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IN THE SUPREME COURT OF CALIFORNIA

ELAYNE VALDEZ,

Petitioner,

vs.

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

Respondents.

No. S204387

2nd Civ. No. B237147

Elayne Valdez v. Warehouse Demo Services, et al., WCAB Case No. ADJ7048296

RESPONDENT WCAB'S ANSWER BRIEF ON THE MERITS

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RESPONDENT WCAB'S ANSWER BRIEF ON THE MERITS

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

On October 10, 2012, the Court granted the Petition for Review filed by respondents Warehouse Demo Services and Zurich North America (collectively, "Zurich").

On December 26, 2012, Zurich filed an opening brief on the merits. ("Opening Brief.")

For the reasons discussed below, this respondent, the Workers' Compensation Appeals Board ("WCAB"), answers that the Legislature's recent amendment of Labor Code section 4605 in Senate Bill ("SB") 863 (Stats. 2012, ch 363, § 42) has effectively resolved the central issue before the Court, i.e., the issue of injured employees going

outside an employer's Medical Provider Network ("MPN") to obtain treatment and to use the resulting non-MPN reports as the sole basis for an award of benefits.[1] Accordingly, the WCAB suggests that the Court may wish to consider dismissing review. (Cal. Rules of Court, Rule 8.528(b)(1) & (b)(3).)[2]

If the Court does decide to dismiss review, the WCAB would further suggest that the Court of Appeal's opinion remain unpublished (Rule 8.52(b)(3)) so that its effect would be limited to this case. (Rule 8.1115(a).) The WCAB would then be free to address any future issues that may arise under the MPN statutes and the new Labor Code section 4605.[3]

QUESTION PRESENTED

Given the Legislature's recent amendment of section 4605, should the Court consider exercising its discretion to dismiss review pursuant to Rule 8.528(b)?

STATEMENT OF THE CASE

With one exception, the WCAB adopts and incorporates the Statement of the Case found at pages four through ten of Zurich's Opening Brief. (Rule 8.504(e)(3).) At page four, footnote two, Zurich states that "the facts actually bear...out[]" that its MPN was properly established and noticed. In the two en banc decisions in *Valdez*, however, the WCAB did not determine this factual issue and returned it to the workers' compensation judge for further trial. (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330, 338 ("*Valdez I*"); *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970, 979 ("*Valdez II*").)

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[1] Elayne Valdez invoked former section 4605 to abandon her employer's MPN, to seek treatment outside of it, and to obtain a non-MPN report that later served as the sole basis for an award of temporary disability benefits. This is what led to the WCAB's two en banc decisions and the Court of Appeal's published opinion in *Valdez*.

[2] All further Rule references are to the California Rules of Court.

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

ARGUMENT AND AUTHORITIES

THE COURT SHOULD CONSIDER DISMISSING REVIEW AND LEAVING THE COURT OF APPEAL'S DECISION UNPUBLISHED BECAUSE AMENDED SECTION 4605 EFFECTIVELY RESOLVES THE CENTRAL ISSUE HERE.

Before 2012, the Legislature last reformed the workers' compensation system by enactment of SB 899 in 2004. (Stats. 2004, ch 34.) At that time the Legislature instituted MPNs to strike a balance between providing industrially injured employees with timely and effective medical care, and reducing treatment and litigation costs for employers. (Opening Brief, p. 1.) This balance is maintained by making MPNs the exclusive source of diagnosis and treatment for industrially injured workers, with limited exception. (*Id.*, at 11.) MPNs now provide the overwhelming majority of the medical treatment that is furnished to industrially injured employees in this state. (*Id.*, at 16.) The WCAB agrees with Zurich that the intended benefits of MPNs would be significantly undermined if, as approved by the Court of Appeal here, an injured employee could leave a valid MPN to self-procure treatment under former section 4605 and obtain an award based solely on the resulting non-MPN medical reports. (*Id.*, at 31.) However, the WCAB believes that the Legislature's recent amendment of section 4605 solves that problem.

SB 863, passed by the Senate on August 31, 2012 and signed by the Governor on September 18, 2012,[4] amended section 4605 to state as follows:

> "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 or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she

[4] The WCAB filed an answer in support of Zurich's petition for review on August 20, 2012, before the Legislature passed SB 863 and the Governor signed it. The WCAB is attempting to suggest the option of dismissing review at the earliest opportunity.

> 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.)

In SB 863, the Legislature also provided that "[t]his act shall apply to all pending matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a basis to rescind, alter, amend, or reopen any final award of workers' compensation benefits." (Stats. 2012, ch 363, § 84.)

The Senate's passage of SB 863 on August 31, 2012[5] occurred well after the Court of Appeal's June 18, 2012 certification for publication of its May 29, 2012 opinion in *Valdez*. The Court of Appeal had stated that its decision was "buttressed by the employee's undoubted right to contract with physicians of his or her choice. A rule excluding medical reports by such physicians for the sole reason that the report was not prepared by an MPN physician would eviscerate the right guaranteed by section 4605." (Slip Opin., at p. 11 [143 Cal.Rptr.3d 11, 17, 2012 Cal. App. Unpub. LEXIS 4023, at *17].) Since the Legislature is presumed to be aware of existing laws and judicial decisions and to have enacted or amended statutes in light of this knowledge (*People v. Overstreet* (1986) 42 Cal.3d 891, 897), the Legislature's amendment of section 4605 can be seen as a direct effort to nullify a core underpinning of the Court of Appeal's opinion.

In *Valdez*, the crux of the matter for the WCAB had been to uphold MPNs by minimizing any incentive an injured employee might see in using former section 4605 to procure, at his or her own expense, a consulting physician or any attending physicians whom he or she desires, and to use the resulting medical reports to obtain benefits. Accordingly, the WCAB held that "where unauthorized treatment is obtained for an industrial injury outside a validly established and properly noticed MPN, the resulting non-MPN treatment reports are inadmissible and *may not be relied upon to award benefits*." (*Valdez II*, 76 Cal.Comp.Cases at 971, italics added.) Now the Legislature has

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[5] See http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_863_bill_20120907_enrolled.pdf

dealt with this issue by amending section 4605 to provide that "[a]ny report prepared by consulting or attending physicians pursuant to this section *shall not be the sole basis of an award of compensation.*" (Italics added.)

To underscore the point, the Legislature also added new language requiring a qualified medical evaluator or *authorized* treating physician: (1) to address any report procured pursuant to section 4605; (2) to indicate whether he or she agrees or disagrees with the findings or opinions stated in the report; and (3) to identify the bases for this opinion.

When *Valdez* was before the WCAB, the question of the viability of medical reports from non-MPN physicians was one of great importance throughout the workers' compensation community. There was great concern that if an injured employee could abandon an employer's valid MPN and invoke section 4605 to freely choose a treating physician whose reports could be used to obtain benefits, MPNs would be rendered voluntary and useless. However, the Legislature has fixed the problem by amending section 4605 to provide that any report prepared by consulting or attending physicians pursuant to the statute shall not be the sole basis of an award of compensation. This removes the incentive for injured employees to obtain a favorable medical report outside the MPN, and instead encourages them to exercise their rights within the MPN. (Opening Brief, p. 14.) In fact, Zurich seems to agree that the amendment of section 4605 means that "applicants can never make an end run around the MPN physicians." (*Id.*, at 34.)

Since the Legislature's amendment of section 4605 resolves the central issue in *Valdez*, a decision by the Court would now have relatively little affect outside the case at bar. In the interests of judicial economy, the WCAB suggests that the Court may wish to consider dismissing its grant of review.

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CONCLUSION

Based on the foregoing argument and authorities, respondent WCAB suggests that the Court dismiss review and leave the Court of Appeal's opinion unpublished.

Dated: January 25, 2013

Respectfully submitted,
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Verification omitted pursuant to Code of Civil Procedure section 446 and *Wings West Airlines v. Workers' Comp. Appeals Bd.* (*Nebelon*) (1986) 187 Cal.App.3d 1047, 1055.

Certificate of Interested Entities or Persons omitted pursuant to California Rules of Court, rule 8.494(c)(1).

CERTIFICATION THAT BRIEF DOES NOT CONTAIN MORE THAN 8,400 WORDS CALIFORNIA RULES OF COURT, RULE 8.504(d)

(Elayne Valdez v. Workers' Compensation Appeals Bd. et al., No. S204387)

Pursuant to California Rules of Court, Rule 8.504(d), I certify that the attached brief contains less than 8,400 words, including footnotes and quotations, according to the counter of the word processing program with which it was prepared. Specifically, according to the computer word count, this brief contains 1,445 words.

I further certify that, pursuant to California Rules of Court, Rules 8.204(b)(3) & (4), the attached brief was prepared using 13-point Times New Roman font, including footnotes and quotations.

Dated: January 25, 2013

Respectfully submitted,
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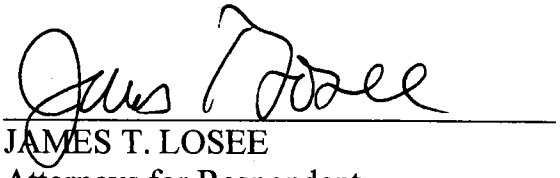
By 

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STATE OF CALIFORNIA)
)ss.
CITY AND COUNTY OF SAN FRANCISCO)

I declare that I am a citizen of the United States and that I am employed in the City and County of San Francisco of the State of California. I am over the age of 18 years and not a party to the within entitled action. My business address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102.

On January 25, 2013, I served the within Respondent WCAB's Answer Brief on the Merits in the matter of No. S204387, Elayne Valdez v. Workers' Compensation Appeals Board, et al., [2d Civ. No. B237147 & WCAB Case No. ADJ7048296], on the Supreme Court by hand-delivery and on the Court of Appeal and all parties and known amicus curiae in this action by placing true copies thereof in sealed envelopes with postage thereon fully prepaid in the United States mail in San Francisco, California addressed as stated below.

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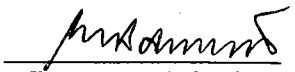
I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on January 25, 2013.



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