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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EDWARD BAUTISTA,

Applicant,

vs.

ARLON GRAPHICS; TRAVELERS,

Defendants.

Case No. **ADJ9549773**
(Santa Ana District Office)

**OPINION AND ORDER DISMISSING
PETITION FOR RECONSIDERATION
AND DISMISSING PETITION FOR
REMOVAL**

Applicant seeks either reconsideration of the September 23, 2015 Findings And Order of the workers' compensation administrative law judge (WCJ), or removal of the case to the Appeals Board. The WCJ found in pertinent part that "referral to a psychologist pursuant to Labor Code Section 4616.3 and [Labor Code section 4616.4] is not appropriate at this time." The WCJ ordered applicant to attend his scheduled appointment with his primary treating physician Peter Borden, M.D., and further ordered the parties to "draft an interrogatory to Dr. Borden in advance of the appointment which specifically requests that Dr. Borden address the issue of a diagnosis of anxiety and whether referral for psychological consult/treatment is reasonable and necessary."

It is admitted that applicant sustained industrial injury to his ribs, pulmonary system, lumbar spine and right ankle in the course of his employment by defendant as a machine operator on April 6, 2014, and he also claims industrial injury to his psyche and sleep disorder.

Applicant contends that Labor Code section 4616.3 and the Rules of the Administrative Director (AD), Rule 9767.7 (Cal. Code Regs., tit. 8, § 9767.7) entitle him to obtain a second opinion from a physician he selected in defendant's Medical Provider Network (MPN).

An answer was not received.

The WCJ provided a Report And Recommendation Of California Workers' Compensation Administrative Law Judge On Petition For Reconsideration (Report) recommending that applicant's petition be denied.

1 Applicant's petition is dismissed.

2 Reconsideration is only available to challenge a final order, decision or award that determines a
3 substantive right or liability of those involved in the case, and is not available to challenge interim orders,
4 which do not decide a threshold issue, such as the WCJ's September 23, 2015 intermediate decision.
5 (Lab. Code, § 5900; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (Pointer)* (1980) 104
6 Cal.App.3d 528 [45 Cal.Comp.Cases 410]; *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81
7 Cal.App.4th 1068 [65 Cal.Comp.Cases 650].)

8 To support removal, a petitioner must demonstrate, 1) that a WCJ's order, decision, or action will
9 result in "significant prejudice" and/or "irreparable harm," and 2) that reconsideration will not be an
10 adequate remedy after the issuance of a final order, decision, or award. (Cal. Code Regs., tit. 8,
11 §10843(a).) Removal to the WCAB is an extraordinary remedy which will be denied absent a showing
12 of substantial prejudice or irreparable injury. (*Kleemann v Workers' Comp. Appeals Bd.* (2005) 127
13 Cal.App.4th 224, footnote 2 [70 Cal.Comp.Cases 133]; *Swedlow, Inc. v. Workers' Comp. Appeals Bd.*
14 (*Smith*) (1983) 48 Cal.Comp.Cases 476 [writ den.].) In this case, applicant makes no specific showing of
15 any significant prejudice or irreparable harm that would result from compliance with the WCJ's
16 September 23, 2015 order.

17 **BACKGROUND**

18 The WCJ provides the factual and procedural background along with the reasons for her decision
19 in her Report in pertinent part as follows:

20 Edward Bautista, born May 22, 1985, while employed on April 6, 2014 as
21 a machine operator by Arlon Graphics, sustained injury arising out of and
22 in the course of employment to his ribs, pulmonary system, lumbar spine,
and right ankle and claims to have sustained injury arising out of and in the
course of employment to his psyche and sleep disorder.

23 Applicant has elected orthopedist Dr. Peter Borden as his primary treating
24 physician.

25 Dr. Borden is in the defendant's MPN. Applicant has sustained significant
26 orthopedic injuries for which he has received treatment. The applicant has
27 credibly testified to symptoms of anxiety which he has verbalized to Dr.
Borden. Dr. Borden fails to diagnose anxiety or refer applicant for an
opinion on the issue of psychological treatment to a psychologist or
psychiatrist.

1 Applicant asserts that he may utilize the second and third opinion process
2 as set forth in Labor Code Section 4616.3 to obtain a second opinion from
3 a psychologist. The Court found that use of the second and third opinion
4 process was not appropriate at this time and that applicant should maintain
his appointment with Dr. Borden on October 8, 2015 and ask Dr. Borden to
specifically comment on the need for psychological medical treatment...

5 The Court found the applicant's testimony to be credible regarding
6 symptoms of anxiety and lack of sleep. The Court noted in [Cal. Code
7 Regs., tit. 8, § 9767.7] that if the treating physician reviews applicant's
8 record and he or she determines the treatment/diagnosis is outside of his or
9 her expertise, then that treating physician would recommend referral to a
10 physician in the appropriate specialty.

11 The treating orthopedist has not made a diagnosis of anxiety and the Court
12 found that referral for a second opinion to a psychologist would not be the
13 appropriate referral for a second opinion. It seems as though if applicant is
14 not satisfied with the diagnosis from Dr. Borden the orthopedist, he should
15 seek a second opinion from an orthopedist as to whether treatment for
16 anxiety is indicated or whether applicant should be referred to a
17 psychologist.

18 To find otherwise would circumvent the second opinion process. To find
19 applicant could seek a second opinion from a psychologist, would not be in
20 the spirit of the legislative intent. This would allow injured workers to
21 refer out to various specialties independently instead of going through the
22 primary treating physician.

23 To find applicant may use a psychologist for a second opinion would be
24 exceeding the Court's authority and power. The Court found the most
25 efficient way to resolve this issue is to directly ask the treating doctor if
26 applicant needs a referral for treatment for anxiety. The applicant has an
27 appointment with his treating doctor on October 8, 2015. Applicant
testified that Dr. Borden thought he should be treated for anxiety.

If the treating doctor finds applicant in need of such a referral, this would
resolve the dispute. If Dr. Borden does not find applicant requires a
referral to a psychologist, then applicant could obtain a second opinion
from an orthopedist.

21 DISCUSSION

22 Labor Code section 4616.3 addresses certain rights of an injured worker who is treating within
23 the employer's MPN.¹ Section 4616.3 subdivision (c) provides in full as follows:

24 If an injured employee disputes either the diagnosis or the treatment
25 prescribed by the treating physician, the employee may seek the opinion of
26 another physician in the medical provider network. If the injured employee
27 disputes the diagnosis or treatment prescribed by the second physician, the
employee may seek the opinion of a third physician in the medical provider
network.

¹ Further statutory references are to the Labor Code.

1 In this case, applicant's primary treating physician, Dr. Borden, is an orthopedist. On August 5,
2 2015, applicant's attorney wrote defendant to demand a second opinion from an MPN physician,
3 specifically identifying psychologist Dr. Nogales.² (Applicant's Exhibit 1.) Defendant replied in an
4 August 12, 2015 letter that a "self-referral to psyche treater Dr. Nogales is not permitted, would not
5 constitute a valid second opinion and would be considered self-procured." (Defendant's Exhibit D.)

6 Applicant filed a Declaration of Readiness to Proceed to Expedited Hearing, asserting that
7 defendant was unreasonably denying medical treatment. As shown by the WCJ's Report, she concluded
8 that applicant should first directly seek a referral to a psychologist from Dr. Borden, and if that was not
9 provided, he could obtain a second opinion about such a referral from a different orthopedic specialist.
10 The WCJ's conclusion is sound.

11 The admitted injury in this case is orthopedic, and defendant is providing treatment for that injury
12 through its MPN. Under section 4616.3(c) and AD Rule 9767.7, applicant has a right to obtain a second
13 opinion physician in the MPN if he disputes either the diagnosis or the treatment prescribed by the
14 treating physician. However, applicant does not dispute the treatment he has received from Dr. Borden,
15 and he has yet to be diagnosed by that physician with regard to his claim of psychiatric consequence
16 from the orthopedic injury. In this situation, it is necessary to first obtain a diagnosis from the treating
17 physician regarding the issue in dispute before there can be a basis to exercise the section 4616.3(h) right
18 to obtain a second opinion. That has not occurred in this case, and the WCJ correctly determined that
19 Dr. Borden should directly "address the issue of a diagnosis of anxiety and whether referral for
20 psychological consult/treatment is reasonable and necessary," as she writes in her Report.

21 Applicant will incur no prejudice by following the WCJ's order, which is not a final
22 determination of either his claim of injury to psyche or of his right to receive medical treatment. The
23 petition for reconsideration or removal is dismissed.

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25 ² Applicant's attorney relied upon and cites the Rules of the Administrative Director (AD) Rule 9767.7 (Cal. Code Regs., tit.
26 8, § 9767.7) in support of the request for the second opinion physician. Similar to section 4616.3(h), AD Rule 9767.7(a)
27 provides in pertinent part as follows: "If the covered employee disputes either the diagnosis or the treatment prescribed by the
primary treating physician or the treating physician, the employee may obtain a second and third opinion from physicians
within the MPN. During this process, the employee is required to continue his or her treatment with the treating physician or
a physician of his or her choice within the MPN."

1 For the foregoing reasons,

2 **IT IS ORDERED** that applicant's petition for reconsideration of the September 23, 2015
3 Findings And Order of the workers' compensation administrative law judge, or in the alternative, for
4 removal of the case to the Appeals Board is **DISMISSED**.

5 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **KATHERINE ZALEWSKI**

10 **I CONCUR,**

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12 **JOSÉ H. RAZO**

13 **I DISSENT (SEE SEPARATE DISSENTING OPINION),**

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15 
16 **MARGUERITE SWEENEY**



17
18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19 **NOV 13 2015**

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

22 **EDWARD BAUTISTA**
23 **SMAILI & ASSOCIATES**
24 **DIMACULANGAN & ASSOCIATES**

25 **JFS/abs**
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1 **SEPARATE DISSENTING OPINION OF COMMISSIONER SWEENEY**

2 I dissent. I would grant applicant's petition and order defendant to authorize an MPN second
3 opinion physician as requested by applicant.

4 The discharge summary from applicant's initial medical provider, Western Medical Group, shows
5 that he sustained significant orthopedic and other injuries when a two ton roll of paper rolled over him
6 while he was at work. (Applicant's Exhibit 3.) In addition to fracturing his ankle, applicant sustained
7 multiple rib fractures that led to respiratory failure requiring intubation and causing damage to his lungs.
8 (*Id.*)

9 After being discharged from Western Medical Group, applicant continued treatment in
10 defendant's MPN with Dr. Borden. In his initial consultation report dated January 26, 2015, Dr. Borden
11 described applicant as showing positive symptoms of "anxiety" and "fatigue," along with muscle pain
12 and the injuries to his musculoskeletal system. (Applicant's Exhibit 2.) However, Dr. Borden did not
13 further address those psychiatric symptoms in his subsequent reports that were received into the record.

14 Applicant appropriately sought a second opinion from an MPN physician regarding his
15 psychiatric symptoms, and he identified an appropriate provider in defendant's MPN. Applicant's right
16 to obtain second opinion from an MPN provider is guaranteed by section 4616.3(c) and AD Rule 9767.7.
17 Nothing in the statute or the AD Rules requires that the injured worker obtain a referral from his or her
18 primary treating physician in order to obtain a second opinion physician. It may be that applicant does
19 not dispute the orthopedic care and diagnosis being provided by his MPN orthopedist Dr. Borden, and it
20 makes no sense to require him to select a different orthopedist in order to obtain the psychiatric
21 evaluation he needs.

22 Applicant is entitled to reasonable medical treatment for his industrial injury. (Lab. Code,
23 § 4600.) He has been experiencing symptoms of anxiety as he testified at trial and as documented by
24 Dr. Borden. Under section 4616.3(c), applicant has an absolute right to obtain a second opinion from an
25 MPN physician with the education, skills, training and experience to properly evaluate his psychiatric
26 condition. The WCJ's decision unnecessarily burdens applicant's right to obtain a psychiatric evaluation
27 by an MPN provider.

1 I would rescind the WCJ's September 23, 2015 decision and order defendant to authorize
2 applicant to obtain a second opinion concerning his psychiatric condition from a qualified provider in
3 defendant's MPN.



4 **WORKERS' COMPENSATION APPEALS BOARD**

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8 **MARGUERITE SWEENEY, COMMISSIONER**

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