WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELAYNE VALDEZ, ***Applicant,*** **vs.** **WAREHOUSE DEMO SERVICES; ZURICH NORTH AMERICA, Adjusted by ESIS,** ***Defendant(s).***	**Case No. ADJ7048296** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

The Appeals Board granted defendant's petition for reconsideration of the Findings and Award issued by a workers' compensation administrative law judge (WCJ) on July 29, 2010, to allow time to study the record and applicable law.

The WCJ relied on medical reports obtained by the applicant from outside the defendant's medical provider network (MPN) to award her temporary disability indemnity for the period of November 2, 2009 through February 10, 2010. Defendant contends, however, that non-MPN medical reports are inadmissible.

In order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision[1] on the following issue: if an applicant has improperly obtained medical treatment outside the employer's MPN, are the reports of the non-MPN treating physicians admissible in

[1] En banc decisions of the Appeals Board (Lab. Code, § 115) are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6] (*Gee*).) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

evidence? We hold that where unauthorized treatment is obtained outside a validly established and properly noticed MPN, reports from the non-MPN doctors are inadmissible, and therefore may not be relied upon, and that defendant is not liable for the cost of the non-MPN reports.

I. BACKGROUND

Applicant Elayne Valdez filed a claim for industrial injury to her back, right hip, neck, right ankle, right foot, right lower extremity, lumbar spine and both knees, while employed as a demonstrator for Warehouse Demo Services on October 7, 2009. Defendant admitted the claim for applicant's back, right hip and neck, and she was sent for medical treatment to the employer's MPN, where she was seen by Dr. Nagamoto, who treated her from approximately October 9, 2009 to October 31, 2009. Applicant then began treating with Dr. Nario, a non-MPN physician, upon referral from her attorney.

This matter proceeded to trial on July 22, 2010, on the issues of temporary disability "from October 7, 2009 and continuing," and attorney's fees. The Minutes of Hearing also indicate that "[d]efendant wishes to raise the issue of [MPN]," which the WCJ deferred as "not relat[ing] to temporary disability."[2] The WCJ also deferred the issue of self-procured medical treatment.

Applicant testified that her attorney sent her to Dr. Nario because the treatment provided by Dr. Nagamoto was not helping her. She never spoke to the claims examiner or otherwise notified defendant about this complaint. Applicant also testified that she "is still on temporary disability," and that she received payments from the Employment Development Department (EDD) from April 7, 2010 through May 26, 2010.

The WCJ found that applicant was temporarily disabled from November 2, 2009 through February 10, 2010, for which indemnity was awarded "less duplication of payment made by the [EDD], whose lien therefore is allowed." The WCJ relied on the non-MPN reports of Dr. Nario for this finding and award of benefits. While the WCJ deferred "the issue of MPN," he

[2] Here, as the WCJ deferred any issues concerning the MPN as not relating to temporary disability, this matter will have to be remanded for consideration of these issues. However, for purposes of this en banc opinion, we will proceed on the assumption that the MPN here was validly established and that all proper notices regarding the MPN were provided to the applicant. (See Lab. Code, § 4616 et seq.; Cal. Code Regs., tit. 8, § 9767.1 et seq.; *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc).)

nevertheless rejected defendant's argument that "reports of non-MPN doctors are inadmissible."

Defendant filed a timely petition for reconsideration from the WCJ's decision, contending that (1) applicant's non-MPN medical reports are inadmissible; (2) there is no evidence to support any reimbursement to EDD for benefits paid to the applicant; and (3) if applicant is awarded temporary disability indemnity, there is no substantial evidence that applicant was temporarily disabled through February 10, 2010. Applicant did not file an answer to defendant's petition. On October 25, 2010, the Appeals Board granted reconsideration for further study.

II. DISCUSSION

A. Where Unauthorized Treatment Is Obtained Outside a Validly Established and Properly Noticed MPN, Reports from the Non-MPN Doctors Are Inadmissible and Therefore May Not Be Relied Upon

An employer or its insurer is obligated to provide all medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury." (Lab. Code, § 4600(a).)[3] Section 4600(a) further provides: "In the case of his or her neglect or refusal to reasonably do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

Section 4600(c) provides: "Unless the employer or the employer's insurer has established a medical provider network as provided for in section 4616, after 30 days from the date the injury is reported, the employee may be treated by a physician of his or her own choice at a facility of his or her own choice within a reasonable geographic area." An MPN is established by an employer or insurer subject to the approval of the administrative director (AD). (Lab. Code, § 4616; Cal. Code Regs., tit. 8, § 9767.3.) Among other things, the regulations require that the employer or insurer's application for approval of an MPN include a statement of how the MPN will comply with the "employee notification process" and the "second and third opinion process." (Cal. Code Regs., tit. 8, §§ 9762.1 through 9762.3.) The statutory and regulatory scheme also imposes several other obligations upon both the insurer/employer and the injured worker.

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[3] All further statutory references are to the Labor Code.

In *Knight, supra*, 71 Cal.Comp.Cases 1423, the Appeals Board held that a defendant's failure to provide the required notices to an employee of rights under the MPN which results in a neglect or refusal to provide reasonable medical treatment renders the employer or insurer liable for reasonable medical treatment self-procured by the employee. As stated previously, we assume for purposes of this opinion that defendant had a validly established MPN, and that all proper notices required under the MPN were provided to applicant. Here, after initially treating with an MPN physician, Dr. Nagamoto, for less than one month, applicant sought treatment outside the MPN with Dr. Nario. This was despite the fact that *within* the MPN she would have had several opportunities to challenge any treatment, diagnosis, or lack thereof with which she disagreed and treat with someone other than Dr. Nagamoto.

More specifically, after the initial medical evaluation arranged by the employer within the MPN pursuant to section 4616.3(a), "[t]he employer shall notify the employee of his or her right to be treated by a physician of his or her choice," including "the method by which the list of participating providers may be accessed by the employee." (Lab. Code § 4616.3(b); Cal. Code Regs., tit. 8, § 9767.6(d).) In addition, AD Rule 9767.6(e) (Cal. Code Regs., tit. 8, § 9767.6(e)) provides that "[a]t any point in time after the initial evaluation with a MPN physician, the covered employee may select a physician of his or her choice from within the MPN."

Furthermore, pursuant to section 4616.3(c), where an injured worker "disputes either the diagnosis or treatment prescribed by the treating physician," he or she "may seek the opinion of another physician in the [MPN]," and of "a third physician in the [MPN]," if the diagnosis or treatment of the second physician is disputed.[4]

In addition, section 4616.4(b) provides that if the treatment or diagnostic service remains disputed after the third physician's opinion, "the injured employee may request independent medical review." Pursuant to section 4616.4(i), if "the independent medical reviewer finds that the disputed treatment or diagnostic service is consistent with section 5307.27 or the American

[4] Section 4616.3(d)(2) also allows treatment by a specialist who is not a member of the MPN "on a case-by-case basis if the [MPN] does not contain a physician who can provide the appropriate treatment and the treatment is approved by the employer or the insurer."

College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, the injured employee may seek the disputed treatment or diagnostic service from a physician of his or her choice from within or outside the [MPN], and "[t]he employer shall be liable for the cost of any approved medical treatment in accordance with section 5307.1 or 5307.11."

The foregoing provisions allow an applicant to treat with any physician of his or her choice within the MPN, and also afford a multi-level appeal process where treatment and/or diagnosis are disputed. Consistent with these provisions, section 4616.6 provides: "No additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article." Thus, section 4616.6 precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnosis issues, i.e., "any controversy arising out of this article." Here, for unknown reasons, the applicant almost immediately chose to go outside the MPN and seek treatment in violation of the MPN statutes and procedures. Subsequently, the WCJ awarded compensation, i.e., temporary disability indemnity, based on the reports of the unauthorized, non-MPN physician. As discussed below, the reports of non-MPN physicians are inadmissible and therefore may not be relied on to award compensation.

The definition of the "primary treating physician" [PTP] set forth in AD Rule 9785(a)(1) (Cal. Code Regs., tit. 8, § 9785(a)(1)) includes the physician selected "in accordance with the physician selection procedures contained in the [MPN] network pursuant to [section] 4616." AD Rule 9785(b)(1) (Cal. Code Regs., tit. 8, § 9785(b)(1)) further provides that "[a]n employee shall have no more than one [PTP] at a time." In addition, pursuant to AD Rule 9785(b)(3) (Cal. Code Regs., tit. 8, § 9785(b)(3)), if an employee "disputes a medical determination made by the [PTP]... the dispute shall be resolved under the applicable procedures set forth in [sections] 4061 and 4062," and "[n]o other [PTP] shall be designated by the employee unless and until the dispute is

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resolved."[5] Thus, where an applicant has left a validly established and properly noticed MPN and impermissibly sought treatment outside the MPN, the non-MPN physician cannot be the PTP; the MPN treater remains the PTP.[6] As stated by section 4061.5 and AD Rule 9785(d) (Cal. Code Regs., tit. 8, § 9785(d)), the PTP "shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation."

In *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041 [65 Cal.Comp.Cases 477], the applicant disagreed with the opinion of her PTP, Dr. Glousman, who had found her condition to be permanent and stationary, released her to return to work without restriction, and prescribed no further doctor-involved treatment or visits. Rather than select a qualified medical evaluator (QME) under sections 4061 and 4062 to resolve her dispute, applicant retained counsel and began treating with Dr. Stokes, whose report was ultimately relied on to award applicant compensation.

The Court in *Rushing* held that because the applicant was discharged from care by Dr. Glousman, her PTP, and she disputed his findings, applicant was not entitled to seek medical treatment with Dr. Stokes without first complying with the provisions of sections 4061 and 4062 by submitting the issue of treatment to an agreed medical evaluator (AME) or a QME. The Court stated, at 80 Cal.App.4th p. 1048, [65 Cal.Comp.Cases at p. 482] :

> "When there are disputes about the appropriate medical treatment, temporary or permanent disability, vocational rehabilitation, the disability rating, or the need for continuing medical care, Labor Code sections 4061 or 4062 apply. (*Keulen v. Workers' Comp. Appeals Bd.*, *supra*, 66 Cal.App.4th at p. 1096.) Sections 4061 and 4062 of the Labor Code establish the procedures for resolving such disagreements. Rushing was, therefore

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[5] One of the disputes mentioned by AD Rule 9785(b)(3) is "a determination that the employee shall be released from care." Section 4062(a) sets forth procedures where either the employee or employer "objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610," which, in addition to temporary disability, would also include medical treatment issues. As stated above, however, the MPN statutes contain specific provisions for addressing disputes over treatment and diagnosis within the MPN, and section 4616.6 provides that "[n]o additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article." Thus, while medical treatment and diagnosis issues must be resolved within the MPN, as discussed below, disputes concerning temporary or permanent disability are to be resolved under sections 4061 and 4062, i.e., outside the MPN.

[6] Of course, where an applicant has refused at the outset to treat within a validly established MPN, the fact that there has been no PTP within the MPN, does not render the non-MPN doctor a PTP.

> required to follow the Labor Code sections 4061 and 4062 procedures to resolve the dispute before she could legitimately select a new [PTP]."

Similarly, here, and we reiterate that for purposes of this opinion we are proceeding under the assumption of a validly established and properly noticed MPN, the applicant could not select a new PTP outside the MPN. As set forth above, she should have either changed treating physicians within the MPN and/or sought the opinion of a second or third MPN physician, etc. Therefore, the non-MPN physician is not authorized to be a PTP, and accordingly, is not authorized to report or render an opinion on "medical issues necessary to determine the employee's eligibility for compensation" under section 4061.5 and AD Rule 9785(d). (Cal. Code Regs., tit. 8, § 9785(d).) Moreover, for disputes involving temporary and/or permanent disability, neither an employee nor an employer are allowed to unilaterally seek a medical opinion to resolve the dispute, but must proceed under sections 4061 and 4062.[7] Accordingly, the non-MPN reports are not admissible to determine an applicant's eligibility for compensation, e.g., temporary disability indemnity.

Furthermore, we conclude that neither section 4605 nor section 5703(a) justifies the admission of reports from non-MPN doctors where treatment was improperly obtained outside the MPN.

Section 4605 provides:

> "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting or any attending physicians whom he desires."

Section 5703(a) provides:

> "The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:
>
> (a) Reports of attending or examining physicians."

[7] For disputes involving temporary disability, section 4062(a) provides that a medical evaluation shall be obtained pursuant to sections 4062.2 for represented employees and under section 4062.1 for unrepresented employees. For disputes involving permanent disability, section 4061(c) provides that a medical evaluation shall be obtained pursuant to sections 4062.2 for represented employees, and section 4061(d) provides that a medical evaluation shall be obtained pursuant to sections 4062.1 for unrepresented employees.

We first note that neither section 4605 nor section 5703(a) uses the term "treating physician." Moreover, section 4605 recognizes both the practical and legal issues involved in attempting to restrict the right of individuals to seek a doctor of their own choosing, especially at their own expense. Furthermore, section 4605 does not address the issue of admissibility, including that of improperly obtained non-MPN medical reports, but merely allows for consulting and attending physicians at an employee's own expense. Therefore, we conclude that section 4605 does not justify the admission of unauthorized non-MPN medical reports. This determination is supported by the reasons previously given for finding such non-MPN medical reports inadmissible: a validly established and properly noticed MPN; the opportunities within the MPN both to change treating physicians and to dispute opinions regarding diagnosis and treatment, including the limitations on admissibility under section 4616.6 for such disputes; the provisions requiring the PTP to "render opinions on all medical issues necessary to determine the employee's eligibility for compensation" (Lab. Code, § 4061.5; Cal. Code Regs., tit. 8, § 9785(d)); and the provisions for resolving disputes regarding temporary and permanent disability under sections 4061 and 4062.

For these same reasons, coupled with the fact that section 5703(a) is discretionary, i.e., "[t]he appeals board *may* receive as evidence…" (italics added), we also conclude that unauthorized non-MPN medical reports are not admissible under section 5703(a). That is, our discretion should not be used to admit medical reports or testimony in lieu of such reports resulting from an unauthorized departure outside the MPN.[8]

Finally, the concurring and dissenting opinion of Commissioner Caplane asserts that our decision effectively deprives injured workers from receiving compensation in these circumstances. On the contrary, it is those applicants who have chosen to disregard a validly established and

[8] We acknowledge that in some prior Appeals Board panel decisions it was determined that medical reports from treatment obtained outside a validly established and properly noticed MPN were admissible. Panel decisions, however, are not binding precedent on other Appeals Board panels (including even the same panel or panel members in a subsequent case) or on WCJs. (Lab. Code, §115; Cal. Code Regs., tit. 8, § 10341; *Garcia, supra,* 126 Cal.App.4th at p. 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee, supra,* 96 Cal.App.4th at p. 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) Nor do panel decisions undergo the expanded discussion and analysis of the Appeals Board as a whole consistent with preparing an en banc opinion. For the reasons stated previously in finding unauthorized, non-MPN reports inadmissible, we disavow any panel decision to the contrary.

properly noticed MPN, despite the many options to change treating physicians and challenge diagnosis or treatment determinations within the MPN, and to dispute temporary or permanent disability opinions under sections 4061 and 4062 outside the MPN, who have removed themselves from the benefits provided by the Labor Code.

B. Where Unauthorized Treatment Was Obtained Outside the MPN, a Defendant Is Not Liable for the Cost of the Inadmissible Reports from Non-MPN Physicians

As stated previously, we held, in *Knight*, *supra*, 71 Cal.Comp.Cases at p. 1435, that the defendant's failure to provide an injured employee with notice of his or her rights under the MPN which resulted in a neglect or refusal to provide reasonable medical treatment, rendered the defendant liable for the reasonable medical treatment self-procured by the employee. In *Knight*, the applicant testified that he never received written notice about the MPN and there was no written notice in evidence. In addition, the applicant was never provided notice of whether an MPN physician had been designated as his PTP, nor was he notified of his rights to be treated by an MPN physician of his choice after his first visit, and to obtain second and third opinions.

Conversely, where there has been no neglect or refusal to provide reasonable medical treatment, a defendant is not liable for the medical treatment procured outside the MPN. This is consistent with section 4605, which provides: "Nothing contained in this chapter shall limit the right of the employee to provide, *at his own expense*, a consulting or any attending physicians whom he desires." (emphasis added.) Accordingly, having determined that where treatment was improperly obtained outside the MPN, any non-MPN medical reports are inadmissible, we can discern no reason to find a defendant liable for the cost of such reports.

III. DISPOSITION

As set forth throughout this opinion, whether the defendant had a validly established MPN and whether it provided the required MPN notices to the applicant are highly relevant to determine the propriety of the applicant seeking treatment outside the MPN and the reliance on a non-MPN physician to award temporary disability benefits. Accordingly, based on the WCJ's deferral of this issue, his decision must be rescinded, and this matter remanded to the trial level for further

proceedings consistent with this opinion.[9]

Finally, we note that should further proceedings determine the existence of a validly established and properly noticed MPN, then the applicant should comply with the applicable MPN provisions and resolve any dispute concerning temporary and/or permanent disability under the procedures set forth in sections 4061 and 4062. On the other hand, should the evidence fail to determine the existence of a validly established and properly noticed MPN, then the applicant may continue to treat outside the MPN until the defendant is in compliance with the MPN regulations (see *Babbit v. Ow Jing dba National Market* (2007) 72 Cal.Comp.Cases 70 (Appeals Board en banc)) and the WCJ assigned to this matter may award temporary disability benefits on the present record, or in his or her discretion, may allow defendant to object to the report in question under section 4062(a) should it be determined under the circumstances of this case that "good cause" exists to extend the time limits of that section. Of course, any award of temporary disability must be supported by substantial medical evidence, and if such evidence is lacking, the medical record should be further developed as expeditiously as possible.

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[9] As the WCJ who heard this matter has since retired, we will return this matter to the presiding WCJ to assign a new WCJ. In addition, we note that although the defendant appears to be correct in its assertion there is no evidence to support any reimbursement to EDD for benefits paid to the applicant, the issue of reimbursement to EDD is now moot in light of our determination that the present record does not support the award of temporary disability benefits and our disposition rescinding the WCJ's decision and remanding for further proceedings.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Appeals Board (En Banc), that the Findings and Award of July 29, 2010, are **RESCINDED** and that this matter is **RETURNED** to the presiding WCJ for assignment to a new WCJ for further proceedings and decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

I CONCUR, in part and I DISSENT, in part
(See attached Concurring and Dissenting Opinion)

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

I CONCUR, in part and I DISSENT, in part
(See attached Concurring and Dissenting Opinion)

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
4/20/2011

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:
ELAYNE VALDEZ
LAW OFFICES OF JEFFREY N. SARDELL
LAW OFFICES OF JOHN MENDOZA

VB/bgr

CONCURRING AND DISSENTING OPINION OF COMMISSIONER BRASS

Assuming the existence of a validly established and properly noticed MPN, I concur in the result reached by my fellow Commissioners. I concur, under the facts of this case, that the applicant's non-MPN medical reports are inadmissible, and that the defendant is not liable for the cost of such reports. I also concur in returning this matter to the trial level to determine the existence of a validly established and properly noticed MPN, as well as the issues of temporary disability and EDD's lien.

I dissent because there may be situations when an injured worker has good reasons to seek care outside even a validly established and properly noticed MPN, and thus, an appropriate exercise of authority under section 5703(a) would be to admit the reports of the non-MPN treating physician.

In the instant case, it does not appear that applicant made a good faith attempt to treat within defendant's MPN or to avail herself of the opportunities to change treating physicians and/or request another opinion. Instead, apparently on the advice of her attorney, she left the MPN after approximately three weeks. Such behavior should not be condoned. Consequently, if the existence of a validly established and properly noticed MPN is determined, I concur with the majority in finding the non-MPN reports inadmissible, thereby reversing the award of temporary disability benefits based on those reports.

Nevertheless, I do not believe that this decision should be used to penalize injured workers when it would be in their best interest to seek care outside a validly established and properly noticed MPN. There may be a misdiagnosis, a lack of effective treatment, and/or an unreasonable delay in providing care. An employee seeking care outside a validly established and properly noticed MPN already has to pay for that treatment (*Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc); § 4605) and for the cost of any non-MPN reports. Furthermore, under the majority's opinion, injured workers exercising their right under section 4605 to seek and pay for their own medical treatment outside the MPN are also foreclosed

from receiving any compensation based on the non-MPN reports.

Sections 4061 and 4062 require an injured worker to go outside the MPN to determine issues of temporary and permanent disability, if they are in dispute. According to the majority's decision, the opinion of the non-MPN treating physician on those issues, regardless of its merits, would not even be considered. It must be emphasized that receiving reports into evidence only means that they will be considered. They may not be relied on unless they constitute substantial evidence and are the most persuasive indication of the injured worker's condition.

Section 5703(a) states that "[t]he appeals board may receive as evidence… [r]eports of attending or examining physicians," and provides authority to admit the reports of non-MPN treating physicians. In situations which do not rise to the level of neglect or refusal to provide reasonable medical treatment, but where an injured worker has nevertheless appropriately sought care outside an MPN, the reports of the non-MPN treating physician should be admitted into evidence under section 5703(a) for consideration of any issue in dispute.

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

04/20/2011

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LAW OFFICES OF JOHN MENDOZA

VB/bgr

CONCURRING AND DISSENTING OPINION OF COMMISSIONER CAPLANE

I concur with the majority that a defendant is not liable for the cost of medical reports obtained by an applicant outside of a validly established and properly noticed MPN, and that such reports are inadmissible under Labor Code section 4616.6 to resolve any dispute related to treatment and diagnosis. However, I dissent from the holding that these reports are inadmissible as to issues of compensation, i.e., temporary disability and permanent disability.

Section 4616.6 states:

> "No additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve *any controversy arising out of this article."* (emphasis added.)

This article is 2.3, "Medical Provider Networks" (MPNs), and is comprised of sections 4616-4616.7. These sections deal *exclusively* with diagnosis and treatment, and thus, section 4616.6 precludes admissibility of reports obtained outside an MPN *only* on those issues. Here, however, the non-MPN medical reports were not admitted and relied on to resolve a dispute over diagnosis and treatment, but one of compensation, i.e., temporary disability, about which the MPN statutes are silent. Statutes governing temporary and permanent disability are contained in Article 3, sections 4650-4664 and are outside the scope of the MPN statutes under Article 2.3.

The majority's opinion also fails to give effect to sections 4605 and 5703(a). These sections were not repealed when the MPN statutes were enacted. It is a fundamental rule of statutory construction that the Legislature is presumed to be aware of existing law.

Section 4605 states that "[n]othing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting or any attending physicians whom he desires." Thus, injured workers have the right to seek medical care outside a validly established and properly noticed MPN if they pay for that care. However, by excluding the reports of non-MPN doctors from evidence, the majority penalizes an applicant for exercising that right by effectively precluding him or her from receiving any benefits under the workers' compensation system.

The issue of entitlement to temporary and/or permanent disability indemnity is usually triggered by a medical report from the applicant's treating doctor. Upon receipt of that report, a defendant can either pay the benefits in question, or object and follow the procedures set forth in sections 4061 and 4062 to resolve the dispute. Under the majority's holding that reports of non-MPN physicians are not admissible for any purpose, a defendant when served with such reports can simply do nothing. Without an admissible medical report, the applicant has been deprived of the opportunity to even present a claim for temporary or permanent disability indemnity, and has essentially been removed from the workers' compensation system. This is an unduly harsh result for exercising the right to seek treatment under section 4605, and certainly one not intended by the legislature. Moreover, an injured worker, who has exercised the right to seek treatment with a non-MPN doctor under section 4605, is already liable for both the cost of treatment and any non-MPN reports, and admitting such reports into evidence merely means they will be considered and not that they will necessarily be relied on to award compensation. Under the majority's disposition, an applicant would have to return to the MPN before he or she is eligible to receive compensation, which may needlessly delay the resolution of a case and the provision of benefits to injured workers.

Section 5703(a) provides that "[t]he appeals board may receive as evidence… [r]eports of attending or examining physicians." As acknowledged by the majority, there is discretion under section 5703(a) which, like section 4605, refers to "attending" physicians, to admit into evidence the reports of non-MPN physicians on issues of compensation. The majority's opinion, however, takes away the discretion of the WCJ under this section to admit the reports of non-MPN treating physicians on these issues in *all* cases where there is a validly established and properly noticed MPN.

The majority has relied in part on *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041 [65 Cal.Comp.Cases 477] for its disposition here. *Rushing*, however, pre-dates the MPN statutes which were enacted under Senate Bill 899, and does not involve an applicant exercising the right to seek treatment under

section 4605.

While I do not condone the actions of an applicant's attorney directing a client to treat with a non-MPN physician when a validly established and properly noticed MPN exists, an applicant nevertheless has the right to do so under section 4605 and should not be penalized for exercising that right. Moreover, in light of the specific restriction on admissibility to issues of diagnosis and treatment by section 4616.6, the discretion provided by section 5703(a) can be utilized to admit non-MPN reports on issues of compensation.

The issue here is only the admissibility of the non-MPN doctor's reports. Once admitted, the WCJ must decide if the reports constitute substantial evidence and the weight to assign to them.

Where there is a validly established and properly noticed MPN, Article 2.3 gives MPN doctors exclusive control over issues of diagnosis and treatment. To extend that control to issues of compensation goes beyond the MPN statutory mandate and gives no effect to sections 4605 and 5703(a).

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Accordingly, I dissent and would affirm the WCJ's decision insofar as he properly exercised his discretion under section 5703 to admit the reports of the applicant's non-MPN treating physician on the issue of temporary disability. I would, however, return this matter to the trial level for the newly assigned WCJ to address the defendant's contention that these reports do not constitute substantial evidence. If so, the parties should then proceed under sections 4062(a) and 4062.2 to select either an agreed medical evaluator (AME) or a qualified medical evaluator (QME).

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

4/20/2011

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