WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA LAZCANO, ***Applicant***

vs.

LUTHERAN HIGH SCHOOL ASSOCIATION; CYPRESS INSURANCE COMPANY; REDWOOD FIRE & CASUALTY COMPANY, both administered by BERKSHIRE HATHAWAY HOMESTATE COMPANIES, ***Defendants***

Adjudication Numbers: ADJ10647989; ADJ13514659
Anaheim District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration[1] of the March 5, 2024 Joint Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant retroactively predesignated Optum and "Dr. Marlowe, M.D." as her treating physician, but that the retroactive designation did not meet the requirements of Labor Code[2] section 4600(d) and was therefore not valid.

Applicant contends that she made a legally valid and unrebutted designation of a medical group in accordance with section 4600(d). Applicant further contends that "Optum," the medical group she designated, is the same entity as "Optumcare Medical Group," the medical group with whom applicant has previously treated.

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.

---

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

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

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 reconsideration, rescind the March 5, 2024, and return the matter to the trial level for development of the record.

FACTS

In ADJ10647989, applicant claimed injury to the low back, left shoulder, head, depression, neurological system, neck, and right knee while employed as an administrative assistant by defendant Lutheran High School Association, then insured by Cypress Insurance Company, c/o Berkshire Hathaway Homestate Companies (defendant), on January 5, 2016. In ADJ13514659, applicant claimed injury to the low back and other body parts while employed as an administrative assistant by defendant on August 20, 2019.

On June 15, 2021, the parties proceeded to Expedited Hearing, and framed issues of whether applicant's "future medical care must remain within the established Medical Provider Network (MPN); whether defendant denied or abandoned applicant's treatment between injuries; whether defendant failed to designate the primary treating physician or provide notice of the MPN; whether there had been a failure of "reporting requirements" by defendant's physicians; and whether applicant was entitled to self-procure her medical treatment. (June 15, 2021 Minutes, at 4:1.)

On January 21, 2022, the WCJ issued Joint Findings and Order, determining in relevant part that defendant failed to establish proper notice to the applicant of her right to predesignate a physician prior to her work injuries, such that the applicant was denied care within defendant's MPN, and was entitled to treat outside of defendant's medical provider network. (January 21, 2022 Joint Findings and Order, Findings of Fact Nos. 3 through 6.)

On February 9, 2022, defendant sought reconsideration of the January 21, 2022 Joint Findings and Order.

On April 11, 2022, we granted defendant's Petition, rescinded the WCJ's decision, and substituted new Findings of Fact that defendant had a properly established Medical Provider Network, that applicant had not met her burden of establishing that defendant refused or neglected medical treatment, and that applicant was not entitled to treat outside defendant's MPN at

employer expense. (Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, April 11, 2022.)

On April 18, 2022, applicant petitioned for reconsideration of our April 11, 2022 decision, averring she could not be charged with fulfilling the predesignation requirements of section 4600(d) in the absence of employer provided notice of her right to predesignate. (Petition for Reconsideration, dated April 18, 2022.)

On December 1, 2022, we issued our Opinion and Decision After Reconsideration. Therein, we determined that pursuant to section 4600(d), "an employer has an affirmative obligation to provide notice to its employees of their right to predesignate a physician in the event of workplace injury." (Opinion on Decision, dated December 1, 2022, at p. 7.) We further observed that pursuant to Administrative Director (AD) Rule 9782(b), "[e]very employer shall advise its employees in writing of an employee's right to predesignate a personal physician pursuant to subdivision (d) of Labor Code section 4600, and section 9780.1." (Cal. Code Regs., tit. 8, § 9782(b).) However, neither section 4600 nor AD Rule 9782 specified a remedy in the event an employer failed to provide the required notice. After considering the relevant case law and taking into account the equitable considerations advanced by the parties, we concluded that "in the event the defendant fails to provide the required notice of the right to predesignate a personal physician pursuant to section 4600(d) and AD Rule 9782(b), we believe the appropriate remedy is to allow applicant to retroactively designate her personal physician, assuming that all of the conditions regarding treatment by a personal physician are met." (*Id.* at p. 8.) We therefore amended our April 11, 2022 Joint Findings of Fact to reflect that "[t]he record requires further development to determine whether applicant wishes to predesignate her personal physician, and if that physician meets the requirements of Labor Code section 4600(d)." (Finding of Fact No. 6.)

On July 10, 2023, applicant completed a "Predesignation of Personal Physician" form. Therein, applicant named "Optum/Evan Marlowe, MD" as her personal physician. The predesignation form further specifies "Optum" as the "Name of Insurance Company, Plan or Fund providing health coverage for nonoccupational injuries or illnesses." The form is countersigned by an unspecified physician agreeing to the predesignation on August 7, 2023. (Ex. 16, Applicant's Predesignation of Personal Physician, dated July 10, 2023.)

On January 10, 2024, the parties proceeded to trial on the issues of whether the applicant wished to predesignate a personal physician, and if that personal physician met the requirements of Labor Code Section 4600(d). (Further Minutes of Hearing and Summary of Evidence (Minutes),

dated January 10, 2024, at p. 3:1.) The WCJ heard testimony from applicant and her attorney, and ordered the matter submitted at the conclusion of the hearing.

On March 5, 2024, the WCJ issued his F&O, determining in relevant part that applicant retroactively designated Optum and Dr. Marlowe, but that the retroactive designation did not meet the requirements of Labor 4600(d) and therefore the predesignation was not valid. (Findings of Fact Nos. 1& 2.)

The WCJ's Opinion on Decision observed that applicant's testimony established that her primary care physicians were Drs. Frisch and Iverson. The WCJ's review of the submitted medical evidence established that Dr. Frisch was part of Optumcare Medical Group, formerly known as Marathon Medical Group. (Opinion on Decision, at p. 2.) The WCJ noted that applicant's medical records number (MRN) appeared to be consistent between the two entities. In further subpoenaed records, the name of Optumcare Medical Group appeared to be reflected simply as "Optum" with the same phone number as the former Optumcare and Marathon medical groups. (*Id.* at p. 3.) The WCJ noted that applicant's current predesignation form specifies Dr. Marlowe, a physician who did not treat applicant prior to her industrial injury. The form further designates "Optum," but the record did not establish the connection between "Optum" as the designated medical group, and "Optumcare Medical Group," as applicant's former primary care provider. The WCJ noted:

> No evidence was submitted to establish the connection between Optum and Optumcare Medical Group. The court after reviewing the record attempted to develop the record and obtain this information. Submission was vacated and the court issued an order indicating to the parties what additional evidence was needed for it to make an informed decision on this case. Applicant's attorney objected and the court set the matter for trial to discuss the additional evidence required. At trial applicant's attorney renewed his objections citing to the court that discovery had closed and it was not within this courts power to develop the record. Defendant attempted to get this information at the 1/10/24 trial from Mr. Martin while he was on the stand. Mr. Martin objected and would not answer the questions. After discussion with the parties on 2/15/24 defendant joined in applicant's objection to the requested discovery. The court felt this additional discovery would have shown if there was connection between the two entities, and what that connection was. The fact that Optum is mentioned in the subpoenaed medical records is insufficient for this court to make a finding that Optum and Optumcare Medical Group are connected sufficiently to make the determination that Optum is a medical group that qualifies under §4600(d)(2)(B). The mere fact that Optum is listed is insufficient to shift the burden to the defendant to prove otherwise. It is applicant's burden and it has

> not been met. Optum does not qualify as personal physician as defined by §4600(d)(2)(B).
>
> (Opinion on Decision, at p. 4.)

Thus, the WCJ concluded that "[a]pplicant's retroactive predesignation of a treating physician fails, as a properly qualifying personal physician was not designated in the form." (*Id.* at p. 5.)

Applicant's Petition contends that the unrebutted trial record establishes that "Optum" and "Optumcare Medical Group" are one and the same, and that the statutes and regulations regarding predesignation of a personal physician must be liberally construed in favor of applicant. (Petition, at pp. 8-9.) Applicant notes that her MRN was consistent in the subpoenaed records of "Optum" as between "Optum" and "Optumcare Medical Group." (*Id.* at p. 9:15.)

The WCJ's Report observes:

> The only evidence submitted that remotely addresses this issue are the subpoenaed records from Optumcare Medical Group, JT Exh. 15. The court analyzed these records in its opinion on decision and found that they established the applicant's main treating physician at that group was Dr. Frisch. She had treated with Dr. Frisch since at least 4/18/13, see page 62 of the subpoenaed records.
>
> At that time, Dr. Frisch was with Marathon Medical Group. The Applicant continued to treat with Dr. Frisch at this location. Based upon the letterhead, location of the group and formatting of the documents the medical group appeared to change its name to Optumcare Medical Group in 2016. Her last office visit was 7/7/17, page number 12. At no time did the letterhead change to Optum. The only documents in the subpoenaed records that show Optum are the prescription requests, beginning on page 108-109. This last request was issued by Dr. Frisch at Optumcare Medical Group on her last visit 7/7/17 for a urinalysis. On page 110-111 dated 2/2/17, Dr. Frisch again while at Optumcare Medical Group requested cultures. The prescription forms again shows Optum with a different phone number at the top. This pattern is repeated again wherein Dr. Frisch at Optumcare Medical Group and at Marathon Medical Group ordered routine testing, blood work and cultures on pages 112-114 dated 9/21/16, pages 115-116 dated 8/27/15, pages 117- 119 dated 5/14/15, pages 120-121 dated 1/7/15, and finally in pages 122-124 dated 10/24/13. This is insufficient to show that Optum and Optumcare Medical Group are one in the same.
>
> In the petition for reconsideration applicant's attorney admits that Optum is the applicant's health insurance company, and that is why it was listed so on the

predesignation form, see petition for reconsideration page 7 lines 2-15. Nowhere has this court attempted to make any rules, this court can only make a decision on evidence that is supported by the facts. The mere listing of an insurance company is insufficient to establish it as an insurance company. However, taken in connection with the verified petition for reconsideration this additional evidence supports applicant's contention that Optum was her health insurance company. Health insurance companies cannot be appointed as a treating doctor as they do not provide treatment. They contract with medical groups and individual providers to provide the necessary treatment to their insured. That is what occurred here, the applicant selected a medical provider, originally Marathon Medical Group, now Optumcare Medical Group within her insurance program. At no time was Optum her medical group provider under §4600(d).

(Report, at pp. 5-6.)

Accordingly, the WCJ recommends we deny applicant's petition.

DISCUSSION

Section 4600 provides that "[i]f an employee has notified the employee's employer in writing prior to the date of injury that the employee has a personal physician, the employee shall have the right to be treated by that physician from the date of injury…." (Lab. Code, § 4600(d)(1).) In the event an employee wishes to predesignate such a physician or medical group, the physician or medical group must meet all of the following conditions:

(A) Be the employee's regular physician and surgeon, licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code.

(B) Be the employee's primary care physician and has previously directed the medical treatment of the employee, and who retains the employee's medical records, including the employee's medical history. "Personal physician" includes a medical group, if the medical group is a single corporation or partnership composed of licensed doctors of medicine or osteopathy, which operates an integrated multispecialty medical group providing comprehensive medical services predominantly for nonoccupational illnesses and injuries.

(C) The physician agrees to be predesignated.

(Lab. Code, § 4600(d)(2).)

Here, applicant seeks to designate "Optum/Evan Marlowe, MD." (Ex. 16, Applicant's Predesignation of Personal Physician, dated July 10, 2023.) The record establishes that

Dr. Marlowe was not applicant's treating physician prior to her January 5, 2016 injury and therefore cannot be predesignated. Applicant contends rather that she is predesignating the "Optum" medical group.

Section 4600(d)(2)(B) specifies that if applicant's designated personal physician is a medical group, certain conditions must be satisfied. The medical group must be a single corporation or partnership, composed of licensed doctors of medicine or osteopathy. In addition, the corporation or partnership must operate an integrated multispecialty medical group, which provides comprehensive medical services predominantly for nonoccupational illnesses and injuries.

We observe that as the party with the affirmative of the issue, applicant carries the burden to establish that her designated personal physician, in this case the Optum medical group, meets the criteria set forth in section 4600(d)(2)(B).

Here, the subpoenaed medical records of "Optumcare Medical Group" establish that applicant obtained medical treatment from Dr. Frisch at her offices in Anaheim, California. (Ex. 15, Subpoenaed Records of Optumcare Medical Group, various dates, at p. 68.) Applicant's February 2, 2017 medical records (p. 18) reflect a medical record number that is consistent with the medical record number listed in the medical records of "Optum" dated July 7, 2017. (p. 108).

However, the record does not establish that applicant's treatment and care with Dr. Frisch and/or with Optumcare Medical Group in Anaheim was with the *same entity* as that which applicant now seeks to designate in Santa Ana, California. (Ex. 16, Applicant's Predesignation of Personal Physician, dated July 10, 2023.) It is unclear whether or if the two providers are the same medical corporation or partnership as contemplated in section 4600(d).

Nor does the record disclose whether the "Optum" entity in Santa Ana qualifies under section 4600(d) as a medical group or partnership, composed of doctors of medicine or osteopathy, which operates an integrated multispecialty medical group. Nor does the record disclose whether the Optum entity in Santa Ana provides comprehensive medical services predominantly for nonoccupational illness and injuries. (Lab. Code, § 4600(d)(2)(B).) The lack of clarity in the record is compounded by the fact that applicant's predesignation form lists Optum as the name of her medical group or provider, but also lists Optum as her insurance company, plan or fund providing health coverage for nonoccupational injuries or illnesses as Optum. (Ex. 16, Applicant's Predesignation of Personal Physician, dated July 10, 2023.)

The WCJ's Opinion on Decision discusses the lack of evidence responsive to whether Optum in Santa Ana was the same entity as Dr. Frisch's medical group in Anaheim, and why he felt additional evidence was necessary to properly adjudicate the issue:

> The court felt this additional discovery would have shown if there was connection between the two entities, and what that connection was. The fact that Optum is mentioned in the subpoenaed medical records is insufficient for this court to make a finding that Optum and Optumcare Medical Group are connected sufficiently to make the determination that Optum is a medical group that qualifies under §4600(d)(2)(B).
>
> (Opinion on Decision, at p. 4.)

We agree. The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) In our en banc decision in *McDuffie v. Los Angeles County Metro. Trans. Auth.* (2002) 67 Cal.Comp.Cases 138 [2002 Cal. Wrk. Comp. LEXIS 1218], 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.)

Here, following our independent review of the record occasioned by applicant's Petition, we are persuaded that development of the record is necessary to a full and complete adjudication of whether applicant's predesignation of "Optum" meets the requirements of section 4600(d). In particular, the record should be developed to address the issue of whether applicant's treating physician or medical group prior to her industrial injury was Optum or its legal predecessor. The record should further be developed to determine whether the Optum entity described in the subpoenaed records of Optumcare Medical Group is the same entity as the Optum that applicant now seeks to designate in Santa Ana, California. Finally, the record should be developed to determine whether the Optum entity in Santa Ana is a single corporation or partnership composed

of licensed doctors of medicine or osteopathy, which operates an integrated multispecialty medical group providing comprehensive medical services predominantly for nonoccupational illnesses and injuries. We remind the parties that as the party with the affirmative of the issue, applicant bears the burden of establishing compliance with section 4600(d). (Lab. Code, § 5705.)

Accordingly, we will rescind the March 5, 2024 F&O and return this matter to the trial level for development of the record consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of March 5, 2024 is **GRANTED**.

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 5, 2024 Joint Findings and Order is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 28, 2024

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

PATRICIA LAZCANO
THOMAS F. MARTIN, PLC
MULLEN & FILIPPI

SAR/abs

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