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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

ELAYNE VALDEZ,
Petitioner and Applicant,
v.

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

Respondents and Defendants.

OPENING BRIEF ON THE MERITS

SUPREME COURT
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Second Appellate District, Case No. B237147
(W.C.A.B. en banc decisions, Case No. ADJ7048296)

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INTRODUCTION

This Court is again called upon to uphold the workers' compensation reforms implemented by SB 899 in 2004. As a significant part of those reforms, the Legislature substantially departed from the practices of previous decades by establishing medical provider networks (MPNs) to minimize litigation and refocus resources on providing adequate medical care for injured workers. In doing so, the Legislature balanced the interests of employers, employees and the public good. But to maintain this intended balance, it was necessary to make MPNs the mandatory and exclusive means for diagnosis and treatment. In a bid to weaken these intended reforms, Valdez now challenges this exclusivity.

A 2011 RAND study on the SB 899 reforms described MPNs as one of the measure's most important new policies. MPNs provide employers an effective means of cost-control and predictability and workers with protections concerning the availability and quality of care, flexibility in doctor selection, and the unilateral ability to challenge the treatment and diagnosis of the MPN doctors the employees have selected. MPNs foster a system focused on providing adequate medical care at a reasonable cost; they are designed to greatly reduce needless and expensive litigation. In part, this is accomplished by incorporating a dispute resolution process into the MPN itself, so that disputes regarding diagnosis or treatment are resolved by doctors either selected by the employee from the MPN or by the Administrative Director, without the need for litigation.

MPNs are expressly designed to be *the exclusive means of diagnosis and treatment*, as confirmed by Labor Code sections 4600, subdivision (c) and 4616.3. To that end, Labor Code section 4616.6 makes *inadmissible* all reports regarding diagnosis and treatment that are not obtained in compliance with the MPN statutes. If the MPN statutory scheme is to

function as the Legislature intended, MPNs *must* be the exclusive means of diagnosis and treatment.

However, under the opinion below, employees may abandon the mandatory MPN system whenever it is tactically advantageous to do so. By effectively re-writing section 4616.6 to allow the admission of most, if not all, outside medical reports, the Court of Appeal has effectively made MPNs voluntary for employees, thus gutting the MPN system. This heralds a return to the failed and expensive litigation model that the Legislature plainly rejected, including the practices of "doctor shopping" and "dueling doctors," resulting in needless delays and increased expenses. This was precisely the result the Legislature intended to avoid with the passage of section 4616.6 and the implementation of MPNs.

As demonstrated by the nineteen amici letters supporting review by this court, MPNs have become the primary system for providing workers' compensation benefits in California, particularly among large self-insured employers and governmental entities, *and cover approximately 80% of California employees*. For many employers, particularly public entities, MPNs are an economic necessity in a time of shrinking budgets and economic upheaval. As a result, the opinion below has rightly caused great concern among California employers.

The Workers' Compensation Appeals Board (WCAB) evaluated the intended operation of MPNs and the application of the controlling statutes in two thorough en banc opinions, each time upholding the exclusive nature of MPNs. The WCAB considered not only the plain language of section 4616.6, but the entire MPN statutory scheme. It concluded that to function as intended, MPNs not only are, but must be, the exclusive means of diagnosis and treatment and that therefore all such reports obtained outside of the MPN statutes are inadmissible. The Court of Appeal disregarded the WCAB's conclusions, as well as the legislative history of SB 899, which

each confirm that MPNs were intended to be the exclusive means of diagnosis and treatment. The WCAB later filed a brief and appeared at oral argument to defend its decisions to the Court of Appeal, but to no avail. As a result, the WCAB filed its support for review by this Court, hoping to reaffirm MPNs as the Legislature intended.

ISSUE 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?

STATEMENT OF THE CASE

A. Defendant Established A Medical Provider Network (MPN) Pursuant To A Statutory/Regulatory Scheme To Provide Medical Care For All Occupational Injuries.

Medical Provider Networks (MPN) were authorized beginning in 2005 under the statutory scheme provided in Labor Code[1] section 4616, et seq., as part of the far reaching workers' compensation reforms enacted by SB 899. Defendant Zurich North America (Zurich) applied for, and had approved, an MPN for the benefit of its insureds, such as defendant Warehouse Demo Services (WDS), (collectively with ESIS, who administered the subject claim ("Defendant").) (See WCAB Record at 121.) At all relevant times, Defendant had (and still has) a validly

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[1] Unless otherwise noted, all statutory citations are to the Labor Code.

established and properly noticed MPN to treat all occupational injuries. Applicant Elayne Valdez, employed by WDS, confirmed in writing that she received the MPN Employee Handbook on June 17, 2009.[2] (WCAB Record 121-123.) The details on why the Legislature authorized the use of MPNs, how they work, and why the drafters intended them to be the exclusive process for diagnosis and treatment are described in detail below. (See discussion, *Post*, at 11-18.)

B. Following Her Injury, Valdez Briefly Treats Within The MPN, Then Abruptly Abandons The MPN.

While employed by WDS, Valdez sustained an industrial slip and fall injury on October 7, 2009. (Ex. 1 at 1:21-23.) She reported the incident on October 9, and was promptly referred to Dr. Nagamoto, a doctor in the MPN, who examined her that same day. (Ex. 1, at 3:14-17; and WCAB Record at 120.) On that same day, she was sent a reminder about the MPN and again provided the information needed to select a doctor and process her claim, including the website which provided the MPN information, the selection of doctors and contact information in case she had questions. (WCAB Record at 129.) Under the MPN involved here, Valdez *had her choice of over 90 different medical facilities* for the treatment of her claimed injuries within a 30 mile radius of her residence, and an even larger selection of individual doctors. (See *id.*, at 124-128.)

Dr. Nagamoto initially gave Valdez a few days off, prescribed some physical therapy and allowed her return to modified duty on October 20 and 22. (Ex. 1, at 3:15-19.) When she said she was unable to perform modified

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[2] To directly reach the legal issues addressed, the decisions below assumed Defendant's MPN was properly established and noticed. (Opn. at 3 and 4.) However, the facts actually bear this out.

duties, he prescribed additional physical therapy, which she attended until October 31, 2009. (*Id.*, at 3:17-21.) Valdez then abruptly ceased going to the MPN physician. She made no attempt to follow the MPN procedures that apply when the worker disagrees with the MPN doctor's diagnosis or treatment. For example, she did not seek to change to another MPN physician, nor did she request a second opinion regarding her diagnosis or treatment from the MPN doctor of her choice. In fact, there is no evidence that she ever expressed any dissatisfaction with her treatment to Dr. Nagamoto or any MPN physician. It was not until trial that she offered any purported explanation, first vaguely claiming that physical therapy was doing "more harm than good;" then, on cross-examination, that she thought it was not "helping." (*Id.*, at 3:20-21 and 4:4-5.) She offered no particulars, nor did she explain why she never mentioned this to Dr. Nagamoto or the claims examiner. Instead, she claimed general ignorance about her ability to change to another MPN physician or seek a second opinion within the MPN (each option being expressly provided for in sections 4616.3 subdivision (b) and (c)), despite having been provided this information on at least two previous occasions. (*Id.*, at 4:5-7; and see WCAB Record at 121-123 and 129.)

C. After Valdez Abandons The MPN In Favor Of An Outside Physician Selected By Her Counsel, The WCJ Relies Exclusively On That Outside Doctor's Report To Award Workers' Compensation Benefits.

By the end of October, Valdez made her last visit to the MPN. It turned out she stopped treating through the MPN on the instruction of her counsel, who sent her outside the MPN to Dr. Nario of Advanced Care Specialists, claiming that this new office was her primary treating physician. (Ex. 1, at 4:7-10; Ex. 2 at 6-7.) From his initial examination on

November 2, 2009, Dr. Nario behaved as if he were the designated treating physician for the workers' compensation claim and sought payment for his services from Defendant. (WCAB Record 49-50, 57.) The claims administrator protested to Valdez's counsel, insisting that Valdez was required to return to the MPN, but that protest went unanswered. (*Id.*, at 121-129.) Ultimately, Nario filed a lien claim in the workers' compensation proceeding seeking payment from Defendant for his out-of-network services. (*Id.*, at 85-95.)

At trial, Defendant raised the issue of Valdez's disregard of the MPN, but the Workers' Compensation 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 diagnosis and treatment 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.) The WCJ rejected Defendant's argument that the reports of the non-MPN doctors were inadmissible under Labor Code section 4616.6, ruling instead that the records of *any* "treating doctor" are admissible because they are potentially relevant. (Ex. 6, at 30.) In effect, the WCJ seemed to consider Dr. Nario as the designated primary treating physician. (*Id.*, at 30-31; and see § 4061.5.) The WCJ then awarded temporary disability based solely on medical reports from Nario's office. (Ex. 6, at 27-32.)

D. In Two En Banc Opinions, The WCAB Holds That A Duly-Established MPN Is The Exclusive Means Of Diagnosis And Treatment And The Outside Reports Are Inadmissible.

The WCAB, *en banc*, reversed the WCJ, unanimously holding 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, 336, 339 and 340.) ("*Valdez I*".) Five out of six panel members also held that Nario's outside medical reports were inadmissible.[3] (*Ibid.*) In reaching its 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 Lab. C., § 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 Lab. C. § 4061.5; Cal. Code Regs., tit. 8, § 9785, subd. (b)(1) and (d).)[4]

The WCAB also rejected Valdez's arguments that sections 4605 and 5703 render admissible reports made by non-MPN physicians. The Board concluded section 4605 does not address admissibility, but merely recognizes the employees' right to treat with their own doctor outside of the workers' compensation system at their own expense. The panel held that the MPN provisions taken as a whole, and in particular section 4616.6, plainly bar the admission of outside reports. (*Valdez I*, at 336-337.)

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[3] That dissent agreed that the reports were "*in*admissible ... to resolve any dispute related to treatment and diagnosis," but thought they should be admissible on the issue of temporary disability. (*Id.*, at 340, emphasis added.) Although each of the subject reports addressed diagnosis or treatment. Another commissioner, while concurring in the result here, dissented from establishing a broad rule of exclusion for non-MPN reports out of his 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.

Similarly, the Board found that section 5703, subdivision (a), which provides that the WCAB may receive medical reports in its discretion, does not render admissible reports which section 4616.6 has declared to be *in*admissible. (*Id.*, at 337 ["...our discretion should not be used to admit medical reports ... resulting from an unauthorized departure outside the MPN."].)

Valdez petitioned for reconsideration of the WCAB's decision, complaining that *Valdez I* caused confusion and arguing that section 4616.6 should be limited to excluding reports that might seek to challenge a report resulting from an Independent Medical Review (IMR) contemplated by section 4616.4. (Ex. 11.) The WCAB granted reconsideration and issued a second *en banc* decision, containing the same concurrences and dissents, and affirming its prior ruling. (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970.) ("*Valdez II*".) The second en banc opinion 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 (Lab. C., §§ 4616, et seq.), and on the required statutory process for resolving disputes over temporary and permanent disability (Lab. C., §§ 4061 and 4062), which Valdez made no attempt to follow. (*Valdez II* at 973-974.)[5]

As a practical matter, this would exclude any reports regarding diagnosis and treatment obtained outside of the MPN, including by any non-MPN doctors recruited by counsel. The WCAB noted that the determination of an employee's existing condition following an injury is

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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. regarding determinations of permanent disability awards and apportionment. (*Valdez II*, *supra*, at 975-976.)

necessarily a diagnosis of the applicant's condition, thus falling within the purpose of the MPN. This does not change when that report is used to determine whether the employee should receive temporary disability. Therefore, any such medical report from outside the MPN is inadmissible.[6] (*Valdez II*, *supra*, at 973, n 4.) Since all the reports 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 Reverses, Holding That Any Medical Report Obtained By An Applicant Is Admissible, Even If Obtained Outside A Valid MPN.

The Court of Appeal granted Valdez's Petition for Writ of Review and requested supplemental briefing on whether: "section 4616.6 [is] limited to cases where there has been an independent medical review under section 4616.4?" (Opn., at 8, n 6.) In addition to considering some amicus briefs filed on the issue, the Court of Appeal took judicial notice of the MPN legislative history, but then made no reference to it. (*Id.*, at 6, n 4.)

The published opinion concluded that the word "report" that section 4616.6 rendered inadmissible meant only a report that has issued pursuant to the IMR process *under section 4616.4 subdivision (f)*. (Opn at 7-8.) Similarly, the Court of Appeal found that the only "controversy" addressed by section 4616.6 was the IMR process itself, necessarily also finding that the disputes over diagnosis and treatment that would lead an employee to change treating physicians within the MPN or to seek a second or third

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[6] If Valdez disagreed with the conclusions of her initial MPN doctor regarding her qualification to receive temporary disability, she could have sought a second opinion from a different MPN doctor regarding her diagnosis or invoked the medical-legal procedures under sections 4062. Instead, she made no attempt to follow these procedures and chose to abandon the MPN process as a tactical maneuver.

opinion were not actual controversies, and were therefore not addressed by section 4616.6. (*Ibid.*)

As a result, the opinion concluded that the only reports barred from admissibility by section 4616.6 would be those that purported to challenge the final stage of the IMR process, making that process the last word on the controversy addressed. (Opn, at 7-8.)[7]

BACKGROUND AND HISTORY: THE LEGISLATURE CREATED MPNS TO SOLVE SPECIFIC PROBLEMS WITH THE COMPENSATION SYSTEM.

A. MPNs Provide An Economical Means To Provide Reasonable Medical Care For Diagnosis And Treatment Of Occupational Injuries, While Safeguarding The Rights Of Injured Workers And Reducing Litigation.

When it enacted SB 899 as urgency legislation in 2004, the Legislature was confronted with a workers' compensation system in crisis, on the verge of collapse due to skyrocketing costs. (Stats. 2004, ch. 34, § 49; and see CAAA[8] ex. 2, at 58 [Assem. Com. on Ins., Analysis of SB 899].) The system that existed previously was adversarial and highly litigious, resulting in significantly higher costs to both the parties and the WCAB. (CAAA, at 58, 59 and 118.)

Before SB 899, the employer could only determine the manner of treatment for 30 days after the injury, after which employees had largely

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[7] As confirmed by the WCAB's Answer in Support of Petition for Review, in the seven years that MPNs have existed *no IMR report has* ***ever*** *been issued.* (*Id.*, at 6.)

[8] Citations to CAAA refer to the legislative history which was submitted by CAAA and judicially noticed by the Court of Appeal.

unlimited discretion to select and change medical providers. (Lab. C., § 4600, subd. (c).) As a practical matter, this meant that applicants' counsel could unilaterally appoint one of their pre-selected medical advocates as treating physician. (*Ibid.*) Employees could select any doctor, and shop for a particular opinion or result, often at the direction of counsel, in a practice known as "doctor shopping." (Lab. C., § 4600, subd. (c); and see *Ralphs Grocery Co. v. Workers' Comp. Appeals Bd.* (1995) 38 Cal.App.4th 820, 829.) "Dueling doctors" – in which each side selected a physician to advocate for its position before the Board – was also a common occurrence. (See CAAA, ex. 2 at 159 [Ca. St. Sen. Repub. Caucus, Outline of Reform Proposal, 4/15/04] [establishing MPNs "eliminates the 'dueling doctor' system that has driven California medical costs sky high."]. As a result of "doctor shopping" and "dueling doctors," disputes over the nature of the applicant's condition, treatment and prognosis wound up being litigated by workers' compensation judges who had to decide between the competing medical opinions, often after a heated and protracted trial. (See *id.*, 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..."].)

In SB 899, the Legislature chose to abandon this adversarial model in favor of one allowing employers to create MPNs, which, once established and approved, become the *exclusive* mechanism[9] for diagnosing and treating industrial injuries. Section 4600, subsection (c), provides that

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[9] There are exceptions. In some circumstances the employee is not required to use the services of one of the employer's MPNs, e.g., (1) where the MPN lacks doctors with the needed medical specialty (a neurosurgeon for a brain injury); (2) where the employee has predesignated his or her own personal physician prior to the industrial injury, and (3) to ensure continuity of care if a treating doctor leaves the MPN before treatment is completed. (Lab. C., §§ 4616.3, subd. (d)(2); 4600, subd. (d); and 4616.2 subds. (d) and (e), respectively.)

the employee can select any treating physician after 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.)

Under the MPN model, employers contract with networks of qualified physicians (MPNs) to diagnose and treat all occupational injuries, subject to quality controls, statutory requirements and the Administrative Director's approval. (Lab. C., § 4616, et seq.) An employer must first justify its request to create an MPN in a detailed application process before the Administrative Director. (Lab. C. § 4616, subd. (b); Cal. Code Regs., tit.8, §§ 9767.2, 9767.3 and 9767.4.) Even after initial approval, MPNs remain subject to the Administrative Director's supervision to ensure that they continue to adhere to all requirements. (Cal. Code Regs., tit.8, §9767.14.)

The Labor Code and related regulations impose stringent requirements on MPNs. The MPN must provide a sufficient number of licensed doctors in reasonably accessible locations, and in the specialties required to diagnose and treat the anticipated occupational injuries. (Lab. C. § 4616, subd. (a); see, e.g., WCAB Record 124-128 [Valdez's choice of over 90 facilities].) MPNs must provide for adequate emergency care and ancillary medical services. (Cal. Code Regs., tit.8, §§ 9767.5, subds. (a)-(c) and 9767.3, subd. (d)(8)(D).) MPNs are prohibited from using any physician compensation system designed to reduce, delay or deny treatment or otherwise restrict access to treatment, and are required to disclose any use of economic profiling. (Lab. C., §§ 4616, subd. (c) and 4616.2.) 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 Cal. Code Regs., tit.8, §§ 9767.1, subd. (a)(19), 9785, subd. (a)(l), and 9767.3, subds. (d)(8)(C) and (e)(16).)

Once an MPN is approved, employees must choose their treating physician for workers' compensation purposes from within the MPN. (Lab. C. §§ 4600, subd. (c) and 4616.3; Stats. 2004, ch. 34, Legis. Counsel's Digest for SB 899, located at CAAA, ex. 2, at 39 [SB 899 requires "an injured employee to select a physician from the provider network to provide treatment for the injury."].) After the initial evaluation scheduled by the employer, the employee can select any appropriate treating physician from the MPN for further treatment, and can change doctors within the MPN as desired for the duration of treatment. (Lab. C. § 4616.3, subds. (b) and (d); Cal. Code Regs., tit.8, § 9767.6, subd. (e); and see WCAB Record 121.) A request for authorization of medical treatment may only be modified, delayed, or denied by a licensed physician. (Lab. C., §4616, subd. (f).)

Furthermore, each MPN is required to establish acceptable procedures to implement all of the items described above, including procedures for informing employees about the MPN and how to invoke these procedures. (Lab. C., §§ 4616.2, subd. (c) and 4616.3, subd. (b); Cal. Code Regs., tit.8, §§ 9767.3, subd. (d)(8)(E), (G) and (I) through (N).)[10]

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[10] These employee safeguards work. As reported in the 2011 CHSWC Annual Report, the Division of Workers' Compensation received only 246 MPN complaints since January 2006, of which 242 were resolved and closed. (*Id.*, at 126.) Since 75-85% of all employees were treated through MPNs for their occupational injuries (as of 2008), this represents a high success level. (Admin. Dir. Dec. at ¶ 5, at 3 [attached to WCAB Answer to Pet. for Review]; and Ptn. for Rev., at 21.) Indeed, few attempts to even invoke the IMR, the ultimate built-in dispute-resolution mechanism, have ever been made, and no IMR report has ever been issued. (Admin. Dir. Dec. at ¶ 10.) The 2011 Annual Report is located at http://www.dir.ca.gov/chswc/Reports/2011/CHSWC_AnnualReport2011.pdf .

Though injured workers must treat within the MPN when the employer has established one, the Legislature gave workers significant control over their treatment within the MPN. Not only can they select any doctor within the subject MPN (as long as the doctor's specialty is appropriate to their condition), employees may challenge the diagnosis or treatment of this doctor by requesting a second opinion, and even a third opinion, from the MPN doctor of their choice. (Lab. C., § 4616.3, subd. (c).) *Only* the employee has the right to request an additional opinion; the employer does not. If, after three opinions from MPN physicians, the employee still disputes the medical conclusion, the employee (and *only* the employee) can demand an Independent Medical Review (IMR) to resolve the dispute through an independent physician selected and appointed by the Administrative Director. The Administrative Director "shall immediately adopt" the determination of the IMR doctor. If the IMR determines that the employee's desired treatment or diagnostic procedure is consistent with controlling medical guidelines, the employee may arrange for that procedure or treatment either within or outside of the MPN. (Lab. C., §4616.4, subds. (h) and (i).)

MPNs eliminate many of the flaws in the old adversarial model they replaced. For example, the MPN:

(1) reduces, if not eliminates, "doctor shopping" by restricting employees to a choice of any appropriate doctor (i.e., within the needed specialty) within the applicable MPN, though it still affords a meaningful selection - e.g., Valdez had *90 different MPN facilities from which to choose;*

(2) builds in a multi-layered, self-executing dispute resolution mechanism for diagnosis and treatment, unlike the litigation model which encouraged doctor shopping and "dueling" medical experts and then

required the WCJ to choose between these competing opinions in adversarial proceedings;

(3) eliminates the practice of "dueling doctors" by giving the employee free rein to select any MPN doctor for diagnosis or treatment, as well as the right to demand second and third opinions from other MPN physicians of their choice -- only the employee may seek these additional opinions, not the employer; and

(4) contemplates that, if the employee still disagrees after the third opinion, he or she (and not the employer) may seek an Independent Medical Review by an independent doctor selected and approved by the Administrative Director; this IMR review is conclusive;

(5) importantly, all of these changes reduce the amount of resulting litigation, which in turn reduces the expense and burden on the WCAB and provides an opportunity to reduce its backlog of claims. (See CAAA, ex. 2 at 58-59 [Assem. Com. on Ins., Analysis of Sen. Bill No. 899, (2003-2004 Regs. Sess.)] and 159 [Ca. St. Sen. Repub. Caucus, Outline of Reform Proposal, 4/15/04; Lab C §§ 4600, subd. (c), 4616, subd. (b); 4616.3, subs. (b) and (c); 4616.4, subd. (b); and Cal. Code Regs., tit.8, § 9768.1, et seq.)

B. MPNs Have Become The Primary System For Diagnosing And Treating Occupational Injuries And Must Be Mandatory And Exclusive To Function As Intended.

A 2011 study commissioned by Commission on Health and Safety and Workers' Compensation ("CHSWC") concluded that MPNs were among the "most important new policies" of SB 899, and that most MPNs "are broad panels selected primarily to meet access requirements and

provide fee-discounting opportunities."[11] MPNs are increasingly becoming the principal mechanism for treating occupational injuries. "[V]irtually 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.) Surveys conducted for the Department of Industrial Relations show that 80% of employees surveyed in 2008 were treated by MPNs, including over 85% of those with back injuries.[12]

MPNs have grown in a few short years to become the primary means of providing workers' compensation medical treatment in California, particularly for public entities, including school districts, counties and cities. For example, in its letter in support of review, Amicus San Diego County and Imperial County Schools Risk Management JPA reported that "the MPN program has produced an approximately 30% savings" in "reduced medical and litigation costs" "contributing directly to our member districts' ability to retain qualified teachers and avoid closure of schools." (Risk Management JPA letter, p. 1.) The County of Riverside states that MPNs "speak to the core" of its efforts to stem fraudulent claims and the

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[11] RAND, *Medical Care Provided Under California's Workers' Comp. Program, Effects of the Reforms and Additional Opportunities to Improve the Quality and Efficiency of Care* (2011) located at http://www.rand.org/pubs/periodicals/health-quarterly/issues/v1/n3/04.html

[12] School of Public Health, Univ. of WA, *Access, Quality and Outcomes of Health Care in the Cal. Workers' Comp. 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 of injured employees, 79%, rated their care as "good" or better. (*Id.*, at p. 34.)

county's "ability to defend ourselves from the fraud and abuse that is rampant in the system." (Cnty of Riverside letter, p. 1)

In order for the MPN model to function, it must be exclusive and mandatory. Employees pursuing compensation claims *must* choose their treating physician from within the pool of doctors that the MPN provides. (Lab. C., §§ 4600, subd. (c) and 4616.3; and see *Krause v. Workers' Comp. Appeals Bd.* (2010) 75 Cal. Comp. Cases 683, 688 [technical flaw in the MPN notice, which caused no prejudice, did not exempt applicant from having to treat with MPN]; see also *Cal. Civil Practice, Workers' Comp.*, Chap. 2, § 2:1, p. 2-6 [MPNs "limit the employee's choice of medical providers to those within the network."]; and Stats. 2004, ch 34, Legis. Counsel's Digest, SB 899; also at CAAA, ex. 2, at 39, [SB 899 requires "an injured employee to select a physician from the provider network to provide treatment for the injury."].) As the WCAB found, the MPN statutes 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. (*Valdez II*, at 972 and 975-976; and see §§ 4616, et seq.; Cal. Code Regs., tit.8, § 9767.6.)

Exclusivity is critical to the ability of MPNs to solve the problems they were created to address. If employees are permitted to evade the MPN, that would herald a return to dueling doctors, doctor shopping and rampant disputes over treatment and diagnosis, effectively making MPNs purely voluntary, abandoned whenever the employee's counsel saw a tactical advantage in doing so, and, in practical effect, sending MPN's the way of the dodo.

The statute in issue here, section 4616.6, is a key component to the success of the MPN model. It prohibits the admission of medical reports regarding diagnosis and treatment made by doctors *outside* of the MPN

statutory scheme. Yet, as discussed below, the Court of Appeal narrowly limited the statute so as to render it meaningless, and MPNs along with it.

LEGAL DISCUSSION

I. TO PRESERVE MPNS AS THE MANDATORY AND EXCLUSIVE SOURCE OF MEDICAL TREATMENT AND DIAGNOSIS, LABOR CODE SECTION 4616.6 EXCLUDES ALL MEDICAL REPORTS NOT OBTAINED IN COMPLIANCE WITH MPN PROCEDURES.

A. The Legislature Has Plenary Power Over Workers' Compensation.

The California Constitution grants the Legislature "plenary power" to create and enforce a complete system of workers' compensation through legislation, which is an expression of the Legislature's police power. (Cal. Const., art XIV, §4; *Longval v. Workers' Comp. Appeals. Bd.* (1996) 51 Cal.App.4th 792, 799.) The word "plenary" "affirms the legislative prerogative in the workers' compensation realm in broad and sweeping language" and this "includes the power to 'fix and control the method and manner of trial of any such dispute (and) the rules of evidence (applicable to) the tribunal or tribunals designated by it'" (*City and County of San Francisco* (1978) 22 Cal.3d. 103, 115, quoting Cal. Const., art XIV, §4; *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."].)

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."].) Thus, no employee has the right to workers' compensation benefits except insofar as such benefits are authorized by statute.

In exercising its plenary power to define the scope of workers' compensation benefits, balancing the interests of the parties and the public good, the Legislature may limit the amount of recovery for certain types of damages, or can simply bar any recovery for some types of damages. For example, no allowance is made for loss of consortium damages to the spouse of an injured employee, even though such a claim is barred from tort recovery by exclusive jurisdiction of workers' compensation. (See, *Lefiell Mfg. Co. v. Sup. Ct. of Los Angeles Cnty* (2012) 55 Cal.4th 275, 284-285.) Recovery is also barred for injuries which result from an altercation when they are suffered by the initial physical aggressor and for injuries flowing from an employee's intoxication, even if the employee would otherwise qualify for benefits. (Lab. C., § 3600, subd. (a)(4) and (a)(7).)

B. Section 4616.6 – The Linchpin For Maintaining MPNs As The *Exclusive* Source Of Diagnosis And Treatment – Unambiguously Renders *All* Outside Reports Inadmissible.

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*."

A court's fundamental task is to determine the Legislature's intent so as to effectuate the law's purpose. (*Baker v. Workers' Comp. Appeals*

Bd. (2011) 52 Cal.4th 434, 442.) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*Ibid.*; *Dubois, supra,* 5 Cal.4th at 387-388.) 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. (*Id.* at p. 387; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31 Cal.3d 715, 726.) To better effectuate the Legislature's intent, the statutory language must be read in context and in harmony with the statutory framework as a whole. (*Chevron U.S.A, Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1194.)

This statute unambiguously says that medical reports from *outside* the MPN are *not admissible*. Indeed, the statute goes further, when it says that outside medical reports are inadmissible to resolve *any* controversy arising out of the use of MPNs, which includes any controversy regarding diagnosis or treatment. That is entirely consistent with the express language of section 4600, subdivision (c), which compels all employees to treat within the MPN when it says that employees may elect any treating physician *unless* the employer has established an MPN.

That was the WCAB's conclusion below. (*Valdez II*, at 973.) The Board construed the plain language of sections 4616.6 and 4600. It concluded that reports from non-MPN physicians must be inadmissible because, under section 4600, the MPN process is intended to be exclusive and mandatory. Prohibiting admission of outside reports is the only way the exclusive MPN system can be enforced. The Board reasoned that the MPN statutes themselves contain a multi-level, built-in process for resolving any controversies regarding diagnosis or treatment, including affording the worker the option of second and third opinions from other doctors of the employee's choice within the MPN, as well as the last resort Independent Medical Review. Thus, when considered in the context of the

MPN statutes as a whole, the Board reasoned that section 4616.6 "precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnosis issues." (*Valdez I*, at 334; and see *Valdez II*, at 973 n. 4 [noting this exclusion extends to a diagnosis being offered to support a disability claim]; and see *ante*, at 9, n.6.) "As the constitutional agency charged with enforcement and interpretation of the Workers' Compensation Law, the [WCAB's] contemporaneous construction of that law, while not necessarily controlling, is entitled to great weight, and courts will not depart from its construction unless it is clearly erroneous or unauthorized. [Citations.]" (*Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1510; *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331.)

Such a broad exclusion is also consistent with the primary goals for implementing MPNs – the reduction of litigation so that resources can be better directed to providing reasonable medical treatment while still controlling costs.[13] Without a prohibition on admissibility of outside medical reports from non-MPN physicians, the MPN system is no longer exclusive or mandatory. As Valdez did here, employees could opt out of the MPN at will, for tactical litigation advantages, by hiring outside doctors and then offering into evidence partisan reports obtained from counsel-selected medical advocates. The WCAB's considered interpretation should

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[13] While unnecessary in light of the plain statutory language, the legislative history plainly shows the intent to make MPNs the exclusive means of diagnosis and treatment. (E.g., see Ca. Labor and Workforce Dev. Agency, Enrolled Bill Report SB 899, 4/16/04 [Once on MPN is in place, "employees ... will receive their medical care in the network."], located at CAAA, ex. 2 at 135; and see Ptn. For Review at 15-17.) If a statute is amenable to two alternative interpretations, the one consistent with legislative intent prevails. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

be upheld. (*Nolan v. City of Anaheim* (2004) 33 Cal.4th 335, 340 [when interpreting a statue, court may consider the statute's purpose, the evils to be remedied, the legislative history, public policy, and contemporaneous administrative construction].) The opinion below, if allowed to stand, would eviscerate the MPN reforms of SB 899, and nullify the Legislature's exercise of its plenary power over workers' compensation.

C. The Court Of Appeal's Artificial Limitation On Section 4616.6 Disregards Its Plain Language And The Entire MPN Statutory Scheme.

As noted above, section 4616.6 says that "*no* other reports" are admissible "to resolve *any controversy arising out of this article*." (Emphasis added.) Yet the Court of Appeal concluded that section 4616.6 only bars the admission of *reports that challenge the independent review (IMR) process mentioned in section 4616.4, subdivision (f)*. That reading is entirely unsupported by the text of section 4616.6. It disregards the statute's plain, unambiguous and *broad* language, which bars the admission of non-MPN reports to resolve *any* controversy arising out of the article, i.e. *any* report regarding diagnosis or treatment. All of the statutes governing the operation of MPNs, including section 4616.6, are contained in Article 2.3. (Lab. C. §§4616 – 4616.7.) Section 4616.6 is plainly saying that no report other than one issuing from an MPN doctor is admissible in the workers' compensation dispute. It neither says, nor can be read by implication to mean, that only reports challenging the final IMR report are inadmissible.

The statute is couched in the broadest possible terms, barring admission of outside reports to resolve *any* controversy arising out of the use of MPNs. Yet the opinion below read the statute as extremely narrow. It necessarily concluded that: (1) "report" meant only that report which may

be produced at the conclusion of the IMR process; (2) the term "this article" only refers to section 4616.4 (governing IMRs) and not the rest of the article; and (3) the phrase "*any* controversy" refers only to the *final controversy* of the built-in dispute resolution process, the IMR. (See, Opn at 7-8.)

But the statute does not refer to only barring the admission of "alternate IMR reports," or otherwise make any reference to section 4614.4 (the IMR statute). It bars admission of *all* reports when it says "*no other* report" is admissible. And the forced reading of the phrase "this article" as limited to section 4616.4 is wrong on its face. "This article" refers to every statute in article 2.3, not merely the IMR statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [if possible, meaning must be given to every word or phrase, so as not to render any portion of the statutory language mere surplusage].)

Lastly, "any controversy" means precisely what it says: **any** controversy. Thus, the scope of section 4616.6 exceeds the specific "dispute" addressed in section 4616.4, subdivision (b), which could result in an IMR. There is no textual or common sense basis for rewriting "any controversy arising out of this article," to mean *only* those controversies arising out of the final IMR report.

The Court of Appeal apparently assumed that the primary purpose of the MPN is to generate an *IMR report*, and then concluded that such a report was "the controversy" – and the *only* "controversy" to which section 4616.6 intended to refer. (See, Opn, at 7.) Not so. The primary purpose of an MPN is to diagnose and treat occupational injuries, which is why employees are required to treat within an MPN once established. (Lab. C §§ 4616, subd. (a)(1) and 4600, subd. (c).) When an employee disputes the initial MPN diagnosis and seeks an alternate diagnosis, that is *a controversy* which the MPN attempts to resolve by allowing the employee to obtain a

second opinion from any MPN doctor. (Lab C., § 4616.3, subd. (c).) Similarly, when an employee disputes the manner of treatment or who should provide that treatment, as supposedly happened here with Valdez (see *ante*, at 4-6), that is *a controversy* which the MPN attempts to resolve by allowing the employee to change treating physicians within the MPN at will, or seek a second opinion. (§ 4616.3, subds. (b) and (c).) If the controversy remains unresolved after a second opinion, the MPN attempts to settle the matter by empowering the employee to obtain a third opinion from any MPN doctor. (§ 4616.3, subd. (c).) If the controversy still remains, the exclusive remedy is the IMR. (Lab. C., § 4616.4, subd. (b).) Thus, an IMR is merely the MPN report/procedure of last resort, used only, if ever, when a controversy over diagnosis or treatment cannot otherwise be resolved.[14]

Had the Legislature intended to limit section 4616.6's reference on the admission of "reports" to *IMR reports*, it would have said so. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 205 [Noting the "cardinal rule of statutory construction" that "a court must not 'insert what has been omitted' from a statute."].) Instead, the Legislature enacted section 4616.6, a separate statute with equal standing to all the other statutes in article 2.3, and not a mere subsection of section 4616.4.[15]

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[14] According to the WCAB, in the seven years that MPNs have operated, no *IMR report has ever issued.* (See, WCAB Answer to Pet. for Review, at 6.) In other words, for those employees who treat within the MPN as intended, the built-in mechanism for medical dispute resolution – the second and third opinions – is working. But if the Court of Appeal is correct that the employee may introduce the reports of outside physicians into evidence, employees will never need to avail themselves of the IMR, choosing instead counsel-selected medical advocates.

[15] How the statutory provisions are structured and organized is a further indication of their intended meaning, operation and interaction. (*In*

Section 4616.6 says that it bars admission of non-MPN reports arising out of "any controversy arising out of this article," meaning all of article 2.3, not only to the one report described in a few subsections of section 4616.4. In fact, reports are generated at every stage of diagnosis and treatment. (See Cal. Code Regs., tit.8, § 9785, subd. (e)(1) [report for initial exam], subd. (f) [listing 7 different events which trigger the need for a report within 20 days, e.g., need for work restriction, change in circumstances, etc.] and subd. (f)(8) [requiring a report every 45 days for continuing treatment].) As the primary treating physician, the MPN doctor is responsible for all reports needed to "render opinions on all medical issues necessary to determine eligibility for compensation." (Lab. C. § 4061.5.) Yet the Court of Appeal artificially decided to read section 4616.6's "report" as only referring to an *IMR report*.

The opinion, in an effort to limit its reading of section 4616.6's "report," cited authority holding that when the same term or phrase is used in related statutes, it should be interpreted to mean the same thing. (Opn., p. 7, citing *Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356.) The court concluded that the only "report" referred to by section 4616.6 was the "report" generated under the IMR statute (section 4616.4, subd. (f) – which says "[t]he independent medical reviewer shall issue a report . . . ."). But nothing in section 4616.6 suggests that it is only barring the admission of reports challenging the IMR under section 4616.4, subdivision (f.) Nor does anything in *Dieckmann* support abandoning the common definition of a word like "report." The opinion's excessively narrow reading of "report" – as meaning only *IMR reports* – flies in the face of

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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."].)

section 4616.6's broad language and the legislative intent behind it. Even *Dieckmann* recognized that the paramount rule of statutory construction to ascertain and effectuate the Legislature's intent. (*Id.*, at 353.) The Court of Appeal disregarded this fundamental rule, thereby undermining the exclusive use of MPNs through its artificial reading of section 4616.6.

D. Valdez's Reliance On Section 5703 To Admit All Relevant Evidence Is Misplaced.

Below, Valdez relied on section 5703, subdivision (a), which 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." She argued that her outside reports should be admitted because they are relevant on the issue of her medical condition. The argument fails, for several reasons.

First, it is well-settled that a specific statute prevails over one of more general application. Section 5703 speaks in *general* terms of the Board's discretion to receive potentially relevant evidence. But section 4616.6 *expressly* makes *inadmissible* reports obtained outside the MPN. The WCAB specifically held that its discretion under section 5703 should not be used to admit non-MPN reports in violation of section 4616.6. (*Valdez I*, 76 Cal.Comp.Cases at 337.) Insofar as sections 5703 and 4616.6 are seen as conflicting (they are not), the more specific statute prevails over the general one, and the newer statute prevails over the older. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.) Section 4616.6 is both more specific and more recent.

Second, the fact that an outside medical report might be "potentially relevant" is not enough to mandate its admission. Excluding potentially relevant evidence to protect an important policy goal is common practice. Much of the Evidence Code addresses the exclusion of relevant documents

for reasons of policy. (E.g., attorney-client privilege [Evid. Code §954], subsequent remedial conduct [*Id.* § 1151], efficient use of court time [*Id.*, §352], etc.; and see Lab. C. § 4061, subd. (d) [excluding all reports addressing permanent disability not prepared by the treating physician or QME[16]]; *Tenet/Centinela Hosp. Medical Ctr. v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 1041, 1048-1049 [annulling an award for relying on an improperly obtained medical report in violation of the mandatory procedures in §§ 4061 and 4062].)[17] The Legislature exercised its plenary power in making inadmissible reports obtained outside of the duly-constituted MPN. It did so because that is the only way to accomplish its goals, to control costs and minimize litigation, goals which require the exclusive use of the MPN process for the diagnosis and treatment of occupational injuries. (See, discussion *ante* at 16-18 and 20-23.) MPNs can only be the *exclusive* means of diagnosis and treatment if the statute barring admissibility of non-MPN reports is enforced as written. (*Valdez II*, 76 Cal.Comp.Cases at 971; § 4616.6.)

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[16] Qualified Medical Examiner: a physician designated to address disputes in a medical-legal report.

[17] The Court of Appeal disregarded the *Tenet* decision for not using the words "inadmissible" or "excluded" when it annulled the WCAB award because that award relied on a medical report improperly obtained in violation of mandatory procedures. (Opn at 9-10.) However, the Court of Appeal made no attempt to distinguish between barring the trier of fact from considering an improper report and finding that report to be inadmissible, even though its dismissal of *Tenet* relies on just such an artificial distinction.

E. Section 4605 Does Not Trump Section 4616.6.

1. The current version of section 4605 does not permit employees to end-run the MPN process or submit outside reports into evidence in the WCAB proceeding.

Labor Code section 4605 was enacted in 1937, though its basic language dates back to 1918. (Stats.1937, ch. 90, p. 282, § 4605; and see Stats.1917, ch. 586, p. 836, § 9.) It currently 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."[18]

Valdez argued below that this provision allowed her to end run the MPN process, i.e., to engage in unlimited doctor shopping as directed by her counsel and then submit any medical reports to the WCAB that those physicians may prepare. She claimed that those reports must be admissible for all purposes to determine her workers' compensation benefits. The Court of Appeal agreed, observing that excluding Dr. Nario's report "would eviscerate the right guaranteed by section 4605." (Opn, at 11.)

But, as an initial matter, it bears noting that the converse would *also* be true: allowing Valdez to rely on *section 4605* to submit *non*-MPN reports into evidence would eviscerate section *4616.6's* unambiguous bar on the admission of reports created outside of the MPN. As discussed above, that would undermine the very purpose of establishing an MPN. (See discussion *ante*, at 16-18 and 20-23.) Moreover, if these statutes are truly in conflict, then section 4616.6, as the more specific and more recent statute, controls. (*Collection Bureau of San Jose*, *supra*, 24 Cal.4th at 310.)

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[18] As discussed below, recently passed SB 863 adds additional language to section 4605 which goes into effect on January 1, 2013. (*Post* at 33-36.)

But the two statutes are not in conflict. One goal of statutory interpretation is to harmonize statutes which interact. (*Chevron USA*, *supra*, 19 Cal.4th at 1194.) Nothing in section 4605 addresses the *admissibility* of medical reports, or MPNs at all, or workers' compensation proceedings or benefits. Section 4605 merely recognizes that an injured employee has a right to hire a physician outside of the workers' compensation system at the employee's expense. It does not purport to govern workers' compensation cases or the procedures of the WCAB; but is a reminder that employees are not bound to treat *only* within the workers' compensation system. They can, at their own expense, treat or consult *outside of the system* if they choose. (*Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486, 490 [treatment procured under section 4605, is necessarily "a matter which is not within the jurisdiction of the Board," distinguishing such an expense from any treatment related to an industrial injury]; and see *Valdez I*, at 337-338.) This reading of section 4605 is wholly consistent with the restriction of section 4616.6.[19]

Thus, under section 4605, employees may elect to bypass the workers' compensation system entirely, including any MPN, and secure outside treatment for which they are personally responsible. But that does

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[19] Section 4605 also needs to be read in context with section 3751, subdivision (b), which bars any medical provider from seeking payment from an employee regarding any industrial injury for which a workers' compensation claim has been filed, unless the claim has been rejected by the employer. Harmonizing these statutes leads to the conclusion that section 4605 only confirms an employee's ability to seek treatment for non-industrial injuries, when a claim has been rejected or when no workers' compensation benefits are being sought. In fact, attempting to collect from the employee for treatment of an accepted industrial injury subjects the medical provider to a penalty three times the amount wrongfully collected, plus attorney's fees and costs. (*Id.*; and see, *Perrillo v. Picco & Presley* (2007) 157 Cal.App.4th 914, 935; citing *Bell*, *supra.*)

not mean that the employee can then *substitute* the outside doctor's report for that of the MPN, or introduce those other reports *into evidence in workers' compensation proceedings*. In other words, if the employee expects to seek workers' compensation benefits, including for an injury or treatment, he or she must remain *within* the MPN process, relying only on reports generated within the MPN statutory scheme. Non-MPN reports obtained in violation of the MPN statutes are rendered inadmissible by section 4616.6. Clearly, then, an employee's decision to go outside the system for treatment at the employee's expense will be respected, but the employee cannot do so *and* still expect that doctor to be compensated, or his/her report to be admissible in *workers' compensation proceedings*.

But that is precisely what Valdez did here. She convinced the WCJ below that she could offer Dr. Nario's outside report into evidence, and argued that his reports were admissible under section 4605, i.e., that she obtained Dr. Nario's services at her own expense. However, Nario sought payment from her *employer* through a lien claim, apparently having no agreement with Valdez that *she* would pay for his outside services. In other words, she abandoned the MPN, not even offering a pretextual reason until long after the fact, and also did not pay the outside doctor. She never sought a second or third MPN opinion or IMR, or, as far as the record shows, even informed her treating MPN doctor, Dr. Nagamoto, that she had any issue with his treatment. Hers is a transparent attempt to end run the mandatory and exclusive MPN process, and then saddle Defendant with her outside medical bill.[20]

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[20] This raises the related issue of when section 4605 properly applies. (See, Reply to Ans. To Ptn. For Rev., at 12-14.) Below, Valdez effectively argued that section 4605 applies whenever invoked, regardless of whether the employee is actually paying the doctor, even though by its own terms it only applies when the employee has paid for the medical service. (See

Valdez cannot evade a duly-constituted MPN, seek outside doctors' reports, submit those reports into evidence, expect that doctor to be *paid by the employer through the compensation system*, and expect the WCJ to award benefits based on that report. It is her right to go outside the MPN. But once she does so, she cannot submit those outside reports into evidence, nor expect the employer, who has already funded the MPN, to foot the outside doctor's bill. That would undermine the very purpose for which MPNs were created. MPNs would cease to exist as the mandatory and exclusive process for diagnosis and treatment and the adjudication of related workers' compensation disputes over diagnosis and treatment.

Since Valdez's actions are hardly unique, these attempts to side-step MPNs contribute to the flood of liens are swamping the WCAB. The 2011 CHSWC "Liens Report"[21] complains that this crisis is causing "serious distress" on the workers' compensation system, consuming "about 35% of the court's calendar" at an administrative expense to "California employers and insurers" of "roughly $200 million per year." (*Id.*, at 1.) At the time of the report, the backlog of unprocessed liens at the Los Angeles office alone was *growing* by nearly 4,000 lien claims per month due to a lack of staffing.[22] (*Id.*, at 8.) This has forced the WCAB to globally coerce settlements, resulting in the widespread reduction of valid claims and the payment of invalid ones, thereby undermining the system while significantly increasing costs. (*Id.*, at 10-11.)

Reply to Ans. To Ptn. For Writ of Review, at 12-13.) In light of the SB 863 amendment, as discussed below, this issue will become even more prominent.

[21] Found at www.dir.ca.gov/chswc/reports/2011/chswc_lienreport.pdf.

[22] At that time, it was estimated that the Los Angeles office had about 800,000 pending lien claims. (*Id.*, at 9.)

In contrast, the Liens Report notes that MPNs "largely avoid lien disputes arising from in-network providers." Not surprisingly, "[w]here MPNs exist, the largest share of medical liens arises from out-of network providers." (*Id.*, at 2; and see § 5304.) Properly enforced, MPNs reduce the number of liens because medical treatment is almost entirely handled within the MPN; however, this requires the enforcement of section 4616.6 as intended. Excluding improper outside reports from evidence would cut off the primary motive to obtain such reports, and correspondingly reduce the number of unpaid doctors filing liens. However, so long as the possibility remains to make use of outside reports from cherry picked medical advocates, applicants will continue their attempts to obtain them.

2. The new language added to section 4605 would not alter the result.

The Court should be aware that, in the summer of 2012, the Legislature amended section 4605 as part of SB 863. It was the earlier version of that statute, as it then read, on which Valdez relied so heavily, with the Court of Appeal's support. In the new version, effective January 1, 2013, section 4605, provides:

> "Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator [QME] or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion."

(Stats. 2012, ch 363, § 42)

As of this writing, the new version has yet to become effective. But to the extent the new language is relevant at all, it confirms Defendant's points above.[23]

The amendment to section 4605 is generally applicable to all workers' compensation claims, regardless of whether an MPN is involved. Notably, SB 863 *did not modify section 4616.6*, nor does it state anywhere, or even imply, that any outside MPN reports *are* admissible. Instead, the Legislature chose, in broad language, to limit applicants' ability to exploit section 4605 to secure tactical litigation advantages. It states that reports of outside or consulting physicians cannot alone form the basis of a compensation award. It simply requires the *authorized* treating physician (in this case, the MPN doctor) or QME to *address reports made by outside doctors*. That is a far cry from rendering those outside reports *admissible* in their own right, or permitting the WCJ to rely (as here) on the outside doctor's report to the exclusion of any authorized MPN physician, or at all. We explain.

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[23] Most of SB 863 is not relevant to the issues here. However, in addition to making improvements to MPN quality (e.g., requiring periodic audits, requiring improved access to services), the Legislature further reinforced its original intent that MPNs are the exclusive means for diagnosing and treating occupational injuries by closing a loophole applicants used to evade MPNs based on technical notice requirements, expressly excluding application of §§ 4061 and 4062 from disputes regarding diagnosis and treatment, and creating a conclusive presumption that an MPN is valid once approved by the Administrative Director. (See, Stats. 2012, ch 363, §§ 27, 28, 47 and 50; which will become revised Lab. C. §§ 4061, 4062, 4616, subds. (a)(4), (5) and (b)(1), and 4616.3, subd. (b).) Moreover, SB 863 creates an expedited resolution process for disputes over whether an MPN applies to a particular claim and requires that an initial medical report from a doctor selected by the employee be submitted to the employer within 5 working days of the initial examination. (see revised Lab C. §§ 5502 subd. (b)(B) and 4603.2, subd. (a).)

Since section 4605 does not address whether an outside report is admissible, that determination is left to other statutes, regulations and holdings. For example, for a report to be admissible, section 5703, subdivision (a)(2), requires doctors to verify it under penalty of perjury and confirm they have not violated other statutes. Likewise, reports addressing the existence or extent of permanent disability are only admissible if prepared by the treating physician or QME. (Lab. C. § 4061, subd. (d); and see additional examples, *ante* at 27-28.) With respect to MPNs, admissibility is controlled by section 4616.6, which excludes all reports regarding diagnosis and treatment which are not obtained in compliance with the MPN statutes. Had the Legislature intended non-MPN reports to be admissible, it would have said so, as it did in these other statutes.

Instead, the drafters wrote in the new version that an outside report *cannot alone be the basis of an award.* In other words, applicants can never make an end run around the MPN physicians. The authorized physician (in this case, the designated MPN physician) or QME "shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion."

Imposing an express requirement that the "authorized treating physician" or QME review and *comment* on an outside report obtained under section 4605 *confirms that the outside report itself remains inadmissible.* The Legislature is plainly requiring the authorized MPN doctor or QME to *consider* and comment on the report. The requirement is analogous to expert witnesses in civil litigation, who may rely on information "of a type that reasonably may be relied upon" by such an expert in forming an opinion, *whether or not that information is, in itself, admissible.* (Evid. C. § 801(b); *People v. Gardeley* (1996) 14 Cal.4th 605, 618 ["even matter that is ordinarily inadmissible can form the proper basis

for an expert's opinion testimony."].) Rather than burden the WCJ with the task of determining whether a particular outside report obtained under 4605 is sufficiently reliable or relevant to require or allow review by the designated physician, the Legislature has mandated that all such reports be reviewed and commented on *by the designated physician*, who is in a better position to efficiently decide what relevance, if any, such a report may have. But the outside report cannot function as the *basis* for an award of compensation and remains inadmissible; only a report by a properly designated doctor, having considered all of the available medical records, can support such an award. Thus, the new amendments to section 4605 reinforce Defendant's argument that outside reports remain inadmissible, and that any other conclusion would eviscerate the mandatory and exclusive nature of MPNs.

CONCLUSION

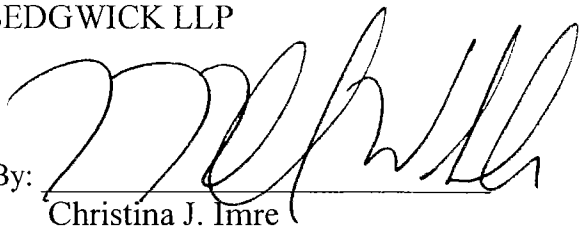
In an attempt to preserve the workers' compensation system in California for the indefinite future, the Legislature exercised its plenary powers to design and implement medical provider networks to replace the more expensive and less efficient litigation model previously in place. The additional reforms recently enacted further support and strengthen the medical provider networks and confirm the Legislature's intent. Once again, this Court is called upon to protect the reforms enacted under SB 899. To protect medical provider networks, as intended by the Legislature,

the decision by the Court of Appeal should be reversed, and the en banc decisions of the WCAB affirmed.

DATED: December 26, 2012 Respectfully submitted,

GRANCELL, LEBOVITZ, STANDER, REUBENS and THOMAS

SEDGWICK LLP

By: 

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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 December 26, 2012, I served the within document(s):

OPENING BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 26, 2012, at Los Angeles, California.

Barbara Fergerson

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