WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAULINE MCCUTCHEON, *Applicant*

vs.

UNITED HEALTH GROUP; TRAVELERS PROPERTY AND CASUALTY COMPANY administered by SEDGWICK CLAIMS MANAGEMENT SERVICES INC.
Defendants

Adjudication Number: ADJ15987729
Los Angeles 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, and for the reasons stated below, we will deny reconsideration.

Preliminarily, we note that former Labor Code[1] 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.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

> (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 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 August 15, 2024, and 60 days from the date of transmission is Monday, October 14, 2024. This decision is issued by or on, so that we have timely acted on the petition as required by Labor Code 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. Labor Code 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 and Recommendation by the workers' compensation administrative law judge, the Report was served on August 15, 2024, and the case was transmitted to the Appeals Board on August 15, 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 August 15, 2024.

We now turn to the merits. Section 4600 requires the employer to provide reasonable medical treatment to cure or relieve from the effects of an industrial injury. (Lab. Code, § 4600(a).) If an employer has established an Medical Provider Network (MPN), an injured worker is 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. Industrial Acc. Com*. (1966) 64 Cal.2d 82, 87 [31 Cal. Comp. Cases 93].)

The burden of proof rests upon the party with the affirmative of the issue. (Lab. Code, § 5705.) Applicant in this matter seeks entitlement to treatment outside defendant's MPN. Consequently, applicant holds the burden of proof to show a neglect or refusal to provide treatment by defendant. (See e.g., *Amezcua 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];[2] 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].)

For the reasons stated by the WCJ in the Report, we agree that applicant did not meet that burden of proof.

[2] 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].)

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/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 14, 2024

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

PAULINE MCCUTCHEON
SOLOV & TEITELL
SCHLOSSBERG & UMHOLTZ

PAG/*pm*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1.	Finding & Order issued:	6/26/2024
2.	Identity of Petitioner:	Applicant
3.	Verification:	The petition is verified
4.	Timeliness:	The petition is timely
5.	Date Petition for Reconsideration filed:	August 2, 2024

6. Petitioners/Applicant contends:

The evidence does not justify the findings of fact and the findings of fact do not support the order, based upon a list of contentions by Applicant, which indicates that the only physicians available are from the same treatment facility.

It should be noted that Applicant's Petition for Reconsideration is basically her trial brief. There are no new arguments, and Applicant does not address the WCJ's reasoning in the decision. Applicant bases her Petition on a series of alleged and unproven facts which were not supported at trial by any evidence or testimony.

II.
FACTS

Applicant worked as a pharmacist for Defendant. She sustained injury to her neck, arm, right elbow and bilateral wrists to include carpal tunnel injury during the CT 5/20/2011 through 3/16/2020. An Application was filed 3/31/2022. The claim was accepted 12/15/2022 after being initially denied on 4/7/2020.

She was initially seen by Cara Guth, PA-C, on 3/20/2020. Cara Guth's identification as a physician's assistant was noted on the First Report of Injury. Clarence Lee, M.D., signed the First Report of Injury. Applicant was returned to full duty at the time and the report noted that based upon applicant's history, the injury was not work related. After the Application was filed, Applicant was seen by a QME, but the QME reports were not offered by either party at trial.

Applicant designated Casa Colina as her PTP on 3/27/2024. Defendant responded to this request on 4/8/2024, informing Applicant that Casa Colina was a medical facility in Defendant's MPN but only authorized for radiological services.

Applicant filed a request for Expedited Hearing claiming that defendant's MPN was defective. The matter proceeded to trial on May 9, 2024 on the issues of whether applicant could treat outside the MPN, and denial of care. Defendant objected to the denial of care issue on both the PTCS and at trial. As a result, that issue was not specifically heard, although the eventual ruling on the validity of Defendant's MPN made a ruling on that issue unnecessary.

The parties jointly offered Defendant's MPN as an exhibit at trial. The trial was virtual and neither party offered any witnesses at trial, relying solely on their trial briefs and defendant's response to applicant's brief.

A decision issued 6/26/2024 finding that Applicant had not met her burden of proof regarding applicant being allowed to treat outside Defendant's MPN.

Applicant's Petition for Reconsideration contains as facts a series of assertions which were not proved by any evidence or testimony at trial and which were not found as facts by the trier of facts. There is no explanation from applicant for how those facts were determined or obtained.

III.
DISCUSSION

Validity of the MPN Network

Defendant argues that their MPN Network is approved by Administrative Director and is therefore presumed to be valid. Petitioner, as noted, contends the MPN Network is invalid.

Labor Code Section 4616(b) (1) provides in pertinent part, "Upon a showing that the medical provider network was approved or deemed 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."

Applicant never offered any evidence or argument that Defendant's MPN was not approved. The parties offered as Joint Exhibit 1 a partial copy of Defendant's MPN regarding orthopedic surgeons, without commentary as to whether the MPN was validly formed.

WCAB Rule 9767.5 (a) (1) provides, "An MPN must have at least three available primary treating physicians… within 30 minutes or 15 miles of each covered employee's residence or workplace."

WCAB Rule 9767.5 (a) (2) provides, "An MPN must have providers of occupational health services and specialists who can treat common injuries experienced by the covered employees within 60 minutes or 30 miles of a covered employee's residence or workplace."

Applicant has never claimed that defendant's MPN did not meet the above two requirements. In fact, Applicant stated in her brief on page 2 that 16 providers were within 15

miles of applicant's residence. Applicant then stated that 7 providers did not require a referral to treat, and of these 7, one of them would not treat a 2020 injury, and one wouldn't treat work injury cases. According to applicant, the remaining 5 were all from one facility.

Defendant's Exhibit D at trial indicates multiple orthopedic surgeons available within 60 minutes or 30 miles of applicant's house. Applicant never disputed this.

Applicant's argument is that Defendant's MPN is not valid because after Applicant finished her review of Defendant's MPN, only 5 physicians were available and they were all from the same location, specifically Concentra.

Unsupported Allegations in the Petition raised only in Applicant's Trial Brief

As earlier noted, no witnesses testified at trial. Instead, applicant is raising arguments that were not presented at trial, and therefore waived. Applicant in the Petition refers to a series of claims that were not proved. For example, no statements were offered from the physicians who allegedly wouldn't treat 2020 injuries or work-related injuries or required a referral before treating a patient.

The only support for applicant's assertions are in her trial brief and relate to a survey done. This information is inadmissible and not properly before the Board.

However, even if the information in Applicant's brief and Petition is accepted as true, the MPN is still valid. Applicant never claimed that 3 physicians within the required mileage limits were not available to her.

It is Applicant's own decision to refuse to treat at Concentra. Applicant gives no reason for not treating at Concentra, and nothing in the Labor Code supports allowing an applicant to treat outside the MPN simply because, based on an applicant's unsupported allegations, it appears that she is convinced that the only available physicians are from one location.

Applicant presented no evidence that the physicians from the one location do not examine and treat patients independently, and issue reports based upon their own examination, knowledge and experience.

Applicant claims in her Petition she was never seen by a physician at Concentra, but inexplicably she offered only one report from Concentra. She never testified at trial and Defendant was denied the opportunity to question applicant about how she came to this conclusion. It is unquestioned that the First Report was injury was signed by a physician.

It is clear that based upon the Labor Code, and WCAB Rules, Defendant has a valid MPN, and the requisite number of physicians within the mileage limitations were available to Applicant. Applicant herself never claimed otherwise. Since Applicant chose to present no witnesses, the

various claims put forth in her Petition should not be considered part of the record. To do so would deny Defendant due process.

Applicant never rebutted the presumption regarding the validity of Defendant's MPN. Further, Applicant never met her burden of proof regarding her claim that Defendant's MPN was invalid.

IV.
RECOMMENDATIONS

The undersigned recommends that the Petition for Reconsideration be denied.

DATE: 8/15/2024 **Lois Owensby**
Workers' Compensation Administrative Law Judge