WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

OSBALDO BARRON, ***Applicant***

vs.

IPS CORPORATION/WELD ON ADHESIVE;
BERKSHIRE HATHAWAY HOMESTATE
INSURANCE COMPANY,
Defendants

Adjudication Number: ADJ11289849
Long Beach 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 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, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2024

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

OSBALDO BARRON
PAPERWORK & MORE
FRIEDMAN & BARTOUMIAN
EDD SDI

LN/pm

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. Applicant's Occupation: Warehouseman
   Date of Injury: CT: August 15, 2010 – April 19, 2018
   Parts of Body Injured: Head, shoulders, nervous system, psyche and neck (alleged).
   Identity of Petitioner: Lien Claimant Premier Psychological Services filed the petition.
   Timeliness: The petition was timely filed.
   Verification: The petition was verified.

2. Date of Findings of Fact: March 28, 2024

3. Petitioner's contentions: That by the decision (finding Defendant had a properly established MPN in place at the time of the injury, with no denial of care allowing treatment outside said MPN), this WCJ acted without or in excess of her powers, the evidence does not justify the findings of fact, and the findings of fact do not support the order.

II.
PROCEDURAL HISTORY

Applicant, Osbaldo Barron, while employed during the period of August 15, 2010 to April 19, 2018, as a warehouseman, at Gardena, California, by IPS Corporation/Weld On Adhesive, claims to have sustained injury arising out of and occurring in the course of employment to his head, shoulders, nervous system, psyche and neck. At the time of injury, the employer's workers' compensation carrier was Berkshire Hathaway Homestate Insurance Company, administered by Berkshire Hathaway San Diego (hereinafter "Defendant").

On July 18, 2018, the case-in-chief resolved via Order Approving Compromise and Release. [*See* Order Approving Compromise and Release, July 18, 2024, EAMS Doc ID 67764632.] On January 9, 2024, Defendant and Lien Claimant Premier Psychological Services (hereinafter "Lien Claimant") proceeded to Lien Trial on the following issues: (1) Whether Defendant had a properly established medical provider network (hereinafter "MPN") in place at

the time of the injury; and (2) Whether there was a denial of care allowing Applicant to treat outside of the MPN. All other issues were deferred, with jurisdiction reserved. [*See* Minutes of Hearing (Lien Trial), January 9, 2024, p. 2, lns. 10.5-16.5, EAMS Doc ID 77538165.]

Various exhibits related to Lien Claimant's lien and services provided during the case-in- chief, along with documents pertaining to Defendant's initial claim set-up and MPN, were offered into evidence. All offered exhibits were admitted into evidence without objection. No witness testimony was offered by either party. [*Id.* at p. 2, ln. 19 – p. 3, ln. 14.]

Additionally, judicial notice was taken of the following documents: DWC-1 Claim Form, dated April 19, 2018 (formerly offered as Lien Claimant's Exhibit "101"); Application for Adjudication of Claim, dated April 20, 2018 (formerly offered as Lien Claimant's Exhibit "102"); Trial Briefs filed on October 11, 2022 (by Defendant) and November 1, 2022 (by Lien Claimant); Petition for Judicial Notice re: MPN, filed June 1, 2023; Petition for Judicial Notice re: MPN, filed June 14, 2023; Petition for Judicial Notice re: MPN, filed July 28, 2023; Objection to Petition for Judicial Notice, filed December 15, 2023; and Response to Objection to Petition for Judicial Notice, filed January 5, 2024. [*Id.* at p. 3, lns. 15-21.]

On March 28, 2024, this WCJ issued Findings of Fact, along with an Opinion on Decision. Therein, the following findings were made: (1) Defendant had a properly established MPN in place at the time of the injury; and (2) There was no denial of care that would allow Applicant to treat outside the MPN. No orders issued with the Findings of Fact. [*See* Findings of Fact, March 28, 2024, EAMS Doc ID 77794442.]

It is from the March 28, 2024 Findings of Fact that Lien Claimant now seeks reconsideration, claiming that the findings were made in excess of the undersigned's powers and are not justified by the evidence. To date, no Answer to the Petition for Reconsideration has been received on behalf of Defendant.

III.
FACTS

On April 20, 2018, counsel for Applicant mailed a Claim Form (DWC-1) to both the employer and Defendant. The Proof of Service identifies the following documents sent to the employer and Defendant along with the Claim Form: Opening Letter to Employer, Application for Adjudication of Claim, 4906(g), 4600 Letter, Fee Disclosure and Venue Authorization. Of these

referenced documents, Lien Claimant only offered into evidence the Claim Form (with Proof of Service) and the Application for Adjudication of Claim. [*See* Claim Form (DWC 1), with attached Proof of Service, filed August 1, 2022, EAMS Doc ID 42472037.]

Pursuant to Defendant's verified Trial Brief, the Claim Form was received by Defendant on April 27, 2018. [*See* Defendant's Trial Brief, filed October 11, 2022, p. 1, ln. 25, EAMS Doc ID 43424879.] No evidence was provided as to what immediate action, if any, was taken by Defendant upon receipt of the Claim Form.

On May 1, 2018, counsel for Applicant sent a letter to Defendant selecting Dr. Mark Michaels as his primary treating physician pursuant to Labor Code § 4600. [*See* Lien Claimant's Exhibit "103", PTP Selection Letter, dated May 1, 2018, EAMS Doc ID 42472039.] Also on May 1, 2018, counsel for Applicant sent a second letter to Defendant stating that medical treatment had been requested via the April 20, 2018 opening letter, and that since the employer had failed to schedule a medical appointment in a timely matter, demand was made to authorize medical care recommended by Dr. Michaels, the non-MPN designated primary treating physician. [*See* Lien Claimant's Exhibit "104", Letter Objecting to MPN Control, dated May 1, 2018, EAMS Doc ID 42472040.]

On May 7, 2018, Defendant mailed a letter to Applicant and Applicant's attorney of record containing notification that a medical appointment had been scheduled with Dr. Philip Baily for May 21, 2018. [*See* Defendant's Exhibit "D", Appointment Notice, dated May 7, 2018, EAMS Doc ID 42528947.] Defendant then mailed out a delay letter on May 8, 2018, followed by MPN notice documents on May 15, 2018. [*See* Defendant's Exhibits "B" and "A", Delay Notice, dated May 8, 2018, and Initial Setup Documents, dated May 15, 2018, EAMS Doc ID 42528945 and 42528944, respectively.]

On May 8, 2018, Defendant mailed out an objection letter to Dr. Michaels in response to a request for treatment authorization dated April 30, 2018, and received by Defendant on May 7, 2018. Defendant informed Dr. Michaels therein that authorization for the requested treatment was denied because Dr. Michaels was not a provider within Defendant's MPN. [*See* Defendant's Exhibit "F", Denial Non-UR Letter, dated May 8, 2018, EAMS Doc ID 42528949.]

On May 30, 2018, Applicant was seen by Dr. Michaels for an initial evaluation and a report was prepared by the doctor. [*See* Lien Claimant's Exhibit

"106", Initial Psychological Evaluation Report, dated May 30, 2018, EAMS Doc ID 42472042.] No evidence was presented at the Lien Trial as to whether or not Applicant attended the earlier evaluation that Defendant had scheduled with Dr. Baily to take place on May 21, 2018.

Applicant continued to treat with Dr. Michaels through June 13, 2018. [*See* Lien Claimant's Exhibits "107" and "108", PR-2 Medical Report, dated June 13, 2018, and Itemized Billing Statement, undated, EAMS Doc ID 42472043 and 42472044, respectively.]

The parties entered into a Compromise and Agreement on July 10, 2018. [*See* Compromise and Release, filed July 18, 2024, EAMS Doc ID 67764645.] The Order Approving Compromise and Release was obtained on July 18, 2018. [*See* Order Approving Compromise and Release, *supra*.] The claim was also denied by Defendant on July 18, 2018. [*See* Defendant's Exhibit "C", Denial Notice, dated July 18, 2018, EAMS Doc ID 42528946.]

IV.
ARGUMENT

Lien Claimant (hereinafter "Petitioner") sets forth the following contentions in the Petition for Reconsideration [Petitioner also included language in the petition requesting that it be treated as a Petition for Removal if it is determined that a Petition for Reconsideration is not the proper pleading. Since the petition is following the issuance of a final decision, reconsideration is the proper method of appeal. [*See* Labor Code § 5900(a).] Removal is not the proper remedy, and as such, will not be addressed further herein. That said, it is worth noting that were it to be determined that the petition should be treated as a removal, Petitioner has failed offer any information supporting the existence of significant prejudice or irreparable harm.]: (1) WCJ acted without or in excess of her powers; (2) The evidence does not justify the findings of fact; and (3) The findings of fact do not support the order [No orders issued with the Findings of Fact. As such, there is no basis to argue that the findings of fact do not support the order and this issue requires no further commentary herein. It is also worth pointing out that no explanation was offered to support Petitioner's argument that this WCJ acted in excess of her powers]. Specifically, Petitioner is alleging that the evidence does not support the findings that: (1) Defendant had a validly established MPN; and (2) There was no denial of care that would allow Applicant to treat outside the MPN. This WCJ shall respond accordingly.

A. Proof of Validly Established MPN

Petitioner argues that Defendant failed to provide proof at trial that they had validly established MPN in place at the time of injury. This issue was raised at the Lien Trial and in response thereto, Defendant filed three petitions requesting judicial notice of Defendant's MPN. Lien Claimant filed an objection to same and Defendant filed a response thereto. Judicial notice was taken of these filings.

The requirements and regulations for the establishment of a medical provider network are outlined in Labor Code § 4616. Pursuant to Section 4616(b)(1), "upon a showing that the medical provider network was approved…by the administrative director, there shall be a conclusive presumption on the part of the appeals board that the medical provider network was validly formed."

Of the various pleadings filed by Defendant and Lien Claimant on this subject, one was definitive of the issue at hand. In Defendant's Response to Objection to Petition for Judicial Notice, verification of the existence of Defendant's approved MPN was provided, along with confirmation that the collective of four insurance companies under Berkshire Hathaway Homestate Companies (of which Berkshire Hathaway Insurance Company is one) is grouped under the legal entity Cypress Insurance Company. [*See* Response to Objection to Petition for Judicial Notice, Exhibit "A" (Approved MPNs) and Exhibit "B" (Attachment A), filed January 5, 2024, pp. 9, 13, EAMS Doc ID 49818482.]

Additionally, Defendant's MPN notice letter (listed as Exhibit "D" to the Response to Objection to Petition for Judicial Notice, *supra*, and also entered into evidence at the Lien Trial as Defendant's Exhibit "A"), provides further evidence that Berkshire Hathaway Homestate Insurance Company is part of Berkshire Hathaway Homestate Companies' MPN. Based upon the persuasive explanation and documentation in Defendant's Response to Objection to Petition for Judicial Notice, of which judicial notice was taken at the Lien Trial, it was found that Defendant had a properly established MPN in place at the time of injury.

Petitioner now argues, for the first time on appeal, that there is no evidence that the Division of Workers' Compensation (hereinafter "DWC") approved Defendant's efforts to consolidate multiple insurance carriers under one MPN application. This argument fails in light of the June 14, 2017 letter from the

DWC approving the MPN Material Modification filing for Cypress Insurance Company using Berkshire Hathaway Homestate Companies' MPN. Said letter was obtained after the Cypress Insurance Company MPN was modified to include the collective of four insurance companies under Berkshire Hathaway Homestate Companies and confirms that the consolidated MPN was approved by the DWC. [*See* Response to Objection to Petition for Judicial Notice, Exhibit "C", *supra*, pp. 14-15.]

Based on the foregoing, Defendant offered reliable evidence at the Lien Trial proving that a validly established MPN was in place for Berkshire Hathaway Insurance Company at the time of Applicant's injury. As such, the decision finding same should stand.

B. Whether There Was A Denial Of Care Allowing Applicant To Treat Outside The MPN

Petitioner contends that Defendant's lack of, or unreasonably delayed action at the inception of the claim constitutes a denial of medical care such that Applicant must be allowed to treat outside of the MPN. This issue was raised at the Lien Trial and Petitioner and Defendant both filed Trial Briefs regarding same, of which judicial notice was taken.

Medical treatment that is reasonably required to cure or relieve an injured worker from the effects of his or her injury shall be provided by the employer. [*See* Labor Code § 4600(a).] Should the employer **neglect or refuse reasonably** to do so, the employer will be liable for the reasonable expense incurred by or on behalf of the employee in providing treatment. [*Id.*, emphasis added; *See also, Knight v. United Parcel Service*, (Appeals Board *en banc*) (2006) 71 Cal. Comp. Cases 1423.]

Following notification by the injured employee of the injury, or upon the filing of a claim form with the employer, the employer shall arrange an initial medical evaluation and begin treatment as required by Labor Code § 4600. [*See* Labor Code § 4616.3(a).] The employer shall also notify the employee of the existence of the MPN, along with the right to change physicians within the MPN after the first visit, and the method by which the list of participating providers may be accessed by the employee. [*See* Labor Code § 4616.3(b).]

The timeframe for setting up the initial treatment is governed by Labor Code § 5402. Pursuant to subsection (c): "Within one working day after an

employee files a claim form under Section 5401, the employer shall authorize the provision of all treatment, consistent with Section 5307.27, for the alleged injury and shall continue to provide the treatment until the date that liability for the claim is accepted or rejected. Until the date the claim is accepted or rejected, liability for medical treatment shall be limited to ten thousand dollars ($10,000)."

In the matter at hand, Defendant received Applicant's claim form via U.S. Mail on April 27, 2018. [*See* Defendant's Trial Brief, *supra* at p. 1, ln. 25.] Defendant subsequently mailed out a letter to Applicant on May 7, 2018, noticing a medical appointment scheduled for Applicant to see a doctor on May 21, 2018. [See Defendant's Exhibit "D".] Defendant also mailed out a Delay Letter to Applicant on May 8, 2018. [*See* Defendant's Exhibit "B".][Although Petitioner argues, for the first time on appeal, that there is no evidence that the delay and appointment letters were actually served upon Applicant, both letters were properly addressed to Applicant at his address in the Official Address Record and carbon copied to Applicant's attorney of record. This is in compliance with Title 8, Cal. Code of Regs., § 9810. Additionally, Petitioner offered no witness testimony, nor documentary evidence, at the Lien Trial to rebut Section 9810 and show that Applicant never received the two letters.]

Using the timeline noted above, it took seven working days (or eleven calendar days) between receipt of the claim form and the scheduling/authorizing of medical treatment in the case. Is this a delay? Yes. As noted in the Opinion on Decision, given the one working day requirement and a timeline herein of seven working days to set up the treatment, there was a six working day delay given the requirements of Labor Code § 5402(c).

The real question at issue though is not simply whether a delay existed here. It is whether the delay constituted a denial of care (i.e. did Defendant refuse or neglect reasonably to provide treatment?)[Additionally, as noted in the Opinion on Decision, the burden of proving the denial of care rests with the applicant, or in this instance, the lien claimant. [*See Southland Spine and Rehabilitation Medical Center, Inc. v. Workers' Comp. Appeals Bd. (Salas)* (2015) 81 Cal. Comp. Cases 88, 90]. This requires looking further into the facts of the matter. Specifically, Applicant's claim form was sent to the employer via U.S. Mail on April 20, 2018, and not received until April 27, 2018. It was not presented in-person, suggesting possibly that immediate medical attention was not needed. A letter was presumably attached to the claim form requesting medical treatment, but it was not offered into evidence by Petitioner at the Lien Trial. It is unclear as to whether or not it was a form letter and whether or not it

effectively communicated a request for care. [*See Figueroa v. Los Angeles Airport Marriott*, 2014 Cal. Wrk. Comp. P.D. LEXIS 376, wherein applicant's attorney's use of form letters to communicate with defendant created confusion such that a request for medical treatment was never effectively communicated and applicant was not entitled to self-procure treatment outside the MPN at defendant's expense.]

Upon receipt of Applicant's counsel's May 1, 2018 letter (presumably received- on or about May 6, 2018, if we allocate five days for mailing), the need for treatment was made quite clear and Defendant took immediate action. Within one working day of the presumed receipt date of the May 1, 2018 letter (i.e. May 6, 2018), Defendant scheduled the initial medical appointment and mailed the letter to Applicant out on May 7, 2018 [It is worth noting that the fact that the appointment was not scheduled to take place until May 21, 2018 (i.e. 15 days later), should not be held against Defendant, since Defendant was responding via Applicant's chosen media for communication (i.e. U.S. Mail) and as such, additional time had to be added on in order to give proper notice of the medical appointment]. This immediate action is not indicative of a refusal or neglect to provide treatment. The opposite, in fact, is true.

Also relevant is the fact that Defendant scheduled a medical appointment for Applicant to take place before Applicant scheduled his own appointment with Dr. Michaels on May 30, 2018. Defendant also put Dr. Michaels on notice via letter dated May 8, 2018, that Dr. Michaels was not in Defendant's MPN and as such, Dr. Michael's two requests for authorization for treatment (dated April 30, 2018 and May 7, 2018) were denied. In spite of the denial, Dr. Michaels assumed the risk that his services would not be paid by Defendant and scheduled the May 30, 2018 initial evaluation appointment.

Given the forgoing facts and timeline in this matter, it was found that Defendant neither refused, nor neglected reasonably to provide treatment to Applicant in this matter. This finding is supported by the evidence in this matter. With respect, Petitioner failed to meet its burden of proving a denial of care at the Lien Trial and has failed to offer any persuasive arguments [Petitioner also raised a transfer of care argument for the first time on appeal. This issue was not raised at the Lien Trial and can be found neither in the Pre-Trial Conference Statement, nor in Petitioner's Trial Brief. As such, further comment herein is not warranted. However, even assuming it had been raised, transfer of care would not be an issue in this matter given the finding of no denial of care. Without a denial of care, Defendant never lost medical control such that a transfer of care back into the MPN would be required] upon reconsideration that would warrant

reversal of the trial decision. Accordingly, the finding that there was no denial of care that would allow Applicant to treat outside the MPN should stand.

V. RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Date: May 7, 2024

Diana L. Marsteiner
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE