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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. **ADJ7582813**

ERNESTO ZARCO,

Applicant,

vs.

**ALLDRIN ORCHARDS, INC.; ZENITH
INSURANCE COMPANY,**

Defendants.

**OPINION AND DECISION
AFTER RECONSIDERATION**

On September 23, 2011, we granted defendant's Petition for Reconsideration of the June 30, 2011 Findings of Fact and Award issued by the workers' compensation administrative law judge (WCJ) wherein the WCJ found that applicant sustained injury to his right leg, neck, back, and abdomen while employed as a farm worker on June 22, 2010. The WCJ further found that applicant is entitled to temporary disability from October 15, 2010 through May 10, 2011 and continuing, that applicant may treat with James Amato, D.C., outside of defendant's Medical Provider Network (MPN) and that the referral to a hernia specialist is appropriate. We granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Defendant contends that the WCJ erred in finding that applicant may treat with Dr. Amato outside of its MPN arguing that it provided applicant with proper notice. Defendant further contends that the WCJ should not have relied on the opinion of Dr. Amato, a non-MPN doctor, to award temporary disability and medical treatment in the form of a referral to a non-MPN hernia specialist.

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

Based on our review of the record and for the reasons discussed below, we will affirm the June 30, 2011 Findings of Fact and Award.

1 Labor Code¹ section 4600(a) provides that:

2 "Medical, surgical, chiropractic, acupuncture, and hospital treatment,
3 including nursing, medicines, medical and surgical supplies, crutches,
4 and apparatus, including orthotic and prosthetic devices and services,
5 that is reasonably required to cure or relieve the injured worker from the
6 effects of his or her injury shall be provided by the employer. *In the case*
7 *of his or her neglect or refusal reasonably to do so, the employer is*
8 *liable for the reasonable expense incurred by or on behalf of the*
9 *employee in providing treatment."* (Lab. Code, § 4600, emphasis
10 added.)

11 Thus, a defendant may be found liable for self-procured medical treatment if it neglects or refuses
12 to provide such treatment. (Lab. Code, § 4600(a).) The California Supreme Court noted that:

13 "[T]he employer is given initial authority to control the course of the
14 injured employee's medical care. [Citations omitted.] Section 4600
15 requires more than a passive willingness on the part of the employer to
16 respond to a demand or request for medical aid. [Citation omitted.] This
17 section requires some degree of active effort to bring to the injured
18 employee the necessary relief. [Citation omitted.] Upon notice of the
19 injury, the employer must specifically instruct the employee what to do
20 and whom to see, and *if the employer fails or refuses to do so, then he*
21 *loses the right to control the employee's medical care and becomes*
22 *liable for the reasonable value of self-procured medical treatment."*
23 *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.*
24 *(Bolton)* (1983) 34 Cal.3d 159, 161-162 [48 Cal.Comp.Cases 566]
25 (citations omitted, emphasis added).

26 Administrative Director Rule 9767.6 provides that:

27 "(a) When the injured covered employee notifies the employer or
insured employer of the injury or files a claim for workers'
compensation with the employer or insured employer, the employer or
insurer shall arrange an initial medical evaluation with a MPN physician
in compliance with the access standards set forth in section 9767.5.

"(b) Within one working day after an employee files a claim form under
Labor Code section 5401, the employer or insurer shall provide for all
treatment, consistent with guidelines adopted by the Administrative
Director pursuant to Labor Code section 5307.27 and as set forth in title
8, California Code of Regulations, section 9792.20 et seq.

"(c) The employer or insurer shall provide for the treatment with MPN

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

1 providers for the alleged injury and shall continue to provide the
2 treatment until the date that liability for the claim is rejected. Until the
3 date the claim is rejected, liability for the claim shall be limited to ten
thousand dollars (\$ 10,000).

4 “(d) The insurer or employer shall notify the employee of his or her right
5 to be treated by a physician of his or her choice within the MPN after the
6 first visit with the MPN physician and the method by which the list of
participating providers may be accessed by the employee.

7 “(e) At any point in time after the initial medical evaluation with a MPN
8 physician, the covered employee may select a physician of his or her
9 choice from within the MPN. Selection by the covered employee of a
10 treating physician and any subsequent physicians shall be based on the
11 physician's specialty or recognized expertise in treating the particular
12 injury or condition in question.

13 “(f) A Petition for Change of Treating Physician, as set forth at section
14 9786, cannot be utilized to seek a change of physician for a covered
15 employee who is treating with a physician within the MPN.” (Cal. Code
16 of Regs., tit. 8, § 9767.6.)

17 After the initial medical evaluation arranged by the employer within the MPN pursuant to section
18 4616.3(a)², “[t]he employer shall notify the employee of his or her right to be treated by a physician of
19 his or her choice,’ including ‘the method by which the list of participating providers may be accessed by
20 the employee.’ (Lab. Code § 4616.3(b); Cal. Code Regs., tit. 8, § 9767.6(d).) In addition, AD Rule
21 9767.6(e) (Cal. Code Regs., tit. 8, § 9767.6(e)) provides that ‘[a]t any point in time after the initial
22 evaluation with a MPN physician, the covered employee may select a physician of his or her choice from
23 within the MPN.’” (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330, 333-334
(Appeals Board en banc).)

24 ² Section 4616.3 provides in relevant part that: “a. When the injured employee notifies the employer of the injury or files a
25 claim for workers' compensation with the employer, the employer shall arrange an initial medical evaluation and begin
26 treatment as required by Section 4600. [¶] b. The employer shall notify the employee of his or her right to be treated by a
27 physician of his or her choice after the first visit from the medical provider network established pursuant to this article, and the
method by which the list of participating providers may be accessed by the employee. [¶] c. If an injured employee disputes
either the diagnosis or the treatment prescribed by the treating physician, the employee may seek the opinion of another
physician in the medical provider network. If the injured employee 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.” (Lab. Code, §
4616.3.)

1 The consequence of defendant's failure to provide required MPN notices was addressed by the
2 Appeals Board in its en banc decision in *Knight v. United parcel Service* (2006) 71 Cal.Comp.Cases
3 1423, 1434 (Appeals Board en banc). Therein, the Appeals Board held that an employer's failure to
4 provide the required notices to an employee of his or her rights under an MPN which results in a neglect
5 or refusal to provide reasonable medical treatment renders the employer liable for reasonable self-
6 procured medical treatment obtained by the employee outside of the MPN. (*Knight v. United parcel*
7 *Service* (2006) 71 Cal.Comp.Cases 1423, 1434 (Appeals Board en banc).) We also held that the burden
8 of proving that the applicant was provided with notice of his rights under the MPN rests with the
9 employer. (Lab. Code, § 5705, *Knight, supra*, 71 Cal.Comp.Cases at p. 1435.)

10 Here, applicant suffered an admitted injury on June 22, 2010 and initially treated at Oak Valley
11 Hospital. Thereafter, he received treatment at Work Wellness through July 26, 2010. (See Applicant's
12 Exhibit 13.) On November 12, 2010, defendant sent applicant a letter in English and Spanish stating
13 that:

14 "Zenith Insurance Company implemented the Zenith Medical Provider
15 Network (ZMPN) on February 1, 2005. The ZMPN is a customized
16 network of physicians, hospitals, outpatient facilities and ancillary
17 services that covers the entire State of California. The goal of the ZMPN
18 is to provide you with access to quality medical care to ensure your
19 recovery and safe return to work. Zenith will pay all approved medical
20 care that is reasonable and necessary and supported by evidence based
21 guidelines for physicians in the ZMPN.

22 "We have received notice that you have chosen to treat with Dr. Amato.
23 This provider is NOT a member of the ZMPN. At this time, we can
24 neither authorize treatment nor provide disability payments based upon
25 reporting from this provider. We have advised Dr. Amato that Zenith
26 will not be remitting payment for your medical care unless they are a
27 member of the ZMPN.

"To assist you in finding a provider who is a member of the ZMPN:

- Please select a provider from the attached regional area listing.
- If you prefer, you can call 1-800-440-5020 to speak with a Zenith customer service representative about selecting an appropriate provider.

"Please notify Zenith of the name of the ZMPN provider you have selected and the date of your initial appointment." (Joint Exhibit BB.)

1 However, despite defendant's November 12, 2010 letter, we are not persuaded that defendant has
2 provided proper MPN notification so as to bring applicant's treatment into the MPN. First, there is no
3 evidence in the record that defendant provided MPN implementation notice at the time the MPN was
4 implemented, at the time of applicant's hire, or at the time of the injury pursuant to Labor Code section
5 4616.3 and Administrative Director Rules 9767.6 and 9767.12. There is no evidence in the record that
6 applicant received notification of the MPN and how it works, that applicant received notification of
7 defendant's continuity of care policy or the determination with regard to applicant's injury, that
8 defendant arranged the initial medical evaluation within one day of applicant's report of injury and began
9 to provide treatment, or that defendant notified applicant of his right to be treated by an MPN physician
10 of his choice after the first visit and to his right to a second and third opinions regarding diagnosis and
11 treatment plans. Moreover, while transferring ongoing care into an MPN is possible, there is no proof in
12 the record that defendant has made a proper attempt to transfer applicant's care into its MPN pursuant to
13 Administrative Director Rule 9767.9. Until the injured covered worker is transferred into the MPN, the
14 employee's physician may make referrals to providers within or outside the MPN. (Cal. Code of Regs.,
15 tit. 8, § 9767.9.)

16 Here, after receiving emergency room treatment and never having received notice of defendant's
17 MPN, applicant sought out Dr. Amato, with whom he began to treat on October 15, 2010. (See Minutes
18 of Hearing and Summary of Evidence (MOH), 5/11/11, at p. 7:8-17.) Therefore, because defendant
19 failed to provide proper MPN notification and because defendant has not properly sought to transfer
20 applicant's care into the MPN, defendant is liable for reasonable self-procured medical treatment
21 obtained by applicant with Dr. Amato.

22 Accordingly, for the reasons discussed herein, we will affirm the June 30, 2011 Findings of Fact
23 and Award.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision after Reconsideration that the June 30, 2011 Findings of Fact
3 and Award be, and it hereby is, **AFFIRMED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

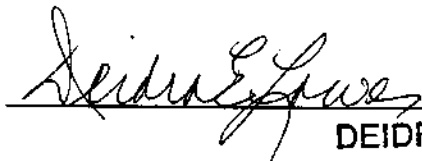
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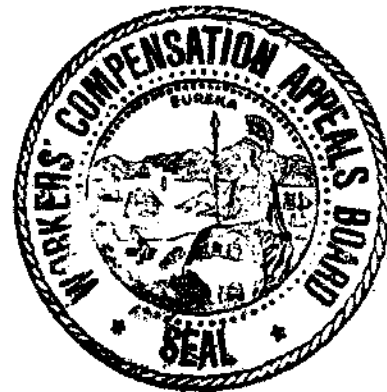
8 **I CONCUR,**

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12 RONNIE G. CAPLANE

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15 DEIDRA E. LOWE



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

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19 **JAN 06 2012**

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

22 **OCCUPATIONAL INJURY LAW CENTER**
23 **MULLEN FILIPPI**
24 **ERNESTO ZARCO**

25 **PAG/csl**

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1 **WORKERS' COMPENSATION APPEALS BOARD**
2 **STATE OF CALIFORNIA**

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4 **ERNESTO ZARCO,**

5 *Applicant,*

6 **vs.**

7 **ALLDRIN ORCHARDS, INC.; ZENITH**
8 **INSURANCE COMPANY,**

9 *Defendants.*

Case No. ADJ7582813

**OPINION AND ORDER
GRANTING PETITION
FOR RECONSIDERATION**

10
11 Reconsideration has been sought by defendant 11 with regard to a decision filed on June 30,
12 2011.

13 Taking into account the statutory time constraints for acting on the petition, and based upon our
14 initial review of the record, we believe reconsideration must be granted in order to allow sufficient
15 opportunity to further study the factual and legal issues in this case. We believe that this action is
16 necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned
17 decision. Reconsideration will be granted for this purpose and for such further proceedings as we may
18 hereinafter determine to be appropriate.

19 For the foregoing reasons,

20 **IT IS ORDERED** that the Petition for Reconsideration be, and it hereby is, **GRANTED.**

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WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA

Case Nos. ADJ 7582813

ERNESTO ZARCO, <i>Applicant</i>	ALLDRIN ORCHARDS AND ZENITH INS. CO. <i>Defendants</i>
Workers' Compensation Administrative Law Judge: ALLYSON C. HALL	Dates of Injury: 6/22/2010

REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION

INTRODUCTION

Ernesto Zarco, born -----, while employed on 6/22/2010 as a Farmworker, occupational group number deferred, at Ballico, CA, by Alldrin Orchards, sustained injury arising out of and in the course of employment to his right leg, neck, back, and abdomen.

FACTS

This matter came before the WCAB for expedited hearing on 5/11/2011 based on the request for expedited hearing filed by applicant's counsel. The matter was originally set for 5/9/2011, but both parties needed time to get their exhibits together and the matter was continued to 5/10/2011 and again to 5/11/2011 for submission. The matter was submitted, and the WCJ issued a Finding of Fact and Award on 6/30/2011 which the defendant filed its Petition for Reconsideration.

The defendant Zenith objected to the decision of the undersigned finding that it had not provided proper notice to the applicant of the availability of physicians of his choice within its Medical Provider Network. The undersigned therefore found that the applicant was entitled to treat outside of the network. The undersigned also found the applicant was entitled to temporary total disability benefits and that the applicant was entitled to future medical treatment, including

a work-up for his hernia. It is from this decision that the defendant filed its Petition for Reconsideration. It was filed timely.

DISCUSSION

The WCJ reviewed the record in its entirety. At issue for decision was whether the defendant had adequately notified the applicant of the availability to treat within its Medical Provider Network, whether the applicant was entitled to temporary total disability benefits, whether the applicant was entitled to treatment related to his hernia claim, and whether applicant's counsel is entitled to attorneys' fees.

Here, the applicant sought treatment with an industrial clinic initially. He was ultimately not satisfied with the treatment he received and sought treatment elsewhere. It is unclear whether the defendant had notified the applicant of the existence of its MPN initially. There were no exhibits offered by defendant to show that the applicant was notified of the MPN when the claim was originally filed. The applicant was injured on 6/22/2010. Joint AA and Joint BB are printouts from the defendant's MPN on 11/9/2010 and cover letter dated 11/12/2010 respectively. Defendant alleges this is proper notice to the applicant. The undersigned does not agree. Again, the injury was in June. A five month delay in notifying of the existence of an MPN and obligation to treat within it does not appear reasonable.¹ The policy behind a Medical Provider Network is to provide notice of available physicians to an injured worker.² The timeliness of that notice is intended to prevent unreasonable delay in an applicant's access to needed treatment. Defendant's obligation under its MPN not only includes notice, but also includes the obligation to provide adequate numbers of available physicians in specialties

¹ Rule §9767.6 requires notice to the applicant of his or her right to be treated by a physician of his or her choice within the MPN after the first visit, and include the method by which the employee may access the list of participating providers.

² Labor Code §4616.3(b)

within the applicant's choice within a reasonable geographic area of the applicant's residence. It does not appear the defendant met its obligation here and the applicant was entitled to treat outside of the network in order to obtain necessary treatment.³ Defendant's argument that there are adequate numbers of physicians of defendant's choice does not meet the requirement of the rule. The undersigned notes that this is an orthopedic/neuro and general surgery (hernia) injury. Defendant's argument that specialties such as family practice are appropriate to treat applicant's injury is appropriate does not seem to meet the applicant's current medical treatment needs.

Further, since the applicant was determined unable to work and certified for temporary total disability by chosen treating physician Dr. Amato, he is entitled to benefits based on that report.

In addition, the undersigned found the applicant was entitled to treatment for his hernia. Since the applicant is entitled to treat outside of the network with a physician of his choice, defendant's arguments as to which specialties defendant feels the applicant should treat within its network are no longer relevant. Furthermore, any claims that the applicant is not treating with network physicians closer to his home are also irrelevant.

The WCJ's decision was not erroneous. There was ample evidence in the record to support the findings of fact and conclusions of law.⁴

RECOMMENDATION

It is respectfully requested that defendant's petition for reconsideration be denied.

8/9/14


ALLYSON C. HALL
WORKERS' COMPENSATION JUDGE

³ *Garcia v. Ins. Co. of the West* (2008) 36 CWCR 88 (WCAB), holding that the carrier is obligated to provide treatment outside of the MPN (even in Mexico) when an MPN is not available to the applicant.

⁴ *Garza v. WCAB*, (1970), 35 CCC 500.