

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARIA SOTO,

Applicant,

vs.

SAMBRAILO PACKAGING; ZENITH
INSURANCE COMPANY,

Defendants.

Case No. ADJ9079342
(Santa Barbara District Office)

OPINION AND DECISION
AFTER
RECONSIDERATION

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the petition for reconsideration. Having completed our review, we now issue our Decision After Reconsideration.¹

Defendant, Sambrailo Packaging, by and through its insurer, Zenith Insurance Company, seeks reconsideration of the Expedited Findings and Award, issued September 3, 2014, in which a workers' compensation administrative law judge (WCJ) held that applicant Maria Soto was entitled to obtain medical treatment outside defendant's Medical Provider Network (MPN), finding defendant's MPN was not in compliance with the applicable access standards by not having three orthopedic specialists willing to treat applicant within the applicable geographic area.

Defendant contests the WCJ's finding that applicant is entitled to obtain medical treatment outside its MPN, contending that applicant has failed to establish that defendant has neglected or refused to provide medical treatment, that the WCJ lacks jurisdiction to consider a challenge to the validity of its MPN on the grounds that it does not meet the statutory access standards, and that there are 46 physicians within the applicable access standard for a rural area who are qualified to act as applicant's primary treating physician. Defendant further argues that the WCJ erred in concluding that the MPN failed to meet the access standards because it did not have three orthopedic surgeons willing to be applicant's

¹ The composition of the panel has changed due to the unavailability of Chairwoman Caplane.

1 primary treating physician, as applicant is required to select from among available MPN physicians who
2 are capable of assuming the role of primary treating physician.

3 Applicant has filed an answer to defendant's petition, and the WCJ has prepared a Report and
4 Recommendation on Petition for Reconsideration recommending that defendant's petition be denied.

5 For the reasons set forth below, we shall find that applicant is not entitled to obtain medical
6 treatment outside defendant's MPN.

7 I.

8 Applicant sustained an admitted injury to her right shoulder, neck and low back on October 7,
9 2011, while employed as an assembler by Sambrailo Packaging in Santa Maria, California. She was
10 referred for treatment to Zenith's MPN in Santa Maria, Central Coast Industrial Care, where applicant
11 lives and worked. Central Coast referred applicant to two orthopedic specialists in Solvang. Applicant
12 states that the "MPN included 9 orthopedic doctors but only one (1) would treat backs." Applicant
13 therefore notified Zenith that the MPN did not meet the applicable access standards and selected Dr.
14 Scheinberg, a non-MPN physician located in Santa Barbara, approximately 70 miles away, to treat her
15 shoulder and back. Defendant declined to authorize such treatment outside the MPN.

16 At a hearing on January 22, 2014, the parties stipulated that the defendant had a validly formed
17 MPN. At issue was whether the MPN complied with the MPN physician access standards of having three
18 orthopedists willing to treat the applicant. They stipulated there was only one. At a subsequent hearing
19 applicant agreed to treat with an MPN neurosurgeon, Dr. Kissel, but Dr. Kissel declined to accept the
20 applicant.

21 The matter was then tried on the issues of whether the WCJ has jurisdiction to determine whether
22 the MPN complied with access standards under Administrative Director's Rules 9767.5 and 9767.14,
23 whether the increased geographic access standards in AD Rule 9767.5(b) applied to extend access in a
24 rural area to 30 miles or 60 minutes from the employer's zipcode, whether there are "at least three MPN
25 approved physicians capable of treating common injuries within the defined geographical area," and
26 finally, whether the MPN "has a treating neurosurgeon as stipulated to at the prior hearing."

27 The WCJ found that the MPN was "invalid" as "not having three orthopedic specialists willing to

1 treat," that "access standards and implementation of the MPN are within" the Courts' jurisdiction, and
2 that because the MPN "is not compliant with the access standards" applicant is allowed to treat outside
3 the MPN.

4 Defendant contends that "the WCJ does not have jurisdiction to decide whether Zenith's validly
5 formed MPN meets the statutorily required access standards as any such allegation must be made through
6 a petition filed with the Administrative Director of the DWC," that under rural access standards it has
7 46 physicians within 30 miles or 60 minutes who are fully qualified to act as a primary treating physician
8 in this case, that whether the MPN had three orthopedic specialists was not an issue at the last trial, and
9 that there is no requirement that available primary treating physicians be limited to a particular specialty.

10 Defendant offered the testimony of Dr. Michael Smith, Zenith's MPN Medical Director. He
11 reviewed applicant's medical file and found no indication that her injuries required treatment or
12 evaluation by a neurosurgeon, as treatment of applicant's condition by a neurosurgeon would be "outside
13 of their area of expertise and not within the standard of the community." He reviewed a print out of a
14 search performed for MPN physicians who were available within 60 miles of the employer's zip code,²
15 which identified that there were 79 providers, and there were 33 physicians within 30 miles. Of those, Dr.
16 Smith indicated that applicant's condition could be treated by physicians who wished to practice as a
17 primary treating physician who were familiar with treating the type of injury at issue. He testified that not
18 every specialist is willing to act as a primary treating physician. He further testified that a physician's
19 designated specialty does not necessarily indicate familiarity with the specific injury at issue. Thus a
20 specialist in physical medicine and rehabilitation or an internist or general practitioner, could be qualified
21 to act as a primary treating physician for applicant's injuries, if an orthopedist was not available within
22 the applicable access standard. If a specific specialty was required to provide treatment, such as an
23 orthopedic surgeon, the primary treating physician could refer applicant to an MPN specialist, and if
24 none were available, applicant could be referred to a physician outside the MPN.

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26 ² Labor Code section 4616(a)(1) requires the MPN to have sufficient physicians in the "geographic area
27 where the employees are employed." *Robles v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases
168 [writ denied], held that the statutory language measuring the distance from the place of employment
prevailed over the Administrative Director's Rule that allowed the measurement from an employees
residence.

1 According to Mr. Arden Taber, the manager of Zenith's MPN, to the extent that applicant
2 requested a referral from a primary treating physician to an orthopedic surgeon as a specialist, the rural
3 designation of defendant's MPN requires that such physicians must be available within 60 miles or 120
4 minutes of the employer's zip code. If no orthopedic specialist within the relevant geographic area was
5 available to provide the recommended treatment, Mr. Taber testified that treatment outside the MPN
6 would be allowed.

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8 II.

9 As to defendant's contention that the WCJ erred in Finding of Fact 1, that the MPN was
10 "invalid," the parties stipulated at the July 15, 2014 hearing that the MPN was "validly formed."
11 Therefore, there is no issue before us as to the validity of the MPN. In any event, the Administrative
12 Director and not the WCJ determines the validity of the MPN, which is subject to review by the Appeals
13 Board. (Labor Code § 4616(b)(5) and WCAB Rule 10959.)

14 The actual issue before the WCJ was whether or not, under the circumstances of this case, the
15 MPN provided applicant with access to a sufficient number of orthopedic specialists within the
16 appropriate geographical area who will assume the role of primary treating physician. The WCJ
17 determined that the MPN did not provide such access and therefore that the applicant could treat outside
18 the MPN.

19 It is this determination that we find is not supported by the record.

20 In creating the MPN system, the Legislature provided employers with a greater degree of control
21 over medical treatment than they had previously exercised. (Lab. Code, § 4616 et seq.) It mandated that
22 the employer initiate treatment within the MPN by arranging the initial medical evaluation to begin
23 treatment. (Lab. Code, § 4616.3(a).) Subsequent to the first medical visit arranged by the employer, an
24 injured worker is entitled to change treating physicians, but is limited to selecting her treating physician
25 from within the MPN.

26 The MPN is required to have "an adequate number and type of physicians . . . to treat common
27 injuries experienced by injured employees based on the type of occupation or industry in which the
employee is engaged, and the geographic area where the employees are employed." (Lab. Code, §

1 4616(a)(1).²

2 Labor Code section 4616.3(d)(1) provides that “[s]election by the injured employee of a treating
3 physician and any subsequent physicians shall be based on the physician’s specialty or recognized
4 expertise in treating the particular injury or condition in question.”³ Thus, the Legislature requires that an
5 MPN make available an adequate selection of physicians of specialties or expertise appropriate to the
6 particular injury or condition in question to undertake the role of primary treating physician. If the MPN
7 provides access to an appropriate selection of physicians, it will satisfy the access requirements
8 applicable to the selection of a specialist or physician with appropriate expertise to provide medical
9 treatment. Applicant would not be permitted to obtain her medical treatment outside defendant’s MPN,
10 but would be required to select a specialist or physician with appropriate expertise as her primary treating
11 physician from within the MPN.

12 The question is whether defendant’s MPN provides the requisite selection of physicians available
13 to assume the role of a primary treating physician. The Legislature intended that an injured worker will
14 be able to select a primary treating physician who has the necessary specialization or expertise in treating
15 her injury. Labor Code section 4616.3(d)(2) provides that “[t]reatment by a specialist who is not a
16 member of the medical provider network may be permitted on a case-by-case basis if the medical
17 provider network does not contain a physician who can provide the approved treatment and the treatment
18 is approved by the employer or insurer.”

19 The Administrative Director drafted regulations to implement the MPN system, including the
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²Lab. Code, § 4616(a)(1)

22 . . . The number of physicians in the medical provider network shall be sufficient to enable treatment for
23 injuries or conditions to be provided in a timely manner. The provider network shall include an adequate
24 number and type of physicians . . . to treat common injuries experienced by injured employees based on
25 the type of occupation or industry in which the employee is engaged, and the geographic area where the
26 employees are employed.

³Lab. Code, § 4616.3 (d)

(1) Selection by the injured employee of a treating physician and any subsequent physicians shall be
26 based on the physician’s specialty or recognized expertise in treating the particular injury or condition in
27 question.

(2) Treatment by a specialist who is not a member of the medical provider network may be permitted on
a case-by-case basis if the medical provider network does not contain a physician who can provide the
approved treatment and the treatment is approved by the employer or the insurer.

1 requirements for access to, and selection of, physicians to provide medical treatment to injured workers.
2 Administrative Director's Rule 9767.5(a), subsections (1) and (2), provide access standards which
3 require MPNs to have available, within 30 minutes/15 miles or 60 minutes/30 miles, at least three
4 physicians of each specialty expected to treat common injuries based on the type of occupation or
5 industry. In this case, the Division of Workers' Compensation has approved the designation of
6 defendant's place of employment as a "rural area," pursuant to Rule 9767.5(b). (Def. Exh. A & B.) In his
7 Opinion on Decision, the WCJ acknowledged that the rural designation acts to double the standards for
8 access to primary treating physicians.⁵

9 Therefore, defendant's MPN is required to have "primary treating physicians" available within 60
10 minutes/30 miles of applicant's home or work, and "specialists who can treat common injuries
11 experienced by covered injured employees," to be 120 minutes/60 miles from an injured workers home
12 or work. Neither the statutes or the Rules provide a detailed level of guidance as to the type of medical
13 specialty reasonably expected for each type of occupation and industry, since it will vary depending upon
14 the occupation and industry involved in each case.

15 The relevant regulations which define a primary treating physician do not preclude applicant's
16 selection of an orthopedic physician as her primary treating physician. This is consistent with Section
17 4616.3(d), Rule 9785(a) and Rule 9767.5(a), which instruct both employer and employee that the
18 primary treating physician should be an appropriate specialist or expert. The right to designate a
19 specialist as a primary treating physician was expressly recognized in *Magana v. First Alarm*, 2012 Cal.
20 Wrk. Comp. P.D. LEXIS 364 (ADJ938670). In that case, an Appeals Board panel upheld a WCJ's
21 finding that in the absence of a dispute over diagnosis or treatment, the applicant was entitled to select a
22 pain management physician as a primary treating physician. The issue of the applicable access standards
23 was not addressed. The same recognition of specialists as primary treating physicians was made in
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26 ⁵ The WCJ concluded that it was "inappropriate" for defendant to rely upon the rural designation to
27 enlarge the geographic area to increase the number of available MPN physicians, because it would
inconvenience applicant by making her travel greater distance to obtain medical treatment. We note,
however, that applicant selected a non-MPN physician in Santa Barbara, 70 miles away, which is more
than double the access standard for access to a primary treating physician in a rural area.

1 *Gomez v. Fastenal*, 2013 Cal. Wrk. Comp. P.D. LEXIS 47 (ADJ8205235), where an Appeals Board
2 panel held that the refusal by a specialist to assume the role of primary treating physician did not permit,
3 of itself, the injured worker to obtain medical treatment outside the MPN.

4 In *Gomez*, the panel noted:

5 It is not a reasonable interpretation of the requirements of Labor Code
6 section 4616.3, that an injured worker is entitled to select a specialist
7 outside the MPN, if a specialist selected from within the MPN is
8 unwilling to assume the role of primary treating physician, *provided*
9 *there are other MPN physicians that meet the access standards*
10 *available who are able to assume the role of primary treating physician.*
11 In most non-emergent cases, an applicant will select a primary treating
12 physician to provide necessary medical treatment within his area of
13 expertise. The primary treating physician may then refer to a specialist
14 to provide a consultation or treatment as a secondary treating physician.
15 The refusal of a specialist to assume the responsibility of a primary
16 treating physician will not negate the validity of the MPN or necessarily
17 give applicant the right to obtain medical treatment outside the MPN.
18 While a specialist in an appropriate medical specialty may agree to
19 assume the role of a primary treating physician, *the refusal of a*
20 *specialist to do so will not allow applicant to go outside the MPN, if*
21 *there are other physicians within the geographic area who are willing to*
22 *assume that role.* (Emphasis added.)

23 To the extent applicant was unable to obtain the agreement of a neurosurgeon within the
24 applicable geographic area to assume the role of primary treating physician, we note the testimony of Dr.
25 Michael Smith, Zenith's MPN Medical Director, that there was no medical reason for the selection of a
26 specialist in neurosurgery to treat applicant's orthopedic injury, as any surgery needed to applicant's
27 injured body parts would be outside the area of a neurosurgeon's specialty.

Defendant has provided evidence that there are a sufficient number of available physicians within
the rural geographic area with specialties capable of providing applicant's primary care, even if a
physician with the specific specialty selected by applicant is unavailable. If applicant requires specialty
medical treatment, applicant can be referred to specialist by her primary treating physician selected from
within the MPN. If an MPN specialist is not available within the applicable rural access standards,
applicant may be referred to a non-MPN specialist. However, applicant has not establish that defendant
has violated the applicable rural access standards for selecting her primary treating physician. Therefore,
applicant is not entitled to select a physician as her primary treating physician, at defendant's expense,

1 that is not a member of the MPN.

2 For the foregoing reasons,

3 **IT IS ORDERED** that as our Decision After Reconsideration, the Expedited Findings of Fact
4 and Order is **AMENDED** as follows.

5 **FINDINGS OF FACT**

6 1. Defendant has a valid Medical Provider Network.

7 2. The access standards applicable to defendant's Medical Provider Network provide that
8 defendant have at least three physicians within 30 miles or 60 minutes of the workplace capable
9 of treating common injuries within the defined geographical area.

10 3. Applicant has not established that defendant has refused or neglected to provide medical
11 treatment through its Medical Provider Network.

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ORDER

IT IS ORDERED that applicant is not entitled to obtain her medical treatment outside the Medical Provider Network at defendant's expense.

WORKERS' COMPENSATION APPEALS BOARD

K Zalewski
KATHERINE ZALEWSKI

I CONCUR,

Deidra E. Lowe
DEIDRA E. LOWE

Richard L. Newman
DEPUTY
RICHARD L. NEWMAN



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 29 2016

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

- MARIA SOTO
- WILLIAM WOLFF
- GREENUP TURCHIN

SV/pc

[Handwritten signature]

SOTO, Maria