

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JESUS MARTINEZ,**

5 *Applicant,*

6 vs.

7 **NEW FRENCH BAKERY; Permissibly Self-Insured,**

8 *Defendant.*
9

Case No. **ADJ8764105**
(Oxnard District Office)

**OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

10 Defendant seeks reconsideration of the June 11, 2013 Findings and Order issued by the workers'
11 compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained an
12 admitted industrial injury to his right shoulder and right arm. The WCJ further found that defendant has
13 a valid medical provider network (MPN), that the MPN does not have three physicians who specialize in
14 orthopedics located within 15 miles of applicant's home or workplace, and that defendant's failure to
15 provide applicant with three orthopedists located within 15 miles of applicant's home or workplace
16 constitutes a refusal and/or neglect to provide medical treatment. Based on these findings, the WCJ
17 ordered defendant to authorize applicant to treat with a primary treating physician outside of the MPN.

18 Defendant contends that the WCJ erred in finding that it did not provide adequate treating
19 physicians within 15 miles of applicant's home or workplace arguing that the proper access standard for
20 specialist is 30 miles and 60 minutes.

21 Applicant did not file an answer. The WCJ issued a Report and Recommendation on Petition for
22 Reconsideration (Report) recommending that we deny reconsideration.

23 **I.**

24 Based on our review of the record and for the reasons discussed below, we will grant
25 reconsideration and rescind the WCJ's decision, substituting it with a new Findings of Fact finding that
26 applicant did not carry his burden of showing that there was a neglect, refusal, or denial of medical
27 treatment.

1 II.

2 Applicant sustained an admitted injury to his right shoulder and arm on August 12, 2011. The
3 parties stipulated that defendant has a valid MPN (U.S. HealthWorks). It is undisputed that, after his
4 injury, applicant was sent to the MPN. There are no medical reports from the MPN in evidence and no
5 testimony regarding applicant's treatment there. However, there is an October 18, 2012 utilization
6 review (UR) certificate (defendant's Exhibit I) addressed to Andrzej Bulczynski, M.D., who, according
7 to the allegations of defendant's petition, is an orthopedic surgeon within the MPN. The UR authorizes
8 right shoulder surgery, with the approval being effective through January 18, 2013. It is undisputed that
9 applicant did not have right shoulder surgery although there is no testimony or documentary evidence
10 explaining why he did not.

11 On or about January 25, 2013, applicant obtained counsel. On May 10, 2013, applicant's attorney
12 sent defendant's attorney a letter advising that applicant intended to seek medical treatment outside the
13 MPN because the "MPN is invalid" in that "it does not list three doctors in the specialty required," which
14 later developments indicate was a reference to orthopedic surgeons. (Applicant's Exhibit 5.) The letter
15 states that applicant was selecting Richard Sheinberg, M.D., a physician not within the MPN, to provide
16 medical treatment.

17 At trial, applicant presented a computer printout of an MPN search done on May 30, 2013
18 showing that defendant's MPN had no physicians within the specialty "orthopedic surgery" within 15
19 miles of the 93003 zip code.¹ (Applicant's Exhibit 1 & 2.) Applicant also introduced into evidence two
20 MapQuest driving direction searches indicating that a trip between Oakview and Thousand Oaks was
21 35.13 miles and would take 40 minutes and that a trip between Oakview and Santa Barbara was 35.43
22 miles and would also take 40 minutes. (Applicant's Exhibits 3 & 4, respectively.)

23 In his decision, the WCJ found that defendant's MPN does not have three orthopedists located
24 within 15 miles of applicant's home or workplace and that this failure constituted a refusal and/or neglect

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26 ¹ Applicant's Application for Adjudication of Claim (Application) shows his address as P. O. Box 1194, Oakview, CA 93003.
27 The Official Address Record shows his address as 1480 W. 1st Ave., Oxnard, CA 93033. The Application shows the address
of applicant's employer (New French Bakery) as 4231 Transport Street, Ventura, CA 93003.

1 to provide medical treatment. Accordingly, the WCJ ordered defendant to authorize applicant to utilize a
2 PTP outside the MPN.

3 III.

4 The issue at trial was whether defendant's MPN met the access standards of Administrative
5 Director (AD) Rule 9767.5 and, if not, whether the failure constitutes a refusal or neglect to provide
6 medical treatment. AD Rule 9767.5(a) provides in pertinent part: "A MPN must have at least three
7 physicians of each specialty expected to treat common injuries experienced by injured employees ...
8 within the access standards set forth in (b) and (c). (Cal. Code Regs., tit. 8, § 9767.5(a).) In turn, AD
9 Rule 9767.5(b) provides in pertinent part: "A MPN must have a primary treating physician ... within 30
10 minutes or 15 miles of each covered employee's residence or workplace." (Cal. Code Regs., tit. 8,
11 § 9767.5(b).) Rule 9767.5(c) provides: "A MPN must have ... specialists within 60 minutes or 30 miles
12 of a covered employee's residence or workplace." (Cal. Code Regs., tit. 8, § 9767.5(c).)

13 The first step in analyzing the issues here is to address the burden of proof. Generally, the burden
14 of proof is on the party holding the affirmative of the issue. (Lab. Code, § 5705.) In *Knight v. United*
15 *Parcel Service*, (2006) 71 Cal.Comp.Cases 1423 [Appeals Board en banc], we held that a defendant has
16 the burden of affirmatively proving that an injured employee was provided with notice of rights under an
17 MPN. (*Knight, supra*, 71 Cal.Comp.Cases at p. 1435.) This principle necessarily extends a defendant's
18 burden to affirmatively proving an employee was also provided with the requisite number of physicians
19 or specialists within the requisite geographic distance/travel time pursuant to Rule 9767.5.

20 Here, the WCJ found that defendant failed to provide three orthopedic surgeons located within 15
21 miles of applicant's home or workplace. This finding was in error because the WCJ applied the 30
22 minutes/15 miles access requirements for treating physician under Rule 9767.5(b) rather than the 60
23 minutes/30 miles access standard for specialists, such as orthopedists, under 9767.5(c). However, this
24 error was harmless at this juncture because defendant presented no evidence on the issue of whether it
25 had any orthopedic surgeons (let alone orthopedic surgeons specializing in shoulder surgery) within any
26 particular time or distance from applicant's residence or workplace.

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1 The next step then becomes whether defendant's failure to carry its burden entitles applicant to
2 treat outside the MPN. In *Knight*, the Appeals Board held that a defendant is liable for self-procured
3 treatment outside the MPN if the defendant failed to provide the employee with the required notice(s) of
4 his or her MPN rights and if this failure resulted in a neglect or refusal to provide treatment. *Knight* did
5 not address the issue of which party carries the burden of proof on this issue. However, we are persuaded
6 that it is the applicant's burden to show that a defendant's breach of an MPN duty resulted in a neglect or
7 refusal.

8 Furthermore, we note that Senate Bill (SB) 863 amended Labor Code section 4616.3(b) to
9 provide that failure to provide notice "shall not be a basis for the employee to treat outside the network
10 unless it is shown that the failure to provide notice resulted in a *denial* of medical care." (Lab. Code,
11 § 4616.3(b), as amended by Stats. 2012 ch. 363 (SB 863) (emphasis added).) SB 863 became effective
12 on January 1, 2013 and uncodified section 84 of SB 863 provides that "[t]his act shall apply to all
13 pending matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a
14 basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits." Therefore,
15 as of January 1, 2013, the aforementioned amendments to 4616.3(b) became applicable to any case still
16 pending, except cases that were finally concluded subject only to the WCAB's continuing jurisdiction
17 under sections 5803 and 5804. (Cf., e.g., *E & J Gallo Winery v. Workers' Comp. Appeals Bd. (Dykes)*
18 (2005) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]; *Rio Linda Union School Dist. v.*
19 *Workers' Comp. Appeals Bd. (Scheftner)* (2005) 131 Cal.App.4th 517, 531 [70 Cal.Comp.Cases 999];
20 *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 916 [70 Cal.Comp.Cases 787];
21 *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285–289 [70 Cal.Comp.Cases
22 133].) Moreover, the language that "it is shown that the failure to provide notice resulted in a denial of
23 medical care" affirms that the employee has the burden to prove "a denial of medical care."

24 In this case, applicant did not carry this burden as we find no evidence of a denial of medical
25 treatment. For one, the evidence reflects that defendant authorized the shoulder surgery, but applicant
26 offered no evidence to explain why he did not obtain the shoulder surgery. It appears that applicant
27 wants the Appeals Board to infer that the reason he did not obtain the surgery was because defendant did

1 not have the requisite number of orthopedic surgeons within the requisite time and distance. However,
2 we will not draw that inference. The only arguably relevant evidence applicant presented was that his
3 search of defendant's MPN reflected that it had no physicians within the specialty "orthopedic surgery"
4 within 15 miles of the 93003 zip code. However, as discussed above, this is the incorrect distance
5 standard and there was no stipulation on the record as to applicant's correct address.

6 Accordingly, we will grant reconsideration and rescind the WCJ's decision, substituting it with a
7 new Findings of Fact finding that applicant did not carry his burden of showing that there was a neglect,
8 refusal, or denial of medical treatment.

9 For the foregoing reasons,

10 **IT IS ORDERED** that defendant's Petition for Reconsideration of the June 11, 2013 Findings
11 and Order is **GRANTED**.

12 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
13 Compensation Appeals Board, that the June 11, 2013 Findings and Order is **RESCINDED** and
14 **SUBSTITUTED** with new Findings of Fact, as provided below.

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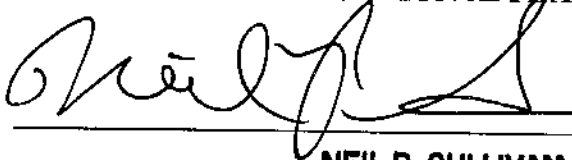
1 **FINDINGS OF FACT**

2 1. Jesus Martinez, born on while employed on August 12, 2011 as a
3 baker, occupational group number 420, at Ventura, California, by New French
4 Bakery, permissibly self-insured and administered by Barrett Business Services,
5 sustained injury arising out of and occurring in the course of employment to his right
6 shoulder and right arm.


7 2. The employer has a valid medical provider network.

8 3. Applicant did not carry his burden of showing that there was a neglect, refusal, or
9 denial of medical treatment.

10 **WORKERS' COMPENSATION APPEALS BOARD**

11  **DEPUTY**
12 **NEIL P. SULLIVAN**

13 **I CONCUR,**

14 
15 **RONNIE G. CAPLANE**
16 **CONCURRING, BUT NOT SIGNING**
17 **ALFONSO J. MORESI**



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

20
21 **AUG 27 2013**

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

24 **HINSHAW CULBERTSON**
25 **JESUS MARTINEZ**
26 **PAUL KINSLER**



27 **PAG/syc**

MARTINEZ, Jesus