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LIU, J.

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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

ELAYNE VALDEZ,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD; WAREHOUSE DEMO SERVICES; ZURICH NORTH AMERICA

Respondents.

SUPREME COURT
FILED

JUL 31 2012

Frank A. McGuire Clerk

Deputy

CRC 8.25(b)

PETITION FOR REVIEW

Of a Published Decision by the Court of Appeal
Second Appellate District, Case No. B237147
(W.C.A.B. en banc decision, Case No. ADJ7048296)

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ISSUE OF FIRST IMPRESSION FOR REVIEW

Can the Court of Appeal modify the statutory scheme established in Labor Code §§ 4616, et seq., which provides for the creation of medical provider networks (MPNs) as the exclusive means of diagnosing and treating occupational injuries, by allowing employees to disregard the medical provider network and instead obtain and rely on medical reports from outside doctors chosen by their counsel?

WHY REVIEW SHOULD BE GRANTED

The intervention of this Court is needed to protect the express legislative goal of establishing medical provider networks (MPNs) as the exclusive means of diagnosing and treating occupational injuries, thereby reinforcing the primary purpose of the workers' compensation system – to provide adequate medical care economically while minimizing litigation.

The Court of Appeal Effectively Nullified the Legislature's Statutory Scheme.

As described in more detail below, the Legislature designed MPNs to balance the interests of employers and employees, providing employers with an effective means of cost-control and predictability, and workers with protections in the availability and quality of care, flexibility in doctor selection, and the ability to challenge treatment and diagnosis decisions. Because MPNs provide a means to control health care costs while meeting obligations to employees, MPNs have become a staple means of providing medical care for occupational injuries, particularly among large self-insured employers and governmental entities, *and currently cover approximately 80% of California employees.*

Described in a 2011 RAND study as one of the key reforms of SB 899, MPNs were created by Labor Code sections 4616, et seq. The parties are required to stay within a properly-established MPN statutory scheme, a

foundational requirement now significantly undermined by the published Court of Appeal decision below. The Legislature chose to enforce the MPN system by excluding from evidence any non-MPN reports on diagnosis and treatment. The Court of Appeal has nullified that key requirement, thereby allowing employees to doctor-shop for any partisan report, effectively making worker participation in MPNs entirely voluntary. The opinion threatens the very purpose of establishing MPNs in the first place, though MPNs are the most prevalent means of providing workers' compensation medical benefits in California.

The Court of Appeal also entirely disregarded the views of the Workers' Compensation Appeals Board (WCAB) as expressed in two en banc opinions. The WCAB later filed a brief and appeared at oral argument to defend its decisions to the Court of Appeal below. Yet the Court of Appeal disregarded the WCAB, instead ruling that employees can abandon an MPN at will and that any partisan reports obtained outside of the MPN process are admissible.

The Legislature Designed MPNs to Accomplish an Important Public Goal While Balancing the Interests of Employees and Employers.

Under the statutory scheme, employers can establish MPNs subject to specific statutory and regulatory requirements, and the approval of the Administrative Director of the Division of Workers' Compensation. This allows employers to negotiate and contain medical costs predictably and economically. The requirements for an MPN include the number and types of medical practitioners, including physicians not primarily engaged in treating occupational injuries (the statutory goal is 25% nonoccupational physicians), accessibility of those doctors at reasonable times to covered employees, and a ban on any physician compensation system which encourages reducing, delaying, or denying medical treatment. The

employer must also disclose any policies of economic profiling used to evaluate MPN doctors and provide for and implement a plan to properly notify each employee about the MPN.

While the employer schedules the initial examination, employees can then select a primary treating physician within the MPN, and can thereafter change doctors within the MPN as they so choose. In this case, for example, Valdez *had her choice of over 90 different medical facilities* within a 30 mile radius of her home for treatment of her claimed injuries. If there is any controversy concerning the diagnosis or treatment, employees are entitled to a formal second opinion from an MPN doctor of their choice. If some controversy remains unresolved, the employee can select another MPN doctor for a third opinion. Any remaining controversy regarding treatment or diagnosis can then be referred to an independent medical review by a non-MPN doctor designated by the Administrative Director.

As further protection for employees, the MPN statutes provide for treatment outside of the MPN under certain circumstances; e.g., if the MPN lacks a required specialty, or to maintain continuity of care. In addition, a request for authorization of medical treatment may only be modified, delayed, or denied by a licensed physician. As part of the approval process, each MPN is required to have approved procedures for all of the requirements described above.

As confirmed by Labor Code sections 4600, subdivision (c), and 4616.3, MPNs are designed to be the *exclusive* means of diagnosis and treatment with regard to workers' compensation benefits. To enforce this, and to ensure that the benefits of this statutory scheme are realized, the Legislature included section 4616.6, which states: "No additional examinations shall be ordered by the appeals board and no other reports shall be admissable [sic] to resolve any controversy arising out of this article." The article referred to is article 2.3, which contains all the statutes

describing the operation of MPNs. By excluding all other reports regarding diagnosis and treatment, this provision seeks to ensure that the parties utilize the *comprehensive* system implemented in an approved MPN, since the benefits, and the intended balance of interests, are largely lost if employees can disregard the MPN and select an outside advocate doctor on a whim, or on advice of counsel.

This petition challenges a published decision by the Court of Appeal which undermines this statutory scheme by artificially limiting section 4616.6 to only apply to the final independent medical review, thereby allowing employees carte blanche to hire outside doctor-advocates to produce partisan reports about diagnosis and treatment. Moreover, it is Defendant's understanding that the independent review process has never been used, so that the opinion makes section 4616.6 effectively meaningless. The opinion effectively nullifies the mandatory provisions of the MPN statutes and turns MPNs into a voluntary system at the discretion of each employee. This thwarts the express legislative goals of reducing litigation and controlling related costs.

In 2003, the Legislature passed sweeping reforms to salvage the collapsing workers' compensation system in California, affecting virtually every aspect of the process in an attempt to make a fundamental change in how such benefits are provided. Since that time, the applicant's bar has conducted a nearly unbroken series of legal challenges the thwart, reduce and delay these reforms in an attempt to maintain the prior (failed) status quo. MPNs fundamentally change how occupational injuries are treated, and will serve to greatly reduce wasteful litigation. The intervention of this Court is needed to protect the express legislative goals of the MPN statutory scheme.

STATEMENT OF THE CASE

A. The Parties and the Underlying Claim

Respondent and applicant ELAYNE VALDEZ sustained an industrial slip and fall injury on October 7, 2009. (Ex. 1 at 1:21-23.) At that time, she was employed by petitioner and defendant WAREHOUSE DEMO SERVICES (WDS). WDS workers' compensation carrier was ZURICH NORTH AMERICA, as administered by ESIS (collectively, "Defendant"). At all relevant times, pursuant to Labor Code[1] sections 4616, et al., Defendant had (and still has) a validly established and properly noticed MPN to treat all occupational injuries.[2]

B. Defendant's Medical Provider Network (MPN)

WDS participates in an MPN established pursuant to the statutory requirements and approved by the Administrative Director. (WCAB Record at 121.) Valdez confirmed in writing that she received the MPN Handbook on June 17, 2009. (*Id.*, at 121-123.) She was again informed of the MPN on October 9, 2009 when she was referred to, and examined by, Dr. Nagamoto. (*Id.*, at 121 and 129.) In addition to the written handbook, the MPN information is provided online. (*Ibid.*) Under the MPN used by WDS, Valdez *has her choice of over 90 different medical facilities* for the treatment for her claimed injuries within a 30 mile radius of her residence, and an even larger selection of individual doctors. (See *id.*, at 124-128.)

C. Valdez Disregards the MPN On The Advice Of Counsel.

Valdez reported the incident the day after the injury, and she was promptly referred to Dr. Nagamoto, a doctor in the MPN. (Ex. 1, at 3:14-17; and WCAB Record at 120.) He initially gave her a few days off,

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[1] All statutory citations are to the Labor Code.

[2] To directly reach the legal issues addressed, the decisions below assumed Defendant's MPN was properly established and noticed. (Opinion at 3.) However, the facts actually bear this out.

prescribed some physical therapy and allowed her return to modified duty on October 20 and 22. (WCAB Record at 118-120.) When she was unable to perform modified duties, Dr. Nagamoto prescribed physical therapy, which she attended until October 31, 2009. (Ex. 1, at 3:17-21.) On cross-examination, she claimed the physical therapy wasn't helping. (*Id.*, at 4:4-5.)

Valdez stopped treating through the MPN when her counsel sent her to Dr. Nario of Advanced Care Specialists beginning November 1, 2009. (Ex. 1, at 4:7-10.) Disregarding the MPN entirely, Valdez purported to change her primary treating doctor to her counsel-selected physician. (Ex. 2 at 6-7; WCAB Record at 26.) Presumably following counsel's instructions, Dr. Nario submitted reports on diagnosis and treatment as if he were the primary treating physician. (E.g., WCAB Record at 57.) The claims administrator protested this, but was disregarded by Valdez's counsel. (WCAB Record at 121-129.) Valdez made no attempt to follow the procedures within the MPN, including her ability to change her treating physician at will to any other MPN physician or to seek a second opinion regarding her diagnosis or treatment from the MPN doctor of her choice.

D. The Workers' Compensation Proceedings

Defendant raised the issue of Valdez's disregard of the MPN, but the Workers' Compensation Administrative Law Judge ("WCJ") deferred the MPN issues as "not relat[ing] to temporary disability." (Ex. 1, at 2:7-9; and WCAB Record at 73, 74 and 76.) The WCJ then relied exclusively on the reports of the non-MPN physicians arranged by Valdez's counsel, and awarded Valdez temporary disability. (See ex. 6 at 31-32.) In doing so, the WCJ rejected Petitioner's argument that the reports of the non-MPN doctors were inadmissible, holding that the records of any treating doctor are admissible because they are potentially relevant. (Ex. 6, at 30.) Indeed, the WCJ seemed to endorse the action by Valdez in wholly disregarding the

MPN in favor of her counsel-selected doctor, effectively treating Dr. Nario as the primary treating physician. (*Id.*, at 30-31; and see § 4061.5.) [the primary treating physician "shall render opinions on all medical issues" to determine compensation].)

The WCAB, *en banc*, reversed the WCJ and *unanimously held* that once properly established and noticed, an MPN is the exclusive mechanism for the diagnosis and treatment of occupational injuries. (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330, 333, 339 and 340.) ("*Valdez I*".) Five panel members out of six also held that the reports obtained by Valdez outside of the MPN were inadmissible, with one commissioner dissenting on the grounds that, while she agreed the reports were "inadmissible ... to resolve any dispute related to treatment and diagnosis," in her view they should be admissible on the issue of temporary disability. (*Ibid.*)[3]

In reaching this conclusion, the WCAB reviewed the statutory and regulatory requirements for establishing and operating an MPN. (*Id.*, at 333-335.) In particular, the WCAB noted that 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.'" (*Id.*, at 334; quoting § 4616.6.) Moreover, since a non-MPN doctor cannot be the primary treating physician, the non-MPN doctor "is not authorized to report or render an opinion on 'medical issues necessary to determine the employee's eligibility for compensation...'" (*Valdez I*, at 336; citing § 4061.5; Cal. Code Regs., tit. 8, § 9785, subd. (b)(1) and (d).)[4]

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[3] One commissioner also dissented to a broad rule that reports obtained outside of the MPN process are always inadmissible, out of concern that facts and circumstances not present here might justify an exception to such a rule. (*Id.*, at 339.)

[4] All regulatory citations are to title 8.

Valdez petitioned for reconsideration of the WCAB's decision. (Ex. 11.) In its second *en banc* decision, the WCAB, with the same dissents, affirmed its prior ruling and further addressed related issues. (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970.) ("*Valdez II*".) The WCAB explained that its decision to exclude the reports was not only based on section 4616.6, but on the entire statutory scheme which creates and defines MPNs as the sole means of medical treatment and diagnosis within the workers' compensation system (§§ 4616, et seq.), and on the required statutory process for resolving disputes over temporary and permanent disability (§§ 4061 and 4062), which Valdez made no attempt to follow. (*Valdez II* at 973-974.)[5]

Importantly, the WCAB described the scope of its decisions as follows:

> "[O]ur decision is applicable only where unauthorized industrial injury treatment reports are obtained outside a validly established and properly noticed MPN, and does not preclude admissibility of any other medical reports and records." (*Valdez II*, at 976.)

As a practical matter, this would exclude any such reports obtained by employees outside of the MPN, including any non-MPN doctors recruited by counsel. The WCAB also noted that a report on whether an applicant qualified for temporary disability was necessarily a diagnosis of the applicant's condition, and therefore any such medical report from outside the MPN was inadmissible. (*Id.*, at 973, n 4.) Since all the reports

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[5] As *Valdez II* explains, the MPN provisions only apply to medical reports (i.e., diagnosis and treatment), and not to medical-legal disputes, such as those addressed by sections 4060, et seq. Since the medical-legal disputes do not involve treatment, those procedures operate outside of the MPNs. (*Valdez II*, *supra*, at 975-976.)

arranged by Valdez's counsel from outside of the MPN addressed diagnosis and treatment, the WCAB ruled they were inadmissible.

E. The Court of Appeal

The Court of Appeal granted Valdez's Petition for Writ of Review, and requested supplemental briefing on this issue: "Is section 4616.6 limited to cases where there has been an independent medical review under section 4616.4?" (Opinion, at 8, n 6.) Disregarding all other controversies that might arise from the treatment and diagnosis of an injured employee in the MPN, and all other reports that would be generated as a result, the Court of Appeal decided that the word "report" in section 4616.6 must mean only that singular report that would be produced after completion of the independent review process under section 4616.4 subdivision (f). (Opinion at 7-8.) As a result, the Court of Appeal concluded that the only reports excluded by section 4616.6 would be those reports that might be sought to challenge the final stage of the independent medical review process, making that process the last word on the controversy addressed. (*Id.*, at 7-8.) Since that narrow exclusion will rarely, if ever, come up, the Opinion allows employees to seek outside reports as desired from partisan doctors to the exclusion of any treatment through the MPN.[6]

While initially unpublished, on June 18, 2012 the Court of Appeal ordered that its opinion be published.

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[6] It is Defendant's understanding that the independent review process has never been used. Under the Court of Appeal opinion, there is no reason to believe it ever will, as any controversy will be brought to a non-MPN partisan doctor of the employee's choosing.

LEGAL DISCUSSION

I. THE LEGISLATURE ESTABLISHED MPNS AS AN IMPORTANT AND EXCLUSIVE MEANS TO PROVIDE ADEQUATE AND ECONOMICAL MEDICAL TREATMENT FOR INDUSTRIAL INJURIES.

A. The Legislature Has Plenary Power To Determine How To Provide Workers' Compensation Benefits.

The California Constitution expressly vests the Legislature with "plenary power" to create and enforce a complete system of workers' compensation through legislation. (Cal. Const., art XIV, §4; see also *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 103, 114.) Since workers' compensation did not exist at common law, the right to any benefits is wholly statutory and determined by the Legislature. (*Dubois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388; *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 650 [the Legislature has the "exclusive and 'plenary' authority to determine the contours and content of our state's workers' compensation system, including the power to limit benefits."]; *Bautista v. State* (2011) 201 Cal.App.4th 716, 725 ["The grant of 'plenary power,' gives the Legislature complete, absolute, and unqualified power to create and enact the workers' compensation system."].)

Exercising this plenary power, in 2004 the Legislature enacted SB 899 to significantly reform the operation of the workers' compensation system, the scope of benefits and how those benefits would be provided. This included the statutory scheme for MPNs and the principal statute addressed by the Court of Appeal here, section 4616.6. A November 2004 RAND study, jointly sponsored by the two California state agencies

responsible for monitoring workers' compensation,[7] described the skyrocketing costs that threatened the entire system and led to SB 899:

> "In recent years, the California workers' compensation system has been encumbered by rising costs and high utilization of medical care. Medical costs for injured workers grew by 111 percent between 1997 and 2002 and now represents more than half the cost of workers' compensation. [Citation.] Medical care payments were more than twice the national average in 2002. [Citation]."

(*Evaluating Medical Treatment Guideline Sets for Injured Workers in California,* RAND Institute for Civil Justice and Health, Dec. 2004, p. xiii, emphasis added.)[8]

SB 899 broadly reformed the workers' compensation system in an effort to lower the cost "experienced by self-insured employers and premiums for businesses, the state and local governments, and nonprofits."[9] (CAAA ex. 2, at 84 [Assem. Republican Bill Analysis, SB 899].)[10] "California ha[d] the highest workers' compensation costs in the nation" and those costs were "killing jobs for hard-working California." (*Ibid.*)

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[7] The California Commission on Health and Safety and Workers' Compensation (CHSWC) and the California Division of Workers' Compensation. (See the *RAND Study*, cited in text above, at p. xiii.)

[8] This is provided by the California Department of Industrial Relations: http://www.dir.ca.gov/chswc/reports/eval_med_tx_guideline_summary.pdf.

[9] This was a particular crisis for government agencies. Following the failure of 25% of the private workers' compensation insurers, 75% of all workers' compensation claims in California were in government hands (combining the obligations of SCIF and CIGA). (CAAA ex. 2, at 58 [Assem. Com. on Ins., Analysis of SB 899].) While this number has since decreased, thanks in large part to the success of the SB 899 reforms, SCIF remains California's largest workers' compensation carrier. *Palm Medical Group, Inc. v. State Comp. Ins. Fund* (2008) 161 Cal.App.4th 206, 213-213.

[10] The Court of Appeal took judicial notice of the MPN legislative history, but then made no reference to it. (See Opinion at 6, n 4.)

Workers' compensation costs "ha[d] increased dramatically over the past few years." (CAAA ex. 2, at 58 [Assem. Com. on Ins., Analysis of SB 899].) These "skyrocketing costs...resulted in employers threatening to take action such as discontinuing employee coverage, diminishing other employee benefits or closing their businesses." (*Ibid.*)

B. The MPNs Are Governed By The Statutory Scheme Enacted By The Legislature.

The fundamental purpose in construing a statute is to determine and effectuate the Legislature's intent. (*DuBois*, *supra*, 5 Cal.4th at 387; *Nickelsberg v. Workers' Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 294.) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois*, *supra*, 5 Cal.4th at pp. 387-388; *Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214.) When the statutory language is clear and unambiguous, there is no room for interpretation and the statute must be enforced according to its plain terms. (*DuBois*, *supra,* 5 Cal.4th at p. 387; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726.) Further, meaning must be given to every word or phrase, if possible, so as not to render any portion of the statutory language mere surplusage. (*Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 716.)

Similarly, how the statutory provisions are structured indicates their intended meaning and operation. (*In re Ebony W.* (1996) 47 Cal.App.4th 1643, 1647; *Nken v. Holder* (2009) 556 U.S. 418, 431, 129 S.Ct. 1749, 173 L.Ed.2d 550 ["the Court frequently takes Congress's structural choices into consideration when interpreting statutory provisions"].) Any particular statutory provision, however, must be considered in light of the entire statutory scheme of which it is part and harmonized with related statutes, to the extent possible. (*Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194; *DuBois*, *supra*, 5 Cal.4th at p. 388.)

Ultimately, legislative intent prevails over a literal interpretation if the two appear in conflict, and if a statute is amenable to two alternative interpretations the one consistent with legislative intent prevails. (*McLaughlin v. State Bd. of Educ.* (1999) 75 Cal.App.4th 196, 211.)

C. Through MPNs The Legislature Returned Significant Control Over Contracting for Medical Treatment To Employers, While Safeguarding The Rights Of Employees.

1. MPNs are designed to be the exclusive mechanism for providing medical diagnosis and treatment, thus providing employers the ability to contain medical costs while mandating adequate medical care.

When there is no MPN, the employer only determines the manner of treatment for 30 days after the injury. (§ 4600, subd. (c).) SB 899 amended this provision so that an employee can select a treating physician after those 30 days "**[u]nless** the employer or the employer's insurer has established a medical provider network as provided for in Section 4616..." (*Ibid.*, emphasis added.) With the creation of MPNs, employers can contract with a designated network of qualified physicians to diagnose and fully treat all occupational injuries, subject to quality controls, statutory requirements and the approval of the Administrative Director. (§ 4616, et seq.) This provides employers with an effective means to contract for reasonable medical costs and ensure continuity in the treatment of occupational injuries. Once approved, employees *must* choose their treating physician for workers' compensation purposes from the MPN (§§ 4600, subd. (c) and 4616.3.)[11]

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[11] While there have been few appellate decisions addressing MPNs to date, at least one Court of Appeal noted that MPNs are mandatory. (*Krause v. Workers' Comp. Appeals Bd.* (2010) 75 Cal. Comp. Cases 683, 688 [affirming that a technical flaw in the MPN notice, causing no prejudice,

SB 899 plainly states that it requires "an injured employee to select a physician from the provider network to provide treatment for the injury." (Stats. 2004, ch 34, Legis. Counsel's Digest, SB 899; also at CAAA, ex. 2, at 39.)

Once an MPN has been properly established and noticed, the MPN statutes control the diagnosis and treatment for the occupational injury. (§§ 4616, et seq.; Cal. Code Regs., § 9767.6.) After the initial evaluation, the employee can select an appropriate primary treating physician from the MPN in light of the existing diagnosis, and can change treating physicians within the MPN at will for the duration of treatment. (§ 4616.3, subds. (b) and (d); and see Cal. Code Regs., § 9767.6.) The same requirements that apply generally to treating physicians (i.e., use of objective ACOEM guidelines, reporting requirements, etc.) apply to the treating physicians in the MPN.[12] The statutes also provide for certain exceptions to treatment within the MPN; for example, if the employee properly pre-designates a personal physician, if the MPN does not have a needed medical specialist, or to ensure continuity of care. (§§ 4600, subd. (d); 4616.2; and, 4616.3, subd. (d)(2).)

If there is any controversy over the initial diagnosis or proscribed treatment of the occupational injury, the employee is entitled to a second opinion from an MPN doctor of the employee's choice. (§ 4616.3, subd. (c); Cal. Code Regs., §9767.7.) If there is still a controversy, the employee can select a third doctor from the MPN for a third opinion. (*Ibid.*) For any remaining controversy regarding diagnosis or treatment even after three opinions, the employee can obtain an independent medical review from a

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did not exempt applicant from having to treat through the MPN]; see also Cal. Civil Pract. Workers' Comp., Chap. 2, § 2:1 [MPNs "limit the employee's choice of medical providers to those within the network."].)

[12] See Cal. Code Regs., §§ 9767.1, subd. (a)(19), 9785, subd. (a)(1), and 9767.3, subds. (d)(8)(C) and (e)(16).

qualified physician outside of the MPN, as approved and assigned by the Administrative Director. (§ 4016.4, subds. (b) and (c); Cal. Code Regs., § 9768.1, et seq.)

Once properly established and noticed, the MPN provisions provide a comprehensive and exclusive system for the diagnosis and treatment of occupational injuries, including the resolution of any controversies related to diagnosis and treatment. Providing for the creation of exclusive and mandatory MPNs is an important component in meeting the legislative goals of controlling costs and advancing the primary purpose of the workers' compensation system – to provide prompt, adequate treatment for work-related injuries. (See *Land v. Workers' Comp. Appeals Bd.* (2002) 102 Cal.App.4th 491, 496.)

2. The legislative history confirms the express intent to make MPNs the exclusive means for treatment and diagnosis.

The legislative history plainly describes the universal recognition, that MPNs would provide *the exclusive source of medical treatment.*

> "Unlimited medical control by employer – Increases the time period of employer/insurer control of the doctor from the current 30 days *instead to unlimited control.* [then lists safeguards to protect employees]" (CAAA, ex. 2 at 101 [Senate Repub. Floor Commentaries, 4/16/04], and see at 108.) (Emphasis added.)

> "This bill provides that employees whose employers utilize an approved medical provider network *will receive* their medical care in the network. The first medical visit *must be* to a network provider chosen by the employer or insurer. Following the first visit, the employee may choose to be treated by another physician from *within the medical provider network listing.*" (CAAA ex. 2, at 135 [Ca. Labor and

Workforce Dev. Agency, Enrolled Bill Report SB 899, 4/16/04].) (Emphasis added.)

In fact, the reality that MPNs were mandatory was also recognized by those opposed to, or expressed concern about, SB 899.

> "**Arguments In Opposition to the Bill**
> Labor unions, applicant attorneys, and some occupational physicians are [sic] that this bill is unfair to injured workers. They should be able to receive whatever medical care they need for any doctor they want." (CAAA, ex. 2 at 84 [Assem. Repub. Bill Analysis, Ins. Comm., SB 899].)

> "**Company-selected doctor imposed on injured workers**. . . . Under this proposal, injured workers would have to select a physician from medical provider networks where the employer or insurer has the exclusive right to determine the physicians in the medical network." (CAAA, ex. 2 at 219 [Letter from the Ca. Indep. Public Employee Legis. Council].)

> "[T]his bill would ... Eliminate the ability for all but a minute percentage of workers to choose their own doctor or obtain a second opinion from a doctor they trust." (CAAA, ex. 2 at 223 [Letter from the Consumer Attorneys of California].)

In addition, the legislature history repeatedly describes the MPN system as protecting employee rights by allowing them to choose a doctor from within the network, to obtain second and third opinions regarding their diagnosis and treatment from within the network, to obtain an independent medical review from outside to network to confirm that the treatment received in the MPN is appropriate, and for the selection of a doctor outside of the MPN if the review finds that appropriate care was not provided. (See, CAAA ex. 2 at 66-67, [Conf. Rpt. Com. Analysis,

4/14/04]; at 89 [Senate Rules Com., Amended Conf. Rpt. No. 1, 4/15/04], at 101 [Senate Repub. Floor Commentaries, 4/16/04], at 115 [Enrolled Bill Memo. to Gov., 4/16/04], and at 118 [Ca. Labor and Workforce Dev. Agency, Enrolled Bill Report SB 899, 4/16/04].) In debating SB 899, neither side ever claimed that employees can simply disregard an MPN at their whim and choose an outside doctor for treatment, whether to obtain an admissible medical report or at all.

3. Through MPNs, the Legislature balanced the rights of the parties and sought to minimize workers' compensation litigation.

In designing MPNs, the Legislature balanced the need for cost controls and efficiency against the potential interests of employees. It created a mechanism for employees (and *only* employees) to obtain second and third opinions within the MPN if they disputed the existing diagnosis or treatment. (§ 4616.3, subd. (c).) Employees (and *only* employees) are also permitted to obtain an independent medical review if there is still a dispute regarding diagnosis or treatment after three medical opinions. (§4616.4.) Importantly, *only the employee has the right to select the primary treating physician, obtain second and third opinions, or invoke an independent medical review*. (And see Cal. Code Regs., § 9767.6, subd. (f).)

In addition, the statutes also provide for treatment outside the MPN under certain exceptions: for example, if the employee properly predesignates a personal physician under section 4600, subdivision (d), or if the MPN does not have a needed medical specialist. (§ 4616.3, subd. (d)(2).) Care outside of the MPN is also provided for to address continuity of care issues.)

Even in creating an MPN, there are several requirements designed to protect employees needed to obtain, and maintain, the necessary approval of the Administrative Director. Importantly, each MPN is required to

establish acceptable procedures for all of the items described above, including procedures for informing employees about the MPN and how to invoke these procedures. (§§ 4616.2, subd. (c) and 4616.3, subd. (b); Cal. Code Regs., §§ 9767.3, subd. (d)(8)(E), (G) and (I) through (N).) MPNs must also meet requirements regarding the qualification, number, types and accessibility of physicians in the MPN, and must include a substantial number of doctors who primarily treat nonoccupational injuries, thus ensuring a variety of medical practices and perspectives. (§ 4616, subd. (a)(1); Cal. Code Regs., § 9767.3, subd. (d)(8)(D), (F) and (H).)

Other protections for employees built into the MPN system include the requirement that a request for authorization of medical treatment may only be modified, delayed, or denied by a licensed physician. (§4616, subd. (f).) Also, physician compensation systems which would encourage reducing, delaying, or denying medical treatment are banned, and any attempt to use economic profiling to evaluate doctors must be disclosed and made publically available. (*Id.*, at subd. (c) and §4616.1.)

"While this is not a perfect bill, it does represent a compromise." (CAAA, ex. 2 at 100 [Senate Repub. Floor Commentaries, 4/16/04].) "Nor are we allowed to second-guess the apparent policy decision of the Legislature, in addressing the workers' compensation crisis." (*Rio Linda Union School Dist. v. Workers' Comp. Appeals* (2005) 131 Cal.App.4th 517, 532.) "It is for the Legislature, not the courts, to pass upon the social wisdom of such an enactment. And, if there is a flaw in the statutory scheme, it is up to the Legislature, not the courts, to correct it." (*Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 334.)

D. In Order To Maintain The Exclusive Nature Of MPNs, Section 4616.6 Excludes All Medical Reports Not Obtained In Compliance With The MPN Procedures.

Section 4616.6 states in full:

> "No additional examinations shall be ordered by the appeals board and no other reports shall be admissable [sic] to resolve any controversy arising out of this article."

Article 2.3 contains all of the MPN provisions, and so by its express terms section 4616.6 applies to the operation of the entire MPN. As such, section 4616.6 categorically bars any order for additional examinations beyond those permitted by the MPN provisions and makes inadmissible any report addressing any controversy regarding diagnosis or treatment obtained in violation of those provisions. Without such a ban, the MPN process would be significantly undermined, as parties could simply opt out of the MPN for tactical benefits at will, submitting whatever partisan reports they obtained or purchased, including from counsel-selected advocates. Such gamesmanship would thwart the goals of the MPN: to provide adequate and economical medical treatment so as to resolve occupational injuries and return employees to work in a timely fashion while minimizing litigation, thus decreasing the burden on both the parties and the WCAB and decreasing the cost of the system overall.

Had the Legislature intended to limit the application of section 4616.6 to those relatively few cases in which the applicant might seek an independent medical review under section 4616.4 – after having already exhausted the right to a second opinion, and also a third opinion – it would have said so. Most likely, the Legislature would have made this provision a sub-section to 4616.4, or specifically referred to the independent medical review process. It did neither.

Instead, the Legislature enacted section 4616.6 as a separate statute with equal standing to all the other provisions in article 2.3. Moreover, the terms of section 4616.6 plainly state that its prohibition applies to "any

controversy arising out of this article," meaning all of article 2.3, and not only to the process described in a few subsections of section 4616.4.

For example, if there is any controversy over the initial examination or treatment following the injury (as apparently happened in this case), the remedy is to change doctors within the MPN, no other examination can be ordered. (§ 4616.3, subd. (b).) Similarly, any controversy regarding any subsequent treatment or diagnosis has its exclusive remedy within the MPN, either by again changing treating physicians, or by seeking a second opinion, or even a third opinion, from an MPN doctor of the employee's choosing. (*Id.*, and subd. (c).) If the controversy still remains, the remedy is an independent medical review. (§ 4616.4.) Further, to preserve the intended benefits of the MPN system, and to enforce its use, section 4616.6 expressly excludes any reports obtained outside of that process. The MPN statutory provisions provide a comprehensive process for the diagnosis and treatment of occupational injuries, and section 4616.6 provides the enforcement procedure which requires the parties to adhere to this statutory scheme.

E. MPNs Have Become A Primary Means Of Providing Diagnosis And Treatment For Occupational Injuries In California.

CHSWC commissioned a follow-up 2011 study on the effects of SB 899, which concluded that MPNs were among "the most important new policies" adopted and noted that most MPNs "are broad panels selected primarily to meet access requirements and provide fee-discounting opportunities."[13] This allows employers not only the ability to control costs

[13] RAND, *Medical Care Provided Under California's Workers' Compensation Program, Effects of the Reforms and Additional Opportunities to Improve the Quality and Efficiency of Care* (2011) located

but also establishes an efficient means of providing appropriate medical care for occupational injuries. As recognize by established treatises, MPNs are increasingly becoming the primary means for treatment of occupational injuries.

> "Similarly, virtually all workers' compensation insurers and large employers have created medical provider networks (MPNs) within which injured employees are required to seek medical treatment." (Hanna, *Cal. Law of Employee Injuries and Workers' Comp.*, (2d Ed., rev. 4/20/12) § 5.01, p. 5-6.)

In surveys conducted for the Department of Industrial Relations in 2008, it was found that 80% of employees surveyed received their treatment though MPNs, including over 85% of those with back injuries.[14] As such, the scope and operation of MPNs potentially affects the vast majority of employees in California and is of great importance to employers who continue to struggle with the burden of providing adequate medical care for occupational injuries.

F. MPNs Are Designed to Reduce Related Litigation And Its Needless Expense, Which Is Otherwise Exacerbated By The Practices Of "Dueling Doctors" and "Doctor Shopping" By Applicants.

The legislative history also documents the specific goal of reducing the "costly and time consuming litigation" that was increasingly draining workers' compensation resources. (CAAA, ex. 2 at 59; citing the Assem.

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at http://www.rand.org/pubs/periodicals/health-quarterly/issues/v1/n3/04.html.

[14] School of Public Health, Univ. of WA, *Access, Quality and Outcomes of Health Care in the California Workers' Compensation System, 2008*, at pp. xiii and xiv. This report is found at http://www.dir.ca.gov/dwc/MedicalTreatmentCA2008/2008_CA_WC_Access_Study_UW_report.pdf. In addition, the vast majority (79%) of injured employees rated their care as "good" or better. (*Id.*, at p. 34.)

Com. on Insurance, Analysis of Sen. Bill No. 899, (2003-2004 Regs. Sess.).) Establishing MPNs "eliminates the 'dueling doctor' system that has driven California medical costs shy high." (CAAA, ex. 2 at 159 [Ca. St. Sen. Repub. Caucus, Outline of Reform Proposal, 4/15/04]; see also at 162 [Senate Floor Statement, 4/16/04 – the existing litigious nature of workers' compensation "distracts from what the system ought to be doing, which is to provide medical care..."].) By establishing adequate minimum requirements for the creation and operation of MPNs, and then giving employees wide discretion to choose doctors and seek multiple opinions and reviews within that framework, MPNs are designed to provide an adequate level of medical care with minimal need for litigation.

In part, MPNs respond to a judicial observation made about the previous unlimited ability of employees to select a treating physician. (*Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 829 ["if there is wide-spread abuse by employees exercising their [unlimited] right to choose a physician, it is a matter that can be brought to the attention of the Legislature."].) In the absence of MPNs, with few exceptions, an employee would be able to select any new doctor at will, in order to shop for a particular opinion or result, often at the direction of counsel, in a practice of "doctor shopping." (*Id.*, and see § 4600, subd. (c).)

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II. THE COURT OF APPEAL HAS REWRITTEN THE STATUTORY LANGUAGE AND DISREGARDED THE LEGISLATIVE PURPOSE OF MPNS.

A. The Court of Appeal Reached Its Decision By Disregarding The Statutory Language Of Section 4616.6 And Imposing An Artificial Definition For The Term "Report."

As discussed above, by its express terms section 4616.6 excludes all "other reports" regarding the resolution of "any controversy arising out of this article." (*Ante*, at 18-20.) By reference to "this article," section 4616.6 applies by its own terms to the entirety of article 2.3 governing MPNs and "any controversy arising" from the operation of MPNs, which govern the diagnosis and treatment of occupational injuries.

Nevertheless, the Court of Appeal concluded that section 4616.6 only applies to the singular report that results from the independent review process mentioned in section 4616.4, subdivision (f). As a practical matter, in order the reach this conclusion the Court of Appeal necessarily assumed that "this article" actually meant "only section 4616.4" (governing independent medical reviews) and that "any controversy" meant "only the final report reached at the conclusion of the independent medical review process." (See, Opinion at 7-8.) Such flagrant deviation from the given statutory language effectively creates a new statute which no longer serves the legislative intent. (See, *ante*, at 13-17.)

Indeed, while the wording of the Opinion is somewhat cryptic, it appears that the Court of Appeal assumed that a primary purpose of the MPN is to reach an independent medical review, and then concluded that such a review was "the controversy" addressed by MPNs. (See, Opinion, at 7.) In fact, the broad and express purpose of an MPN is to diagnose and treat occupational injuries. (§ 4616, subd. (a); and see *ante*, at 13-18.) An

independent medical review is merely a procedure of last resort which is only used, if ever, when a controversy over diagnosis or treatment cannot otherwise be resolved by the primary treating physician, a doctor selected by the employee providing a second opinion, and another selected doctor providing a third opinion.[15] (§§ 4616.4, subd. (b).)

Instead, the Court of Appeals relied entirely on an artificial definition of the word "report," as used in section 4616.6, which the Court of Appeal held could only refer to the singular final report produced at the end of the independent medical review process pursuant to section 4616.4, subdivision (f). In doing so, the Court of Appeal simply disregarded all other controversies that would naturally follow from the operation of an MPN and the treatment and diagnosis of occupational injuries, and the many reports that might address those issues. (Opinion at 7-8.) In fact, there are several reports which would naturally follow from an MPN, including: 1) The initial report prepared upon the first examination after the occupational injury, and any subsequent reports regarding continuing treatment and diagnosis; 2) The examination reports prepared by any subsequent primary treating physicians selected by the applicant (who can change primary physicians within the MPN at will); 3) The examination report prepared if the applicant requests a formal second opinion to challenge the prescribed diagnosis and treatment, 4) The examination report prepared if the applicant requests a third opinion to challenge the prescribed diagnosis and treatment, and 5) the report showing the results of an independent medical review. Each of these reports addresses a potential controversy regarding diagnosis or treatment, and, by its express terms, section 4616.6 should exclude any "other reports" which seek to address these issues.

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[15] It is Defendant's understanding that there has never been a request for an independent medical review under section 4616.4, ever.

In reaching its conclusion, the Court of Appeal relied on a misplaced citation to *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356, to the effect that when the same term or phrase is used in related statutes, it should be interpreted to mean the same thing in each. (Opinion at 7.) While that is generally true, in this case the meaning of "report" common to both statutes is that of a document containing the analysis and conclusions relating to the subject addressed. There is nothing in *Dieckmann* which supports abandoning the common and well known definition of a word like "report." Moreover, there is nothing in section 4616.6 to suggest that it is limited by the details of section 4616.4, subdivision (f), or that it disregards the remainder of the MPN statutes and the controversies that will result from the treatment and diagnosis of occupational injuries.

The Court of Appeal also neglected the broader pronouncements in *Dieckmann*, including: "The paramount rule of statutory construction is that courts should ascertain and effectuate the intent of the Legislature. [Citations] The language of a statute should not be literally or strictly construed if such construction will conflict with or frustrate the ascertained legislative purpose and if the language will reasonably permit a construction that effectuates that purpose. [Citations.]" (*Id.*, at 353.) As discussed above, the purpose of MPNs is to provide the exclusive means for the treatment and diagnosis of occupational injuries. (*Ante*, at 13-17.) The Court of Appeal has disregarded this purpose, and has significantly undermined the use of MPNs through an artificial reading of section 4616.6.

B. Section 4605 Does Not Provide A Trump Card Employees Can Use to Disregard MPNs.

Adopted nearly a century ago, 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 physician or any attending physicians whom

he desires." Nothing in section 4605 addresses the admissibility of medical reports obtained under that section, or any relationship between such doctors and ongoing workers' compensation proceedings. As a practical matter, it merely states a truism – that employees can use their own funds to consult or treat with any medical practitioners they like outside of the workers' compensation process, *but it says nothing about whether such a doctor's report may be admissible in a workers' compensation dispute.*[16] Section 4605 is a simply reminder that although an employee is being provided with treatment through the workers' compensation system, he or she is free to also seek treatment or consultation concurrently from whomever they'd like, as long as they pay for the treatment. It is a reminder that employees are not bound to treat *only* within the workers' compensation system, but can, at the employee's option and expense, treat or consult concurrently *outside of the system*, if they so choose.[17]

Valdez, and the Court of Appeal, appear to mistakenly believe that employees have a right to worker's compensation benefits as determined by the counsel-selected expert of their choice – this is simply untrue. The Legislature has plenary power to determine how workers' compensation benefits will be determined and distributed (*ante* at 10-12), and it has decided to exclude all reports regarding diagnosis and treatment obtained

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[16] In this regard, Valdez hopes to eat her cake and have it too. She argued below (and will presumably argue here) that section 4605 authorizes her to consult with doctors of her choice *at her own expense*; however, she had no intention of paying her doctors, who have filed liens against WDS. (E.g., WCAB Record at 63-69, 85-98, 154-173, etc.) This, in itself, should bar any application of section 4605.

[17] Compare this to section 3751, subdivision (b), barring medical providers from seeking compensation from an employee for treatment related to an occupational injury, unless the pending workers' compensation claim has been rejected. This would be incompatible with section 4605 as invoked by Valdez, unless treatment under section 4605 is wholly outside of, and separate from, the workers' compensation proceedings.

outside of the MPN process. Section 4605 is simply not an antiquated trump card allowing employees to "opt-out" of an MPN whenever they wish to do so.

One goal of statutory interpretation is to harmonize the elements of a statutory scheme. (*Chevron U.S.A., Inc.*, *supra*, 19 Cal.4th at 1194; *DuBois*, *supra*, 5 Cal.4th at p. 388.) This is easily accomplished here. Section 4605 simply preserves the employee's right to consult a doctor of choice outside of the workers' compensation system and is silent on the admissibility of reports. Conversely, section 4616.6 expressly excludes reports obtained outside of a properly established MPN unless the employee has followed the statutorily-mandated procedures for doing so. In any event, if two related statutes cannot be harmonized, then the most recent enactment controls over the older, and the more specific statute prevails over a general one. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.) Section 4616.6 was adopted in 2004 as part of urgent reform effort, and specifically addresses the issue of admissibility. It therefore prevails in both ways over section 4605, which was originally adopted in 1917 and merely states a general principle.

C. This Case Is The Latest In A Long String Of Challenges To The Sweeping Workers' Compensation Reforms Enacted Through SB 899.

In response to the imminent collapse of the workers' compensation system in California, and recognizing the significant social costs this would cause, the Legislature enacted fundamental reforms of the workers' compensation system, the bulk of which came in the sweeping urgent reforms of SB 899. These reforms were intended to control costs, and return the workers' compensation to its original goals– providing prompt, economical and adequate medical case with only a minimal need for litigation.

However, these reforms have provoked a long series of largely unsuccessful challenges from the applicant's bar, which either opposed the reforms, or sought to blunt or delay their effect. (See, e.g., *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285 [applying apportionment based on causation to cases pending when SB 899 went into effect]; *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1432 [applying to pending cases the revised consequences in SB 899 for unreasonable delay]; *Kopping v. Workers' Comp. Appeals Bd.*, (2006) 142 Cal.App.4th 1099, 1103 [affirming statutory language of a conclusive presumption that prior disability exists at the time of a subsequent injury]; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1317 [preventing the applicant's bar from avoiding the impact of the new basis for apportinment]; *Facundo-Guerrero, supra,* 163 Cal.App.4th at 464-465 [affirming Legislature's power to limit the amount of treatment provided]; and *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1540 [upholding SB 899 provision that requires separate injuries to be awarded separately];

Conversely, employers were also required to file petitions in order to enforce implementation of the SB 899 reforms. (E.g., *Sierra Pacific Industries v. W.C.A.B.* (2006) 140 Cal.App.4th 1498, 1502 [applying new guidelines for reasonable medical treatment to cases pending when SB 899 took effect]; *E.L. Yeager Const. v. W.C.A.B.* (2006) 145 Cal.App.4th 922, 930 [reversing order which rejected medical report based on criteria no longer controlling under SB 899]; and *Zenith Insurance Co. v. W.C.A.B.* (2008) 159 Cal.App.4th 483, 487 [applying new ratings schedule to pending claims].) In this context, the instant case is simply one more challenge to the sweeping statutory reforms of SB 899.

III. ALTERNATIVELY, IF THE COURT DECLINES REVIEW IT SHOULD DEPUBLISH THE COURT OF APPEAL OPINION.

As discussed at length above, the Court of Appeal misread the statutes which create and govern MPNs, and, as a result, the Opinion significantly undermines the MPN process and operates to thwart the statutory scheme and legislative goals in implementing MPNs. The Opinion operates to preserve a litigious posture for workers' compensation claims, authorizing the abuses of "doctor vs. doctor" and "doctor shopping" that MPNs were designed to prevent. As a result, the Opinion will serve to needlessly increase workers' compensation expenses, particular the cost and delay that will result from increased litigation. Moreover, rather than providing guidance, as attempted by the *en banc* decisions of the WCAB, the Court of Appeal decision serves to sow confusion and creates more questions than it resolves; a precarious position considering that most California employees are now covered by MPNs.

If this Court declines to presently review this important issue and provide guidance regarding MPNs, Defendant requests that it order the Court of Appeal opinion depublished so that it will not serve as a basis to thwart the increasingly important MPN process. These issues can then be returned to expertise of the WCAB for further consideration.

CONCLUSION

MPNs have become an important means of providing medical care for occupational injuries. Already used for 80% of California employees, the use of MPNs continues to increase as employers struggle to satisfy their obligation to provide reasonable and economic treatment for occupational injuries. As a result, employers, insurers and employees in California need guidance on the proper application of the MPN statutes, and what ability, if

any, employees have to disregard properly established MPNs in favor of partisan medical experts.

DATED: July 30, 2012

Respectfully submitted,

GRANCELL, LEBOVITZ, STANDER, REUBENS and THOMAS

SEDGWICK LLP

By: _____

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WAREHOUSE DEMO SERVICES; ZURICH NORTH AMERICA, ADMINISTERED BY ESIS

CERTIFICATION OF WORD COUNT
CALIFORNIA RULES OF COURT, RULE 8.486(a)(6)

The Petition for Review was produced on a computer, using the word processing program WordXP, and the Font is 13-point Times New Roman.

According to the word count feature of the program, this document contains 8,434 words, including footnotes, but not including the table of contents, table of authorities, and this certification

DATED: July 30, 2012

Michael M. Walsh

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELAYNE VALDEZ,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al.,

Respondents.

B237147

(W.C.A.B. No. ADJ7048296)

ORDER CERTIFYING OPINION FOR PUBLICATION (NO CHANGE IN JUDGMENT)

THE COURT:

The unpublished opinion in this case having been filed on May 29, 2012, and request for certification for publication having been made,

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in rule 8.1105(b) of the California Rules of Court; and

ORDERED that the words "Not to be Published in the Official Reports" appearing on pages 1 and 10 of said opinion be deleted and the opinion herein be published in the Official Reports.

PERLUSS, P. J. WOODS, J. ZELON, J.

Filed 5/29/12 Valdez v. WCAB CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELAYNE VALDEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al. Respondents.	No. B237147 (W.C.A.B. No.ADJ7048296) WRIT OF REVIEW

Proceeding to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded. Charles Ringwalt, Administrative Law Judge.

Perona, Langer, Beck, Serbin & Mendoza, Ellen R. Serbin and John Mendoza, for Petitioner.

Grancell, Lebovitz, Stander, Reubens and Thomas, Timothy E. Kinsey, Sam L. Lebovitz and Steward Reubens for Respondent Warehouse Demo Services; Zurich North America.

Charles E. Clark; The Rondeau Law Firm and Charles R. Rondeau; Goldflam & Barth and Stuart I. Barth for California Applicants' Attorneys Association as Amicus Curiae.

A divided Workers' Compensation Appeals Board (WCAB) concluded that a medical report is inadmissible if it has been prepared by a person who is not part of a medical provider network established pursuant to Labor Code section 4616 et seq. We granted the petition for a writ of review filed by the employee, Elayne Valdez, because of the importance of the issues raised by the parties. We conclude that the rule of exclusion laid down by section 4616.6 applies only when there has been an independent medical review performed under the authority of section 4616.4. We therefore annul the decision of the WCAB and remand with directions for further proceedings that are consistent with this opinion.

FACTS

In a fall on October 7, 2009, petitioner Elayne Valdez sustained injuries to her back, hip and neck in the course and scope of her employment by Warehouse Demo Services, insured at that time by Zurich North America and administered by ESIS. At the time, Warehouse Demo Services had established a medical provider network (MPN). Petitioner began treatment with a physician who was a part of that MPN.

On October 23, 2009, petitioner's counsel wrote ESIS stating, among other things, that petitioner "demands a change of physician pursuant to Labor Code Section 4616.3(c)" and that neither petitioner nor her counsel knew the name of the physician within the MPN and also did not know the name of the MPN. The letter asked ESIS to provide these names to counsel.

On October 31, 2009 petitioner stopped treatment with the MPN physician and became a patient of "Advanced Care Specialists," specifically Mark Nario, D.C., at her own expense. Petitioner testified in a hearing before the workers' compensation administrative law judge (WCJ) that she stopped treatment with the MPN physician because it was doing her more harm than good. Her legal counsel referred her to Dr. Nario.

Petitioner testified that she had 24 physical therapy visits with Dr. Nario and approximately 20 acupuncture visits; following that she received decompression. She also saw a chiropractor.

Warehouse Demo Services, Zurich North America and ESIS (collectively respondents) contend that "petitioner did not avail herself of the ability to change her treating physician to another physician within the MPN." Petitioner contends that she was never told "how she could go about changing doctors within the MPN." The WCAB concluded that for "no apparent reason and without regard to following MPN procedures, [petitioner] began treating with Dr. Nario, a non-MPN physician, upon referral from her attorney."

Whether petitioner was actually informed of the MPN and the need to treat with physicians who were a part of the MPN are therefore contested issues. In light of our disposition of the petition, however, we need not address and resolve these issues; they remain to be resolved on remand.

PROCEDURAL HISTORY

On July 29, 2010, the WCJ made findings that petitioner sustained injuries to her right hip and neck in the course and scope of employment and that she was temporarily disabled from November 2, 2009 through February 10, 2010. The WCJ noted "an initial report of Dr. Nario, 11-2-2009" that estimated 8 to 12 weeks of temporary disability. The WCJ rejected the argument that reports from "non-MPN doctors are inadmissible," ruling that records from "treating doctors have always been admissible for the reason that such doctors are familiar with the patient, generally on a long time basis, and entitled to great weight."

Respondents petitioned for reconsideration. The WCAB granted reconsideration and issued two en banc opinions.

The issue, as formulated by the WCAB, was: "[I]f an applicant has improperly obtained medical treatment outside the employer's MPN, are the reports of the non-MPN treating physician admissible in evidence?"[1]

The WCAB found that the WCJ "relied on the non-MPN reports of Dr. Nario for this finding [temporary disability] and award of benefits." The WCAB also "assume[d] for purposes of this opinion that defendant had a validly established MPN, and that all proper notices required under the MPN were provided applicant." The WCAB noted that petitioner chose to treat with Dr. Nario, even though she would have had several opportunities to challenge the treatment she was receiving from the MPN physician.

Finding that an employee has the right to seek the opinion of a second and third physician in the MPN in case of a disagreement over diagnosis and treatment and has the further right to seek independent medical review after the third physician's opinion, the WCAB held that Labor Code 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.'"[2] The WCAB concluded that reports from non-MPN physicians are inadmissible and may not be relied on to award compensation.

The WCAB added an additional reason for finding Dr. Nario's report inadmissible: because Dr. Nario was not the primary treating physician (PTP) in the MPN, he was not qualified to render opinions on the medical issues necessary to determine petitioner's eligibility for compensation. According to the WCAB, there can be only one PTP and only the PTP can "render opinions on the medical issues necessary to determine petitioner's eligibility for compensation."

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[1] "On or after January 1, 2005, an insurer or employer may establish or modify a medical provider network for the provision of medical treatment to injured employees." (Lab. Code, § 4616, subd. (a)(1).) All further statutory references are to the Labor Code, unless otherwise noted.

[2] 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."

For the latter point, the WCAB relied in large part on *Tenet/Centinela Hosp. Medical Ctr. v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 1041 (*Tenet*) to find that the petitioner could not select someone outside the MPN to serve as the PTP; because Dr. Nario was not authorized to be the PTP, he could not render an opinion on the medical issues necessary to determine petitioner's eligibility for compensation and his report was inadmissible.

The WCAB rejected the contention that section 4605 made Dr. Nario's report admissible.[3] According to the WCAB, section 4605 does not address the issue of the admissibility of medical reports, but merely allows the employee to consult or treat with a physician of choice at the employee's expense.

Two commissioners dissented and filed separate dissenting opinions. In substance, while the dissenters agreed with the WCAB that petitioner should not have unilaterally left the MPN physician, they found that the non-MPN medical report should be admissible at the WCAB's discretion.

In its second en banc opinion, the WCAB did not limit itself to holding that section 4616.6 made Dr. Nario's report inadmissible. The WCAB also based its decision on the conclusion that Dr. Nario was not the PTP and therefore could not render a medical opinion, which made his report inadmissible. The two dissenters maintained their positions.

DISCUSSION

1. The Purpose of Section 4616.6 and its Relationship to the Statutory Scheme

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be

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[3] Section 4605 provides: "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires."

harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)[4]

Section 4616.6 provides: "No additional examinations shall be ordered by the appeals board and no *other* reports shall be admissable [*sic*] to resolve any controversy arising out of this article." (Italics added.) This statute is in article 2.3, which is entitled "Medical Provider Networks," and includes only sections 4616 to 4616.7. Under those sections, if an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician the employee has picked from the MPN, the employee has the right under section 4616.3, subdivision (c) to seek the opinion of a second, and then a third physician, both of whom must be in the MPN.

Subdivision (b) of section 4616.4 provides: "If, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request independent medical review regarding the disputed treatment or diagnostic service still in dispute after the third physician's opinion in accordance with Section 4616.3. The standard to be utilized for independent medical review is identical to that contained in the medical treatment utilization schedule established in Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate."

The criteria for the selection of a physician to conduct an "independent medical review" are contained in subdivision (a) of section 4616.4. The rigorous process of an independent medical review is also detailed in subdivisions (c), (d) and (e) of section 4616.4.[5]

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[4] Amicus Curiae CAAA has requested that we take judicial notice of the legislative history of these sections, along with two cases; we grant the motion as to the legislative materials, but deny as to the case reports.

[5] "Upon receipt of information and documents related to the application for independent medical review, the independent medical reviewer shall conduct a physical examination of the injured employee at the employee's discretion. The reviewer may

Subdivision (f) of section 4616.4 states in relevant part: "The independent medical reviewer shall issue a *report* to the administrative director, in writing, and in layperson's terms to the maximum extent practicable, containing his or her analysis and determination whether the disputed health care service was consistent with the medical treatment utilization schedule established pursuant to Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, within 30 days of the examination of the injured employee, or within less time as prescribed by the administrative director." (Italics added.)

The word "report" must mean the same thing in section 4616.4 subdivision (f) as in section 4616.6. "Where the same term or phrase is used in a similar manner in two related statutes concerning the same subject, the same meaning should be attributed to the term in both statutes unless countervailing indications require otherwise. [Citations]" (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356, rev. den.) Thus, the "report" that is admissible and not precluded by section 4616.6 is the report of the independent medical review that is prepared pursuant to subdivision (f) of section 4616.4. The controversy that it resolves is that which is the subject of the entire article – the use of the MPN.

Considering the thoroughness of an independent medical review, once that review has been concluded and the controversy of treatment or diagnosis has been resolved, the

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order any diagnostic tests necessary to make his or her determination regarding medical treatment. Utilizing the medical treatment utilization schedule established pursuant to Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, and taking into account any reports and information provided, the reviewer shall determine whether the disputed health care service was consistent with Section 5307.27 or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines based on the specific medical needs of the injured employee." (§ 4216.4, subd. (e).)

matter should be at an end. Further medical reports and examinations would not only be likely to be duplicative, but would also add time and expense to the process. This also explains why section 4616.6 specifically bars the WCAB from ordering additional medical examinations. "We must also give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*In re McSherry* (2003) 112 Cal.App.4th 856, 862.)

It does not makes sense, however, to construe section 4616.6 as a general rule of exclusion, barring any use of medical reports other than those generated by MPN physicians. Section 4616.6 states nothing of the sort. If the Legislature intended to exclude all non-MPN medical reports, the Legislature could have said so; it did not.

The WCAB appears to have based its conclusion that section 4616.6 "precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnoses issues" on the circumstance that an employee can select a physician within the MPN and is also afforded a "multi-level appeal process where treatment and/or diagnosis are disputed." The fact that process is available to allow physician choice within the MPN does not, however, demonstrate legislative intent to exclude from all proceedings relevant evidence of the employee's medical status.

While as the WCAB states in its brief submitted on this issue[6] that the question whether section 4616.6 is limited to cases where there has been an independent medical review does not arise because in this case there was no independent medical review, it was the WCAB's decision to derive an evidentiary exclusion from section 4616.6 that has led to this review.

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[6] We notified the parties pursuant to Government Code section 68801 that we were considering this question: Is section 4616.6 limited to cases where there has been an independent medical review under section 4616.4?

Based on the phrase "no other reports shall be admissible to resolve any controversy arising out of this article" Respondents contend that section 4616.6 makes inadmissible "any report addressing diagnosis or treatment obtained in violation [MPN] provisions." However, this is not what section 4616.6 states. Section 4616.6 nowhere refers to reports of "diagnosis or treatment obtained in violation MPN provisions." If the Legislature intended to bar for all purposes all medical reports that were not generated within the MPN, the Legislature could have said so; it did not.

Amicus California Workers' Compensation Institute suggests that, besides section 4616.6, there is a "much broader statutory scheme from which the Appeals Board determined that reports by non-MPN physicians are inadmissible into evidence for any purpose." Support for this suggestion, according to this amicus, comes from the circumstance that in other statutory contexts reports are limited to specifically designated documents.

In fact, the existence of such limitations in other contexts supports our conclusion. Given that in other contexts the Legislature has created rules of exclusion, but did not as to non-MPN reports, we can only conclude that the Legislature did not enact that limitation. "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" (*Arden Carmichael v. County of Sacramento* (2001) 93 Cal.App.4th 507, 516.)

2. Tenet Does Not Create a Rule of Exclusion

The WCAB's decision is also based on the circumstance that Dr. Nario was not the "primary treating physician" (PTP), as that concept is defined by California Code of Regulations, title 8, section 9785(a), and that he was therefore not authorized to render an opinion on "'medical issues necessary to determine the employee's eligibility for compensation' under [Labor Code] section 4061.5 and [California Code of Regulations, title 8, section] 9785(d)." Drawing on *Tenet*, the WCAB concluded that this makes non-MPN medical reports inadmissible. (*Ibid.*)

Tenet involved an employee who disagreed with the PTP, Dr. Glousman, who had concluded that she was permanent and stationary[7] and could return to work; instead of selecting a qualified medical evaluator under section 4061 and 4062, she selected a physician on her own, Dr. Stokes. (*Tenet, supra,* 80 Cal.App.4th at p. 1044.) The WCJ treated Dr. Stokes as the PTP and did not rely on Dr. Glousman's report. (*Id.* at pp. 1044-1045.)

The Court of Appeal held that Dr. Glousman continued as the employee's PTP and that the employee therefore should have resorted to the dispute resolution procedures of section 4061 and 4062 (*Tenet, supra*, at pp. 1046, 1048). While it is manifest that the Court of Appeal in *Tenet* concluded that the WCJ should not have considered Dr. Stokes to be the PTP, the court did not conclude or state that Dr. Stokes' report was inadmissible. *Tenet* does not announce such a rule of exclusion, but instead only held that the physician selected by the employee could not be substituted by the WCJ for the duly serving PTP.

The WCAB noted that, as in *Tenet*, the employee was not free to ignore the dispute resolution mechanisms of sections 4061 and 4062. However, as is apparent, *Tenet* does not support the conclusion that "[a]ccordingly, the non-MPN reports are inadmissible to determine an applicant's eligibility for compensation."

The statutory scheme does not exclude from consideration medical reports prepared by non-MPN physicians, but in fact provides that medical reports prepared by the employee's treating physician may be submitted to the qualified medical evaluator.[8] There is no statutory requirement that the employee's treating physician be part of the

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[7] "Permanent and stationary" means that the person has reached maximal medical improvement and is unlikely to undergo a change within the next year.

[8] "Any party may provide to the qualified medical evaluator selected from a panel any of the following information: [¶] (1) Records prepared or maintained by the employee's treating physician or physicians. [¶] (2) Medical and nonmedical records relevant to determination of the medical issue." (§ 4062.3 subd. (a).)

employer's MPN. Rather, the statute provides that medical records "relevant to the determination of the medical issue" may be provided to the qualified medical evaluator. (Fn. 8.)

As the Legislature permitted the parties to submit non-MPN medical reports to the qualified medical evaluator, there is no basis to infer a legislative intent to preclude their use in other proceedings. It would be illogical to conclude that the qualified medical evaluator may consider non-MPN medical reports, but that those reports must be excluded if a party seeks to introduce them in other proceedings solely because they have not been prepared by MPN physicians.

Our conclusion is buttressed by the employee's undoubted right to contract with physicians of his or her choice. A rule excluding medical reports by such physicians for the sole reason that the report was not prepared by an MPN physician would eviscerate the right guaranteed by section 4605.

4. Conclusion

The decisions of the WCAB are annulled and the case is remanded for further proceedings consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick LLP, 801 South Figueroa Street, 19th Floor, Los Angeles, CA 90017-5556. On July 30, 2012, I served the within document(s):

PETITION FOR REVIEW

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.

☑ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 30, 2012, at Los Angeles, California.

Barbara Fergerson

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