WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NANCY WHALEN, *Applicant*

vs.

FIVE ACRES BOYS & GIRLS AID SOCIETY;
UNITED STATES FIRE INSURANCE COMPANY; administered by
CRUM & FORSTER *Defendants*

Adjudication Number: ADJ7991744

Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the "Supplemental Findings of Fact and Award Re Medical Treatment and Penalties" (F&A) issued on April 12, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part that applicant is entitled to treat outside the defendant's Medical Provider Network (MPN) pursuant to Labor Code[2] section 4603.2(a)(2) and that defendant's notices to transfer care into the MPN were defective. The WCJ further found that defendant unreasonably delayed medical treatment and awarded penalties on the delayed medical treatment. Finally, the WCJ awarded applicant's attorney a fee of $28,935.00 pursuant to section 5814.5.

Defendant contends, in pertinent part, that a prior determination that applicant may treat outside the MPN pursuant to section 4603.2(a)(2) does not preclude defendant from later transferring care back into the MPN. Defendant further contends that it properly transferred applicants care back into the MPN. Lastly, defendant challenges the award of attorney's fees

[1] Commissioners Sweeney and Lowe were on the panel that issued the order granting reconsideration. Commissioners Sweeney and Lowe no longer serve on the Appeals Board. New panel members have been appointed in their place.

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

because defendant argues it had a reasonable basis for denying further non-MPN treatment. Defendant further challenges applicant's attorney's bill of particulars as excessive.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we correct the Opinion on Decision for error and amend the Findings of Fact to indicate that defendant may not compel applicant to seek treatment within the MPN, but otherwise deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will affirm the April 12, 2021 F&A.

FACTS

The procedural history of this case was detailed in the WCJ's Report as follows:

> This matter was previously the subject of a November 16, 2018 Findings of Fact and Award. Therein, it was determined that applicant Nancy Whalen, while employed on December 21, 2007, as a licensed vocational nurse, occupational group number 311, at Altadena, California, by Five Acres Boys & Girls Aid Society, insured by United States Fires Insurance Company, administered by Crum and Forster, sustained injury arising out of and in the course of employment to the right wrist, bilateral knees, back, right thumb, ·psyche, upper GI system, colonic/rectal system, hypertensive cardiovascular disease, headaches, sleep disorder, right hand, and fingers. Permanent disability and future medical care were awarded. Additionally, Findings of Fact No. 16 determined that the defendant had failed to provide the required notices under Title 8, Cal. Code Regs. § 9767.9 to compel applicant to treat within its MPN. Following defendant's December 13, 2018 Petition for Reconsideration, the decision was affirmed by the Workers' Compensation Appeals Board on January 30, 2019. That decision is now final.
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> Supplemental proceedings involving penalties were brought to trial on May 21, 2020, with the resulting Supplemental Findings of Fact and Award issuing July 6, 2020. The Award .included the award of attorney fees per Labor Code § 5814.5, billed in quarter hour increments. No appeal was taken therefrom. That decision is now final. These supplemental proceedings concern two areas of dispute: (1) whether defendant can compel the applicant to treat within its MPN, and if so, whether it has properly effectuated a transfer of care, and (2) various penalty and related attorney fees issues.

Trial was held on February 25, 2021, and the following issues were framed for decision:

1. Whether the applicant has been properly transferred into Defendant's Medical Provider Network.

   a. Whether the applicant may be compelled to treat within the Defendant's Medical Provider Network pursuant to Labor Code§ 4603.2(a)(2).

   b. If the answer is in the affirmative, whether defendant has complied with Title 8, Cal. Code Regs. § 9767.9 such that it may compel applicant to treat within its Medical Provider Network.

2. The 10.5 hours of time as set forth in the May 13, 2020 Bill of Particulars and as deferred in prior trial proceedings.

3. The January 10, 2020 Petition for Penalties pursuant to Labor Code § 5814 and 5814.5.

4. The two hours as set forth on the January 14, 2020 Bill of Particulars and as deferred in prior trial proceedings.

5. The August 4, 2020 Bill of Particulars.

6. The February 21, 2021 Bill of Particulars.

7. Whether the hourly increments as set forth in the Bill of Particulars is appropriate at the quarter hour versus the tenth of the hour.

8. Defendant's objection to the Bill of Particulars section for non-substantive legal work (e.g. leaving a message with assistant asking if the attorney is available) and what is reasonable for the tasks completed.

9. Attorney fees.

No witnesses were called to testify although defendant made an offer of proof in lieu of testimony, which was entered into the record without objection. Extensive additional exhibits were offered into evidence for both applicant and defense. Both applicant and

> defendant filed briefs, which were read and considered, including applicant's March 16, 2021 objection to the attachments to defendant's March 15, 2021 trial brief.
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> The court issued its decision on April 8, 2021 (served April 12, 2021). Therein, it was determined that pursuant to Labor Code § 4603.2(a)(2), there had been a prior final determination that applicant was entitled to treat outside defendant's MPN, that applicant continued to be entitled to treat outside defendant's MPN, and that defendant could no longer seek to compel applicant to treat within its MPN.
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> The decision further determined that defendant's Transfer of Care Notices to the applicant were uniformly defective, and that the defendant had unreasonably delayed medical treatment to the applicant when it denied authorization for more than one year on the grounds that applicant was treating outside its network. Finally, attorney fees were awarded, after adjustments described in the Opinion, but generally based on applicant's Counsel's Bills of Particulars which were billed in quarter-hour increments.
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> Aggrieved by these findings, defendant has filed a Petition for Reconsideration. Defendant avers the language of§ 4603.2(a)(2) limits its application to the physician at the time of the finding of entitlement to non-MPN treatment, and that applicant's 2019 change of primary treating physician terminated applicant's rights to non-MPN treatment. Defendant maintains its Transfer of Care notices were correct, and served to compel the applicant to treat within defendant's MPN. As such, defendant maintains there was no delay in medical treatment, and if there was, that defendant maintained genuine doubt as to its liability for said treatment. Finally, defendant objects to the quarter-hour billing increments used by applicant's counsel, and the corresponding award of attorney fees predicated thereon.

(WCJ's Report, pp. 3-5.)

This matter was previously decided in 2018, where it was noted that applicant had been treating outside of defendant's MPN for years and that defendant failed to properly bring applicant back within the MPN because its notices were defective. (Findings of Fact and Award, November 16, 2018.) Thereafter, applicant continued to treat outside the MPN, until defendant again sought to transfer applicant back within the MPN. (Defendant's Exhibits BB, CC, GG, and HH.) During this second period when defendant disputed whether applicant was permitted to continue treatment

outside the MPN, defendant refused to authorize treatment outside the MPN. (See, e.g., Defendant's Exhibits KK and LL; Applicant's Exhibits 154, 156, and 158.)

DISCUSSION

Defendant's liability for medical treatment arises under section 4600, which requires defendant to provide reasonable medical treatment to cure or relieve the effects of an industrial injury. Reasonable and necessary medical treatment shall be provided by the employer. (§ 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." (*Ibid*.) The Supreme Court has discussed the consequences of an employer's refusal to provide medical treatment:

> [T]he employer is given initial authority to control the course of the injured employee's medical care. Section 4600 requires more than a passive willingness on the part of the employer to respond to a demand or request for medical aid. This section requires some degree of active effort to bring to the injured employee the necessary relief. Upon notice of the injury, the employer must specifically instruct the employee what to do and whom to see, and if the employer fails or refuses to do so, then he loses the right to control the employee's medical care and becomes liable for the reasonable value of self-procured medical treatment.

(*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd*. (1983) 34 Cal. 3d 159, 165 (internal citations omitted).)

Section 4603.2(a)(2) reads, in pertinent part:

> (2) If the employer objects to the employee's selection of the physician on the grounds that the physician is not within the medical provider network used by the employer, and there is a final determination that the employee was entitled to select the physician pursuant to Section 4600, the employee shall be entitled to continue treatment with that physician at the employer's expense in accordance with this division, notwithstanding Section 4616.2.

(§ 4603.2(a)(2).)

Applicant argues that she is permitted to treat outside the MPN indefinitely upon application of this section. Defendant argues that the section only applies to the primary treating physician who triggered application of section 4603.2(a)(2). Defendant argues that once applicant

changes the primary treater, defendant is permitted to transfer applicant's care back into the MPN. We need not decide on this issue in this case. Even assuming that defendant is correct and the term 'that physician' only applies to a single doctor, defendant must be careful when disputing the provision of medical treatment and seeking to bring an applicant back within the MPN. That is because, and notwithstanding any possible interpretation of section 4603.2, defendant may not unreasonably deny medical treatment pursuant to section 4600 and the holding of *Braewood*. To do so permits applicant to continue treatment outside the MPN, notwithstanding section 4603.2.

We agree with the WCJ's analysis that defendant's transfer of care notices were statutorily defective. Accordingly, defendant's denial of treatment while this dispute was pending was not reasonable and applicant is permitted to continue treat outside the MPN with her presently selected primary treater. That is because defendant unreasonably denied medical treatment pursuant to section 4600. In the future, and to avoid duplication of such disputes, defendant may wish to seek judicial resolution of a dispute prior to terminating treatment. When a defendant unilaterally terminates provision of medical treatment, it does so at its own peril.

Applicant is presently permitted to treat outside the MPN due to defendant's violation of section 4600. We see no reason to disturb the findings of the WCJ and to the extent that the WCJ recommends correcting the Opinion on Decision, that is not necessary as the controlling aspect of the case is the F&A.

Accordingly, as our Decision After Reconsideration we will affirm the April 12, 2021, F&A. (See Lab. Code §§ 5806, 5807.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the F&A issued on April 12, 2021, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 14, 2025

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

NANCY WHALEN
GLASS LAW FIRM
MULLEN & FILIPPI, LLP

EDL/mc

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