicant's attorney requested a report from Dr. Smolins on November 1, 2024 and Dr. Smolins provided a response on November 19, 2024. (Applicant's Exhibit 4; Joint Exhibit 102.) As Dr. Smolins' response was within 20 days of *the injured worker's* request for a report, it was timely under WCAB 9767.10(2)(2). Defendant disputes that Dr. Smolins response constituted a report, or provided sufficient justification for his opinion that applicant had a covered condition which would allow him to continue to treat under the continuity of care policy for up to a year. However, defendant did not seek a second opinion through the panel QME process to resolve the dispute as required. (See, Cal. Code Regs. tit. 8, section 9767.10(d)(3).)

As defendant did not comply with the requirements of WCAB 9767.10, there was sufficient basis for me to find both an unreasonable delay of medical care that warranted the imposition of both a penalty under Labor Code section 5814 and the award of attorneys' fees under Labor Code section 5814.5.

Recommendation

For the foregoing reasons, I recommend that applicant's Petition for Reconsideration, filed herein on September 18, 2025, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record, Pursuant to Rule 10628, and the case was transmitted to the Appeals Board on this date.

Date: September 29, 2025
By: A. Paraiso

OPINION ON DECISION

This matter proceeded to trial on July 23, 2025 on applicant's claim he was entitled to continue to treat with the PTP, penalties, attorneys' fees and whether applicant was required to designate a new PTP in defendant's medical network. Documentary evidence was submitted, testimony was taken, and defendant submitted a memorandum of points and authorities.

Stipulated facts

Carlos Valdiviezo, born […], while employed during the period of May 2, 2016 through May 2, 2017 as a groundskeeper, Occupational Group Number 491, at San Francisco, California, by The Olympic Club, sustained injury arising out of and in the course of employment to the bilateral wrists and elbows. At the time of injury, the employer was insured for workers' compensation purposes by North River Insurance Company.

An Award On Amended Stipulations was issued in this matter on December 5, 2023.

Documentary evidence

Joint Exhibits

David Smolins wrote a letter to Debbie Brierly in response to a notification that he was no longer in defendant's Medical Provider Network ("MPN.") He stated that as the patient's primary treating physician "it is our professional opinion that continued medical treatment for the patient's serious medical or serious chronic condition is necessary. It is essential that the patient be allowed to continue treating with" and then listed at series of diagnosis codes for pain in the bilateral elbows, bilateral wrists and bilateral shoulders. The letter then stated that he would continue as the primary treating physician under Regulation 9767.9 It was signed David Smolins and faxed to Debbie Brierly and Michael Neale. (Joint Exhibit 101, Letter from Dr. Smolins dated November 19, 2023.)

Crum and Forster wrote to the applicant on October 3, 2023 with a Notice of Terminated Provider. The letter stated that the current treating provider, Remedy Network/ Dr. Smolins was no longer in the employer approved MPN. The applicant was asked to review the information and provide response within 10 days if he will elect another provider within the MPN. The contact for the MPN's medical access assistant was listed. It also advised that he needed confirmation from defendant to continue treating with the terminated doctor. The letter was copied to Brian Egan, Law Offices of Nadeem Makada, and Remedy Medical Attn: Dr. Smolins. The address for Dr. Smolins was "PO Box 6917 Redwood City CA 94063-9998." Attached was a form defendant's letterhead that asked to identify which conditions may apply, listed the grounds to continue treating in the MPN, and stated that the information needed to be completed by the provider and placed on their letterhead with their signature. The attached proof of service again showed service on Dr. Smolins at the PO Box in Redwood City. (Joint Exhibit 102, Letter from defendant to applicant, with a proof of service, dated October 3, 2023.)

Applicant's Exhibits

There is a letter dated January 25 2022 from the Law Offices of Nadeem Makada to Debbie Brierly. It stated that the applicant wished to change trading physicians and designated David Smolins at Remedy Medical Group. The address listed is "1900 O'Farrell St. Ste. 90 San Mateo CA 94403." Attached is a print out of provider net /conduit with a list of various doctors consisting of two patient pages. Highlighted is David Smolins with the address listed on O'Farrell St. in San Mateo. (Applicant's Exhibit 1)

There is a letter on Crum & Forster letterhead dated February 4, 2022 to David Smolins at the 1900 O'Farrell Street address advising the doctor that North River Insurance utilizes a pharmacy benefits network. (Applicant's Exhibit 2.)

A petition for penalties, sanctions, attorneys' fees and request for an administrative audit dated January 26, 2024 alleged that applicant's treating physician issued a medical report addressing continuity of care finding the applicant to be eligible based on a serious and chronic medical condition, however, defendants did not authorize the continued care. It requested sanctions for an alleged violation of the award of lifetime medical care and requested applicant be allowed to continue treatment with Dr. Smolins, an order for the value of all denied medical care plus a 25% penalty, less attorneys' fees and an estimated 6 hours of attorneys' fees, sanctions and a referral to the audit unit. (Applicant's Exhibit 3.)

The first page of the Exhibit 5 is a letter from Dr. Smolins which appears to be identical to Joint Exhibit 101 except for the date, which is May 13, 2024. The second page of the exhibit is a letter dated November 1, 2023 from applicant's counsel to Dr. Smolins at 1900 O'Farrell St. Ste. 190 in San Mateo CA that asked him to advise in writing if any of the conditions under Labor Code section 4616.2(d)(1) apply. The third page is the October 3, 2023 letter from defendant to the applicant regarding a notice of terminated provider. (Applicant's Exhibit 5.)

Applicant's Exhibits 6, 7 and 8 are all letters to Dr. Smolins from defendant advising him that they were deferring the RFAs received as he was no longer in the MPN. The address listed for Dr. Smolins on all three letters was 1900 O'Farrell Street, Suite 190 in San Mateo.

Debbie Brierly emailed applicant's counsel on January 24, 2024 advised that Dr. Smolins was no longer in the MPN but continued to treat the applicant. The email indicates that attached is a copy of the "Transfer of Care-Provider is not in the MPN" letter mailed to all parties in October. She asked if the applicant will voluntarily elect a new PTP within the MPN. (Applicant's Exhibit 9.)

Analysis

1. Is applicant entitled to continue to treat with Dr. Smolins?

When a physician within a defendant's medical provider network is terminated from that network, the terminated provider may continue to provide treatment for up to one year under certain conditions. (Labor Code section 4616. 2(d).) The requirements of this "continuity of care policy" require the insurer to notify the injured worker of the need to select a new provider within the MPN and advise of the exceptions that allow the applicant to continue treating with the current PTP. "The notification shall be sent to the covered employees address and a copy of the letter shall be sent to the covered

employees primary treating physician. The notification shall be written in English and Spanish and use layperson's terms to the maximum extent possible." (Cal. Code Regs. tit. 8, section 9767.10(d)(1).)

It is apparent the required notification of the continuity of care plan in this case did not comport with this requirement. The letter was sent to the injured worker, however the letter was only in English and did not contain the requisite notice in Spanish. (Joint Exhibit 102.) The applicant did require a Spanish language interpreter at trial, so the requirement that the notice be sent to the injured worker is particularly apt in this case. In addition, the copy of the letter sent to the PTP, Dr. Smolins, was sent to "PO Box 6917 Redwood City CA 94063-9998." (Id. at page 2.) This is not the address for Dr. Smolins that was listed in his address within the MPN, nor is it the address on his letterhead, or any of the other correspondence in evidence used by defendant to correspond with Dr. Smolins, all of which use "1900 O'Farrell St. Ste. 90 San Mateo CA 94403." Both the failure to provide the required notices in both English and Spanish and the failure to send the notification to the PTP at the correct address mean that the defendant failed to meet its burden of proof that it complied with the notice requirements. (*See, Charon v. Ralphs Grocery Co.,* 2013 Cal. Wrkl. Comp. P.D. Lexis 100.; *Roque v. Louise's Trattoria*, 2008 Cal. Wrk. Comp. P.D. Lexis 349.)

Failure to provide required MPN notices that results in a failure to provide reasonable medical treatment, as what happened in this case, makes a defendant liable for reasonable self-procured medical care. (*Knight v. UPS* (2006) 71 Cal. Comp. Cases 1423 (*Appeals Board en banc*.); *Babbit v. Ow Jing* (2007) 72 Cal. Comp. Cases 70 (*Appeals Bd. en banc*.).) I therefore find that applicant is entitled to treat outside of defendant's MPN at defendant's expense.

2. *Is applicant entitled to Labor Code section 5814 penalties*?

Defendant did delay the provision of medical care in this case, as evidenced by the three letters to Dr. Smolins advising him that they were deferring requests for authorization of treatment as he was no longer in the MPN. (Applicant's Exhibits 5, 6 and 7.) However, the imposition of penalties is appropriate only if the delay is unreasonable. (Labor Code section 5814.)

Debbie Brierly, the claims adjuster, testified at trial that she received a letter from Dr. Smolins dated November 19, 2023 with a request for continuity of care but denied that it had an explanation as to whether the applicant's condition was serious and chronic. (Summary of Evidence at July 23, 2025 trial 8:1-6.) Defendant contends that the letter from Dr. Smolins, contained in Joint Exhibit 101 is not a "report" and therefore was not a response compliant with Rule 9767.10.

Rule 9767.10(3) requires the parties to go through the Labor Code section 4062 medica-legal process if defendant disputes the PTP's opinion that the applicant meets one of the grounds for continuing to treat under a continuity of care policy. That did not happen here. Defendant acknowledges that Dr. Smolins wrote a letter. (Id.) Defendant does not believe that the letter has sufficient explanation of the contention that the applicant has a serious and chronic condition, and contends a letter is the same as a report and thus does not comply with the regulation. Dr. Smolins does state that the applicant had a serious and chronic condition. (Joint Exhibit 101.) It is consistent with the letter from defendant to the injured worker that asked the provider identify if an exception to the continuity of care transfer to an MPN physician applies, with the request that it be placed on his letterhead and contain his signature. (Joint Exhibit 102, page 3.) I find it unreasonable that defendant received notice from the PTP that he opined

that the applicant should continue in his care, and they did not either make a follow up request to Dr. Smolins or applicant's attorney if they did not believe that the provided information was sufficient, or initiate the medical legal process. Instead, defendant denied medical care by deferring Dr. Smolins' RFAs.

When determining the amount of the penalty to be awarded, the trier of fact should consider factors such as the amount of the delayed benefit, the length of the delay, and whether the delay was inadvertent and corrected. (*Ramirez v. Drive Financial Services* (2008) 73 Cal. Comp. Cases 1324 (A*ppeals Bd En Banc*.). The delay in medical care in this case is from November 19, 2023, the date Dr. Smolins submitted the letter invoking the continuity of care exception, through the date of trial, or July 23, 2025, more than a year and a half. Defendant did not provide any evidence of mitigation. Based on the length of the delay, I find that the penalty of 25% of the delayed benefit is warranted.

As applicant did not provide any information on the number of visits during the delay period, or the dollar value of the delayed medical treatment, I do not have sufficient information to calculate the dollar amount of the penalty being awarded.

I therefore find that applicant is entitled to a penalty 25% of the official medical fee schedule (OMFS) of the treatment provided by Dr. Smolins from November 19, 2023 through July 23, 2025, up to the $10,000.00 cap, in an amount to be adjusted by the parties.

3. Is applicant attorney entitled to a fee?

The imposition of attorney's fees incurred in the enforcement of an award, including an award of further medical care, is mandatory. Labor Code section 5814.5 states that when compensation was unreasonably delayed or refused following an award, "the appeals board ***shall***, in addition to increasing the order, decision or award pursuant to Section 5814, award reasonable attorneys' fees incurred in enforcing the payment of compensation awarded." (emphasis added) Fees under Labor Code section 5814.5 are to be based on a reasonable hourly rate, and not a percentage of the applicant's penalty award. (*Ramirez*, *Supra*, at 1336.)

Applicant's counsel did not provide a bill of particulars or an itemization of the time spent in enforcing the award in this case. Applicant's penalty petition states he "will" spend 6 hours in this matter, but that is not an itemization of the time actually spent in enforcing the award. I do note that this matter has been highly litigated. At a minimum, applicant's counsel did prepare and file the January 26, 2024 penalty petition, an August 30, 2024 declaration of readiness to proceed on the issue, appeared at the December 2, 2024 mandatory settlement conference when the penalty issue was set for trial, and filed an answer to the defendant's petition for removal on the issue of whether the adjuster, Ms. Brierly, had to testify at the penalty trial. I am awarding applicant's attorney fees based on 10 hours, at the rate of $400.00 per hour, for a total of $4000.00. In calculating this fee, I note applicant attorney spent 7.5 hours at the July 23, 2025 trial. I am providing an additional hour for his appearance at the December 2, 2024 MSC which includes the preparation of the pretrial conference statement, and an hour and a half hour for drafting the penalty petition, DOR and answer to the petition for removal.

4. Is applicant required to designate a new PTP?

As defendant did not comply with the requisite notification requirements of 9767.10(d)(1), I find no basis to require the applicant to designate a new treating physician within defendant's MPN.

DATE: August 28, 2025

Elizabeth Dehn
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION served on all parties as shown on the Official Address Record, pursuant to Rule 10628.
DATE: August 29, 2025
BY: A. Paraiso