

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **JOVANNI MONTELONGO,**

5 *Applicant,*

6 **vs.**

7 **PHIL BRUNO ENTERPRISES, INC., dba**
8 **EXCLUSIVE FRESH, INC.; PROCENTURY**
9 **INSURANCE COMPANY,**

10 *Defendants.*

Case No. ADJ9338499
ADJ9338498
(Oakland District Office)

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION

11 Defendant seeks reconsideration of the March 16, 2015 Findings Of Fact of the workers'
12 compensation administrative law judge (WCJ), who found in Finding of Fact 1 that applicant sustained
13 industrial injury to his back and left knee on January 4, 2014, while employed as a delivery driver, then
14 insured by Procentury Insurance Company (PIC). The WCJ further found in Finding of Fact 5 that
15 "Rising Interplan is the proper Medical Provider Network ("MPN") in this case," and in Finding of Fact
16 6 that the "physician(s) chosen by the Applicant from the Rising Interplan MPN are the proper treating
17 physician(s)."

18 Defendant contends that the WCJ should have found that Midwest Rising is the proper MPN, and
19 that the physicians chosen by the applicant were not from that MPN.

20 An answer was not received from applicant.

21 The WCJ was not available to provide a Report And Recommendation On Petition For
22 Reconsideration.

23 Reconsideration is granted. The WCJ's Finding of Fact 5 and Finding of Fact 6 are reversed as
24 the Decision After Reconsideration. Defendant provided sufficient notice to applicant that Midwest
25 Rising is the proper MPN, and the physicians selected by applicant are not from that plan. Applicant did
26 not show that he was misled or otherwise unable to use the correct MPN, and defendant did not neglect
27 to provide reasonable medical treatment through its MPN.

1 **BACKGROUND**

2 The WCJ provided a summary of the background facts and reasons for his decision in his Opinion
3 on Decision (Opinion), as follows:

4 Jovanni Montelongo, while employed as a delivery driver by Phil Bruno
5 Enterprises, Inc., dba Exclusive Fresh, Inc., sustained admitted injury to his
6 back and left knee on November 2, 2013 (Case No. ADJ9338499) and
7 January 4, 2014 (Case No. ADJ9338498). At the time of both injuries, the
8 employer was insured by Procentury Insurance, with claims administered
9 by Illinois Midwest Insurance Agency.

10 This matter came on for hearing on the sole issue of whether Applicant's
11 current treating physicians (Tariq Mirza, M.D., and Toufan Razi, M.D.) are
12 within the Medical Provider Network. The issue, as framed by the
13 Conference Judge was 'if MPN follows the carrier.'

14 The issue was submitted on a documentary record, without testimony...

15 After Applicant's first injury with Phil Bruno Enterprises, Midwest
16 Insurance sent the Applicant a number of documents, each dated November
17 5, 2013... (Defendant's Exhibit A). One of the documents contained the
18 heading, 'RE: MPN NOTIFICATION.' The document stated, 'Please be
19 advised we utilize the Rising/Interplan medical provider network (MPN).
20 This can be accessed online at <http://midwest.risingms.com>.' A similar
21 package of documents, including the MPN Notification, was sent out after
22 the second injury, dated January 9, 2014 (Defendant's Exhibit A).

23 On February 27, 2014, the injured worker became represented by the Law
24 Offices of Marc Terbeek. The Application for Adjudication of Claim that
25 was filed on March 3, 2014 reflected an Oakland residential address for the
26 injured worker.

27 On March 11, 2014, Applicant's attorney wrote to Midwest Insurance
designating Tariq Mirza, M.D., as primary treating physician. (Applicant's
Exhibit 3.) The letter stated that Dr. Mirza was within 'your MPN list.'
Applicant's Exhibit 2, headed 'Rising Provider Directory,' is a three-page
document ostensibly identifying members of a PPO Network, including Dr.
Mirza. The Uniform Resource Locator ('URL') at the bottom of these
pages is www.viiad.com/risingCompass.

Although it is not made clear by the submitted documents (the Judge's
Notes on the Pretrial Conference Statement are more explicit), it appears
that Applicant's attorney was attempting to appoint a primary treating
physician from the Procentury Insurance Company MPN—'Rising
Interplan'—whereas the adjusting agency uses an MPN called 'Midwest
Rising,' notwithstanding its two letters to the injured worker stating, 'We
utilize the Rising/Interplan Medical Provider Network.' The issue is
further confused by Defense counsel's letter to Applicant's attorney, dated
October 9, 2014 (Applicant's Exhibit 1), identifying
www.viiad.com/risingCompass as the proper website for the MPN.

Prior to the October 9, 2014 letter, both Midwest and Defense counsel had
written to Applicant and/or Applicant's attorney and/or the physicians
appointed by the Applicant to protest that the named doctors were not

1 within their MPN [Defendant's Exhibit D (letters from Midwest to
2 Applicant dated March 7 and March 31, 2014); Defendant's Exhibit E (two
3 letters from Midwest to doctors, dated June 10, 2014, and another letter to
4 doctor dated August 7, 2014); and Defendant's Exhibit F (letters from
5 Defense counsel to Applicant's attorney, dated March 18, 22, and 31,
6 2014)].

7 Neither Applicant nor Defendant has presented any argument on the issue,
8 as framed by the Conference Judge, whether the proper MPN was the
9 insurance company's MPN or the adjusting agency's MPN.

10 Labor Code Section 4616(a)(1), as it existed through 2012, provided in
11 pertinent part:

12 On or after January 1, 2005, an insurer or employer may establish or
13 modify a medical provider network for the provision of medical treatment
14 to injured employees.

15 Effective January 1, 2013, this section was modified (additions indicated in
16 **boldface**)

17 On or after January 1, 2005, an insurer[,] employer **or entity that provides**
18 **physician network services** may establish or modify a medical provider
19 network for the provision of medical treatment to injured employees.

20 From the above, it appears that, prior to 2013, an employer or insurance
21 company could set up a medical provider network, **but not a third party**
22 **adjusting agency**, such as Illinois Midwest Agency. Now, such a medical
23 provider network would be possible. However, it would still have to be
24 approved by the Administrative Director [AD].

25 Defendant argues in its Brief that the Defendant's MPN 'was approved by
26 the AD in 2012.' Obviously, this is not so, since the right for any entity
27 other than the employer or insurer to set up an MPN did not exist in 2012.
28 Defendant cites as evidence Defendant's Exhibit B, identified in the
29 Minutes of Hearing as 'A DWC MPN Approval dated 10/10/14, page 119
30 DIR Directory.' The document furnished by Defendant does not mention
31 Illinois Midwest Insurance Agency. Rather, it shows ProCentury Insurance
32 Company's MPN as 'Rising Interplan,' with a date of approval of March 6,
33 2012. There is no mention in Defendant's Exhibit B of a 'Midwest Rising'
34 medical provider network.

35 Defendant having failed to provide evidence that the Administrative
36 Director has approved 'Midwest Rising' as a medical provider network for
37 Illinois Midwest Insurance Agency, I find that Rising Interplan is the
38 correct Medical Provider Network in this matter and that the physicians
39 chosen by the Applicant's attorney are the appropriately chosen physicians.

40 DISCUSSION

41 In his Opinion, the WCJ does not note the fact that following applicant's admitted injury,
42 defendant promptly provided reasonable medical treatment through the Midwest Rising MPN, and
43 applicant initially designated a treating physician from that MPN. After applicant obtained
44 representation, his attorney designated Dr. Mirza as treating physician. Dr. Mirza is part of the Rising

1 Interplan MPN, but not part of the Midwest Rising MPN. Defendant promptly notified applicant, his
2 attorney and the physician that Dr. Mirza was not authorized to act as a treating physician because he was
3 not in the Midwest Rising MPN. (Defendant's Exhibit D.)

4 While there was potential for confusion because the second MPN is called Rising Interplan, there
5 is no evidence that any actual confusion was caused by the fact that both MPNs have the word "Rising"
6 in their names. When defendant directed applicant to treatment within the Midwest Rising MPN, it sent
7 multiple notices identifying that as the correct MPN along with information about how to access the list
8 of physicians and how to obtain assistance in doing that if needed. (Defendant's Exhibits A, D and F.)¹

9 Applicant presented no evidence that he was misled by the notices defendant sent or by the
10 similarities in the MPN names. In short, there is no evidence that the notices sent by defendant or the
11 similarity in the MPN names caused any actual confusion that constituted a neglect or refusal to provide
12 reasonable medical treatment through the Midwest Rising MPN. (See, Lab. Code, §§ 4600 and 4616(a);
13 cf. *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 87 [31 Cal.Comp.Cases 93]; *Knight v. Liberty*
14 *Mut. Ins. Co.* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc) (*Knight*); Cal. Code Regs., tit. 8,
15 § 9767.9.)

16 The WCJ's reasoning that the PIC's adjuster, Illinois Midwest Insurance Agency (IMIA), was not
17 authorized to have an MPN is not persuasive. The Midwest Rising MPN is on the list of MPNs approved
18 by the AD. (Defendant's Exhibit B.) As such, Midwest Rising is presumed to be a valid MPN, and there
19 is no evidence to the contrary. (Lab. Code, § 4616(b)(1).) No statute or law precludes an insurer from
20 utilizing an MPN of an adjusting agent once the MPN is approved by the AD, as with Midwest Rising.
21 The WCJ's reliance upon language subsequently added to section 4616(a)(1) on that point does not
22 compel a contrary conclusion.

23 Defendant provided applicant with proper notice of his rights in the Midwest Rising MPN and it
24 acted reasonably in providing information about how to obtain a physician in that MPN. Applicant
25

26 ¹ The issue of whether a defendant may cease paying temporary disability indemnity because of an MPN dispute is not before
27 us, and we express no opinion on that.

1 presented no evidence of confusion or mistake caused by the similar MPN names that supports a finding
2 that defendant neglected or refused to provide reasonable medical treatment through the Midwest Rising
3 MPN. Under these circumstances, the WCJ's findings 5 and 6 that Rising Interplan is the proper MPN,
4 and that the physicians chosen by applicant from that MPN are the "proper treating physicians" are both
5 incorrect, and they are reversed.

6 For the foregoing reasons,

7 **IT IS ORDERED** that the defendant's petition for reconsideration of the March 16, 2015
8 Findings Of Fact of the workers' compensation administrative law judge is **GRANTED**.

9 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'
10 Compensation Appeals Board that the March 16, 2015 Findings Of Fact of the workers' compensation
11 administrative law judge are **AFFIRMED**, except that Findings Of Fact numbers 5 and 6 are
12 **RESCINDED** and the following Findings of Fact are **SUBSTITUTED** in their places:

13 **FINDINGS OF FACT**

14 *****

15 5. Midwest Rising is the proper Medical Provider Network ("MPN") in this case.

16 6. The physician(s) chosen by the Applicant from the Rising Interplan MPN are not the proper
17 treating physician(s).

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1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board that the case is returned to the trial level for further proceedings and
3 decisions by a workers' compensation administrative law judge, as appropriate, in accordance with this
4 decision.

5 **WORKERS' COMPENSATION APPEALS BOARD**

6 
7 _____
8 **MARGUERITE SWEENEY**

9 I CONCUR,

10 
11 _____
12 **KATHERINE ZALEWSKI**

13 
14 _____
15 **RONNIE G. CAPLANE**



16
17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

18 **JUN 09 2015**

19
20 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
21 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

22 **JOVANNI MONTELONGO**
23 **LAW OFFICES FOR INJURED WORKER**
24 **BRADFORD & BARTHEL**

25 **JFS/abs** 