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IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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Frank A. McGuire Clerk
Deputy

ELAYNE VALDEZ,

Petitioner,

v.

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

Respondents.

REPLY TO WCAB 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

The WCAB's answer marks an odd and sudden shift from its previously consistent position on the issues raised in this matter, as well as an inexplicable disregard for the undisputed record. In short – despite the recent and mistaken assumption of the WCAB – Labor Code section 4605 does not apply in this case, either before or after SB 863.

By its own terms, section 4605 only applies when the applicant provides a physician "at his or her own expense." There is no evidence – none – that Valdez ever intended to pay for outside medical services, and certainly no evidence of any actual payment. For whatever reason, the WCAB suddenly ignores this, and instead parrots Valdez's false pretense about section 4605. The recent amendment to section 4605 cannot resolve this matter, because 4605 never applied. The WCAB recognized the general unimportance of section 4605 in its previous briefs, which fail to even mention it.

As framed by the WCAB in two en banc opinions, the present issue is whether employees can disregard a proper medical provider network (MPN) and instead obtain and rely on outside medical reports by counsel-selected medical advocates to obtain workers' compensation benefits. This issue focuses on the scope of Labor Code section 4616.6, which states that "no other reports shall be admissable [sic] to resolve any controversy

arising out of this article." While reaching a different result, the Court of Appeal recognized that section 4616.6 is the central issue. This is the issue raised in the Petition for Review, which generated substantial amicus interest and support.

As discussed in the Opening Brief, the potential interaction between Labor Code sections 4616.6 and 4605 is only a minor aspect of the broad exclusionary effect of section 4616.6. This follows from the reality that it is unusual for any employee to obtain a medical report at his or her own expense – an express prerequisite for invoking section 4605. As a result, the urgency and importance of the issues at hand have not changed with the adoption of SB 863 or the amendment to 4605.

Bizarrely, the WCAB proposes to disregard the pressing interests of employers, many of whom filed letters urging this Court to reverse the Court of Appeal and clarify section 4616.6 with all deliberate speed. As the WCAB again acknowledges, MPNs are a crucial and increasingly dominant means of providing diagnosis and treatment for occupational injuries, and section 4616.6 is the linchpin which ensures that the MPN process is exclusive. There are thousands of pending cases with issues pre-dating SB 863, and a continuing need to clarify section 4616.6, which was not changed by SB 863. As a result, employers urgently need clarification regarding the application of section 4616.6, and the resulting effect on the operation of MPNs.

LEGAL DISCUSSION

I. LABOR CODE SECTION 4605 HAS NO APPLICATION HERE AND IS ONLY AN INCIDENTAL CONCERN TO THE INTERPRETATION OF SECTION 4616.6.

For whatever reason, the WCAB has chosen to ignore the fact that section 4605 does not apply in this matter, despite repeated briefing discussing this issue. (E.g., Opening Brief, at pp. 5-6 and 30-31, including n. 20; and see Reply to Ans. to Ptn. for Rev., at p. 14.) Defendant has repeatedly observed that Labor Code Section 4605[1] does not apply because Valdez never satisfied the express condition precedent: "Nothing ... shall limit the right of any employee to provide, **at his or her own expense**, a consulting physician or attending physician whom he or she desires." (Lab. Code § 4605.)[2] There has never been any evidence, nor any reason to believe, that Valdez obtained Dr. Nario's, services "at his or her own expense" or that she ever had any intention of paying for those reports. [3] The interaction, however limited, between sections 4616.6 and 4605 was only discussed because of Valdez's repeated and misguided effort to hide behind section 4605.

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1 All statutory citations are to the Labor Code.

2 The language "or her" and "or she" was added by SB 863.

3 In her supplemental brief to the Court of Appeal, Valdez does make the unsupported and belated assertion that she "exercised her right under Labor Code § 4605, to treat with a doctor at her own expense," while ignoring the contrary evidence. (See, Ptner's Supp. Brief, at p. 6.)

Further demonstrating that section 4605 has no application here; both Valdez and Dr. Nario have insisted that Nario was actually the newly designated treating physician for workers' compensation purposes. (Ex. 1, at p. 4:7-10; WCAB Record at pp. 43-44 and 57.)[4] In keeping with this attempted misdirection, Valdez demanded that Defendant pay Nario's medical bills even before she began treated with him. (WCAB Record at pp. 43-44.) Similarly, Nario promptly demanded payment from Defendant once he started treatment, and then filed a lien against Defendant seeking payment for all the treatment which Nario's medical group provided, which he is currently pursuing. (*Id.*, at pp. 49-50, 85-95.) Section 4605 is not mentioned in any of these communications. While not explaining why it ignores them, the WCAB has expressly incorporated these facts into its Statement of the Case. (WCAB Ans. Brief on the Merits, at p. 2.)

At the very least, since the issue of whether section 4605 applies in this matter has never been adjudicated, it is mere wishful thinking (quite wishful, given the record) to claim that any amendment to 4605 would have any effect on the resolution of this case. For that matter, as one might expect, section 4605 is rarely invoked at all, since it is unusual for an

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[4] Valdez recently sought an extension of time on the grounds that she never received a copy of the record submitted by the WCAB. While Defendant was not opposed to an extension, the WCAB provided a copy of its record by e-mail to all parties on April 11, 2012, including to Ellen@PLBLaw.com. While Defendant and CAAA have each cited to this record in subsequent briefs, Valdez never suggested that she did not receive a copy until the extension request.

employee to seek medical care for an occupational injury at his or her own expense.[5] Section 4605 merely recognizes that an employee may obtain and pay for his or her own medical treatment outside of the workers' compensation system, meaning that such a doctor has no standing as a treating physician, or any other standing, within the workers' compensation proceedings. (See Ptn. For Rev., at pp. 25-27.) Section 4605 does not resolve the issues raised here, either before or after SB 863; but confirming the intended application of section 4616.6 will

II. THE WCAB HAS INEXPLICABLY DEPARTED FROM ITS OWN HOLDINGS AND ARGUMENTS TO DATE – WHICH CONFIRMED THAT THE ISSUE HERE IS THE SCOPE OF SECTION 4616.6.

The primary issue in this matter continues to be the scope of Labor Code section 4616.6 regarding the exclusion of documents obtained outside of a properly established and noticed MPN. Evaluating the MPN statutory scheme, the WCAB held in its initial en banc decision that 4616.6 barred the admissibility of any medical reports not obtained in compliance with applicable MPN provisions. (*Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330, 331-332.) ("*Valdez I*") In *Valdez I*, section 4605

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[5] Demonstrating how rarely section 4605 has been invoked historically, despite having been enacted almost a century ago, it has only ever been discussed, even briefly, in six judicial opinions, counting *Valdez*.

is only mentioned insofar as the WCAB concludes that section 4605 does not provide an exception to the general exclusion of non-MPN reports in section 4616.6. (*Id.*, at pp. 336-337; and see p. 338 [noting that section 4605 is also consistent with holding the employer harmless for any medical expense obtained outside of the MPN provisions].) In doing so, the WCAB did not find, or even suggest, that section 4605 applies to the reports offered by Valdez, instead ruling categorically that section 4605 never provides an exception to section 4616.6.[6]

The subsequent Petition for Reconsideration by Valdez made no claim that the subject medical reports were actually obtained in compliance with section 4605, or that Valdez had paid for them at her own expense, or ever intended to, but merely argued in the abstract that section 4605 should provide an exception to section 4616.6. (See Valdez Ptn. for Recon., ex. 11, at pp. 81 and 83-84.) Similarly, in *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 970 ("*Valdez II*") the en banc WCAB again confirmed the broad exclusion of non-MPN reports under section 4616.6 at length, addressing various arguments raised by Valdez. As a sub-part of the discussion, the WCAB reaffirmed that section 4605 provides no exception to section 4616.6. (*Id.*, at pp. 978-979.) Again, the question of whether Valdez had actually obtained reports pursuant to section 4605 was

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[6] Similarly, the WCJ did not address or rule on section 4605. (See ex. 6, at pp. 27-32.)

not addressed, as the issue continued to be irrelevant in light of the legal holding reached. Consistent with the legal conclusion of the WCAB, these reports were simply referred to as "non-MPN reports" (i.e., they were not referred to as "4605 reports"). (*Valdez II*, at p. 972.)

In granting Valdez's Petition for Writ of Review, the Court of Appeal sought additional briefing specific to the scope and application of section 4616.6, making no mention of section 4605. (See Opinion at p. 8, n.6.) Similarly, the WCAB made no reference to section 4605 in its brief to the Court of Appeal. The Court of Appeal then based its misguided opinion on its interpretation of section 4616.6, while also asserting in the last paragraph that its interpretation was "buttressed" by its new and broad interpretation of section 4605. (*Id.* at p. 11.) The Petition for Review urged this Court to reverse the Court of Appeal and confirm the proper application of section 4616.6. Similarly, the WCAB made no reference to section 4605 in its Answer in Support of Petition for Review.

In short, as acknowledged by the WCAB, the pressing legal question here is the application of section 4616.6, which was unaffected by SB 863 and remains a crucial provision for the intended operation of MPNs. Section 4605 is only a peripheral consideration as one possible application of section 4616.6, and is only discussed at all because it is raised as a pretense by Valdez. Moreover, as discussed above, the evidence demonstrates that section 4605 has no application here in any case.

III. THERE IS AN URGENT NEED TO ADDRESS THE SCOPE AND APPLICATION OF LABOR CODE SECTION 4616.6.

The primary issue in this case, as discussed at length in *Valdez I* and *Valdez II*, is the scope and application of section 4616.6. Section 4616.6 is the keystone needed to protect the intended operation of MPNs by ensuring that they are the exclusive means of diagnosis and treatment. (See Opening Brief, at pp. 19-22.) When the Court of Appeal gutted section 4616.6 – thus opening the door to as much abuse of the MPN system as applicants cared to pursue – there was an outpouring of support for review by this Court. Nineteen amicus letters urge this Court to reverse the Court of Appeal and confirm the intended application of section 4616.6 as detailed by the WCAB. These letters represent both public and private employers, insureds, self-insureds and insurers; although the letters most heavily represent self-insured public employers who fear having to decrease needed services to cover increased expenses if MPNs are undermined.

Most of these amicus letters only mention section 4605 as an incidental issue, one aspect of the application of section 4616.6, and some don't mention 4605 at all. That section 4605 is considered an ancillary issue by almost all concerned is not surprising, because it is the actual facts in *Valdez* which exemplify the most common abuse of MPNs. An employee abandons the MPN, selecting a convenient pretense to justify a

counsel-picked medical advocate, *but with every expectation that the employer will pay for all medical expenses.* Both the employee and the doctor demand payment for these medical expenses, followed by the inevitable medical lien against the employer. (See, Opening Brief, at pp. 30-31.) Given the transaction costs of litigation and delay, even plainly unmeritorious claims or liens are often settled, frequently at the urging of an overburdened WCAB. (*Id.*, at p. 31.) In this scenario, as in the instant case, section 4605 is simply the pretense belatedly selected to avoid the MPN, while the employee continues to demand payment from the employer. Since the employee almost never pays the doctor, section 4605 rarely (if ever), properly applies.

This is the often repeated situation faced by the many parties who filed letters, or had letters filed on their behalf, urging action by this Court. This plea for relief was made on behalf of most of the school districts, cities and counties in California. These parties urge review by this Court because the misguided Court of Appeal decision effectively endorsed this pattern of abuse, undermining the entire MPN process. While SB 863 may have limited the extent to which employees can exploit certain loopholes (or, more likely, will simply drive counsel to find new ways to skirt MPNs), the linchpin in this process is section 4616.6. Once the plain meaning and intent of section 4616.6 is confirmed and enforced, as described in *Valdez I*, *Valdez II*, and the Opening Brief, and as urged by the amicus letters, then

the other related game playing and attempted subterfuge will cease, as there will be no motive for it. Confirming the intended scope of section 4616.6 will exclude reports obtained outside of the MPN statutory scheme, so employees will not pursue them. By resolving this issue presently, this Court can prevent substantial litigation over the validity of the various means that are being, and will be, employed to circumvent MPNs for tactical advantage by instead providing clear guidance on the application of section 4616.6. Dismissing review will simply restart the same review process that has already been completed with two en banc WCAB opinions and the Court of Appeal, leaving California employers, public and private, suffering the continuing burden and expense of needless confusion and delay

In this regard, it is important to note that the WCAB still opposes restoring the misguided Court of Appeal opinion, to ensure that it has no impact beyond this matter. (WCAB's Ans. Brief on the Merits, at pp. 2 and 3; and see, WCAB's Ans. In Support of Pet. For Review, at pp. 1-2.) The WCAB remains consistent in this regard, as the Court of Appeal decision disregarded not only two en banc WCAB majority opinions, but also the dissents to those opinions, so that the en banc WCAB can unanimously agree that the Court of Appeal decision was incorrectly decided and undermines the intended operation of MPNs. (See, Opening Brief, pp. 6-8.)

CONCLUSION

As demonstrated by the record, section 4605 does not apply in this case, despite the misguided request of the WCAB. The importance of addressing section 4616.6, and protecting the intended operation of MPNs, remains undiminished, and this Court should proceed with its intended review and reverse the Court of Appeal.

DATED: February 14, 2013

Respectfully submitted,

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