WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CLEMENTE VELASCO DIAZ, *Applicant*

vs.

ALPHA STRUCTURAL, INC.; OAK RIVER INSURANCE COMPANY, administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, *Defendants*

Adjudication Numbers: ADJ9787530; ADJ9787531; ADJ10781220
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Lien claimant Moussa Moshfegh, M.D. (lien claimant) seeks reconsideration of the December 10, 2021 Joint Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that in Case No. ADJ9787530, applicant, while employed as a foreman on October 30, 2014, claims to have sustained industrial injury in the form of a hernia. In ADJ9787531, applicant while similarly employed from January 1, 2012 to November 25, 2014, claims to have sustained industrial injury to his back, shoulders, hand, legs, and "multiple parts." The WCJ further found that in ADJ10781220, applicant while similarly employed on March 28, 2014, sustained injury in the form of a hernia. The WCJ determined in relevant part that applicant did not sustain a hernia injury on October 30, 2014, and that applicant did not require the self-procured medical treatment provided by lien claimant in response to any of the three claimed injuries.

Lien claimant contends that defendant failed to issue Explanation of Review (EOR) letters in response to its billing. Lien claimant also contends that because defendant failed to commence

[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been substituted in her place.

treatment within one working day applicant's injury, applicant was entitled to self-procure medical treatment at employer expense.

We have not received an answer from any party. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. For the reasons set forth in the Report, which we adopt and incorporate, and for the reasons discussed below, we will affirm the F&O.

FACTS

Applicant has filed three applications for adjudication. In Case No. ADJ10781220, applicant sustained admitted injury in the form a hernia while employed as a foreman by defendant Alpha Structural, Inc., on March 28, 2014.

In ADJ9787530, applicant claims to have sustained injury in the form of a hernia while similarly employed on October 30, 2014. Defendant denies injury arising out of and in the course of employment (AOE/COE).

In ADJ9787531, applicant claims to have sustained injury to his back, shoulders, hand, legs, and "multiple parts" while similarly employed from January 1, 2012 to November 25, 2014. Defendant denies injury AOE/COE.

The parties resolved all three pending cases by way of Compromise and Release, approved March 9, 2017. (Order Approving Compromise and Release, dated March 9, 2017.)

On November 16, 2021, lien claimant and defendant proceeded to trial and framed for decision the issues of injury AOE/COE for both the October 30, 2014 injury and the claimed cumulative injury from January 1, 2012 to November 25, 2014. The parties further placed in issue the "self-procured treatment lien of Dr. Moshfegh." (Minutes of Hearing, dated November 16, 2021, at p. 2:20.) The WCJ ordered the matter submitted the same day on the documentary record.

On December 10, 2021, the WCJ issued his F&O, determining in relevant part that in ADJ9787530, applicant did not suffer a hernia injury on October 30, 2014. (Finding of Fact No. 2.) The WCJ further determined that applicant did not require the self-procured medical treatment provided by lien claimant in any of the three pending cases. (Findings of Fact Nos. 3, 4, & 5.) The WCJ ordered the lien of Dr. Moshfegh disallowed in full.

In the accompanying Opinion on Decision, the WCJ explained that the reporting of lien claimant relied on a clearly erroneous medical history that did not account for applicant's admitted March 28, 2014 hernia injury, and that the record did not support lien claimant's assertion of a denial of medical treatment enabling applicant to self-procure medical care. (Opinion on Decision, at pp. 1-2.)

Lien claimant's Petition contends that pursuant to Labor Code[2] section 4603.2, subd. (b)(2), the employer failed to timely issue an EOR in response to the submission of lien claimant's billing, and that any issues regarding a false or misleading medical history contained in the lien claimant's reporting could have been rectified upon timely notice of the deficiencies. (Petition, at p. 3:20.) Lien claimant also contends that pursuant to Administrative Director (AD) Rule 9767.6, subd. (b) (Cal. Code Regs., tit. 8, § 9767.6(b)), the employer was obligated to provide for all treatment within its MPN within one day of the injury, but in this instance failed to transmit MPN notices until seven days after the March 28, 2014 injury. (*Id.* at p. 4:18.) Accordingly, lien claimant concludes applicant was entitled to self-procure his medical treatment with a physician of his choosing at employer expense.

The WCJ's Report notes that while the lien claimant "avers that defendant was obligated to issue an objection or explanation of benefit asserting that the Moshfegh reporting was incomplete or based on a false and misleading history … [t]here is no authority cited supporting such a duty … [a]n explanation of benefits addresses the reasonableness of charges, relevant only when the necessity of the services is established." (Report, at p. 3.) The WCJ further observes that the medical history as set forth in lien claimant's reporting is inconsistent with the evidentiary record, and fails to account for applicant's admitted March 28, 2014 hernia injury. (*Ibid*.) With respect to lien claimant's contentions that defendant failed to provide timely medical treatment, the WCJ observes that "the reports of Drs. Lee, Petrie and Bellinger demonstrate that applicant was furnished with necessary medical care, which establishes that the services of petitioner were not necessary … [s]till further, petitioner failed to prove that there was any separate hernia injury as alleged, for which petitioner claims to have treated." (*Id.* at pp. 4-5.) The WCJ recommends we deny reconsideration, accordingly.

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

DISCUSSION

In addition to the WCJ's well-reasoned report, we observe the following.

In workers' compensation matters, the burden of proof rests on the party or lien claimant holding the affirmative of the issue. (Lab. Code, § 5705; § 3202.5.) "[T]he lien claimant bears the burden of establishing the … entitlement to benefits and the reasonable value of the services." (*Zenith Ins. Co. v. Workers' Comp. Appeals Board* (*Capi*) (2006) 138 Cal.App.4th 373, 376-377 [71 Cal.Comp.Cases 374].) There is a "well-established general principle that a lien claimant has the burden of proving all of the elements necessary to the establishment of its lien." (*Tapia v. Skill Master Staffing* (2008) 73 Cal.Comp.Cases 1338, 1343 (Appeals Board en banc).) Thus, lien claimant must prove all the elements needed to support the lien claim, and this includes the burden of proving that that it was authorized to provide the treatment for which a fee is sought. (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113 (Appeals Board en banc) (*Torres*); *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588 (Appeals Board en banc); *Tapia v. Skill Masters Staffing* (2008) 73 Cal.Comp.Cases 1338 (Appeals Board en banc); *Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd.* (1994) 26 Cal.App.4th 789 [59 Cal.Comp.Cases 461].)

Lien claimant's reports of September 22, 2015 and December 18, 2015, both reflect an alleged date of injury of October 30, 2014. (Ex. 1, Report of Moussa Moshfegh, M.D., various dates.) The December 18, 2015 report describes applicant's treatment history as follows:

> Mr. Velasco Diaz stated that approximately in July 2014 he started experiencing pain and burning sensation in his right groin with the strenuous activity at work. He stated that he notified his supervisor but apparently medical care was not offered. Mr. Velasco Diaz stated that he continued working and reported his discomfort a few more time and finally on October 30, 2014 he was referred to a clinic. He stated that at this facility diagnosis of a hernia was made and he was referred to a hernia specialist. Mr. Velasco Diaz stated that this specialist operated on his right groin in November 2014.

(Ex. 1, Report of Moussa Moshfegh, M.D., dated December 18, 2015, at pp. 1-2.)

However, the medical record in evidence demonstrates that applicant sustained an admitted right inguinal hernia on March 28, 2014. Applicant's subsequent medical history is described in the WCJ's Report as follows:

> Clarence R. Petrie, M.D. (Defendant's Exhibit F) treated applicant for an admitted right inguinal hernia industrial injury plead as occurring on 03/28/2014. Treatment was provided by defendants after the injury, and Dr. Petrie ultimately operated on the hernia on 06/12/2014. Applicant treated through 08/11/2014 and thereafter cancelled appointments with the surgeon.
>
> As of 11/14/2015 applicant saw Raye L. Bellinger, M.D. (Defendant's Exhibit E) who reported that applicant had seen a Dr. Donahue on 10/30/2014 due to groin discomfort. Dr. Bellinger found that a diagnosis of an October 2014 re-injury of right hernia questionable in his 2015 report, and on 08/19/2016 reviewed sub-rosa film of applicant and concluded that applicant's complaints were out of proportion with his activities.

(Report, at p. 2.)

Dr. Moshfegh was not provided with the relevant medical records or an accurate medical history until the March 23, 2016 report, which revealed applicant's prior injury of March 28, 2014, and surgical repair on June 12, 2014. (Ex. 1, Reports of Moussa Moshfegh, M.D., dated March 23, 2016, at p. 2.) Following his review of these records, Dr. Moshfegh concluded that "I gather that the date of the injury was quoted mistakenly to me and the date of injury was in March 2014 and the date of surgery the patient quoted to me as November 2014 which was absolutely wrong and the patient had surgery in June 2014 and he was released to unrestricted work as of September 23, 2014." (*Id.* at p. 4.)

To be substantial evidence, a medical opinion must be based on pertinent facts, on an adequate examination, and it must set forth the basis and the reasoning in support of the conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) However, not all expert medical opinion constitutes substantial evidence. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]*; Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*Escobedo, supra,* at p. *611; McAllister, supra*, at pp. 413, 416-417; *Rosas, supra*, at pp. 1700-1702, 1705.) "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical

opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin, supra*, 4 Cal.3d 162.) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid*.)

Here, lien claimant's reporting is premised on a wholly inaccurate medical history and cannot constitute substantial medical evidence. Insofar as the parties contest the existence of an October 30, 2014 injury, the record reflects no supporting evidence beyond the non-substantial reporting of lien claimant. Accordingly, we concur with the WCJ's conclusion that lien claimant, standing in the shoes of applicant, has not met its affirmative burden of establishing industrial injury occurring on October 30, 2014. (Finding of Fact No. 2.)

Lien claimant further asserts that defendant refused or neglected medical treatment such that applicant was entitled to seek treatment with a physician of his choosing at employer expense. Lien claimant contends that pursuant to AD Rule 9767.6, the employer is obligated to "provide for all treatment, consistent with guidelines adopted by the Administrative Director pursuant to Labor Code section 5307.27 and as set forth in title 8, California Code of Regulations, section 9792.20 et seq." (Cal. Code Regs., tit. 8, § 9767.6, subd. (b).) Lien claimant asserts, "there is no evidence to suggest that treatment was commenced one working day within the Defendants' MPN." (Petition, at p. 5:9.)

However, as the WCJ's Report observes, following the March 28, 2014 injury date, applicant sought and received treatment from within defendant's MPN including evaluation and diagnosis by Eileen Lee, D.O. (Ex. A, Report of Eileen Lee, D.O., various dates), surgical intervention performed by Clarence Petrie, M.D. (Ex. D, Reports of Clarence Petrie, M.D., various dates), and later, follow-up consultation with Raye Bellinger, M.D. (Ex. E, Reports of Raye Bellinger, M.D., various dates). The evidence thus supports defendant's timely provision of medical treatment in response to applicant's March 28, 2014 injury. Moreover, lien claimant identifies no request for medical treatment submitted by applicant which defendant neglected or refused. (See *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc).)

Finally, insofar as lien claimant asserts defendant's dilatory MPN notice required applicant to self-procure medical treatment at employer expense, we observe that pursuant to section 4616.3(b), "[t]he employer's failure to provide notice … shall not be a basis for the employee to

treat outside the network unless it is shown that the failure to provide notice resulted in a denial of medical care." (Lab. Code, § 4616.3(b).) Here, the record reflects no evidence that a delay in notice of applicant's right to treat within defendant's MPN resulted in a denial of care. (Lab. Code, § 5705; see also *Lynch v. County of Kern* (October 22, 2014, ADJ9415335) [2014 Cal.Wrk. Comp. P.D. LEXIS 575].) We therefore agree with the WCJ's conclusion that evidentiary record does not support the need for self-procured medical treatment outside defendant's MPN.

We will affirm the F&O, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 10, 2021 Findings and Order is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 3, 2026

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

MOUSSA MOSHFEGH, M.D.
COLLECTIVE RESOURCE
WAI, CONNOR & HAMIDZADEH

SAR/abs

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

JOINT REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant, Clemente Velasco Diaz, born [] while employed as a foreman at Los Angeles, California by Alpha Structural, Inc., then insured by Oak River Insurance Company, administered by Berkshire Hathaway Homestate Companies, in ADJ9787530 (MF) claimed to have sustained injury arising out of and occurring in the course of employment in the form of a hernia on 10/30/2014; and in ADJ9787531 claims to have sustained injury arising out of and occurring in the course of employment during the period 01/01/2012 through 11/25/2014 to his back, shoulders, hand, legs and multiple parts; and in ADJ10781220 sustained injury arising out of and occurring in the course of employment on 03/28/2014 in the form of a hernia.

Petitioner lien claimant Moussa Moshfegh, M.D. seeks reconsideration of the Findings of Fact of 12/10/2021 that applicant did not suffer the hernia injury as alleged (ADJ9787530), did not require the self-procured treatment services of lien claimant, that defendant did not deny care for the admitted hernia injury within its medical provider network (ADJ10781220) and that petitioner's hernia treatment was not necessary for the orthopedic claim (ADJ9787531).

II. CONTENTIONS

Petitioner lien claimant Moussa Moshfegh, M. D. contends that defendant failed to issue a proper objection letter or explanation of benefits that the medical reporting relied upon in the decision herein contained an incomplete history, that the medical provider network notices were improper and that there was no evidence to rebut the reasonableness of petitioner's services.

III. FACTS

Clarence R. Petrie, M.D. (Defendant's Exhibit F) treated applicant for an admitted right inguinal hernia industrial injury plead as occurring on 03/28/2014. Treatment was provided by defendants after the injury, and Dr. Petrie ultimately operated on the hernia on 06/12/2014. Applicant treated through 08/11/2014 and thereafter cancelled appointments with the surgeon.

As of 11/14/2015 applicant saw Raye L. Belllinger, M.D. (Defendant's Exhibit E) who reported that applicant had seen a Dr. Donahue on 10/30/2014 due to groin discomfort. Dr. Bellinger found that a diagnosis of an October 2014 re-injury of right hernia questionable in his 2015 report, and on 08/19/2016 reviewed sub-rosa film of applicant and concluded that applicant's complaints were out of proportion with his activities.

Lien Claimant's Exhibit 1 includes the report of Moussa Moshfegh, M.D. from 12/18/2015 in which he recounted a history that applicant handled heavy weights at work and in July of 2014 started experiencing pain and burning in the right groin. The history goes on to state that applicant notified his supervisor but medical care was not offered and after more discomfort was finally referred to a clinic on 10/30/2014.

IV. DISCUSSION

Objection Letter / Explanation of Benefits

The 10/30/2014 alleged hernia injury and the 11/25/2014 alleged orthopedic injury were both denied by defendant (Defendant's Exhibit H).

Petitioner avers that defendant was obligated to issue an objection or explanation of benefit asserting that the Moshfegh reporting was incomplete or based on a false and misleading history. There is no authority cited supporting such a duty. An explanation of benefits addresses the reasonableness of charges, relevant only when the necessity of the services is established. Whether defendant objected to the self-procured treatment or not, it was petitioner's burden to establish that the self-procured treatment was reasonably necessary to cure or relieve from the effect of an industrial injury.

Reporting of Drs. Petrie and Bellinger

Petitioner makes no specific allegation of how the history in the Petrie and Bellinger reports is incomplete. Conversely the history in Lien Claimant's Exhibit 1 (report of Dr. Moshfegh 12/18/2015) is at odds with evidence herein. He recounted a history that applicant handled heavy weights at work and in July of 2014 started experiencing pain and burning in the right groin. The history goes on to state that applicant notified his supervisor but medical care was not offered and after more discomfort was finally referred to a clinic on 10/30/2014. This hardly supports a claim

of hernia injury on 10/30/2014 as alleged. Applicant's hernia injury was months earlier, and treatment had been provided.

MPN Treatment / Notice

Defendant provided medical care beginning 04/02/2014 with Eileen Lee, D.O. (Defendant's Exhibit A) for the admitted injury plead as 03/28/2014, but which is identified in the reporting as occurring on the first date of service (04/02/2014). There is no evidence specifically identifying the exact date of injury, applicant having noticed pain and bulging in the groin at some point near those dates, and there is no evidence of when he reported it to the employer. There is evidence that treatment was seasonably provided, including hernia surgery. When symptoms apparently persisted, applicant was authorized to treat further within the MPN (Defendant's Exhibit K, 03/10/2015 authorization for transfer of care within the network).

Thus, petitioner's argument that the MPN notices in evidence (Defendant's Exhibit G) dated 04/07/2014 are defective is not supported by the overall course of defendant's furnishing of medical care.

Evidence of Reasonableness of Self-Procured Services

Petitioner asserts that there is no evidence to rebut the reasonableness of its services. As stated above, the burden rested with petitioner, and was not shouldered herein. Further, the reports of Drs. Lee, Petrie and Bellinger demonstrate that applicant was furnished with necessary medical care, which establishes that the services of petitioner were not necessary. Still further, petitioner failed to prove that there was any separate hernia injury as alleged, for which petitioner claims to have treated.

V. RECOMMENDATION

Based on the foregoing the undersigned WCALJ recommends that the petition for reconsideration be denied.

DATE: 01/13/2022

WILLIAM M. CARERO
Workers' Compensation
Administrative Law Judge