S204387

SUPREME COURT
FILED

MAR 19 2013

Frank A. McGuire Clerk

Deputy

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

ELAYNE VALDEZ,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD; WAREHOUSE DEMO SERVICES; ZURICH NORTH AMERICA, ADJUSTED BY ESIS (Real Parties in Interest);

Respondents

PETITIONER'S ANSWER BRIEF ON THE MERITS

After a Published Decision by the Court of Appeal, Second Appellate District, Case No. B237147, Annulling an En Banc Decision by the Workers' Compensation Appeals Board, WCAB Case No. ADJ7048296

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TABLE OF CONTENTS

Page No.

ISSUES PRESENTED 1

INTRODUCTION 1

FACTUAL AND PROCEDURAL HISTORY 6

A. Petitioner's Injury and Efforts to Treat Within the MPN 7

B. Trial and Award of Temporary Disability Benefits 9

C. Petition for Reconsideration and En Banc Decisions 11

D. Petition for Writ of Review and Request for Publication .. 13

LEGAL DISCUSSION 14

I THE COURT OF APPEAL CORRECTLY RULED THAT LABOR CODE §4616.6 CANNOT BE CONSTRUED AS A GENERAL RULE OF EXCLUSION 14

A. The Plain and Unambiguous Language of Labor Code §4616.6 Governs Its Interpretation 14

B. By Its Plain and Unambiguous Language Labor Code §4616.6 Only Applies to Controversies Concerning Diagnosis or Treatment Within the MPN and Not an Applicant's Entitlement to Temporary or Permanent Disability Benefits 17

C. Labor Code §4616.6 Does Not Apply to the Facts in this Case Because There Was Never a Dispute over Petitioner's Diagnosis And Treatment; Rather, the Issue Here Was Petitioner's Entitlement to Temporary Disability Benefits . 22

TABLE OF CONTENTS
(CONTINUED) **Page No.**

II THE COURT OF APPEAL CORRECTLY HELD THAT AN APPLICANT HAS AN UNDOUBTED RIGHT UNDER LABOR CODE §4605 TO SELECT AND PAY FOR A PHYSICIAN OF HER OWN CHOICE 24

A. Medical Treatment Sought and Paid for by an Injured Employee is Expressly Authorized Under Labor Code §4605 24

B. SB 863 Reaffirms an Applicant's Right to Self-Procure Medical Treatment At Her Own Expense Outside the Employer's MPN 27

C. The Fourteenth Amendment Guarantees an Applicant the Right to Determine and Control Her Own Medical Treatment at Her Own Expense 30

III THE COURT OF APPEAL PROPERLY FOUND THAT AN APPLICANT HAS A STATUTORY AND DUE PROCESS RIGHT TO HAVE ALL RELEVANT EVIDENCE, INCLUDING NON-MPN MEDICAL REPORTS, CONSIDERED IN SUPPORT OF HER CLAIM FOR TEMPORARY OR PERMANENT DISABILITY 32

A. Procedural Due Process Mandates that an Applicant have Meaningful Right to Gather and Present Evidence 32

B. An Applicant has a Statutory Right to Submit the Medical Reports Generated by Non-MPN Physicians 36

C. An Applicant's Right to Select a Physician within the Employer's MPN System or to Request a Panel QME Does Not Fulfill An Applicant's Due Process Right 39

CONCLUSION 41

CERTIFICATE OF COMPLIANCE 42

TABLE OF AUTHORITIES

Page No.

Cases

Bell v. Samaritan Medical Clinic, Inc.
(1976) 60 Cal.App.3d 486 [131 Cal.Rptr. 583] 25

Brodie v. Workers' Comp. Appeals Board
(2007) 40 Cal.4th 1313 [57 Cal.Rptr.3d. 644] 32

Burrell v. City of L.A.
(1989) 209 Cal.App.3d 568 [257 Cal.Rptr. 427] 36, 38, 39

Cobbs v. Grant
(1972) 8 Cal.3d 229 [104 Cal.Rptr. 505] 30

Cruzan v. Director, Mo. Health Dept.
(1990) 497 U.S. 261 ..... 1, 25, 30

Department of Rehabilitation v. Workers' Comp. Appeals Bd.
(2003) 30 Cal.4th 1281 [135 Cal.Rptr.2d 665] 23

Dieckmann v. Superior Court
(1985) 175 Cal.App.3d 345 [220 Cal.Rptr. 602] 15

Doe v. City of Los Angeles
(2007) 42 Cal.4th 531 [67 Cal.Rptr.3d 330] 21

Donaldson v. Lungren
(1992) 2 Cal.App.4th 1614 [4 Cal.Rptr.2d 59] 25, 30

DuBois v. Workers' Comp. Appeals Bd.
(1993) 5 Cal.4th 382 [20 Cal.Rptr.2d 523] 15

Edgar v. Workers' Comp. Appeals Bd.
(1966) 246 Cal.App.2d 660 [56 Cal.Rptr. 37] 36, 37

Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd.
(1980) 103 Cal.App.3d 1001 [163 Cal.Rptr. 339] 33, 34, 35

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

Cases

Fremont Indemnity California v. Workers' Comp. Appeals Bd.
(1984) 153 Cal.App.3d 965 [200 Cal.Rptr.3d 762] 4

Gaytan v. Workers' Comp. Appeals Bd.
(2003) 109 Cal.App.4th 200 [134 Cal.Rptr.2d 516] 4, 5

Guerrero v. Davlyn Investments, Inc.
2010 Cal.Wrk. Comp. P.D. Lexis 47 38

Haas v. County of San Bernardino
(2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341] 40

Heath v. Workers' Comp. Appeals Bd.
(1967) 254 Cal.App.2d 235 [62 Cal.Rptr.139] 38

Hegglin v. Workers' Comp. Appeals Bd.
(1971) 4 Cal 3d 162 [93 Cal.Rptr.15] 4, 33

Kaiser Co. v. Industrial Acci. Com.
(1952) 109 Cal.App.2d 54 [240 P.2d 57] 33

Lennane v. Franchise Tax Bd.
(1994) 9 Cal.4th 263 [36 Cal.Rptr.2d 563] 15

Lona v. Citibank, N.A.
(2011) 202 Cal.App.4th 89 [134 Cal.Rptr.3d 622] 26

Los Angeles v. Industrial Acci. Com.
(1963) 215 Cal.App.2d 310 [30 Cal. Rptr. 75] 38

Lungren v. Deukmejian
(1988) 45 Cal.3d 727 [248 Cal.Rptr. 115] 16, 25, 30

Marsh v. Workers' Comp. Appeals Bd.
(2005) 130 Cal.App.4th 906 [30 Cal.Rptr. 3d 598] 14

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

Cases

Martinez v. Alert Plating Company, Inc.
2010 Cal.Wrk. Comp. P.D. Lexis 108 38

Meeks Bldg. Ctr. v. Workers' Comp. Appeals Bd.
(2012) 207 Cal.App.4th 219 [142 Cal.Rptr.3d 920] 22, 23

Moyer v. Workers' Comp. Appeals Bd.
(1973) 10 Cal.3d 222 [110 Cal.Rptr. 144] 15

Peak v. Rec Solar
2010 Cal.Wrk. Comp. P.D. Lexis 308 38

Pence v. Industrial Acci. Com.
(1965) 63 Cal.2d 48 [45 Cal.Rptr. 12] 1, 4, 33, 34

Perrillo v. Picco & Presley
(2007) 157 Cal.App.4th 914 [70 Cal.Rptr.3d 29] 25

Quinn v. State of California
(1975) 15 Cal.3d 162 [124 Cal.Rptr. 1] 16

Rucker v Workers' Comp. Appeals Bd.
(2000) 82 Cal.App.4th 151 [97 Cal.Rptr.2d 852] 5, 34, 35, 40, 41

Salgado v. County of Orange
2009 Cal.Wrk. Comp. P.D. Lexis 279 ..... 26, 38

Summers v. Newman
(1999) 20 Cal.4th 1021 [86 Cal.Rptr.2d 303] 14

Tenet/Centinela Hospital v. Workers' Comp. Appeals Bd. (Rushing)
(2000) 80 Cal.App.4th 1041 [95 Cal.Rptr.2d 858] 27, 28, 29

Tyler v. Workers' Comp. Appeals Bd.
(1997) 56 Cal.App.4th 389 [65 Cal.Rptr.2d 431] 34

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

Cases

Valdez v. Warehouse Demo Services
(2011) 76 Cal.Comp. Cases 330 [*Valdez* I] 7

Valdez v. Warehouse Demo Services
(2011) 76 Cal.Comp. Cases 970 [*Valdez* II] 7

Vasquez v. State of California
(2008) 45 Cal.4th 243 [85 Cal.Rptr.3d 466] 21

Voss v. Superior Court
(1996) 46 Cal.App.4th 900 [54 Cal.Rptr.2d 225] 15

Union Lumber Co. v. Industrial Acci. Com.
(1932) 124 Cal.App. 584 [2 P.2d 1047] 37, 38

Codes, Statutes and Other Authorities

Cal. Code Regs., tit. 8, §35(a)(1) 28

Cal. Code Regs., tit. 8, §9767(f)(3) 8

Cal. Code Regs., tit. 8, §9785(a)(1) 28

Cal. Code Regs., tit. 8, §9785(b)(1) 28

Cal. Rules of Court, Rule 8.204(a)(2)(C) 26

Civil Code §3541 37

Labor Code §3202 16

Labor Code §4060 9

Labor Code §4060(b) 28

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

Codes, Statutes and Other Authorities

Labor Code §4061 29

Labor Code §4061(c) 28

Labor Code §4061.5 28

Labor Code §4062 ..... 20, 22, 29

Labor Code §4062(a) 28

Labor Code §4062(c) 20

Labor Code §4062.2 ..... 9, 39, 40

Labor Code §4062.3(a) 28, 29

Labor Code §4600(c) 7

Labor Code §4605 ..... 1, 2, 3, 5, 6, 24, 25, 26, 27, 28, 29, 31, 32

Labor Code §4605(a) 3

Labor Code §4616 ..... 18, 35

Labor Code §4616.1 18

Labor Code §4616.2 18

Labor Code §4616.3 ..... 7, 8, 19

Labor Code §4616.3(c) 19

Labor Code §4616.4 ..... 13, 19, 20

Labor Code §4616.4(b) 19

TABLE OF AUTHORITIES
(CONTINUED)

Page No.

Codes, Statutes and Other Authorities

Labor Code §4616.4(d) 19

Labor Code §4616.4(f) 19

Labor Code §4616.5 20

Labor Code §4616.6 ... 1, 2, 3, 5, 11, 13, 14, 16, 17, 18, 20, 21, 22, 32, 35

Labor Code §4616.7 ..... 17, 35

Labor Code §4650 22

Labor Code §4653 22

Labor Code §4654 22

Labor Code §4655 22

Labor Code §4903.1(b) 26

Labor Code §5703 ..... 34, 36

Labor Code §5703(a) 1, 2, 5, 24, 26, 36

Labor Code §5704 ..... 36, 37

Senate Bill No. 863 (Stats. 2012, ch. 363) 2, 5, 16, 20, 21, 26, 27, 28

Senate Bill No. 899 (Stats. 2004, ch. 34) 16

ISSUES PRESENTED

(1) Does *Labor Code* §4616.6 exclude from evidence reports of a treating physician who is not a member of the employer's Medical Provider Network ("MPN"); and

(2) Does *Labor Code* §4605 [former and as amended], *Labor Code* §5703(a) and due process afford an applicant the right to have non-MPN treating physician reports admitted as evidence in support of his or her claim for workers' compensation benefits?

INTRODUCTION

The central issue here is whether *Labor Code* §4616.6 may be construed as a general rule exclusion, barring all medical reports not generated by MPN physicians hand-picked by the employer. Inextricably tied to this issue is the question of whether an applicant has a statutory and due process right to make her own medical treatment decisions and to present all relevant evidence, including non-MPN medical reports, in support of her claim for benefits. (See *Labor Code* §§4605 and 5703(a); *Cruzan v. Director, Mo. Health Dept.* (1990) 497 U.S. 261, 269[1] and *Pence v. Industrial Acci. Com.* (1965) 63 Cal.2d 48, 50-51 [45 Cal.Rptr. 12].)

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[1] A copy of the *Cruzan* decision is attached as Exhibit "16," 152-195 to the Petition for Writ of Review.

As the record demonstrates, Petitioner submitted a non-MPN medical report for the sole purpose of determining temporary disability benefits and *not* to resolve a controversy or dispute concerning her diagnosis or treatment within the MPN.

In reviewing *Labor Code* §4616.6, the Second District Court of Appeal looked to the plain and unambiguous language *and* its purpose and correctly found that it was limited to cases where there has been an independent medical review ("IMR") within the MPN. (Opinion, pgs. 5-8.) It also correctly interpreted *Labor Code* §§4605 and 5703(a) in affirming the "undoubted" right of an applicant to select and pay for a physician of her own choice and to have the WCJ consider non-MPN medical reports in determining compensation. (Opinion, pgs. 8-9.)

In 2012, our Legislature enacted Senate Bill No. ("SB") 863 (Stats. 2012, ch. 363), which included several revisions to the *Labor Code* including the MPN statutes.[2] Given the chance to clarify or modify *Labor Code* §§4616.6 and 5703(a), the Legislature chose to leave both intact. SB 863 did, however, amend *Labor Code* §4605 making it clear that a report of a §4605 physician is not only admissible, but that such a report "shall" be addressed by a Qualified Medical Examiner ("QME") or MPN physician

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[2]Petitioner has filed a motion requesting that the Court take judicial notice of the text of SB 863 (Stats. 2012, ch. 363.).

and included in the record. *Labor Code* §4605(a), as amended, reads 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 agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion. (Emphasis added.) (Exhibit "A" to the Request for Judicial Notice ["RJN"], pg. 74, §42.)

Despite the use of the phrase "*any report*," Respondents argue that *Labor Code* §4605 (former or as amended) does not apply and that *Labor Code* §4616.6 overrides all other laws regarding admissibility of non-MPN treating physician reports. Based on their myopic interpretation of §4616.6,

Respondents contend that *only employers* are allowed to gather evidence and present witnesses where there is an established and properly noticed MPN. In making this argument, Respondents have challenged an applicant's fundamental due process right under the Fourteenth Amendment to select and present witnesses in support of her claim for workers' compensation benefits -- a basic tenant of due process.

This Court has ruled that an injured worker is entitled to due process of law in workers' compensation proceedings. (*Pence*, 63 Cal.2d at 50-51; *Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [93 Cal.Rptr.15].) The WCAB acts "as a court, and it must observe the mandate of the Constitution of the United States and of California. This cannot be done except by due process of law." (*Fremont Indemnity California v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [200 Cal.Rptr.3d 762].)

"Due process requires a *meaningful opportunity* to present evidence and have it considered in explanation or rebuttal." [Emphasis added.] (*Gaytan v. Workers' Comp. Appeals Bd.* (2003) 109 Cal.App.4th 200, 214 [134 Cal.Rptr.2d 516].) Because the right to present evidence in explanation or rebuttal is guaranteed by the due process clause of the Fourteenth Amendment, any legislation or interpretation of legislation that

attempts to limit this fundamental right should be ruled unconstitutional. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [97 Cal.Rptr.2d 852].) Thus, the Respondents' position that *Labor Code* §4616.6 bars an applicant from any *meaningful* opportunity to present her own evidence, violates the applicant's right to due process of law.

It is Respondents' goal based on their skewed interpretation of the law and not the Petitioner's objective, to make an end run around the plain and unambiguous language of *Labor Code* §§4605 and 5703(a), to bar the applicant from presenting favorable medical evidence in support of her claim for benefits. Such a result would prejudice an applicant's constitutional and statutory right to self-procure treatment at her own expense and would violate an applicant's procedural due process right to a fair and open hearing. (See *Gaytan*, 109 Cal.App.4th at 219; *Labor Code* §§4605 and 5703(a).) As the Second District Court of Appeal opined, a rule excluding medical reports "for the sole reason that the report was not prepared by an MPN physician would eviscerate the right guaranteed by section 4605." (Opinion, pg. 11.)

In its Answer Brief on the Merits, the Workers' Compensation Appeals Board ("WCAB") contends that in light of SB 863 and the amendment to *Labor Code* §4605, this Petition for Review should be

dismissed and the *Valdez* opinion de-published. (WCAB's Answer Brief on the Merits, pgs 1-2.) Although amended *Labor Code* §4605 reaffirms the right of an applicant to offer non-MPN reports, this amendment does not settle all of the issues before this Court.[3]

Without the *Valdez* decision, employers and their insurers will continue to use the MPN statutes to contest applicants' due process rights. Accordingly, Petitioner respectfully requests that the published *Valdez* opinion be affirmed.

FACTUAL AND PROCEDURAL HISTORY

In their version of the "facts," Respondents have taken great liberty with the record and have included "evidence" that was never considered by the Workers' Compensation Judge ("WCJ"), the Workers' Compensation Appeals Board ("WCAB"), or the Second District Court of Appeal in rendering their decisions.[4] The most glaring example is the fact that neither

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[3]*Labor Code* §4605, as amended, raises a host of constitutional concerns. Although it expressly provides that a non-MPN report "shall" be reviewed by the QME and MPN physicians, and it indicates that such a report would be admissible, §4605 now places undue restrictions on non-MPN reports which arguably violates an applicant's procedural due process right to gather and present evidence in support of his or her claim.

[4]Petitioner has filed and served a motion to strike portions of the Opening Brief on the Merits on the grounds that Respondents have included "facts" outside or unsupported by the record.

the WCJ nor the WCAB ever made a finding that Respondents had a properly established and noticed MPN. (*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]; Exhibit "1," 2:7-9, Exhibit "8," 46-47, to Petition for Writ of Review.) Respondents' stilted version of the events necessitates that Petitioner restate the relevant facts and procedural history.

A. Petitioner's Injury and Efforts to Treat Within the MPN

On October 7, 2009, Petitioner, Elayne Valdez sustained work-related injuries to her back, hip and neck, while employed as a product demonstrator by Warehouse Demo Services. Petitioner sought treatment from Dr. Nagamoto, a physician within the Respondents' MPN. (Exhibit "1," 1:21-25, 3:4-21.)

On or about October 23, 2009, Petitioner retained legal counsel for her workers' compensation claim. On that same date, Petitioner, through her attorney, sent a letter to Laura Walters, a claims adjuster with ESIS, requesting medical treatment within Respondents' MPN under *Labor Code* §§4600(c) and 4616.3(c).[5] (WCAB Record, pgs 107-108.).

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[5]At trial, the WCJ admitted the letter dated October 23, 2009 into evidence. (WCAB Record, pg. 103:11.)

In this letter requesting MPN medical treatment, the Petitioner informed the claims adjuster that neither she nor her attorney were aware of "the names of the physicians within the employer and/or insurance carrier's MPN. . ." (WCAB Record, pg. 108.) Furthermore, Petitioner demanded that Respondents provide a full list of Respondent's MPN physicians. She also requested an appointment with an MPN physician pursuant to *Labor Code* Section 4616.3(c). (WCAB Record, pg. 108.) Finally, Petitioner notified Respondents that she was changing her primary treating doctors to "Advance Care Specialists (but not limited to) Mark Nario, D.C." No evidence was admitted indicating that the Respondents ever responded to the Petitioner's request for a §4616.3(c) appointment or provided her with a current MPN list of physicians. (*Cal. Code Regs.*, tit. 8, §9767(f)(3).)

On October 31, 2009, Petitioner stopped treating with the Respondents' MPN doctor and elected to self procure treatment outside of the MPN because she felt her hip was not getting better and the treatment was "doing her more harm than good." (Exhibit "1," 3:20-25, 4:4-5.)

By October 31, 2009, Respondents had still not informed Petitioner as to how she could go about changing doctors within the MPN. (Exhibit "1," 4:6-7.) In fact, Petitioner testified that she "did not know she could see another doctor." (*Id.*)

On November 2, 2009, Dr. Nario evaluated Petitioner and prescribed treatment including physical therapy. She had 24 physical therapy visits, approximately 20 acupuncture visits, and received decompression. Dr. Nario opined that Petitioner would be temporarily disabled for "8-12 weeks." (Exhibits "1," 1:20-24, 2:11-15, 3:5-23, 4:4-9, and "3," pgs 8-12.)

B. Trial and Award of Temporary Disability Benefits

ESIS refused to comply with the findings of Dr. Nario and denied Petitioner temporary disability benefits. As a consequence, the issue of whether Petitioner was entitled to temporary disability benefits went to trial on July 22, 2009. Petitioner offered Dr. Nario's medical report to substantiate her claim for temporary disability. (Exhibit "1," Applicant's 4; Exhibit "4," 13-21; Exhibit "5," 26; and Exhibit "6," 27-32.)

Respondents presented no evidence to contest Dr. Nario's findings with regard to Petitioner's entitlement to temporary disability. Had they disagreed with Dr. Nario's findings on compensability, they could have requested a Qualified Medical Evaluator (QME) panel under *Labor Code* §§4060 and 4062.2, at any time.[6]

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[6]Although it had the reports of treating physician Dr. Nario for nearly one year, Respondent failed to request a QME under *Labor Code* §§4060 and 4062.2. As aptly noted by the WCJ in his answer to Respondent's petition for reconsideration, Respondent appears "to have been so certain that non-MPN

At the outset, the WCJ deferred ruling on whether the Respondents had a valid and properly noticed MPN, concluding that these issues had no bearing on whether the Petitioner was entitled to temporary disability benefits. (Exhibit "1," 2:7-8.) Respondents sought to introduce correspondence and other materials relating to their MPN. These exhibits were not admitted into evidence. The WCJ marked them for identification only. (Exhibit "1," 2:19-22; WCAB, 121-129.) Respondents never made a motion for reconsideration to request that the exhibits be admitted and did not seek review of the WCJ's evidentiary ruling.

On July 29, 2010, the WCJ issued his Findings and Award. The WCJ held that Petitioner had an admitted injury and was thus, entitled to temporary disability benefits based on Dr. Nario's medical report. The WCJ rejected Respondents' contention that reports of non-MPN doctors were inadmissible, observing that "[r]ecords from treating doctors have always been admissible for the reason that such doctors are familiar with the patient,

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reports are inadmissible that [they] looked forward to the trial and establishing the MPN, rather than objecting [and obtaining a QME]." (WCAB Record, pg. 150). Respondent had every opportunity to obtain a QME report. Indeed, in its petition for reconsideration, Respondent averred that the issue of temporary disability had to be resolved by a panel QME only (WCAB Record, pgs. 142 and 149). Yet, at the time Respondent made this assertion, nearly one year had passed since it had objected to Petitioner's medical treatment, and Respondent had still not obtained a panel QME.

generally on a long time basis, and entitled to great weight." (Exhibit "6," 27-32.)

C. Petition for Reconsideration and En Banc Decisions

Respondents filed a petition for reconsideration from the WCJ's decision on the grounds that the WCJ acted in excess of his powers by considering a non-MPN report on the issue of temporary disability. (Exhibit "7," 34-40.) The WCJ issued a report and recommendation in response to the Respondents' petition for reconsideration. As to the reports of non-MPN doctors, the WCJ emphasized that "[w]hile defendant may not be liable for the cost of treatment or reports, all treating doctor reports are admissible." (Exhibit "8," 46.)

On April 20, 2011, an en banc WCAB granted the petition for reconsideration and ruled that the report of Dr. Nario, a non-MPN treating physician was inadmissable under *Labor Code* §4616.6 and rescinded the award of temporary disability benefits.[7] (Exhibit "9," 50-51; Exhibit "10," 52-68.) It held that where *"unauthorized treatment"* is obtained outside a validly established and properly noticed MPN, reports from the non-MPN

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[7]Since the WCJ deferred any issues concerning the MPN as not relating to temporary disability, the WCAB, for its purpose, proceeded on the assumption that Respondents' MPN was validly established and properly noticed. (Exhibit "10", fn. 2, 53:26-27.)

doctors are inadmissible, and therefore may not be relied upon to resolve any dispute related to the issues of treatment, diagnosis *or* compensation (i.e. temporary disability and permanent disability).

Two of the seven Commissioners filed dissenting opinions as to the WCJ's discretion to consider non-MPN doctors' reports to determine the issue of compensation. As one Commissioner observed, under Article 2.3, MPN doctors have exclusive control over issues of diagnosis and treatment. To extend that control to issues of compensation, the Commissioner opined, *"goes beyond the MPN statutory mandate and gives no effect to sections 4605 and 5703(a)."* (Exhibit "10," 63:3-27, 64-68:1-7.)

Because the WCAB ruled on matters not raised at trial, the Petitioner was newly aggrieved and filed a petition for reconsideration of the en banc decision which was granted. (Exhibit "11," 69-92.) In its second en banc decision, the WCAB reaffirmed its prior holding that reports of non-MPN treating physicians are inadmissible. (Exhibit "14," 131-133; Exhibit "15," 134-151.) The same two Commissioners, once again, filed dissenting opinions, rejecting the majority's position that non-MPN medical reports are inadmissible under any circumstances. (Exhibit "15," 147:3-26, 148-151:1-26.) The dissent observed:

> While Legislative intent is not always apparent, it strains credulity to assume that in enacting section 4616.6, the legislature intended that by exercising the right to obtain medical treatment at their own expense, injured workers would preclude themselves from receiving benefits for their industrial injuries. Moreover, the majority has removed the discretion of the WCJ to admit the reports of non-MPN treating physicians in all cases and circumstances where there is a validly established and properly noticed MPN, apparently creating for the first time an exception to section 5703(a), which was enacted in 1937. (Exhibit "15," 150:19-24.)

D. Petition for Writ of Review and Request for Publication

Petitioner filed a timely petition for writ of review which was granted. The Second District Court of Appeal annulled the en banc decision of the WCAB and held that the rule of exclusion laid down by *Labor Code* §4616.6 under the MPN statutes applies only when there has been an independent medical review pursuant to *Labor Code* §4616.4. (Opinion, pg. 8.) It observed that "[i]t does not make sense . . . to construe section 4616.6 as a general rule of exclusion, barring any use of medical reports other than those

generated by the MPN. Section 4616.6 states nothing of the sort. If the Legislature intended to exclude all non-MPN medical reports, the Legislature could have said so, it did not." (Opinion, pg. 8.) It further concluded that a rule excluding all non-MPN reports would "eviscerate the right guaranteed by section 4605." (Opinion, pg. 11.)

LEGAL DISCUSSION

I

THE COURT OF APPEAL CORRECTLY RULED THAT LABOR CODE §4616.6 CANNOT BE CONSTRUED AS A GENERAL RULE OF EXCLUSION

A. The Plain and Unambiguous Language of Labor Code §4616.6 Governs Its Interpretation

This Court's analysis of *Labor Code* §4616.6 must begin with the language of the statute itself. In construing a statute, this Court's primary goal is to discern the intent of the Legislature so as to effectuate the purpose of the law. (*Summers v. Newman* (1999) 20 Cal.4th 1021, 1026 [86 Cal.Rptr.2d 303].) Legislative intent "'is generally determined from the plain or ordinary meaning of the statutory language, unless the language or intent is uncertain.'" (*Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th

906, 914 [30 Cal.Rptr. 3d 598].) "Every word and clause should be given effect so that no part or provision is rendered meaningless or inoperative." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [20 Cal.Rptr.2d 523].) Generally terms such as "shall" and "must" are presumed to have "intended mandatory meaning but may be construed otherwise if indicated by other rules of construction." (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 353 [220 Cal.Rptr. 602].)

The words of a statute should not be read in isolation, but must be construed in context and "keeping in mind the nature and obvious purpose of the statute where they appear." (*Moyer v. Workers' Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [110 Cal.Rptr. 144].) If the plain, common sense meaning of the statute's words is unambiguous, the Court must presume the Legislature meant what it said and not interpret away clear language in favor of an ambiguity that does not exist. (*Lennane v. Franchise Tax Bd.* (1994) 9 Cal.4th 263, 268 [36 Cal.Rptr.2d 563].)

As a general rule, the Court must presume that the Legislature in enacting a law is "'aware of existing, related laws and intended to maintain a consistent body of statutes.'" (*Voss v. Superior Court* (1996) 46 Cal.App.4th 900, 925 [54 Cal.Rptr.2d 225].) Therefore, "[a]n interpretation

that renders related provisions nugatory must be avoided." *(Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735 [248 Cal.Rptr. 115].)

Finally, the Court must "liberally construe workers' compensation statutes to the worker's benefit." (*Quinn v. State of California* (1975) 15 Cal.3d 162, 170 [124 Cal.Rptr. 1].) *Labor Code* §3202 provides that the Act "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment."

Applying these rules of construction, the Second District Court of Appeal correctly held that *Labor Code* §4616.6 cannot be construed as a general rule of exclusion, barring the use of any medical reports other than those generated by MPN physicians from all proceedings. (Opinion, 5-8.) Based on the plain and unambiguous language of the statute, this rule of exclusion simply does not exist under SB 899[8] and still does not exist under workers' compensation statutes, even as recently revised by SB 863.

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[8]SB 899 (Stats. 2004, ch. 34.).

B. By Its Plain and Unambiguous Language, Labor Code §4616.6 Only Applies to Controversies Concerning Diagnosis or Treatment Within the MPN and Not an Applicant's Entitlement to Temporary or Permanent Disability Benefits

Respondents contend that for the MPN model to be successful, it must be "exclusive" and "mandatory." In keeping with this goal, the Respondents further assert that *Labor Code* §4616.6 "unambiguously" excludes all medical reports obtained outside the MPN to resolve "any" controversy." (Opening Brief, pgs. 20-26.) These contentions are without merit and belie the clear and unambiguous language of §4616.6.

Labor Code §4616.6 provides that "[n]o additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out *of this article.*" (Emphasis added.) This "*article*" refers to Article 2.3 entitled Medical Provider Networks, *Labor Code* §§4616 through 4616.7 (the MPN statutes) and does not extend to the use of "other reports" in any other context. Thus, by the clear language of the statute and its reference to "this article," *Labor Code* §4616.6 applies only to evidence that is obtained to resolve a "controversy arising out of . . ." any of

the eight statutes of Article 2.3, all of which relate solely to the issues of medical treatment and diagnosis by physicians within the MPN.

A brief overview of the MPN statutes illustrate that limitation of "other reports" under *Labor Code* §4616.6, when viewed in the context of the MPN statutes as a whole, only applies when the applicant has raised a controversy over her diagnosis or treatment and there has been an Independent Medical Review ("IMR"). *Labor Code* §4616 declares that an employer may establish an MPN; and explains that the purpose of the MPN is to make medical treatment "readily available" (§4616 (2)). Section 4616 also dictates the requirements on the employer for submitting a plan to the administrative director.

Labor Code §4616.1 addresses "economic profiling" and mandates that the employer's policies related to economic profiling be filed with the Administrative Director. *Labor Code* §4616.2 addresses what is described as "continuity of care" and the employer's obligations for payment of treatment rendered by a physician who is a "terminated provider" (a physician who the employer has terminated from the MPN). In addition, this section requires that the employer provide written notice to their employees describing the employer's "continuity of care" policies.

Labor Code §4616.3 addresses the right of the employee (who chooses to receive treatment at the expense of the employer rather than paying for her own treatment) to medical treatment within the MPN. This section is the first provision within Article 2.3 to make mention of a "dispute." Specifically, this section addresses the procedure followed "if an injured employee disputes *either the diagnosis or the treatment prescribed by the treating physician.*" (Emphasis added.) (*Labor Code* §4616.3(c).) Section 4616.3 allows the injured worker to request the opinion of a second and even a third physician within the employer's network of doctors when the employee disputes the diagnosis or treatment. (*Id.*)

Labor Code §4616.4 outlines the independent medical review process. The appeal process occurs only if an injured employee disputes a "medical diagnosis" or "treatment prescribed" by an MPN physician. (*Labor Code* §4616.4(b).) The injured worker may, after disputing the "medical diagnosis or treatment" made by the first, second and third of the employer's physicians, petition to have the diagnosis and treatment reviewed by a physician who has been selected by the administrative director.

Labor Code §4616.4(d) discusses what medical records or other information may be considered as part of the IMR process. *Labor Code* §4616.4(f) mandates that "the independent medical reviewer shall issue a

report to the administrative director, in writing, and in layperson's terms to the maximum extent practicable, containing his or her analysis and determination whether the disputed health care service was consistent with the medical treatment utilization schedule. . ." The IMR is the last word on the nature and extent of the employer's liability to furnish care within the MPN only. (*Labor Code* §§4616.4 and 4616.6.)

An injured worker who elects to proceed with an IMR is denied the constitutional right to due process of law. Pursuant to SB 863, the findings of the IMR are not subject to cross-examination and to judicial review. *Labor Code* §4062(c) provides that "[i]f the employee objects to the diagnosis or recommendation for medical treatment by a physician within the employer's medical provider network established pursuant to Section 4616, the objection shall be resolved only in accordance with the independent review process established in Section 4616.3 and 4616.4." (RJN, Exhibit "A," pg. 56, §28.)

Labor Code §4616.5 defines the word "employer." Finally, *Labor Code* §4616.6 discusses the limitation on the use of "other reports" during the IMR process. The first three words of *Labor Code* §4616.6 define the statute's subject matter; specifically "no additional examinations." When the Legislature used the phrase "additional examinations . . . *arising out* of this

article," it was referring to the dispute resolution process for "controversies" arising out of medical diagnosis or prescribed treatment as found in §4616.3.

Respondents' contention that the limitations under *Labor Code* §4616.6 reach beyond the MPN, is simply not supported by the plain and ordinary meaning of the statute. Neither this section nor any other section of the MPN statutes mention temporary disability, permanent disability, or the adjudication of such claims, which are not the subject of the §4616.6 dispute resolution process.

This Court has cautioned against reading into a statute language it does not contain or rewriting a statute to conform to an assumed intention which does not appear from its language. (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253 [85 Cal.Rptr.3d 466]; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [67 Cal.Rptr.3d 330].) Had the Legislature intended to preclude an applicant from offering reports by a physician outside the MPN for any reason, it could have easily done so in 2004 and again in 2012 with SB 863; it did not. Thus, the Second District Court of Appeal correctly opined that "the rule of exclusion laid down by section 4616.6 applies only when there has been an independent medical review performed under the authority of section 4616.4." (Opinion, pg. 2.)

C. Labor Code §4616.6 Does Not Apply to the Facts in this Case Because There Was Never a Dispute over Petitioner's Diagnosis And Treatment; Rather, the Issue Here Was Petitioner's Entitlement to Temporary Disability Benefits

The limitations on "other reports" under §4616.6 is irrelevant to the facts in this case. As the record demonstrates, Petitioner never disputed the medical diagnosis and prescribed treatment by the MPN doctor nor did she request an IMR. Indeed, the Petitioner agreed with the medical diagnosis and the treatment prescribed. After she lost trust in the employer's doctors, she continued the prescribed treatment with her own physician.

The sole issue before the WCAB was Petitioner's entitlement to temporary disability, an issue outside the purview of the MPN statutes. (*Labor Code* §§4062, 4650, 4653, 4654, 4655.) Under the Act, "when an industrial injury causes an employee to be restricted from working, either totally or partially, the employee may be entitled to receive temporary disability indemnity." (*Id.*; (*Meeks Bldg. Ctr. v. Workers' Comp. Appeals Bd.* (2012) 207 Cal.App.4th 219, 224 [142 Cal.Rptr.3d 920].) The purpose of temporary disability indemnity is "to provide interim wage replacement

assistance to an injured worker during the period of time he or she is healing and incapable of working." (*Id.*)

Medical treatment benefits are a separate class of benefits from disability payments. (*Meeks Bldg. Ctr.*, 207 Cal.App.4th at 227.) The employer's obligation to pay temporary disability benefits is tied to the employee's "actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom" and not the resolution of a disputed diagnosis or prescribed treatment. (*Id.* at 224.) As this Court has explained, temporary disability benefits are in the nature of a medical-legal benefit, "reimbursing the employee for [her] time when requested to submit to a medical examination to resolve a compensation claim." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1294-1295 [135 Cal.Rptr.2d 665].) The right to these benefits are decided outside the MPN.

II

THE COURT OF APPEAL CORRECTLY HELD THAT AN APPLICANT HAS AN UNDOUBTED RIGHT UNDER LABOR CODE §4605 TO SELECT AND PAY FOR A PHYSICIAN OF HER OWN CHOICE

A. Medical Treatment Sought and Paid for by an Injured Employee is Expressly Authorized Under Labor Code §4605

Respondents contend that the MPN was designed to be the exclusive means of diagnosis and treatment with regard to workers' compensation benefits and was meant to bar an injured worker from offering any outside "doctor-advocate" reports for *any reason*. Their contention is without merit. They have misconstrued the MPN statutes and interpreted *Labor Code* §§4605 and 5703(a) in such a manner that would render the plain and unambiguous language of these statutes meaningless.

Article 2.3 falls within Chapter 2 of Division 4 which also includes *Labor Code* §4605. The language of this statute is explicit. It states that *"[n]othing contained"* in Chapter 2 [which includes Article 2.3] *shall* limit the right of an employee to provide, at her own expense, a treating physician. This section is a statutory restatement of an employee's constitutional right to direct and control her own medical treatment decisions without encumbrance,

at the employee's own expense. (*Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, 1620 [4 Cal.Rptr.2d 59]; *Cruzan*, 497 U.S. at 269). Respondents have not cited any authority for their assertion that the MPN statutes *mandate* that an injured employee treat *exclusively within* the employer-controlled MPN at the risk of being denied all benefits under the Act.

Our courts have consistently recognized that *Labor Code* §4605 allows "any injured employee is free to seek medical treatment and/or consultation *in addition to, or independent of*, that for which his employer is responsible." [Emphasis added.] (*Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486, 490 [131 Cal.Rptr. 583].) *Labor Code* §4605 "ensures that employees are not forced to accept treatment or advice from a physician selected by the employer if they wish to go outside the workers' compensation system at their own expense." (*Perrillo v. Picco & Presley* (2007) 157 Cal.App.4th 914, 936 [70 Cal.Rptr.3d 29].)

In their Opening Brief and Reply to the WCAB's brief, Respondents argue that *Labor Code* §4605 does not apply because Petitioner did not pay or intend to pay for the medical report obtained outside the MPN. (Opening Brief, pgs 30-31; Reply brief, pg. 6.) They note that Dr. Nario, her treating physician, filed a lien in the case. These arguments are nonsensical and are outside the record.

Whether Petitioner intends to pay for her own medical treatment is a separate issue from her fundamental right to self-procure medical treatment or to present non-MPN medical reports in support of her claim for benefits. (*Labor Code* §§4605 and 5703(a); *Salgado v. County of Orange*, 2009 Cal.Wrk. Comp. P.D. Lexis 279.) As Respondents concede, the issue of their liability for any non-MPN treatment was never addressed by the WCJ or WCAB. (Reply Brief, pg. 6-7.) Thus, this issue should not be considered on appeal. (*Cal. Rules of Court*, Rule 8.204(a)(2)(C); *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 102 [134 Cal.Rptr.3d 622] .)

Regardless of who may be liable for the Petitioner's medical expenses, Dr. Nario, as her treating physician, prepared a §4605 medical report in support of her claim for temporary disability benefits. The MPN statutes do not bar the use of medical reports prepared by non-MPN physicians to determine eligibility for benefits. In this case, Dr. Nario's medical report constituted substantial medical evidence of Petitioner's injury and was properly admitted and relied upon in awarding her temporary disability benefits.

Moreover, Respondents' argument that the use of non-MPN reports will undermine the MPN system and significantly increase costs is unfounded. *Labor Code* §4903.1(b), as amended by SB 863, expressly provides that payment or reimbursement of liens for medical expenses "shall

not be allowed" *for any expense incurred unless authorized by the employer.* (RJN, Exhibit "A," pg. 113, §66.) In the end, *Labor Code* §4605 promotes the cost-saving goals of the 2004 Act by having the injured employee, not the employer, bear the cost of medical treatment.

B. SB 863 Reaffirms an Applicant's Right to Self-Procure Medical Treatment At Her Own Expense Outside the Employer's MPN

Respondents assert that SB 863 is irrelevant. Despite the fact *Labor Code* §4605 expressly contemplates the admission of §4605 reports in determining benefits, Respondents maintain that although an applicant may treat with a non-MPN physician, all outside medical reports are inadmissible under any circumstance because a non-MPN doctor may not qualify as a "treating physician." (Opening brief, pgs. 34-35.) Citing *Tenet/Centinela Hospital v. Workers' Comp. Appeals Bd.* (*Rushing*) (2000) 80 Cal.App.4th 1041 [95 Cal.Rptr.2d 858], they contend a "treating physician," can only be an MPN doctor, a physician pre-selected by the employer to be part of its' MPN. These assertions are without merit.

To begin with, SB 863 specifically provides that "[t]his act shall apply to all pending matters regardless of the date of injury, unless otherwise specified in this act, but shall not be the basis to rescind, alter, amend, or

reopen any final award of workers' compensation benefits." (RJN, Exhibit "A," pg. 134, §84.) Since Petitioner's claim is still pending, SB 863 is relevant to the issues in this case.

Furthermore, Respondents' argument that a non-MPN doctor cannot be a "treating physician" finds no support in the language of the Act. In fact, there are numerous provisions of the Act referring to "treating physicians" that do not "specifically mention MPN physicians, or distinguish them from non-MPN physicians." (*Valdez,* 76 Cal. Comp. Cases at 976; See also *Cal. Code Regs.*, tit. 8, §35(a)(1); *Labor Code* §§4060(b), 4061(c), 4061.5, 4062(a) and 4062.3(a) and *Cal. Code Regs.*, tit. 8, §9785(b)(1).) These sections do not define or limit the term "treating physicians" to doctors within the employer-established MPN. Since *Labor Code* §4605 contemplates an injured worker seeking medical advice outside of the workers' compensation system and the MPN, the Respondents' restrictive definition of a "treating physician" is not supported by any statute under the Act. (*Cal. Code Regs.* tit. 8, §9785(a)(1).)

Respondents' reliance on *Tenet* with respect to who may be a "treating physician" is misplaced. In that case, the treating physician chosen by the employer issued a report discharging the employee with provisions for future medical care when needed. (*Tenet*, 80 Cal.App.4th at 1044.) The employee objected to the treating physician's permanent disability opinion

and was provided a three-physician panel. Rather than selecting a physician, the employee hired an attorney and began treating with another physician. (*Id.*) At trial, the WCJ concluded that the employee was entitled to change treating physicians when future medical treatment was warranted. On appeal, the court annulled the WCJ's award, holding that since her treating physician had released her from further medical care, the employee could not seek medical treatment from a new physician without complying with the procedures set forth in *Labor Code* §§4061 and 4062. (*Id.* at 1047-1048.)

The *Tenet* decision pre-dates the MPN statutes which were enacted in 2004 and does not address an injured worker's rights under *Labor Code* §4605. More important, the facts in *Tenet* do not compare to the circumstances here. Unlike the employee in *Tenet*, Petitioner was still actively treating at the time she left the MPN. (Exhibit "1," pg. 3.) The *Tenet* opinion suggests that had the employee not been discharged from active care, she would have been free to validly change treating physicians. (*Id.* at 1045.)

The Second District Court of Appeal correctly noted that the statutory scheme under *Labor Code* §§4061 and 4062 "does not exclude from consideration medical reports prepared by non-MPN physicians." (Opinion, pg. 10.) On the contrary, the Act provides that any party may submit "records prepared or maintained by the employee's treating physician or physicians" or

medical records "relevant to determination of the medical issue." (*Labor Code* §4062.3(a).) There is no statutory requirement, as the court noted, that mandates that the treating physician be part of the employer's MPN.

C. The Fourteenth Amendment Guarantees an Applicant the Right to Determine and Control Her Own Medical Treatment at Her Own Expense

It is well-settled that individuals have a fundamental constitutional right to pay for, direct and control their own medical treatment decisions. (*Cobbs v. Grant (*1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505]; *Cruzan,* 497 U.S. at 269.) As the *Cruzan* court observed, "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (497 U.S. at 269.)

An individual's constitutional right to medical self-determination derives from a "liberty interest" found in the Fourteenth Amendment to the United States Constitution and in California, from the right to privacy in article I of the California Constitution. (*Cruzan,* 497 U.S. at 278; *Donaldson v. Lungren* (1992) 2 Cal.App.4th 1614, 1620 [4 Cal.Rptr.2d 59].)

Our courts have held that the right of "patient autonomy" is the "ultimate exercise of one's right to privacy." (*Id.*)

Although a vast majority of injured workers prefer to treat within the MPN at the expense of the employer, the MPN statutory scheme has not eliminated an injured employee's constitutional and statutory right to procure medical treatment at their own expense. A rule compelling an applicant to seek treatment for an admitted injury within the MPN, at the risk of receiving no compensation if she exercised her rights under *Labor Code* §4605, would violate the applicant's most basic and fundamental right to make her own medical decisions and to present meaningful evidence in explanation or rebuttal.

III

THE COURT OF APPEAL PROPERLY FOUND THAT AN APPLICANT HAS A STATUTORY AND DUE PROCESS RIGHT TO HAVE ALL RELEVANT EVIDENCE, INCLUDING NON-MPN MEDICAL REPORTS, CONSIDERED IN SUPPORT OF HER CLAIM FOR TEMPORARY OR PERMANENT DISABILITY

A. Procedural Due Process Mandates that an Applicant have Meaningful Right to Gather and Present Evidence

Despite the plain and unambiguous language of *Labor Code* §§4605 and 4616.6, Respondents repeatedly assert that the purpose of the MPN provisions is to eliminate the "dueling doctor" scenario. Contrary to Respondents' claim, the stated goal of the MPN statutory scheme was to save costs by requiring an injured employee treat *at the employer's expense* within the MPN only. (See *Brodie v. Workers' Comp. Appeals Board* (2007) 40 Cal.4th 1313, 1329 [57 Cal.Rptr.3d. 644].) The goal of the MPN legislation has never been to arm one of the "duelers" and disarm the other, thereby tipping the scales of justice decidedly in favor of the employer.

Based on the Respondents' overly broad interpretation of *Labor Code* §4616.6, the injured worker would be barred from presenting any medical evidence, other than those reports prepared by doctors pre-selected and "cherry-picked" to be within the employer's own MPN. Accepting the

Respondents' interpretation would deprive an applicant of the constitutional guaranty of due process of law. (*Pence,* 63 Cal.2d at 50-51; *Hegglin,* 4 Cal.3d at 175.)

Even if regarded as a purely administrative agency, the WCAB is "bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing." (*Kaiser Co. v. Industrial Acci. Com.* (1952) 109 Cal.App.2d 54, 58 [240 P.2d 57].) Over the past century, our courts have consistently defined the role of the Industrial Commission (predecessor to WCAB) in the following terms "[The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd.* (1980) 103 Cal.App.3d 1001, 1015 [163 Cal.Rptr. 339].)

This Court has affirmed that parties in workers' compensation cases have a statutory and procedural due process right to offer evidence in explanation or rebuttal. (*Pence,* 63 Cal.2d at 50-51; *Hegglin,* 4 Cal.3d at 175.) As the *Pence* court observed, "[t]he law is clear that undue infringement of the right to cross-examination [citations] as well as improper restrictions on the right to present evidence in rebuttal [citations] is a

deprivation of the constitutional guaranty of due process of law." (*Pence*, 63 Cal.2d at 50-51.)

The right to a meaningful opportunity to meet and rebut the evidence is indispensable to an applicant's right to a fair hearing. Due process requires that "[a]ll parties must be fully apprised of the evidence submitted or to be considered, and must be *given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.*" [Emphasis added.] (*Rucker*, 82 Cal.App.4th at 158.) "The principle of allowing *full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims.*" [Emphasis added.] (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal.Rptr.2d 431].)

Fidelity, 103 Cal.App.3d at 1001 and *Rucker* 82 Cal.App.4th at 151, are instructive. In *Fidelity*, the workers' compensation insurer petitioned the court on the grounds that the WCAB failed to give it proper notice and the opportunity to submit rebuttal medical evidence in connection with a motion to set aside a compromise and release. (103 Cal.App.3d at 1007-1008.) Upon reconsideration of the applicant's motion, the WCAB re-opened the case and accepted new medical evidence under *Labor Code* §5703 without giving the insurer proper notice or the opportunity to submit evidence in

rebuttal. (*Id.*) The *Fidelity* court held that "[s]uch failures violate[d] the procedural requirements of section 5803 and of due process of law." (*Id.* at 1016.)

In *Rucker*, the petitioner's demand for advances against permanent disability (PDA) and penalties for nonpayment was denied on the erroneous grounds that the petitioner never requested PDA. On appeal, the petitioner argued that she was denied due process because she was not given the opportunity to present evidence to rebut the WCJ's finding. (82 Cal.App.4th at 155-156.)

The *Rucker* court concluded that the petitioner's due process rights were violated when the WCJ proceeded on a completely different theory for nonpayment of benefits than submitted by the parties, without affording an opportunity for rebuttal. It held that the "improper restriction on the right to present evidence in rebuttal is a deprivation of the constitutional guaranty of due process of law." (*Id.* at 157)

Following the holdings in *Fidelity* and *Rucker*, an applicant's right to a fair and open hearing will be jeopardized if *Labor Code* §4616.6 is interpreted as a general rule of exclusion, barring an applicant from presenting her own treating physician's reports in support of her claim for benefits. Nothing within the language of the Act, including Article 2.3 [*Labor Code* §§4616 through 4616.7] indicates, that our Legislature intended

to "diminish the minimum procedural guarantees of the Constitution" by infringing upon an applicant's fundamental right to present relevant and substantial medical evidence in explanation or rebuttal of her claim for temporary disability benefits. (*See Burrell v. City of L.A.* (1989) 209 Cal. App.3d 568, 577 [257 Cal.Rptr. 427].) Accordingly, the Second District Court of Appeal's decision annulling the WCAB's order should be affirmed.

B. An Applicant has a Statutory Right to Submit the Medical Reports Generated by Non-MPN Physicians

The right to an opportunity "to produce evidence in explanation or rebuttal" of medical reports is also statutory. (*Edgar v. Workers' Comp. Appeals Bd.* (1966) 246 Cal.App.2d 660, 665 [56 Cal.Rptr. 37].) Our Legislature has codified an injured worker's constitutional right to gather and present evidence by enacting *Labor Code* §§5703 and 5704.

Labor Code §5703(a) provides in part that "[t]he appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) *Reports of attending or examining physicians* . . . " [Emphasis added.] *Labor Code* §5704 states that "[t]ranscripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing,

shall be served upon the parties to the proceeding, and an opportunity shall be given to *produce evidence in explanation or rebuttal thereof* before decision is rendered." [Emphasis added.]

Excluding all non-MPN reports for any reason, will "strip" §§4605, 5703(a) and 5704 of all effectiveness and in essence, render them void. It is axiomatic that an "interpretation that gives effect is preferred to one which makes void." (*Civil Code* §3541.)

More important, interpreting these statutes to exclude all non-MPN reports will result in a denial of due process. In *Edgar*, 246 Cal.App.2d at 665, the court of appeal found the applicant was denied his due process rights under *Labor Code* §5704 to present rebuttal medical evidence in support of his claim for disability. Referring to §5704, the *Edgar* court observed, "[t]he Legislature may reasonably be presumed to have expected that when evidence, oral or documentary, was introduced during an open hearing the parties would be accorded as of course a reasonable opportunity to meet it," in order to meet the constitutional requirement of due process." (*Id.* at 667.)

Respondents' claim that the MPN statutes expressly bar medical reports obtained outside the MPN is inconsistent with past case law and prior WCAB decisions. Before *Valdez*, the reports of a non-MPN treating physician were routinely admitted into evidence under §5703(a) to resolve medical-legal disputes [entitlement to benefits]. (See *Union Lumber Co. v.*

Industrial Acci. Com. (1932) 124 Cal.App. 584, 588 [2 P.2d 1047]; *Los Angeles v. Industrial Acci. Com.* (1963) 215 Cal.App.2d 310, 313 [30 Cal. Rptr. 75]; *Heath v. Workers' Comp. Appeals Bd.* (1967) 254 Cal.App.2d 235, 240 [62 Cal.Rptr.139]; *Salgado v. County of Orange*, 2009 Cal.Wrk. Comp. P.D. Lexis 279; *Guerrero v. Davlyn Investments, Inc.*, 2010 Cal.Wrk. Comp. P.D. Lexis 47; *Martinez v. Alert Plating Company, Inc.*, 2010 Cal.Wrk. Comp. P.D. Lexis 108; and *Peak v. Rec Solar*, 2010 Cal.Wrk. Comp. P.D. Lexis 308.)

It is well established that the parties to workers' compensation claims have a procedural due process right to "offer" and "present" evidence in "explanation or rebuttal," and that such opportunity to offer evidence must be "meaningful." Admitting only those reports authored by hand-picked physicians within the employer's MPN and barring any non-MPN medical evidence in rebuttal for any reason, as urged by the Respondents, will infringe upon an applicant's statutory and procedural due process right to a fair and open hearing.

The Fourteenth Amendment right to due process of law is a freedom that is not subject to the capricious political winds of Legislative "reform"; but is constitutionally grounded and immovable. "The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts." (*Burrell*, 209 Cal.App.3d at

577.) A fair trial requires that the applicant be given the opportunity to be heard at a "meaningful time and in a meaningful manner." (*Id.* at 576.) To protect these due process rights, workers' compensation proceedings must employ the "minimum requisite procedures that are federally mandated." (*Id.* at 577.) Therefore, any rule that prohibits a party from the collection of evidence, or attempts to diminish the value of the evidence collected breaches the basic tenants of procedural due process.

C. An Applicant's Right to Select a Physician within the Employer's MPN System or to Request a Panel QME Does Not Fulfill An Applicant's Due Process Right

Respondents may argue that an applicant has a due process right because she has the choice of several doctors within the employer's MPN and also may present evidence through the panel QME process as set forth in *Labor Code* §4062.2. These arguments have no merit.

The fact that the MPN statutes allow an injured worker to change from one defense doctor to another or to obtain second and third opinions within the MPN is irrelevant to an injured employee's due process right to gather and present her own medical evidence. An MPN treating physician pre-

selected and paid for by the employer can hardly be compared to an independent physician chosen by the applicant.[9]

As for the QME process, it forbids the "selection" of an evaluator and dictates a process whereby the injured worker must "strike" an evaluator's name from a list compiled by the Department of Industrial Relations' Medical Director. The injured worker has no ability to "select" her medical evaluator, rather, she may only strike a name from the list. (See *Labor Code* §4062.2.)

Under this statutory scheme, the employer is permitted to select any and every doctor it desires to become part of its group of expert witnesses within the employer's MPN, but the employee is relegated to striking a name from a random list the employee did not compile. Moreover, the employer is permitted to select and determine the identity of its witnesses through its pre-selection of doctors within its MPN (these doctors author reports that are subsequently admitted into evidence), but the injured employee is not. Neither the MPN nor QME process satisfies the right to a fair and open hearing, "one of 'the rudiments of fair play' assured to every litigant by the Fourteenth Amendment as a minimal requirement." (*Rucker*, 82 Cal.App.4th

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[9]In *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1034 [119 Cal.Rptr.2d 341], this Court observed that a "procedure holding out to the adjudicator, even implicitly, the possibility of future employment in exchange for favorable decisions creates such a temptation and, thus, an objective, constitutionally impermissible appearance and risk of bias."

at 157-158.) Any argument that diminishes that fundamental due process right should be rejected.

CONCLUSION

For the foregoing reasons, Petitioner, Elayne Valdez respectfully requests that this Court affirm the decision in *Valdez* and deny Respondent WCAB's request for depublication .

DATED: March 15, 2013.

Respectfully submitted,

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Attorneys for Petitioner, ELAYNE VALDEZ

CERTIFICATE OF COMPLIANCE

Counsel of Record, hereby certifies that, pursuant to California *Rules of Court*, the enclosed **PETITIONER'S ANSWER BRIEF ON THE MERITS** was produced using 13-point type, including footnotes, and contains approximately 8,574 words. Counsel relies on the word count of the computer used to prepare this Brief.

DATED: March 12, 2013.

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California in the offices of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action; my business address is 300 East San Antonio Drive, Long Beach, California 90807-0948.

On the date given, I served the following document:

PETITIONER'S ANSWER BRIEF ON THE MERITS

on the interested parties through their attorneys of record by placing true and correct copies thereof addressed as shown on the attached list, as designated below:

(X) BY FIRST CLASS MAIL (C.C.P. §§ 1013a, et seq.): I caused said document(s) to be deposited in the United States Mail in a sealed envelope with postage fully prepaid at Long Beach, California, following the ordinary practice at my place of business of collection and processing of mail on the same day as shown on this declaration.

() BY EXPRESS MAIL (C.C.P. §§ 1013(c)(d), et seq.): I caused said document(s) to be deposited with an express service carrier in a sealed envelope designed by the carrier as an express mail envelope, with fees and postage prepaid.

I declare under penalty of perjury under the laws of the State of California and of the United States of America that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service is made.

DATE: March 18, 2013.

Carol Stephen

Carol Stephen

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