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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

ELAYNE VALDEZ,

Petitioner ~~and Appellant~~,

v.

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

Respondents ~~and Defendants~~.

REPLY TO PETITIONERS' ANSWER BRIEF ON THE MERITS

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

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INTRODUCTION

Valdez's Answer confirms the urgent need for this Court to clarify the scope and meaning of Labor Code section 4616.6, and, by extension, the very viability of the Medical Provider Network (MPN) system established by the Legislature. MPNs are the predominant means of providing diagnosis and treatment for industrial injuries, *covering approximately 80% of California employees*. Given the importance of MPNs in the newly-revamped world of workers' compensation, and the significant number of pending and future cases which involve MPNs, their continuing viability is a question in need of immediate answer.

Valdez and the Court of Appeal would pull the linchpin of the MPN system: Labor Code section 4616.6, which says that only reports generated through the MPN are admissible. According to Valdez, employees are free to disregard MPNs whenever they perceive a tactical advantage in doing so. In practical effect, that would undermine the very existence of MPNs, which cannot achieve the Legislature's salutary goals if employees may abandon the MPN process at will.

That is exactly what would happen should this Court affirm the Court of Appeal's reading of Labor Code section 4616.6. The opinion below narrowly restricted the "reports" which are inadmissible to only those reports made after the Independent Medical Review (IMR) process. But there will seldom if *ever* actually *be* a report *after* the IMR. By statue, the administrative director *must* immediately adopt the IMR report, which then governs future treatment. Therefore, the appellate court's conclusion – that section 4616.6's ban on admission of "reports" is limited to post-IMR reports – is nonsensical. The court below's interpretation would effectively nullify section 4616.6.

Valdez also attempts an end run around MPNs by arguing that section 4605[1] - a century-old statute which grants workers the right to treat outside the workers' compensation system at their own expense – creates a loophole that swallows up section 4616.6's restriction on admissibility of reports. The notion that the Legislature intended this timeworn, rarely cited statute to trump the more recent section 4616.6 is ludicrous on its face. As the en banc Workers' Compensation Appeals Board (WCAB) concluded, section 4605 *does not address admissibility at all*, and would not undercut section 4616.6's exclusion of outside reports in any case. Even as amended under SB 863, section 4605 confirms that outside medical reports are not admissible.

Valdez's claim that the exclusion of outside medical reports violates due process is similarly flawed. The Legislature's plenary power over workers' compensation is well established. The Legislature created multiple safeguards for employees when establishing the MPN system. There is no due process violation here of any kind.

This Court should reverse the Court of Appeal and uphold the en banc opinions of the WCAB.

FACTUAL ISSUES RAISED IN THE ANSWER

Though the factual history is addressed in the Opening Brief (at 3-10) and the Petition for Review (at 5-9), a few issues raised in Valdez's Answer require a response. First, Valdez inexplicably challenges the *certified record* prepared and filed by the WCAB at the specific instruction of the Court of Appeal, arguing that any documents that were not

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

specifically admitted into evidence by the WCJ should be stricken here.[2] (Valdez Answer at 6-7.) These documents primarily address Defendant's MPN, including the MPN notices provided to Valdez, the written confirmation she signed acknowledging the MPN, and communications on how to schedule treatment within the MPN and her choices for medical care. (See WCAB at 121-129, and Opening Brief at 3-6.) However, rather than address the MPN issues raised by Defendant, which should have resulted in the exclusion of the outside medical reports, the WCJ erroneously deferred the so-called "MPN" issues as "not relat[ing] to temporary disability." (WCAB Record at 103:7-9.) The WCJ then relied exclusively on the reports of the non-MPN physicians selected by Valdez's counsel to find that Valdez was entitled to temporary disability. (See ex. 6 at 31-32; Opening Brief at 6.)

The WCJ never made any evidentiary rulings regarding the admissibility of these documents, but rather improperly deferred any consideration of the MPN at all, including whether this was a valid or duly constituted MPN or whether Defendant had given Valdez proper notice, despite Defendant's repeated attempts to exclude Valdez's medical reports on the grounds that there was an MPN. (WCAB Record at 103:7-9; and at 73, 74 and 76.) Since the WCJ's error forms the basis for the subsequent petition for reconsideration, and the WCAB rulings, consideration of the documents *improperly* ignored is appropriate. Defendant has argued at every level that the outside medical reports are inadmissible because Valdez was required to treat through the MPN, putting the MPN and all related documents directly at issue. (WCAB Record at 139:12-20; *Valdez v.*

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[2] The events regarding the certified record and the documents Valdez seeks to strike are described in greater detail in Defendant's Response to Valdez's Motion to Strike, filed concurrently with this reply and incorporated herein.

Warehouse Demo Services (2011) 76 Cal.Comp.Cases 330, 331 (*Valdez I*); Opening Brief at 6-7.)

In any case, the WCAB has certified a record of documents which it reviewed in making its en banc rulings, and this is the pertinent record for appellate review under section 5950 [authorizing judicial review of an order, decision, or award by the WCAB]. There is simply no basis on which to challenge the certified record prepared and submitted by the WCAB.[3]

In fact, there has never been any dispute that Defendant has an MPN: Valdez initially treated in it. (See, Pet. For Writ of Review at 2; Valdez Answer at 7; Opinion at 2.) Valdez made the obligatory argument that she did not receive proper notice of the MPN as a tactic to avoid the MPN in favor of her counsel's chosen medical advocate, despite the multiple notices to Valdez. (WCAB Record at 107-108, 121-123 and 129.) Defendant has always acknowledged that the WCJ improperly deferred, and never ruled upon, the validity of the MPN or whether Valdez received proper notice.[4] (Opening Brief at 5-7, and see 4, n.2.) The WCAB later assumed that the MPN was properly established, and proper notice given, in order to address the meaning of section 4616.6, and the Court of Appeal followed suit. (*Valdez I*, at 334; Opinion at 4.)

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[3] As such, the subsequent assertions by Valdez which rely on the absence of this portion of the record should be disregarded (E.g. Valdez Answer at 6-8, 10, 25-26.)

[4] After January 1, 2013, per SB 863, the validity of an MPN is conclusively presumed once the MPN is approved by the director and the failure to satisfy the notice requirements is insufficient to avoid treating within the MPN so long as adequate medical care is provided. (Lab. Code §§ 4616, sub. (b)(1) and 4616.3, subd. (b), respectively.)

LEGAL DISCUSSION

I.

IT IS WELL ESTABLISHED THAT THE LEGISLATURE INTENDED MPNS TO BE THE EXCLUSIVE MECHANISM FOR TREATING INDUSTRIAL INJURIES.

A. Valdez Disregards The MPN Statutory Scheme And The En Banc Decisions Of The WCAB.

In both the Opening Brief (at 10-15) and the Petition for Review (at 13-20), Defendant discussed at length the MPN statutory scheme, how it is designed to operate as the exclusive means of diagnosis and treatment and how Labor Code section 4616.6 is the lynchpin needed to enforce this process by excluding outside reports on diagnosis and treatment. In response, Valdez reviews the individual MPN statutes and lists many of the same maxims on statutory interpretation, but these are ultimately unhelpful to her attempt to redraft section 4616.6. (Valdez Answer at 14-21.)

Valdez also cites section 3202, which provides generally that workers' compensation statues "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Valdez never explains how interpreting section 4616.6 to undermine the operation of MPNs would serve the collective interests of employees, since MPNs are designed to reduce cumbersome litigation and provide more consistent and prompt medical services to workers. (Opening Brief at 14-15.) In any case, section 3202 "is a tool for resolving statutory ambiguity *where it is not possible through other means to discern the Legislature's actual intent.*" (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1332.) (Emphasis added.) As such, section 3202 is a tool of last resort, used only if other means of statutory interpretation, such as legislative history, cannot resolve the ambiguity. (*Id.*)

As the WCAB explained at length in two en banc opinions, the MPN statutory scheme "precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnosis issues." (*Valdez I*, at 334; and see *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970, 973-975 (*Valdez II*).) There is no *need* to look beyond the statutory language itself to conclude that non-MPN reports are excluded, and the WCAB's statutory interpretations should be deferred to unless "they are clearly erroneous or unauthorized." (*Brodie*, 40 Cal.4th at 1331.)

The legislative history expressly reinforces this conclusion, when it repeatedly states that MPNs are designed to be the exclusive means of diagnosis and treatment for purposes of workers' compensation benefits and were intended to minimize related litigation. (Pet. for Review at 11-12 & 15-17; Opening Brief 10-13.) Valdez effectively concedes this point by failing to even mention the legislative history.

Valdez also claims that section 4616.6 does not apply to proceedings adjudicating temporary disability, but she fails to address the arguments on this point in the Opening Brief (at 8-9 and n. 6) and *Valdez II* (at 973, n, 4). (See, Valdez Answer at 21-23.) While Valdez is obviously correct that disability benefits are distinct from medical benefits, this misses the point. Her argument flies in the face of section 4616.6, which says that "no other reports shall be admissable [sic] to resolve *any controversy* arising out of this article." (Emphasis added.) Therefore, a medical report generated outside the MPN cannot be used to resolve a controversy over diagnosis and treatment, whether it is used to support medical benefits or disability benefits. If the employee does not agree with the initial MPN medical report, then the employee, and only the employee, can seek a second opinion, and then a third opinion, and an IMR on the issue, if desired, under sections 4616.3 and 4616.4. In any case, with regard to disability benefits, the employee can also submit whatever additional evidence properly

address the issue, such as testimony or other relevant documents. (See Lab. Code § 5703.)

Valdez also claims that she didn't really dispute the MPN diagnosis and treatment, despite switching doctors. (Valdez Answer at 22.) Presumably, she means that there was no "controversy" so somehow section 4616.6's ban on admissibility just disappears. Her claim is makeweight. Valdez belatedly claimed that she changed doctors because the treatment she was receiving with the MPN doctor was not working – clearly a *dispute* about – i.e., a *controversy* over - treatment. (Opening Brief at 5.) If there was no dispute about diagnosis or treatment, there would have been no reason or "need" for the counsel selected doctor to make a separate diagnosis, which he did. (WCAB Record at 112-115.) In any case, a dispute over who should *conduct* the treatment is still a dispute *about treatment*.[5]

B. Valdez And The Court of Appeal Would Make Section 4616.6 Superfluous.

In an attempt to limit its effect, Valdez argues first that section 4616.6 only applies to activities taking place within the MPN, and not to any other diagnosis or treatment, and then further argues, like the Court of Appeal, that section 4616.6 only applies when there has been an IMR within the MPN.[6] (Valdez Answer at 17-18.) Valdez offers little analysis in this regard, relying largely on the assertion that it must be so.

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[5] Also, the reference to "her own physician" is fiction. (Valdez Answer at 22.) This doctor was selected by counsel and was not someone with whom Valdez had any relationship. Indeed, she could have designated a personal doctor before the injury for treatment despite the MPN. (Lab. Code § 4600, subd. (d).)

[6] This is different from the separate IMR process which SB 863 has now established in workers' compensation claims in which there is no MPN. The two IMR processes (while unfortunately given the same name)

Her first point is addressed in the Opening Brief (at 19-22) and was also rejected by the WCAB. (*Valdez I*, at 334.) When an MPN applies, it is designed to be the sole mechanism for diagnosis and treatment, so any controversy regarding diagnosis and treatment necessarily arises out of the MPN statutes. As such, "no other reports," but for those authorized by the MPN statutes shall be admissible to address diagnosis or treatment. (Lab. Code § 4616.6.) What *other* reports could section 4616.6 be excluding? The reports generated pursuant to the MPN statutes are admissible, leaving only outside reports to exclude. If section 4616.6 does not apply to outside reports, it would appear to apply to nothing at all.

Valdez then argues that section 4616.6 only applies to the IMR. (Valdez Answer at 18 and 21.) However, as previously discussed, this is wholly inconsistent with the statutory construction and would also make section 4616.6 a nullity. (Opening Brief at 22-26.) Valdez ignores that discussion. Similarly flawed is her argument that section 4616.6 could have been drafted to reinforce evidentiary exclusions beyond the IMR, either originally or through SB 863. Since section 4616.6 as written already excludes outside reports, there was no need to modify it.

The fallacy of Valdez's argument is demonstrated by the IMR statute itself. Section 4616.4 describes the effect of the IMR report as follows: "The administrative director *shall* immediately adopt the determination of the independent medical reviewer, and shall promptly issue a written decision to the parties." (Lab. Code § 4616.4, subd. (h).) (Emphasis added.) The administrative director has no discretion here. Once properly completed, the IMR report *must* be adopted and any treatment approved in the report *must* be authorized. However, according

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are distinct and apply under different circumstances to different claims. (See, Lab. Code §4616.4 (MPN) and §4610.5 (non-MPN).) All references to "IMR" in this brief are to the MPN IMR.

to Valdez (and the Court of Appeal), the only purpose of section 4616.6 is to *exclude other reports which might contradict the IMR report.* But there won't be any. The administrative director is required to adopt the IMR report, and under section 4616.4 subdivision (i) the employee is allowed to choose a doctor to perform the approved procedure. By the time of the dispositive IMR report, there is no room for nor need for other reports. If section 4616.6 is to have any meaning, it must mean something more than merely excluding reports that are already barred from having any impact under section 4616.4.

C. Valdez's Reliance On Section 5703 Is Misguided.

Labor Code section 5703, subdivision (a), says the Board "may receive as evidence," "and use as proof of any fact in dispute," the following matters, including the "[r]eports of attending or examining physicians." Defendants showed in their opening brief why the general provisions of section 5703 do not trump section 4616.6's ban on admission of reports generated by non-MPN physicians. (Opening Brief at 26-27.) Valdez's response is to merely *assume* that the general provisions of section 5703, subdivision (a) necessarily bar any attempt to restrict evidence for any reason.[7] (See, Valdez Answer at 36-37.)

The WCAB discussed section 5703 at length, rightly concluding it did not override section 4616.6's ban on admission of reports generated outside of the MPN. (*Valdez I* at 336-337; *Valdez II* at 979, n. 12; and see *Brodie*, *supra*, 40 Cal.4th at 1331 [WCAB's statutory interpretations should be deferred to unless "they are clearly erroneous or unauthorized."].) The Board concluded it would necessarily be an abuse of discretion to use section 5703 to circumvent MPNs and section 4616.6. (*Valdez I* at 337.)

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[7] Oddly, Valdez claims that the Court of Appeal itself relied on section section 5703, when the opinion below actually never *mentions* section 5703 at all. (Valdez Answer at 2)

Valdez relies on one of the WCAB dissents to claim: (1) the WCAB's implementation of section 4616.6 is suspect because it creates the first exception to section 5703's broad language about receiving doctors' reports; and (2) that the Legislature did not intend to require treatment within the MPN. (Valdez Answer at 13.)

As shown in the Opening Brief, the first point is both irrelevant and untrue. It is untrue because there already are exceptions to section 5703's broad, general statement that the Board may receive evidence of doctor reports, including section 4061 subdivision (i) [excluding reports on permanent disability unless produced by specified doctors] and section 5502, subdivision (d)(3) [barring admission of reports produced after the close of discovery]. (See Opening Brief at 27 for additional exceptions.)[8] It is irrelevant because being the first exception would not change the validity of section 4616.6. The second mistaken point is addressed above. (See *anti* at 5-7; and see Opening Brief at 19-22.)

Substituting hyperbole for analysis, Valdez claims that enforcing section 4616.6's admissibility ban would "strip" section 5703 and 5704 "of all effectiveness and in essence, render them void." (Valdez Answer at 37.) It bears repeating that the converse is equally true: her rewriting of section 4616.6 would render all outside reports *admissible* despite that statute's plain language to the contrary. The sole (and nonsensical) exception would be to bar admission of reports issued after the IMR report. (See discussion *ante* at 7-9.) But in any event, section 5703, subdivision (a) continues to allow the WCJ to review all medical reports "of attending or examining physicians" not otherwise excluded, whether by sections 4616.6, 4061, 5502, or otherwise. Similarly, section 5704 still requires service on the

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[8] The opening brief contains a typo. It mistakenly refers to section 4061 subdivision (d), when it should be (i).

parties of all materials added to the record without notice, and a chance to respond to those matters with admissible evidence. The meaning of these statutes has not changed, and they are certainly not stripped or void.

Valdez's reliance on cases which have admited non-MPN reports under section 5703 is equally misguided and irrelevant. (See, Valdez Answer at 37-38.) All of the published decisions she cites *predate* the creation of the MPNs system; the most recent one was written in 1967. The remaining four citations are to unpublished WCAB panel decisions, which not only predate the *Valdez* en banc decisions but fail to even mention section 4616.6.[9]

II.

LABOR CODE SECTION 4605 DOES NOT ALTER SECTION 4616.6'S BAN ON ADMISSION OF NON-MPN REPORTS, AND IS INAPPLICABLE IN ANY CASE.

Valdez repeatedly asserts her right to obtain medical reports as desired and then use them to obtain workers' compensation benefits. For the reasons discussed in the Opening Brief and by the WCAB, section 4605 does not trump section 4616.6. (Opening Brief at 28-35.)

A. The Cases Cited By Valdez Regarding Section 4605 Do Not Address The Issue Of Admissibility.

None of the cases she cites even suggest that section 4605 has any relevance to admissibility or discuss MPNs in any way.[10] Instead, the two published decisions on which she relies address failed attempts by doctors

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[9] Moreover, one panel decision (*Martinez*) expressly declined any ruling on admissibility, and another (*Peak*) noted that defendant failed to timely raise the MPN issues and then failed to support them.

[10] Valdez mistakenly cites the *Donaldson* and *Cruzan* cases in this argument, but since neither has anything to do with section 4605 they are not discussed here. (See Valdez Answer at 25; and see *post* at 17-18.)

to collect payment from the employee for their medical services, citing section 4605 and an alleged agreement by the employee to pay them. Valdez is mistaken to think these cases support her position.

For example, Valdez relies on *Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal. App. 3d 486 for the general statement that section 4605 acknowledges an employee's right to treat *outside* of the workers' compensation system. But she ignores the balance of the opinion and insists that she can use 4605 (outside) medical reports *inside* the workers' compensation system. First, *Bell* decided that section 4605 did not apply in that case because, like here, "[n]othing in the record before us suggests that [the applicant] sought any medical assistance from [the doctor] on any basis other than industrially injured employee [ ] whose employer[was] liable for the reasonable expense thereof." (*Id.*, at 490.) In addition, in the sentence immediately following the one quoted by Valdez, *Bell* says that medical treatment properly sought under section 4605 "is not within the jurisdiction of the Board." (*Id.*; and see Valdez Answer at 25.) According to *Bell*, if medical care is properly sought under section 4605, then it is unrelated to the subject industrial injury.

Perillo v. Picco & Presley (2007)157 Cal.App.4th 914 is similarly unhelpful. There, employees retained a medical expert to prepare medical-legal reports for use in both workers' compensation claims and a third-party suit in civil court. After being partially paid by the employer through workers' compensation, the doctor tried to recover additional amounts from the third party settlement. The court ruled that workers' compensation exclusivity barred any additional recovery and that the employer was responsible for these costs because it had contested the injury. (*Id.*, at 929-931.) The court further concluded that section 4605 did not apply because the doctor was not a treating physician and that section 4605 did not apply

to medical-legal services. (*Id.*, at 936-937.) There is no mention of MPNs or any issues of admissibility.

B. Valdez's Feigned Reliance On Section 4605 Is Disingenuous.

Valdez continues to make the odd argument that whether or not she ever intended to pay for outside medical treatment has nothing to do with her ability to rely on section 4605 to use any resulting outside report to obtain benefits. (Valdez Answer at 25-26.) But by its own terms, section 4605 *only ever applies* when an employee obtains an attending physician "*at his own expense*." (Emphasis added.) Thus, that statute cannot possibly apply here. There is no evidence that Valdez ever intended to pay any outside doctor, indeed quite the opposite is true, since her outside doctor filed a lien in this workers' compensation proceeding. (WCAB Record at 85-95.) Thus, by its own terms, section 4605 does not apply here. (See, Opening Brief at 5-6.) Nor, of course, will it *ever* apply here, to trump section 4616.6's ban on admission of non-MPN reports, for the many reasons already discussed. (See discussion at Opening Brief, pp. 28-32.) Applicants cannot rely on section 4605, which allows them to treat outside the workers' compensation system at their *own* expense, only to shift their "own expense" onto their employers.

Valdez next claims that her abandonment of the MPN in favor of her counsel-selected outside physician will actually *save* the employer money. Even if that were true, she is substituting her own policy decision for that of the Legislature, which, via section 4616.6, flatly prohibited admission of reports from non-MPN physicians. But in any event, her "cost savings" policy claim is *not* true. "Outside doctors" have every expectation of being paid *by the employer*; they promptly declare themselves the primary care doctor and pursue a lien against the employer. (Opening Brief 5-6 and 29-

31.) *That is precisely what the outside doctor did here.* Instead of a cost "savings," resort to a physician outside the MPN results in yet another lien claim added to the existing backlog, with all the inherent legal fees and transaction costs, in addition to the potential for employers having to pay all or part of the lien. (*Id.*, at 31-32.) Net effect: employers have established elaborate MPNs, with the concomitant expense, as the exclusive means to diagnose and treat, but according to Valdez employers must *also* pay the outside doctor when employees such as Valdez abandon the MPN on a whim, in *purported* reliance on section 4605, when the conditions of section 4605 (employees pay outside doctors at their own expense) have not been satisfied. That is double the expense, not a "savings" in costs. Valdez's reliance on section 4605 is nothing more than an ill-disguised artifice for evading the mandatory MPN system.

Based on changes enacted by SB 863 regarding liens, Valdez argues that any such problems have already been addressed. (Valdez Answer at 26-27.) This argument is also misguided. First, because it forgets the enormous number of *existing liens* filed *before* SB 863 went into effect. (Opening Brief 31-32.) Second, because it assumes that motivated counsel will not find other potential loopholes in an attempt to preserve the litigation model of dueling doctors. The Legislature has already enacted a simple solution to this problem – bar the admission of medical reports obtained outside the MPN statutory scheme. The argument that such an exclusion is not needed is simply an attempt to keep open the potential for future loopholes.

And Valdez ignores Defendants' point, that SB 863's recent amendment to section 4605 actually reinforces the conclusion that such outside reports are not admissible. Instead, Valdez asserts that SB 863 actually makes 4605 reports *admissible*. (Valdez Answer at 27.) As explained in the Opening Brief, however, this is contrary to the new

statutory language and would undermine MPNs, which have been newly reinforced by SB 863. (Opening Brief at 32-35, including n.23.)

III.

THE LEGISLATURE HAS WIDE DISCRETION TO IMPLEMENT A WORKERS' COMPENSATION SYSTEM AS IT SEES FIT, AND THE MPNS PROVIDE ADEQUATE DUE PROCESS.

Valdez challenges the power of the Legislature to enact MPNs as the exclusive means to diagnose and treat within the workers' compensation system. She challenges the dispute resolution process built into MPNs, arguing for the first time that any employee undergoing an IMR "is denied the constitutional right to due process of law." (Valdez Answer at 20.) The claim is ironic, since she abandoned the MPN, offering no reason until long after the fact, and never sought to avail herself of the IMR process. In any event, Valdez's arguments are misplaced since the Legislature exercised its plenary powers to reasonably balance the interests of all parties, and the public good, when designing MPNs to provide adequate medical care.

A. There Is No Infringement Of Substantive Due Process: Employees Have No Right To Workers' Compensation Benefits Except As Provided By Statute.

Substantive due process "protects against arbitrary legislative action" ... and "requires legislation not to be unreasonable, arbitrary or capricious but to have a real and substantial relation to the object sought to be attained. (*Coleman v. Dept. of Personnel Admin.* (1991) 52 Cal.3d 1102, 1125) (Citation and internal quotes omitted.) To offend substantive due process, the challenged law must infringe on fundamental and

constitutionally protected liberty or property interests. (*Dawn D. v. Superior Court* (1998) 17 Cal.4th 932, 940.)

As discussed in previous briefs, employees have *no right* to workers' compensation benefits except for those provided at the Legislature's discretion in the exercise of its plenary power. (See Opening Brief at 18-19; Pet. for Review at 10-12.) Valdez has never challenged these well-established authorities. Nor has she ever questioned the goals or motives of the Legislature to provide adequate medical care for industrial injuries based on objective medical standards while minimizing the need for litigation. There is nothing unreasonable, arbitrary or capricious in how the Legislature designed MPNs, and no loss of a fundamental right is at issue in any case. Thus, there is no substantive due process violation here.

Valdez mistakenly relies on her general right to seek medical care outside of the workers' compensation process, as recognized by section 4605. (Valdez Answer at 30-31.) But there is nothing about the MPN process, or the exclusion of non-MPN reports from workers' compensation proceedings, which infringes on her ability to secure outside medical treatment at her own expense. The only limitation is on her ability to *use* outside reports *to obtain benefits within* the workers' compensation system. The Legislature is empowered to limit the types of recovery available and to establish reasonable conditions for securing those benefits which it does allow. (See Opening Brief at 19 and Lab. Code § 3600 subd. (a) [examples of potential compensation claims which are categorically barred]; *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App4th 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."]; *City and County of San Francisco v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d. 103, 115 [its plenary

power allows the Legislature to control the manner of dispute resolution and set rules of evidence].)

For example, in cases where no MPN is involved, the Legislature has balanced control over medical treatment by giving the employer complete control over the injured employee's medical care for the first thirty days. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 165.) Thereafter, the employee is allowed to select a doctor, but only "within a reasonable geographic area." (Lab. Code § 4600, subd. (c).) Under this scheme, the employer has control over the treatment of minor injuries and over the initial treatment for more significant ones, after which control, with some limits, transfers to the employee.

Under the MPN system, the Legislature has reconfigured the balance of medical control. Now the employer can establish an MPN if it meets the many requirements statutory and regulatory requirements and is approved by the Director. The employer then schedules the initial examination with the MPN, and only that. At all times thereafter, *the employee* chooses his/her doctors within the MPN, and has sole discretion whether to seek additional opinions or an IMR. Thus, selection of the medical providers is shared between employer and employee in a meaningful fashion throughout the process.[11]

The cases Valdez cites in her Answer do not suggest otherwise. Those authorities address circumstances far different from the instant case and have nothing to do with reasonable statutory requirements as a

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[11] As previously noted, Valdez had a selection of over 90 different medical facilities within 30 miles of her residence. (Opening Brief at 4.) Her unsupported assertion that each of these is a hand-picked defense advocate is patently absurd. (See, Valdez Answer at 32-33, 38-40; and see *post* at 19-22.) If she believes the statutory protections are insufficient, she should direct her concerns to the Legislature.

condition to obtain discretionary benefits. (Valdez Answer at 30-31; e.g., *Cobbs v. Grant* (1972) 8 Cal.3d 229 [addressing the need for informed consent for medical treatment]; *Cruzan v. Director, Mo. Health Dept.* (1990) 497 U.S. 261 [upholding state requirement for clear and convincing evidence of patient's desires before discontinuing medical care]; and *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614 [holding that plaintiff did not have a right be cryogenically preserved despite his terminal disease].) There is simply no basis for any substantive due process concern.

B. MPNs Satisfy Procedural Due Process.

1. Valdez misunderstands the nature of a procedural due process challenge.

"In the exercise of its police power a Legislature does not violate due process so long as an enactment is procedurally fair and reasonably related to a proper legislative goal. The wisdom of the legislation is not at issue in analyzing its constitutionality, and neither the availability of less drastic remedial alternatives nor the legislative failure to solve all related ills at once will invalidate a statute." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.) Importantly, due process is a flexible concept which does not mandate the same procedures for every situation. (*Rodriguez v. Department of Real Estate* (1996) 51 Cal.App.4th 1289, 1296-1297.)

Even in workers' compensation, due process does not "require that every indulgence be given to the employee and all efforts made to obtain evidence in support of a claim." (*San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936.) Similarly, "due process does not prohibit the enactment of reasonable rules of procedure or restrictions on evidence." (*Ibid.*) Ultimately, "the paramount concern of the due process clause is simply fairness." (*Ibid.*)

A primary goal of workers' compensation is to provide prompt and adequate medical care to injured workers in an economic fashion. (*Dept. of Rehabilitation v. Workers' Comp. Appeals Bd.* (2008) 30 Cal.4th 1281, 1288-1289.) As a means to accomplish this goal, MPNs reduce the burdensome costs and delays of needless litigation over diagnosis and treatment and have *doctors* make such decisions, not administrative judges.[12] (Opening Brief at 10-12.) As we now show, the Legislature designed a reasonable process for diagnosing and treating industrial injuries in which employers and employees both participate in doctor selection, multiple safeguards are built in to protect an adequate level of care using objective verifiable standards, and employees are provided multiple opportunities to raise any concerns they may have. [13] (See, Opening Brief at 12-15.)

2. Valdez's unsupported claim that MPN doctors are inherently "biased" is misguided and misinformed.

Valdez's principal argument is that procedural due process requires that she be allowed to make use of whatever partisan medical advocates her counsel can locate and admit any resulting medical reports as evidence to obtain workers' compensation benefits. (Valdez Answer at 32-36.) She rejects the Legislature's attempt to design a new means of determining appropriate diagnosis and treatment and instead insists that procedural due

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[12] Valdez's incorrectly asserts that the only purpose of MPNs is to reduce medical costs for the employer, and inexplicably cites *Brodie*, *supra*, 40 Cal.4th 1313 on this point, when *Brodie* does not mentions MPNs at all.

[13] All medical treatment for industrial injuries is required to comply with evidence-based, peer-reviewed, nationally recognized standards of care, which are currently defined by the American College of Occupational and Environmental Medicine's (ACOEM) Practice Guidelines, Second Edition. (Lab. Code §§ 5307.27; 4616, subd. (e); and see 8 Cal.Code Reg. § 9792.8.)

process requires a "dueling doctors" scenario. However, the cases cited by Valdez do not support this conclusion, and her vision of "dueling doctors" is exactly the result the Legislature meant to avoid. (Opening Brief at 10-11 and 14-15.)

As the necessary predicate to her argument, Valdez insists that all MPN doctors are *presumably biased* despite the plethora of statutory protections imposed by the Legislature. (Valdez Answer at 39-40.) Since her assumption is fatally flawed, so too is her conclusion. Her sole reason for claiming a need to "collect evidence" from outside doctors is to negate this "presumed bias" on the part of the MPN physicians. Her self-serving *assumption* of bias is disproven by the actual results, including a high satisfaction rate by injured employees with MPNs and the reality that most MPNs are selected to provide accessibility and fee-discounting possibilities. (Opening Brief at 13, n 10 and 15-16, n. 11 and 12.)

In an attempt to support her unfounded bias presumption, Valdez cites *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017. *Haas* rejected a system in which the county prosecutor unilaterally assigned administrative hearing officers on a case-by-case basis, which allowed consideration of the officer's prior rulings when making the assignment. Since the officers were paid by the case, the court concluded this created a temptation to favor the county in such rulings in the hopes of increasing the officer's caseload and income. (*Id.*, at 1029-1030.) Importantly, the court did not base its conclusion on the fact that the county *paid* the officers, but on the manner in which the county *selected* officers. (*Id.*, at 1037.)

The distinction is crucial, because while the employer contracts with the MPN *as a whole* to provide medical services to all of its employees, it is *the employee* who selects the individual doctor for treatment and for second and third opinions. For example, Valdez had a choice of over 90 different MPN medical facilities for treatment, and the one who would get paid for

providing her medical services *is the provider Valdez selects*. (See, WCAB Record at 124-128.) Out of those 90 different facilities, she had a vast choice of doctors and, ultimately, it is the *employee* who selects the treating doctor, as well as the second and third doctors for opinions. If a doctor truly *is* "biased" against employees, he or she will be selected by few, if any, employees. And those who do will switch, leaving little incentive for that doctor to remain in the MPN. Since both the employer and the employee participate in selecting the treating doctor, they share in any influence that selection might affect. Thus, as a practical matter, her presumption of bias is ill-founded.

What's more, the Legislature enacted many safeguards to protect against any possibility of "bias" by an MPN physician. Valdez ignores all of these safeguards, instead just assuming that MPN doctors must be institutionally biased against employees. These safeguards include: (1) giving the employ*ee unilateral* power to obtain second and third opinions from other MPN doctors of his/her choice (an option the employer does not enjoy), as well as to request an IMR – all of which is paid by the employ*er* – thereby providing meaningful economic incentives to ensure accurate diagnosis and treatment in the first place; (2) giving the employee the ability to select any outside doctor if the IMR concludes the proposed MPN diagnosis or treatment was inadequate; (3) an outright ban on any compensation system which encourages doctors to reduce, delay, or deny treatment; (4) protecting continuity of care if there is a change in MPN status; (5) mandatory reporting on the details of any attempt to use economic profiling, and (6) the continuing ability of the Director to withdraw MPN validation if reported abuses are not corrected[14]. (Opening

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[14] This was strengthened under SB 863, which now requires periodic audits of the MPNs. (Lab. Code § 4616, subd. (b)(1) and (4).)

Brief at 10-15; Pet. for Review at 13-18.) Moreover, the same requirements that apply generally to treating physicians in workers' compensation (i.e., using objective treatment guidelines, reporting requirements, etc.) apply to the treating physicians within the MPN. (See 8 Cal. Code Regs. §§ 9767.1, subd. (a)(19), 9785, subd. (a)(l), and 9767.3, subds. (d)(8)(C) and (e)(16).) Since they are incorporated into the MPN process, these statutory protections should be considered when evaluating whether MPNs comply with due process. Valdez simply ignores all of these safeguards, instead just presuming MPN physicians are biased.

In SB 863, the Legislature amended several MPN statutes to add additional employee protections and further support the goal of making the MPN system the exclusive means of diagnosis and treatment whenever used. (See, Opening Brief at 33, n. 23.) This development of the statutory system is a legislative process, however, not a judicial one, and the courts should decline to interfere by making their own modifications. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 157-158.)

3. The MPN dispute resolution process satisfies due process concerns, assuming there are any.

In drafting the MPN statutes, the Legislature designed a reasonable dispute resolution process to address the stated goal of promptly providing adequate medical care based on objective standards, while reducing related litigation. It did so by having *doctors* promptly address and resolve medical decisions. If the employee does not agree with the initial diagnosis or treatment, he can compel a second opinion from any MPN doctor s/he chooses. (Lab. Code §4616.3, subd. (c).) If still not satisfied, the employee can compel a third opinion from a third doctor of the employee's choosing. (*Id.*) If either of these doctors approves treatment requested by the employee, the employer is *obligated* to provide it. (8 Cal.Code Regs. § 9767.7, subd. (g).) If still not satisfied, the employee can request an IMR

by a physician previously approved by the Director. The Director is then obligated to adopt the IMR report and the employer is obligated to provide the care decided upon, even from an outside doctor if that care was previously denied by the MPN doctors. (Lab. Code § 4616.4, subds. (h) and (i).) Notably, the employ*er* cannot invoke any of these procedures.

At every stage of the dispute resolution process, the employee has the opportunity to express his/her concerns or objections to the existing diagnosis or treatment. The employee is free to explain to the second opinion doctor concerns about the initial diagnosis or treatment, and why these were inadequate, so that these concerns can be addressed. Similarly, the employee can raise with the third opinion doctor any concerns or objections about the two previous diagnoses and treatment plans. So, before the IMR, the employee has the opportunity to have concerns and objections addressed by three different doctors, including the original one.[15]

If the employee then requests an IMR, s/he can raise whatever concerns exist regarding the previous diagnoses and proposed treatments, explain why they are inadequate, and describe what diagnosis or treatment the employee believes is more appropriate and why.[16] (Lab. Code § 4616.4, subd. (c); and see 8 Cal.Code Regs. § 9768.10.) The IMR doctor is independently selected by the Director and will reach a decision based on the employee's application and whatever attachments were submitted with it, an evaluation of the previous medical records, including the previous opinions about diagnosis and treatment, and, if desired, a physical examination of the employee. (Lab. Code § 4616.4, subds. (d) and (e).) In

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[15] Valdez complains that she is not allowed to cross-examine the MPN doctors, but does not identify any restriction against doing so. (See, Valdez Answer at 34.)

[16] There does not appear to be any limitation on the employee using a treatise or medical consultant in preparing the IMR request.

the context of an IMR, this constitutes a complete development of the record.

Valdez insists on a return to the adversarial litigation mindset that predated the MPN reforms, in which parties line up their respective experts to duke it out before the WCJ. However, given the near collapse of the workers' compensation system before SB 899 was passed, the Legislature used its plenary powers to craft a new model to provide adequate medical care for industrial injuries, in which medical decisions are ultimately made by impartial doctors, with many safeguards built in. Procedural due process is a flexible concept ultimately based on fairness, and it does not require that medical treatment for injured workers can only be provided through a process of dueling doctors and cumbersome litigation. As described above, the MPN dispute resolution process provides employees with numerous opportunities to raise objections and concerns. Ultimately, the employee can bring these objections and concerns, including any needed rebuttal, to a neutral IMR doctor for a determination, thus satisfying the fairness requirements of due process.

4. After the IMR process, reconsideration and judicial review are also available.

Valdez next wrongly complains that there is no judicial review of the IMR process. (Valdez Ans. at 20.) In fact, the written decision of the Director adopting the IMR report may be appealed to the WCAB. (8 Cal.Code Reg. § 9768.16, subd. (b); Lab. Code § 5300, subd. (f).) Any decision by the WCAB in this regard can be reviewed by the Court of Appeal in the typical manner. (Lab. Code § 5950.) Thus, judicial review of the IMR process is available in the same manner as decisions made by the WCJ.

It is worth noting that since MPNs only address diagnosis and treatment, the dispute resolution mechanisms that are otherwise in place

operate normally whether or not there is an MPN. For example, section 4060 still applies to controversies over compensability if the employer initially denies the claim. Similarly, section 4061 applies to disputes over permanent disability or the need for future medical care. Also, as a catch-all, any objections to a medical determination not otherwise addressed by other sections, such as the MPN review process, is governed by section 4062.[17] As a result, but for issues of diagnosis and treatment, Valdez can still call upon other mechanisms to resolve her claim.

5. The cases cited by Valdez are inapplicable to the circumstances here.

The cases cited by Valdez regarding procedural due process each address significantly different circumstances and statutes, and so are inapplicable here. (See Valdez Answer at 32-36.) Most of those cases involve the WCJ's or WCAB's failure to follow established procedures for a hearing by: (1) failing to given notice that a particular issue would be ruled on (*Rucker*, *Fidelity*); (2) barring the consideration of admissible evidence (*Gayton*, *Edgar*); (3) preventing a party from responding to opposing evidence (*Pence*, *Hegglin*); or, (4) having ex parte communications with the Independent Medical Examiner which result in modification of a medical report without a chance for the parties to respond (*Fremont*).

In each of these fact-specific cases, the WCJ or WCAB held an adversarial hearing, but failed to allow one side to properly participate according to the governing rules. However, none of those cases address a statutory scheme similar to that of the MPNs, nor do any of them address a claim that any statute, if properly followed, would violate procedural due

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[17] By their own terms, sections 4061 and 4062 do not apply to diagnosis or treatment issues within an MPN.

process. Valdez appears to argue that the general right to present evidence, or to rebut, somehow grants license to disregard statutory restrictions on evidence. None of the cases suggest this, presumably because this argument would largely gut all rules on admissibility.

CONCLUSION

In an exercise of its plenary powers for the public welfare, the Legislature designed the MPN system as the exclusive means for diagnosing and treating industrial injuries. Through the adjustments in SB 863, the Legislature has confirmed that it is committed to the MPN process and that it intends to enact improvements and modifications as needed. The intervention of this Court is urgently needed to protect the intended operation of MPNs by confirming the meaning of section 4616.6 and preserving that statute's bar on admission of outside medical reports. The Court of Appeal should be reversed and the en banc decisions of the WCAB affirmed.

DATED: May 8, 2013

Respectfully submitted,

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DATED: May 8, 2013

Michael M. Walsh

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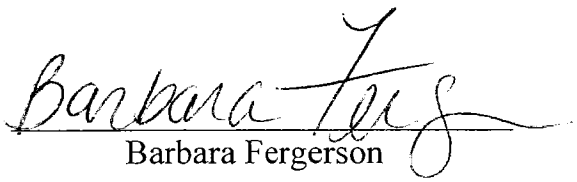

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