WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JASON GUTIERREZ, *Applicant*

vs.

MISSION POOLS;
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants*

Adjudication Number: ADJ17164621
Anaheim District Office

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

Defendant seeks removal in response to the Findings and Order (F&O) issued April 9, 2024, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an electrician/plumber on August 9, 2022, sustained industrial injury to his right elbow, neck, right shoulder, right wrist, right hand and fingers. The WCJ found that defendant denied medical care to the applicant, allowing applicant to treat outside defendant's Medical Provider Network (MPN) at employer expense.

Defendant contends that it did not refuse medical treatment to the applicant, and that applicant is required to treat within its MPN.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant defendant's petition as one seeking reconsideration, rescind the F&O, and return the matter to the trial level for further proceedings and decision by the WCJ.

FACTS

Applicant sustained injury to his right elbow, neck, right shoulder, right wrist, right hand and fingers while employed as an electrician/plumber by defendant Mission Pools on August 9, 2022.

The WCJ's April 9, 2024 Opinion on Decision describes the following procedural history:

> Defendants filed for an Expedited Hearing because the Applicant was treating outside of the Medical Provider Network. The matter was set for Hearing on June 19, 2023 on the limited issue of whether the Applicant has medical control so as to treat outside of the Medical Provider Network [MPN] when treatment to claimed body parts is denied to an MPN Doctor; notwithstanding Defendant's contentions of MPN notices. Due to missing and marked up exhibits, the matter was deemed a regular hearing and time was given to the parties to submit missing exhibits and resubmit clean copies of marked up exhibits. The matter was Ordered submitted on July 11, 2023. A Finding and Order issued October 3, 2023. Defendants filed a Petition for Removal on October 19, 2023 and an Order Rescinding Finding and Order issued October 26, 2023. The Findings were rescinded because the Parties had deferred all other body parts other than right elbow. The right elbow was being treated within Defendant's Medical Provider Network. Without the ability to determine whether treatment was denied to other body parts, the original decision was rescinded. The Parties returned for re-trial on February 26, 2024. In the interim, Defendants admitted injury to additional body parts; specifically the neck, right shoulder, right wrist, right hand and fingers. The Applicant testified at the re-trial on February 26, 2024.
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> (Opinion on Decision, at p. 1.)

The parties placed in issue whether "applicant [has] medical control so as to treat outside the MPN when treatment to the claimed body parts are denied to an MPN doctor; notwithstanding defendant's contention of MPN notices." (Minutes of Hearing and Summary of Evidence, dated February 26, 2024,[1] at p. 3:2.) The WCJ heard applicant's testimony, and ordered the matter submitted for decision the same day.

On April 9, 2024, the WCJ issued his F&O, determining in relevant part that there was a denial of care by defendant, such that applicant was entitled to obtain medical treatment outside defendant's MPN at employer expense. (Finding of Fact No. 8.)

[1] The Minutes of Hearing and Summary of Evidence states that trial proceedings were held on February 26, 2023. The correct trial date was February 26, 2024.

Defendant's Petition for Removal avers it maintains a validly established and noticed MPN, and that because there has been no denial of medical treatment documented in the record, the applicant is not entitled to treat outside the MPN at employer expense.

Applicant's Answer avers the F&O is a final order, and that defendant's Petition for Removal is a procedurally incorrect vehicle for the purposes of challenging a final order.

The WCJ's Report avers that defendant denied medical treatment for body parts beyond the admitted right elbow injury and that defendant's neglect or refusal of medical treatment now entitles applicant to self-procure his medical treatment outside the MPN at employer expense.

DISCUSSION

A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case," (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) The term 'final order' includes orders dismissing a party, rejecting an affirmative defense, granting commutation, terminating liability, and determining whether the employer has provided compensation coverage." (*Id.*, at p. 1075.) A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues.

If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final orders. Here, the F&O included a finding that applicant was entitled to medical treatment outside the employer's Medical Provider Network. As such, the WCJ determined that applicant had a right to medical treatment, and because the right to medical treatment and defendant's liability for it is a final order, the decision was a final order subject to reconsideration rather than removal. Accordingly, we will treat the defendant's Petition for Removal as one seeking reconsideration.

Labor Code[2] section 4600 requires that an employer or its insurer provide all medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury. (Lab. Code, § 4600(a).) In the case of his or her 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).) An employer will not be relieved of the duty to furnish medical care absent good cause, and section 4600 has been liberally interpreted in favor of the employee's right to obtain reimbursement. (*California Union Ins. Co. v. Industrial Acc. Com.* (*Mitchell*) (1960) 183 Cal.App.2d 644 [25 Cal.Comp.Cases 172]; *Simien v. Industrial Acc. Com.* (1956) 138 Cal.App.2d 397 [21 Cal.Comp.Cases 10]; *Bobbitt v. Ow Jing dba National Market* (2007) 72 Cal.Comp.Cases 70 [2007 Cal. Wrk. Comp. LEXIS 1] (Appeals Board en banc).)

A failure to comply with applicable statutes and regulations that results in a neglect or refusal to provide reasonable medical treatment renders the employer or insurer liable for medical treatment self-procured by the injured worker. (*Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 [2006 Cal. Wrk. Comp. LEXIS 323] (Appeals Board en banc) (*Knight*).) Insofar as the applicant has the affirmative of the issue, the burden of proof to establish a refusal or neglect of medical treatment such that applicant can self-procure medical treatment outside defendant's MPN rests with the applicant. (Lab. Code, § 5705; see also *Lynch v. County of Kern* (October 22, 2014, ADJ9415335) [2014 Cal.Wrk. Comp. P.D. LEXIS 575].)

Here, defendant originally admitted injury to applicant's right elbow. Defendant did not admit injury to applicant's other claimed body parts until their work-relatedness was confirmed by the orthopedic Qualified Medical Evaluator in supplemental reporting dated November 1, 2023.[3] The WCJ thereafter determined that "[w]ith the exception of the right elbow, all other admitted body parts were admitted by Defendants effective January 11, 2024." (Finding of Fact No. 2.)

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

[3] The June 19, 2023 Minutes of Hearing indicated that defendant admitted injury to the right elbow only, while applicant further claimed injury to the neck, shoulders, arms, right wrist, and right hand. (Minutes of Hearing, dated June 19, 2023, at p. 2:4.) Given applicant's date of injury of August 9, 2022, it is not clear why the parties waited to specifically address the issue of the disputed body parts with the Qualified Medical Evaluator until defendant's interrogatory of November 1, 2023. We observe that the dispute resolution protocols set forth at Labor Code section 4062 are available to the parties in the event that either the employee or employer objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610. Here, a supplemental report request to the QME on November 1, 2023 resulted in the prompt issuance of a supplemental report clarifying the nature and extent of the injury. We encourage the parties to utilize the dispute resolution procedures set forth in Labor Code section 4060 et seq. as early as possible to resolve medical-legal disputes and to allow for prompt delivery of benefits to injured workers.

Applicant contends that defendant has authorized treatment only to the admitted right elbow and refused or neglected medical treatment to all other body parts such that applicant may now self-procure his medical treatment outside defendant's MPN at employer expense. (Minutes, at p. 5:1.)

Defendant contends that the record does not establish a neglect or refusal of medical treatment. Defendant avers there is no dispute that applicant received medical treatment through defendant's MPN to the admitted elbow injury, and that all relevant treatment requests have either been authorized or reviewed by Utilization Review (UR) and Independent Medical Review (IMR). (Petition, at p. 6:12.) Defendant asserts, "[m]ost complaints by the applicant were limited to the right elbow/forearm, with some to include the right wrist." (*Id.* at p. 7:25.)

The WCJ's Opinion on Decision notes applicant's trial testimony in which applicant testified that his complaints of injury upon initial evaluation extended beyond the right elbow and forearm, and included the neck shoulder, right wrist and hand. (Opinion on Decision, at p. 2.) Applicant further testified that primary treating physician Dr. Mattar told applicant that "treatment for the neck had been denied by the [d]efendants." (*Ibid*., citing Minutes, at p. 6:1.) The Opinion on Decision further cites to the February 6, 2023 report of Dr. Mattar, wherein the physician confirms that applicant was having neck pain, but that "he is only authorized to see me for the elbow." (Ex. 9, Report of Raafat Mattar, M.D., dated February 6, 2023, at pp. 3-4 [Bates pp. 63-64].)

Thus, the WCJ concluded that the defendant neglected or refused medical treatment to the neck, and that the refusal of medical treatment allowed applicant to treat outside of defendant's MPN at employer expense. (Finding of Fact No. 8.)

However, following our review of the entire evidentiary record occasioned by defendant's Petition, we are not persuaded that the record adequately addresses the issue of whether there has been a refusal or neglect of medical treatment. Neither party has offered into evidence defendant's notice of acceptance of liability. Nor does the record reflect a notice to the applicant or his treating physicians that a requested treatment is not being authorized.

We acknowledge that the February 26, 2023 report of primary treating physician Dr. Mattar indicates that a prior request for platelet rich plasma injection had been denied. (Ex. 9, Report of Raafat Mattar, M.D., dated February 6, 2023, at pp. 3-4 [Bates pp. 63-64].) However, as per defendant's verified Petition, an initial request for a PRP injection was authorized by defendant on

November 23, 2022 and administered on January 3, 2023. (Petition, at p. 10:1) Thereafter, the treating physician submitted a request for authorization for a second such injection six days later, which defendant submitted to Utilization Review. The requested treatment appears to have been noncertified by UR, a decision subsequently affirmed by IMR. (*Id.* at p. 10:8.) Thus, and insofar as section 4600 requires defendant to provide "all medical treatment that is *reasonably* required to cure or relieve" from the effects of applicant's industrial injury, the requested treatment was not deemed to be medically necessary pursuant to a valid UR and IMR process. (Lab. Code, § 4600(a).) Accordingly, based on the limited record before us, defendant did not deny medical treatment reasonably required to cure or relieve from the effects of applicant's injury.

Primary Treating Physician Dr. Mattar notes in his report of February 6, 2023 that "[i]n regard to the cervical spine, the patient is having neck pain but he is only authorized to see me for the elbow … [h]owever, since the neck is not an accepted body part, I did tell him to follow up with his PCP. I will be more than happy to treat this if this is an accepted body part." (Ex. 9, Report of Raafat Mattar, M.D., dated February 6, 2023, at pp. 3-4 [Bates pp. 63-64].) However, we are unable to discern from this statement whether Dr. Battar actually requested authorization for treatment to the neck, or whether the physician merely assumed that no authorization would be forthcoming on body parts beyond the right elbow and forearm. The only evidence in the record directly addressing a putative denial of authorization is applicant's trial testimony that he was told by Dr. Mattar that the physician "was not allowed to treat anything but the applicant's right elbow," and that the doctor "couldn't treat the neck because there was no authorization, but the doctor had tried to obtain such authorization." (Minutes, at p. 6:3.) However, the record does not disclose what treatment modalities were requested and when. The record offers no direct evidence that defendant denied a treatment request by Dr. Mattar or any other treating physician, and Dr. Mattar's own reporting does not establish that he affirmatively requested medical treatment that defendant denied.

On the other hand, it is well-established that "[u]pon notice or knowledge of a claimed industrial injury an employer has both the right and duty to investigate the facts in order to determine his liability for workmen's compensation, but he must act with expedition in order to comply with the statutory provisions for the payment of compensation which require that he take the initiative in providing benefits. He must seasonably offer to an industrially injured employee that medical, surgical or hospital care which is reasonably required to cure or relieve from the

effects of the industrial injury." (*Ramirez v. Workers' Comp. Appeals Bd.* (1970) 10 Cal.App.3d 227, 234 [35 Cal.Comp.Cases 383].) Moreover, "[t]he duty imposed upon an employer who has notice of an injury to an employee is not … the passive one of reimbursement but the active one of offering aid in advance and of making whatever investigation is necessary to determine the extent of his obligation and the needs of the employee." (*United States Cas. Co. v. Industrial Acc. Com.* (*Moynahan*) (1954) 122 Cal.App.2d 427, 435 [19 Cal.Comp.Cases 8].)

Decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924] (*Tyler*); see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*Id.* at p. 141.) The principle of allowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims. (*Tyler, supra,* at p. 928.)

Here, the record does not sufficiently address the underlying issue of whether the defendant has neglected or affirmatively denied a request for authorization for medical treatment that is otherwise reasonable and medically necessary. We are therefore persuaded that due process requires that we return this matter to the trial level for further proceedings and decision by the WCJ addressing with specificity whether defendant has neglected or refused medical treatment as requested by applicant's treating physicians.

Accordingly, we will grant defendant's Petition insofar as it seeks reconsideration of the F&O, rescind the WCJ's decision, and return this matter to the trial level for further proceedings

and decision by the WCJ. Should the WCJ determine in subsequent proceedings that defendant has neglected or refused medical treatment to the applicant, applicant would be entitled to continue to treat outside defendant's MPN at employer expense until such time as the defendant has complied with the transfer of care protocols required by Administrative Director Rule 9767.9 (Cal. Code Regs., tit. 8, § 9767.9.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of April 9, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of April 9, 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/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 17, 2024

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

JASON GUTIERREZ
LAW OFFICES OF THOMAS F. MARTIN
DIMACULANGAN AND ASSOCIATES

SAR/abs

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