

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

DENISE BERNARD SWAYNE PETTY, *Applicant*

vs.

**CARE ASSIST SERVICES INC.; WESCO INSURANCE COMPANY, administered by
AMTRUST NORTH AMERICA, *Defendants***

**Adjudication Numbers: ADJ12163448, ADJ12162469
Long Beach District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Lien claimant Medland Medical (lien claimant) seeks reconsideration of the Findings and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 8, 2024, which found that applicant sustained injury in the course of employment to her back - lumbar and cervical spine; that lien claimant failed to meet its burden of proof regarding self-procured treatment obtained outside the Medical Provider Network (MPN); and that all other issues were moot.¹

Lien claimant contends that the medical treatment and the medical-legal services were reasonably and necessarily self-procured by applicant after defendant denied applicant's claim and that a panel qualified medical evaluator (QME) found her injury to be industrial. That is, lien claimant contends that after defendant denied liability for applicant's injury occurring on January 20, 2019, defendant lost medical control so that it is liable for the cost of applicant's self-procured medical treatment.

¹ We include Case Number ADJ12162469 because the WCJ fails to differentiate between defendant's offer of medical treatment for applicant's injury of May 26, 2018, and defendant's failure to offer medical treatment for applicant's injury of January 20, 2019 (Case Number ADJ12162469). Moreover, both cases were resolved by way of a single Stipulations with Request for Award.

We have not received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings consistent with this opinion. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

BACKGROUND

On May 3, 2019, applicant filed two Applications for Adjudication. The first Application alleges a specific injury to applicant's back on May 26, 2018, while working as a care assistant for defendant and was assigned Case Number ADJ12162469. The second Application alleges a specific injury to applicant's back, shoulders and upper extremities on January 20, 2019, while working as a care assistant for defendant, and was assigned Case Number ADJ12163448.

On June 7, 2018, defendant mailed applicant an information packet with a cover letter titled, ACCEPTANCE OF WORKERS' COMPENSATION CLAIM. The letter indicates the information provided is for the May 26, 2018 date of injury, and the benefits may include medical benefits and medical mileage, and it identifies a MPN Website. (Exhibit B, 5/18/2019.)

On January 21, 2019, applicant was examined by MPN provider Arash Yaghoobian, M.D., for the January 20, 2019 injury. Dr. Yaghoobian issued a Permanent and Stationary Report which states, "The patient has reached maximal medical improvement with authorized treatment and is now considered to have reached permanent and stationary status." (Exhibit E, Marked ID ONLY, 1/21/2019, p.10.)

On May 15, 2019, applicant's attorney issued two letters to defendant, which list both case numbers and both dates of injury. The first letter demands that defendant provide applicant medical treatment within the employer's MPN for body parts of right upper extremity, right shoulder, and upper/middle/lower back. Applicant's attorney identifies USHW/Concentra as the MPN provider. (Exhibit C, 5/15/2019.) The second letter is written pursuant to Labor Code section 4600, and USHW/Concentra is designated as applicant's primary treating physician. (Exhibit C, 5/15/2019.)

On May 23, 2019, defendant issued a **notice of denial** of applicant's claim for the date of injury January 20, 2019. The letter stated that:

“After careful consideration of all available information, we are denying all liability for your claim of injury to your back, right shoulder, and right extremity on 1/20/19, because there is no substantial legal, medical or factual evidence to indicate that a new injury occurred on that date resulting from your employment at Careassist Services, Inc. . . . You were examined by Dr. Yaghoobian on 1/21/19. At that time, he found your back injury to have reached permanent and stationary status. He stated the incident that occurred on 1/20/19 was not a new injury to your back, but an aggravation to your prior injury of 5/25/18. He did not find injury to your right upper extremity or right shoulder occurred. Additionally, your free choice elected primary treating physician, Dr. Rafla indicated in his 3/7/19 report that you had an aggravation on 1/20/19, not a new injury. [italics and bold added for emphasis.]”

(Exhibit X, 5/23/2019.)

Thus, in its letter to applicant defendant denied liability for her claim of injury occurring on January 20, 2019, to her back, right shoulder, and right extremity. (Exhibit X, 5/23/2019.)

On June 24, 2019, pursuant to Labor Code section 4600, applicant's attorney designated Omid Haghghnia, D.C., as applicant's primary treating physician. (Exhibit 1, 6/24/2019.)

On June 26, 2019, applicant's attorney issued a letter to Dr. Haghghnia as applicant's primary treating physician pursuant to Labor Code section 4600 and Rule 9785(b)(2) (Cal. Code Regs., tit. 8, §9785(b)(2)). Applicant's attorney requested that Dr. Haghghnia:

“. . . review all previous records and prepare an initial comprehensive medical-legal report which provides all of the medical information required by 8 CCR §9785. Including your opinions on all medical issues necessary to determine the employee's eligibility for compensation. 8 CCR §§ 9785(d) -(g), 10606(b).

Your report must address causation of the applicant's medical condition and whether the treatment provided to applicant was reasonably required to cure or relieve the injured worker from the effects of his or her injury. Lab code §4600(a), 8 CCR §§9793(e), 10606(b)

Should you initiate treatment of the applicant, please supplement your routine “Primary Treating Physician's Progress Report” (DWC Form PR-2) with periodic medical-legal reports when these would be advisable for purposes of clarification or elaboration ON INFORMATION BEYOND WHAT COULD BE REASONABLY BE PROVIDED IN THE PR-2. Please submit medical-legal progress reports every forty-five (45) days as required by 8 CCR 9785(f)(8).

(Exhibit 7, letter dated 6/26/2019 attached to report 7/16/2019.)

On July 16, 2019, Dr. Haghighinia examined applicant and issued a Doctor's First Report of Occupational Injury and Illness for date of injury of January 20, 2019.² (Exhibit 7, 7/16/2019, p. 1.) The report is prepared on a State of California Form 5021. Dr. Haghighinia diagnosed injury to applicant's cervical spine sprain/strain; cervical spine pain with right-sided upper shoulder myofasciitis; cervical spine pain radiculopathy to the upper right shoulder and upper right arm down to fingers; lumbar spine sprain/strain with radiculopathy to the right buttock area. He stated that he could not determine if the claimed injury was a re-injury and that he needed to review the previous doctor's records to determine if there was a re-injury or a new injury to the lumbar spine region. (Exhibit 7, 7/16/2019, p. 9.) With respect to the history of applicant's claimed injury, he reported that:

On January 20, 2019, Ms. Petty was performing her usual and customary work duties. She was assisting a patient to get out of a recliner, when the patient pulled forcefully on her right arm causing her to experience pain to her neck, with pain radiating into her upper back. She also experienced pain to her right shoulder and lower back, with pain radiating into her legs. She reported the injury to her supervisor but was not offered medical attention. She was evaluated by an unrecalled physician in Irvine. She was examined only. She was released back to work at modified duties, however her employer did not have modified duty available and she has not returned to work.

He then noted that:

She states she had a previous accident at work on May 26, 2018, while working for the same employer where she injured her low back and she had been under the care of another doctor in that regard. Last appointment was back in January 2019 right after she injured herself again at the neck area and the low back region and based on what the doctor told her, the injury to the low back is re-injury of the previous injury that happened on May 26, 2018. [italics and bold added for emphasis].

(Exhibit 7, 7/16/2019, pp. 3-4.)

On August 2, 2019, lien claimant sent a Request for Authorization (RFA) to defendant. (Exhibit 5, 8/2/2019.)

On August 2, 2019, QME Wesley M. Nottage, M.D., conducted an evaluation and issued a medical-legal report. Dr. Nottage's diagnostic impression is as follows: 1. Lumbar myofascial sprain

² Applicant's attorney also requested that Dr. Haghighinia prepare an initial comprehensive medical-legal report and opine as to all medical legal issues necessary to determine applicant's eligibility for compensation.

superimposed on lumbar degenerative disc disease. 2. Cervical myofascial sprain superimposed on cervical degenerative disc disease.

FUTURE MEDICAL CARE:

Future care should be afforded to this patient and should include courses of physical therapy, medications for inflammation or pain, including injections per ACOEM Guidelines.

APPORTIONMENT:

The patient has a history of two separate injuries. She reports the original injury of May 26, 2018, that produced only low back discomfort. She reports the injury of January 20, 2019, produced both neck and low back discomfort.

I would apportion 90% of the cervical spine impairment to the injury of January 20, 2019, 0% to the injury of May 26, 2018, and 10% to nonindustrial factors including degenerative disc disease, within a reasonable medical probability.

The lumbar impairment is apportioned **70% to the injury of May 26, 2018, 20% to the injury of January 20, 2019** and 10% to nonindustrial factors including degenerative disc disease, within a reasonable medical probability.

(Exhibit 2, 8/02/19.)

On August 27, 2019, Dr. Haghghinia examined applicant and issued a PR-2 Primary Treating Physician's Progress Report. The report requested authorization for a right sacroiliac joint under fluoroscopic guidance and sedation and a transforaminal epidural steroid injection at L4-5 under fluoroscopic guidance and sedation. (Exhibit 8, 9/27/19.)

On September 19, 2019, defendant, issued a NOTICE REGARDING MEDICAL TREATMENT to applicant stating that, "**The provider seeking authorization is outside of our approved MPN and we are therefore not responsible for the treatment. Reasonably necessary treatment will be provided within the MPN**" (Exhibit D, 9/19/2019.)

On September 16, 2019, the RFA was denied by Utilization Review. (Exhibit 5, 8/2/2019.)

On March 29, 2023, the parties entered into a settlement by way of Stipulations with Request for Award (Stipulations). In Paragraph 1, the Stipulations list Case Number ADJ12163448 and identify a specific injury on January 20, 2019 to applicant's upper extremities, back, and shoulders and list Case Number ADJ12162469 and identify a specific injury on May 26, 2018 to the back. However, the Stipulations also state: "LUMBAR SPINE ONLY" Thus, arguably the remaining body parts are in dispute.

On April 21, 2023, the WCJ issued two Awards approving the Stipulations, in Case Number ADJ12162469 and in Case Number ADJ12163448.

On August 2, 2023, Medland Medical filed a lien on behalf of Dr. Haghghinia.

On November 7, 2023, Medland Medical filed a Notice of Representation dated October 13, 2023.

On November 7, 2023, Medland Medical issued a billing statement to defendant in the amount of \$1,251.42 with dates of service of July 16, 2019 and August 27, 2029. (Lien Claimant, Exhibit 3, 11/7/2023.)

On June 3, 2024, lien claimant and defendant proceeded to trial. As relevant here, the issues in dispute were: parts of the body injured; whether defendant's MPN precluded recovery of self-procured medical treatment outside the MPN; whether or not the services were reasonable and necessary; and whether defendants failed to provide medical benefits to applicant once PQME Dr. Nottage found the injury compensable.

DISCUSSION

I.

Former Labor Code³ 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, Labor Code 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.

(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

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

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 4, 2024 and 60 days from the date of transmission is Sunday, November 3, 2024. The next business day that is 60 days from the date of transmission is Monday, November 4, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)⁴ This decision is issued by or on Monday, November 4, 2024, so that we have timely acted on the petition as required by 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, the Report was served on September 4, 2024, and the case was transmitted to the Appeals Board on September 4, 2024. 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 4, 2024.

II.

We now turn to the issue of defendant’s liability for the medical evaluation and treatment provided to applicant by Dr. Haghghinia.

We first note that lien claimants hold the burden of proof to establish entitlement to reimbursement for medical treatment liens. (*Torres v. AJC Sandblasting* (2012) 77 Cal.Comp.Cases 1113, 1115 [2012 Cal. Wrk. Comp. LEXIS 160] (Appeals Board en banc).) This burden includes the burden to show that specific treatments and the charges for those treatments

⁴ 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.

were reasonable and necessary. (*Id.* at 1121.) 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.)

Section 4600 subsection (a) provides:

Medical, surgical, . . . and hospital treatment,. . . that is reasonably 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.*** (§ 4600.) [bold and italica added for emphasis.]

If an employer has established an MPN, the employer is only liable for payment for treatment by 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"].)

On May 23, 2019, defendant denied applicant's claim of injury for January 20, 2019. On June 26, 2019, applicant's attorney issued a letter designating Dr. Haghghinia as applicant's PTP, and on July 16, 2019, Dr. Haghghinia examined applicant and issued a report. On August 2, 2019, QME Dr. Nottage found that applicant had sustained an injury on January 20, 2019. Yet, there is no evidence that defendant ever offered applicant medical treatment for that injury.

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., *Amezcuca 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].) Pursuant to *Knight v. United Parcel Service* (2006) 71 Cal. Comp. Cases 1423 [2006 Cal. Wrk. Comp. LEXIS 323] (Appeals Board en banc), an employer or insurer'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 or insurer liable for reasonable medical treatment self-procured by the employee. (*Id.* at 1434.)

Here, applicant treated within the employer's MPN for the May 26, 2018 injury to her back. *But the issue here is not whether defendant provided treatment for applicant's May 26, 2018 injury, the issue is whether defendant provided medical treatment for applicant's subsequent injury on January 20, 2019.*

When a defendant denies liability for a claimed industrial injury, it relinquishes control to direct an applicant's medical treatment, and it may no longer require an applicant to treat within the MPN. Thereafter, an applicant may self-procure medical treatment and when injury is subsequently found, defendant is liable for the cost of the treatment. Here, defendant denied applicant's specific injury occurring on January 20, 2019, and her attorney elected Dr. Haghghinia as her PTP. After defendant's denial of her claimed injury, applicant sought treatment with PTP Dr. Haghghinia, and because liability was denied, applicant was free to seek treatment at her employer's expense with any treater of her choice. Thus, without any proof that defendant offered medical treatment for applicant's January 20, 2019 injury, and in light of the August 2, 2019 report by QME Dr. Nottage that finds that applicant sustained injury and defendant's subsequent stipulation to injury, it appears that defendant is liable for the medical treatment provided by Dr. Haghghinia. Thus, we will rescind the decision and return the matter to the WCJ to determine the reasonableness and necessity of Dr. Haghghinia's treatment.

Accordingly, we grant lien claimant's Petition for Reconsideration, rescind the F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of the August 8, 2024 Findings & Order of is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of August 8, 2024 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ **KATHERINE A. ZALEWSKI, CHAIR**

I CONCUR,

/s/ **JOSÉ H. RAZO, COMMISSIONER**

/s/ **JOSEPH V. CAPURRO, COMMISSIONER**



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 4, 2024

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

**MEDLAND MEDICAL
AMTRUST HRU**

DLM/oo

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