

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

Case No. ADJ9028294

JOSE LEYVA,

Applicant,

vs.

KENNETH SMITH ROSE COMPANY,
STAR INSURANCE COMPANY,

Defendants.

FINDINGS, ORDER AND AWARD

DONALD H. JOHNSON, Workers' Compensation Administrative Law Judge, Finds, Orders and Awards as follows:

FINDINGS OF FACT

1. Applicant, Jose Leyva, born December 6, 1973, while employed on April 30, 2013 as a farm laborer, Occupational Group 490, at McFarland, California, by Kenneth Smith Rose Company, sustained injury arising out of and in the course of employment to the low back, left ankle, and right elbow, and claims injury arising out of and in the course of employment to the psyche, legs, hips, and by way of sleep disorder.
2. At the time of injury, Applicant's on-season earnings were \$643.31 per week, warranting on-season indemnity rates of \$428.87 per week for temporary disability, and \$230.00 per week for permanent disability.
3. At the time of injury, Applicant's off-season earnings were \$248.29 per week, warranting off-season indemnity rates of \$165.52 per week for temporary disability.
4. The rose season runs from May 6th to July 9th.
5. The Defendant has a valid, properly-noticed Medical Provider Network (MPN) named Rising Compass.
6. Dr. Robert MacArthur was validly designated as Applicant's Primary Treating Physician (PTP) on August 19, 2013.
7. Dr. MacArthur no longer treats in Bakersfield, California.

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Findings, Order and Award... (Continued) Page 2

8. The fact that Dr. MacArthur no longer treats in Bakersfield does not provide a basis for Applicant to treat outside the Rising Compass MPN.
9. There has been no denial of treatment within the MPN by Defendant.
10. None of the medical reports indicate that Applicant was unable to work, or had any work restrictions.
11. Applicant has failed to meet the burden of proof to show entitlement to any period of temporary disability indemnity.
12. Applicant is in need of further medical treatment to cure or relieve the effects of this injury.
13. There is no pool of funds from which to draw any attorney fee.
14. Rule 9767.1 does not affect any issue in this case.
15. Rule 9767.9 does not affect any issue in this case.

ORDER

1. Dr. Robert MacArthur is Applicant's designated PTP within the Rising Compass MPN, as of August 19, 2013, at whatever address he currently practices at.

AWARD

AWARD IS MADE in favor of Jose Leyva against Kenneth Smith Rose Company as follows:

- (a) Further medical treatment per Finding number 12.



DONALD H. JOHNSON

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on: November 12, 2013
on all parties as shown on the following Service Roster

By: KATHY NIXON *kn*

Service Roster Case Number: ADJ9028294 – November 12, 2013
– Findings, Order and Award

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OPINION ON DECISION

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Designation of Dr. MacArthur as MPN PTP

Applicant's Exhibit 1 is a designation of Dr. Robert MacArthur as Applicant's primary treating physician on August 19, 2013. The parties stipulated that Defendant has a valid, properly noticed MPN named Rising Compass. Both Applicant's Exhibit 2 and Defense Exhibit A show that Dr. MacArthur is a member of Defendant's MPN, the Rising Compass MPN on August 19, 2013 and September 17, 2013 respectively. Dr. Robert MacArthur was validly designated as Applicant's primary treating physician (PTP) within the MPN on August 19, 2013. The parties stipulated that Dr. MacArthur is still in the Rising Compass MPN, but no longer practices in Bakersfield.

Entitlement to Treat Outside the MPN

Applicant argues that since Dr. MacArthur no longer treats in Bakersfield, Applicant is entitled to treat outside the MPN. Under *Cerda*, if Dr. MacArthur is listed as an MPN physician at one address in an MPN, unless there is some provision holding Dr. MacArthur to treat only at that address, Dr. MacArthur remains an MPN physician at a different address from that listed in the MPN.¹ Therefore Dr. Robert MacArthur is Applicant's designated primary treating physician within the MPN, at whatever his new address is.

Under Labor Code §4600(c,) an employee may be treated by a physician of their choice within a reasonable geographic area. However, this requirement is prefaced by an exclusion where the employer or carrier has established or contracted with a medical provider network under Labor Code §4616. Labor Code §4616.3(c) specifies that if the employee disputes the diagnosis or treatment of the treating physician, the employee may seek the opinion of another physician within the medical provider network, and a third within the network after that. There is no limitation specified as to geographic location. Therefore, there is no reasonable geographic area restriction on the selection of a primary treating physician within an MPN.

¹ . *Charter Oak Unified School Dist. v. WCAB (Cerda)*, 76 Cal. Comp. Cases 1083, 1087 (*writ den'd* 2011.)

The fact that Dr. MacArthur no longer treats in Bakersfield does not provide a basis for Applicant to treat outside the MPN.

Rule 9767.1

This was raised as an issue, with the notation that it deals with MPN treatment. No further development of this issue was offered. This Rule is a listing of definitions for Medical Provider Networks. A court need not address contentions unsupported by reasoned argument with citation to authority.² This Rule has not been shown to apply to any issue in this case.

Rule 9767.9

This was raised as an issue, with the notation that it deals with MPN treatment. No further development of this issue was offered. This Rule deals with the transfer of ongoing medical care into the MPN. There was no argument or showing of how any provision of this rule affected an issue in this case. A court need not address contentions unsupported by reasoned argument with citation to authority.³ This Rule has not been shown to apply to any issue in this case.

Labor Code 4616.3

This code section was discussed in the analysis of the entitlement to treat outside the MPN.

Denial of Treatment Within the MPN

Defendant's letter of September 20, 2013 (Exhibit B,) although it advised Applicant's attorney that Dr. MacArthur was no longer practicing in Bakersfield, did not deny the designation of Dr. MacArthur as the PTP. Applicant testified that he received treatment at Central Valley Occupational starting one or two days after the April 30, 2013 injury, and his last treatment there was on the Friday before the trial on October 2, 2013.

There has been no denial of treatment by the employer.

Earnings

Applicant is a seasonal employee at Defendant, and the parties stipulated that the rose season is from May 6th to July 9th a period of 65 days. For seasonal employees the in-season

² . *Badie v. Bank of America* 67 Cal.App.4th 779, 784-85, 79 Cal. Rptr. 2d 273 (1998): "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (citing: *People v. Stanley* (1995) 10 Cal.4th 764, 793, 897 P.2d 481, 42 Cal.Rptr.2d 543 (1995); *Tiernan v. Trustees of Cal. State University & Colleges* 33 Cal.3d 211, n. 4, 655 P.2d 317, 188 Cal.Rptr. 115 (1982); *Muega v. Menocal* 50 Cal.App.4th 868, 877, 57 Cal.Rptr.2d 697 (1996); *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* 38 Cal.App.4th 523, 559, 45 Cal.Rptr.2d 117 (1995); *Kim v. Sumitomo Bank* 17 Cal.App.4th 974, 979, 21 Cal.Rptr.2d 834 (1993).)

³ . *Badie v. Bank of America* 67 Cal.App.4th 779, 784-85, 79 Cal. Rptr. 2d 273 (1998): "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (citing: *People v. Stanley* (1995) 10 Cal.4th 764, 793, 897 P.2d 481, 42 Cal.Rptr.2d 543 (1995); *Tiernan v. Trustees of Cal. State University & Colleges* 33 Cal.3d 211, n. 4, 655 P.2d 317, 188 Cal.Rptr. 115 (1982); *Muega v. Menocal* 50 Cal.App.4th 868, 877, 57 Cal.Rptr.2d 697 (1996); *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* 38 Cal.App.4th 523, 559, 45 Cal.Rptr.2d 117 (1995); *Kim v. Sumitomo Bank* 17 Cal.App.4th 974, 979, 21 Cal.Rptr.2d 834 (1993).)

temporary disability rate is calculated with the in-season earnings, and the off-season temporary disability rate is calculated with the off-season earnings.⁴

Applicant was injured in 2013 while working for Defendant. No earnings information for 2013 was offered, but earnings for 2012 was offered. Applicant earned \$5,973.56 while working for Defendant in 2012. Using the 65 day season, this would give an average weekly earnings of \$643.31, yielding an on-season temporary disability rate of \$428.87 per week and a permanent disability rate of \$230.00 per week.

Applicant's off season earnings in 2012 include \$2,787.60 at 4 Suns Farm Labor Service, \$5,225.63 at Kern AG Labor Management, and \$2,627.60 at T&R Bangi AG Services, for a total of \$10,640.83. Using an off season of 300 days, this would give an average weekly wage of \$248.29. This would mean the off-season temporary disability rate would be \$165.52 per week.

Temporary Disability

Applicant claimed temporary disability from May 1, 2013 to present and continuing. Applicant offered five reports from Central Valley Occupational (CVO) dated 6/27/13 (Exhibit 11,) 8/1/13 (Exhibit 10,) 8/9/13 (Exhibit 9,) 8/23/13 (Exhibit 8,) and 9/27/13 (Exhibit 7.) All of them indicate Applicant is released to regular work with no restrictions noted. The Applicant testified that the physicians at CVO never said he could not return to work, and did tell him he could return to work on some of his visits.

Applicant testified that the employer did not offer him work and did not offer modified work. If an employer does not offer an injured worker modified work when the worker has work restrictions, the worker is entitled to temporary disability. Here however, the Applicant did not have any work restrictions from the injury, so the lack of any offer of work was not from the effects of the injury. Therefore the Applicant is not entitled to any temporary disability indemnity on this medical record.

Further Medical Treatment

The last report from CVO of September 27, 2013 (Exhibit 7) appears to indicate that they are awaiting MRI reports, that they refilled a prescription, and give him another appointment for either October 4 or October 9. This shows that the Applicant does require further medical treatment.

Attorney's Fees

There is no pool of funds from which to award any fee to Applicant's attorney.



DONALD H. JOHNSON
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

⁴ . *Jimenez v. San Joaquin Valley Labor*, 67 Cal. Comp. Cases 74, 83-85 (WCAB *en banc* 2002.)

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