

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

SHERILL CLAYTOR, Applicant

vs.

**ALEXANDER R. LATTEI, M.D.; STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Number: ADJ11059073
Anaheim District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case.¹ This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on February 9, 2021. By the F&O, the WCJ found in relevant part that applicant is permitted to treat with Dr. Curtis Spencer outside of defendant's medical provider network (MPN).

Defendant contends that the WCJ improperly found that applicant may treat with Dr. Spencer outside of the MPN. Defendant also contends that the transfer of care provisions do not apply to this matter as applicant was treating within the MPN when she requested that Dr. Spencer resume acting as her primary treating physician (PTP). Lastly, defendant contends that there has been no denial of care that would permit applicant to select a non-MPN physician.

We received an answer from applicant. Defendant submitted a supplemental pleading and applicant submitted a reply to defendant's supplemental pleading. We accept these pleadings from the parties pursuant to WCAB Rule 10964. (Cal. Code Regs., tit. 8, § 10964.) The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer, the supplemental pleadings and the contents of the WCJ's Report with respect thereto.

¹ Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

Based on our review of the record and for the reasons discussed below, we will affirm the F&O.

FACTUAL BACKGROUND

Applicant sustained injury arising out of and in the course of employment to her lumbar spine, left hip, left hemi-sacrum, inferior ramus, left symthiysis, left pelvis and left acetabulum on June 12, 2014 while employed as a doctor's assistant by Alexander T. Latteri, M.D. The parties stipulated that the injury caused 34% permanent disability and there is a need for medical treatment pursuant to the Stipulations with Request for Award, which was approved on May 4, 2020.

Applicant treated with Dr. Spencer as her PTP from 2014 to 2019. (Minutes of Hearing and Summary of Evidence, December 1, 2020, p. 2.) Defendant corresponded with Dr. Spencer about applicant and authorized several treatment modalities recommended by Dr. Spencer. (Applicant's Exhibits Nos. 12-22.)

On September 3, 2019, applicant sent defendant a letter selecting Scott Small, M.D. as her PTP. (Defendant's Exhibit B, Applicant's request to change PTP, September 3, 2019.) Dr. Small provided treatment to applicant from 2019 into 2020. (Defendant's Exhibits C-U, Reports of Dr. Small, various dates from November 13, 2019 to August 8, 2020.) Applicant also continued to receive treatment from Dr. Spencer from July 2019 to at least December 2019 while also treating with Dr. Small. (Applicant's Exhibits Nos. 1-6, Reports of Dr. Spencer, various dates from July 29, 2019 to December 12, 2019; Minutes of Hearing and Summary of Evidence, December 1, 2020, p. 6.)

On June 1, 2020, applicant sent a letter to defendant requesting to treat with Dr. Spencer as her PTP again. (Applicant's Exhibit No. 10, Correspondence, June 1, 2020.)

On June 15, 2020, defendant sent a letter to applicant stating in relevant part:

State Fund has ended the contract with Harbor Health Systems as the MPN administrator of the State Fund MPN by Harbor Health (MPN ID# 2432), effective July 27, 2020.

The enclosed materials contain important information about State Fund's new Medical Provider Network (MPN) named State Fund MPN, MPN ID# 3136, which will be effective July 27, 2020. If there is no dispute regarding the designation of your current physician as the Primary Treating Physician (PTP), no action is required on your part. You will be able to continue your medical care with your current physician. If you decide to change your physician or referred to a specialist, you will need to select one from the State Fund MPN.

Medical Access Assistants (MAA) are available to help you in finding and scheduling appointments with a physician or specialist. You can contact them by telephone at (888) 782-8338 or email at statefundMPNMAA@scif.com.

Please carefully read the enclosed information. **If there is no dispute regarding the designation of your current physician as the Primary Treating Physician (PTP), no action is required on your part. You will be able to continue your medical care with your current physician.**

...

State Fund has ended the State Fund MPN by Harbor Health (MPN ID# 2432), effective July 27, 2020. You are receiving this notification because you are being transferred into the new State Fund MPN (MPN ID#3136) on July 27, 2020.

If your current primary treating physician, treating physicians and/or providers are listed in the State Fund MPN by Harbor Health (MPN ID# 2432), and are also listed physicians or providers in the new State Fund MPN, (MPN ID# 3136), then effective July 27, 2020 they will be treating you under MPN ID #3136. If your current primary treating physician, treating physicians and/or providers are NOT listed in the new MPN program, and there is no dispute regarding the designation of your PTP, **State Fund will allow you to continue your treatment with your current primary treating physician, treating physicians and/or providers after July 27, 2020.** However, if you decide to change medical care on or after July 27, 2020 from your current primary treating physician, treating physicians and/or providers to other physicians or providers; or, if your current primary treating physician, treating physicians and/or providers decide they can no longer continue treating you; or, if your current primary treating physician recommends or refers you to a specialist or ancillary service provider, then you must select the new primary treating physician, specialists, and/or ancillary service providers from the new State Fund MPN (MPN ID# 3136).

(Applicant's Exhibit No. 23, SCIF MPN letter, June 15, 2020, pp. 1-2, emphasis in original.)

The letter was in both English and Spanish. Dr. Small was copied on this letter. (*Id.* at p. 1.)

The matter proceeded to trial on December 1, 2020 with the sole issue identified as: "Can the Applicant resume treatment with Dr. Spencer as the PTP outside of the MPN." (Minutes of Hearing and Summary of Evidence, December 1, 2020, p. 2.) The parties stipulated at trial that applicant treated with Dr. Spencer as her PTP from July 2014 to June 2019. (*Id.*) Applicant testified at trial as follows in relevant part:

On September 3, 2019, the Applicant acknowledges that she chose Dr. Small as her PTP. She continued to see both Dr. Small and Dr. Spencer concurrently.

Dr. Spencer's work was to reintegrate the Applicant into the workplace. The Applicant trusted Dr. Spencer.

The Applicant acknowledged, when approached by Applicant's attorney with Dr. Small's reporting, Dr. Small's November 13, 2019 report, which is after the election, that the Applicant is to follow up with Dr. Spencer, and that her temporary disability status is up to Dr. Spencer. The Applicant also acknowledged Dr. Small's December 11, 2019 report, wherein she was to follow up with Dr. Spencer.

The Applicant acknowledges Dr. Small's December 12, 2019 report, where he notes that the ergonomics that were ordered by Dr. Spencer were not yet installed. The Applicant acknowledges Dr. Small's January 20, 2000 [*sic*] report, in which the doctor leaves the Applicant's temporary disability status up to Dr. Spencer. The same is true of Dr. Small's March 24, 2020 report. The Applicant acknowledged that Dr. Small's April 7, 2020 report states that she should follow up with Dr. Spencer as necessary.

...

On June 1 of 2020, the Applicant wished to re-elect Dr. Spencer as her PTP, because she trusted him 100 percent, and because he knew her condition. Dr. Spencer's office is only a couple of miles from the Applicant's home, while Dr. Small's office is 25 to 30 miles away from the Applicant's home. The Applicant wishes to have a Primary Treating Physician closer to her home. The Applicant agreed with the question by counsel that having two PTPs doesn't make sense. The Applicant continues to see Dr. Small to obtain her medication, and that's because Dr. Spencer does not have authority to treat the Applicant at this time.

When asked if Dr. Small is in SCIF's MPN, the Applicant testified she didn't know. When asked if her attorney, Mr. Martin, set up an appointment for the Applicant with Dr. Spencer in 2014, she said yes. As far as she knows, Dr. Spencer was not in the MPN.

(*Id.* at pp. 6-7.)²

The WCJ issued the F&O as outlined above.

DISCUSSION

Labor Code³ section 4600(a) provides that:

Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably

² The summary of applicant's testimony inadvertently refers to Dr. Small's "January 20, 2000" report, but is actually in reference to a 2020 report.

³ All further statutory references are to the Labor Code unless otherwise stated.

required to cure or relieve the injured worker from the effects of the worker's injury shall be provided by the employer. In the case of the employer's neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment.

(Lab. Code, § 4600(a).)

If an employer has established an MPN, injured workers are 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. I.A.C.* (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 Appeals Board has held en banc that "a defendant may satisfy its obligation under Labor Code section 4600 to provide reasonable medical treatment by transferring an injured worker into an MPN in conformity with applicable statutes and regulations regardless of the date of injury or the date of an award of future medical treatment." (*Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases 70, 71 (Appeals Board en banc).) Administrative Director (AD) Rule 9767.9 provides for the transfer of ongoing care into an MPN as follows in relevant part:

(a) If the injured covered employee's injury or illness does not meet the conditions set forth in (e)(1) through (e)(4), the injured covered employee may be transferred into the MPN for medical treatment, unless otherwise authorized by the employer or insurer.

...

(e) The employer or insurer shall authorize the completion of treatment for injured covered employees who are being treated outside of the MPN for an occupational injury or illness that occurred prior to the coverage of the MPN and whose treating physician is not a provider within the MPN, including injured covered employees who pre-designated a physician and do not fall within the Labor Code section 4600(d), for the following conditions: [1) an acute condition; 2) a serious chronic condition; 3) a terminal illness; or performance of a surgery or 4) other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days from the MPN coverage effective date].

(f) If the employer or insurer decides to transfer the covered employee's medical care to the medical provider network, the employer, insurer, or entity that provides physician network services shall notify the covered employee of the determination regarding the completion of treatment and the decision to transfer medical care into the medical provider network. The notification shall be sent to the covered employee's address and a copy of the letter shall be sent to the covered employee's 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, § 9767.9(a), (e)-(f), emphasis added.)

AD Rule 9767.12 provides for notification of the MPN as follows:

(a) When an injury is reported or an employer has knowledge of an injury that is subject to an MPN or **when an employee with an existing injury is required to transfer treatment to an MPN, a complete written MPN employee notification with the information specified in paragraph (2) of this subdivision, shall be provided to the covered employee by the employer or the insurer for the employer.** This MPN notification shall be provided to employees in English and also in Spanish if the employee primarily speaks Spanish.

(1) A complete MPN notification with the information specified in paragraph (2) of this subdivision may be sent electronically in lieu of by mail, if the covered employee has regular electronic access to email at work to receive this notice at the time of injury or when the employee is being transferred into the MPN. If the employee cannot receive this notice electronically at work, then the employer shall ensure this information is provided to the employee in writing at the time of injury or when the employee is being transferred into the MPN.

(Cal. Code Regs., tit. 8, § 9767.12(a)(1), emphasis added.)

AD Rule 9767.12(a)(2) outlines the information required to be provided in a complete MPN notification. (Cal. Code Regs., tit. 8, § 9767.12(a)(2).)⁴

It is acknowledged that the burden of proof rests upon the party with the affirmative of the issue and therefore, the employee has been found to hold the burden of proof to show a neglect or refusal to provide treatment in order to obtain treatment outside of an MPN. (See e.g., *Amezcu*

⁴ 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).)

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];⁵ see also *San Diego Unified Sch. Dist. v. Workers' Comp. Appeals Bd. (Robledo)* (2013) 79 Cal.Comp.Cases 95, 96 (writ den.) [applicant has the burden to establish that a failure to provide notice of the MPN resulted in a denial of care].) This case presents a fairly unique set of facts in that defendant authorized and provided treatment to applicant with a non-MPN physician, Dr. Spencer, for several years before she selected Dr. Small as her PTP, a physician that defendant asserts is a member of its MPN.

Defendant argues that applicant was brought back into the MPN when she selected Dr. Small as her PTP and thus, she may not now choose a non-MPN physician absent a denial of care. We agree that the evidence does not indicate a denial of care by defendant. Instead, the evidence shows that applicant treated with a non-MPN physician for years and continued to treat with Dr. Spencer after she began treating with Dr. Small. *If* Dr. Small is a member of defendant's MPN (whether the old or new MPN), there may be a viable argument that applicant voluntarily returned herself to the MPN by selecting Dr. Small as her PTP and she may not now choose a PTP outside the MPN absent a denial of care. However, this conclusion presumes that Dr. Small is actually in the MPN, a fact that applicant has not conceded and is not supported by substantial evidence in the record. (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"].) We do not presume Dr. Small is in the MPN based solely on defendant's assertion that he is a member of it.

Defendant contends that applicant's September 3, 2019 letter selecting Dr. Small as her PTP "should be sufficient for a finding that Dr. Small was in State Fund's MPN at the time." (Defendant's Petition for Reconsideration, March 3, 2021, p. 6.) Following this artificial logic would presumably also mean applicant's subsequent June 1, 2020 letter selecting *Dr. Spencer* as her PTP again is sufficient to find that Dr. Spencer is actually a member of the MPN after all. We disagree that applicant's September 3, 2019 letter is sufficient to show that Dr. Small is in the

⁵ 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); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].)

MPN.

Put simply, there is not substantial evidence showing that applicant was treating within the MPN when she requested to have Dr. Spencer resume his role as PTP. There is also no evidence in the record that defendant objected to applicant's June 1, 2020 request to have Dr. Spencer act as her PTP again. There is substantial evidence to show years of treatment outside the MPN and no effective transfer of care returning applicant to treatment within the MPN. Under these circumstances, applicant is entitled to resume treatment with her non-MPN physician, Dr. Spencer, as her PTP.

In light of the analysis above, defendant's contention that the transfer of care provisions do not apply is without merit. The WCJ expressly found that defendant may return applicant to the MPN by complying with the statutory and regulatory requirements for transfer of care and continuity of care policies. We agree that defendant must transfer applicant's care into the MPN in conformity with the applicable statutes and regulations. (*Babbitt, supra*, 72 Cal.Comp.Cases at p. 71.) This necessitates providing applicant with the requisite MPN notice. (See Cal. Code Regs., tit. 8, § 9767.12(a) and (a)(2); see also Lab. Code, § 4616.3(b) [the employer is required to provide notice of the MPN to an employee, but a failure to do so only permits treatment outside the MPN if it results in a denial of care].) Additionally, defendant must comply with the process outlined in AD Rule 9767.9(f) for transferring care. The transfer of care provisions in Rule 9767.9(f) require defendant to make a determination regarding whether applicant's condition satisfies—or fails to satisfy—one of the four conditions set forth in subsections (e)(1)-(4). This section requires that defendant determine whether applicant has a condition which would allow her to complete treatment with her PTP. Furthermore, the regulation requires that defendant notify applicant of its determination regarding completion of care. This notification must also be sent to applicant's PTP, be in English and Spanish, and use layperson's terms to the maximum extent possible.

There is substantial discussion in the parties' pleadings regarding whether defendant scheduled an initial appointment for applicant with a physician in the MPN when she first reported her injury in 2014. We fail to see the relevance of this question based on the facts of this case and how the sole disputed issue was framed.

Therefore, we agree with the WCJ's conclusion that applicant is entitled to treat with Dr. Spencer as her PTP. Defendant may in the future attempt to transfer applicant's treatment into the MPN in accordance with the required process.

In conclusion, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order issued by the WCJ on February 9, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 17, 2023

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

**LAW OFFICES OF THOMAS MARTIN
SHERRILL CLAYTOR
STATE COMPENSATION INSURANCE FUND**

AI/pc

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