SUPREME COURT
FILED

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Deputy

S204387

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 MOTION TO STRIKE PORTIONS OF RESPONDENTS' OPENING 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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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Petitioner and Applicant, ELAYNE VALDEZ, hereby moves to strike portions of Respondents' Opening Brief on the Merits on the grounds that Respondents have cited to RAND studies, amici letters, and unsupported anecdotal statistics (purportedly pertaining to the virtues of the MPN) which are outside the record and have proffered evidence that was not admitted to make unsubstantiated factual claims. The portions of the Opening Brief that Petitioner seeks to strike are as follows:

(1) All references to *California Commission on Health and Safety and Workers' Compensation*, CHSWC 2011, Annual Report,http://www.dir.ca.gov/chswc/Reports/2011/CHSWC_Annual Report2011.pdf., found on page 13 and fn. 10 of the Opening Brief;

(2) All references to the *California Commission on Health and Safety and Workers' Compensation*, CHSWC; Liens Report, http://www.dir.ca.gov/chswc/reports/2011/chswc_lienreport.pdf found on pages 31, 32 and fn. 21 of the Opening Brief;

(3) All references to the RAND, *Medical Care Provided Under California's Workers' Comp. Program, Effects of the Reforms and Additional Opportunities to Improve the Quality and Efficiency of Care* (2011); http://www.rand.org/pubs/periodicals/health-quarterly/issues/v1/n3/04.html found on page 16 and fn. 11 of the Opening Brief;

(4) All references to the School of Public Health, Univ. of WA, *Access, Quality and Outcomes of Health Care in the Cal Workers' Comp. System* (2008); http://www.dir.ca.gov/dwc/MedicalTreatmentCA 2008/2008_CA_WC _Access_Study _UW_report.pdf found on page 16 and fn. 12 of the Opening Brief;

(5) All references to Defendant's Exhibit "B," Objection to treatment December 16, 2009; received into evidence for identification only on July 22, 2010; WCAB Records, 121-128; and found on pages 4 through 6 of the Opening Brief;

(6) All references to Defendant's Exhibit "C," Designated Employment records; received into evidence for identification only on July 22, 2010; WCAB Records, 129; and found on page 5 of the Opening Brief;

(7) The statement found on pages 3-4 of the Opening Brief which reads as follows: "At all relevant times, Defendant had (and still has) a

validly established and properly noticed MPN to treat all occupational injuries;"

(8) The statement found on page 4 of the Opening Brief which reads as follows: "Applicant Elayne Valdez, employed by WDS, confirmed in writing that she received the MPN Employee Handbook on June 17, 2009;"

(9) The statement found on page 4 of the Opening Brief which reads as follows: "On that same day, she was sent a reminder about the MPN and again provided the information needed to select a doctor and process her claim, including the website which provided the MPN information, the selection of doctors and contact information in case she had questions;"

(10) The statement found on page 4 of the Opening Brief which reads as follows: "Under the MPN involved here, Valdez had her choice of over 90 different medical facilities for the treatment of her claimed injuries within a 30 mile radius of her residence, and an even larger selection of individual doctors;"

(11) The statement found on page 5 of the Opening Brief which reads as follows: "Instead, she claimed general ignorance about her ability to change to another MPN physician or seek a second opinion within the

MPN (each option being expressly provided for in sections 4616.3 subdivision (b) and (c)), despite having been provided this information on at least two previous occasions;"

(12) The statement found on page 6 of the Opening Brief which reads as follows: "The claims administrator protested to Valdez's counsel, insisting that Valdez was required to return to the MPN, but that protest went unanswered;"

(13) The statement found on pages 15-16 of the Opening Brief which reads as follows: "A 2011 study commissioned by Commission on Health and Safety and Workers' Compensation ("CHSWC") concluded that MPNs were among the 'most important new policies' of SB 899, and that most MPNs 'are broad panels selected primarily to meet access requirements and provide fee-discounting opportunities;'"

(14) The statement found on page 16 of the Opening Brief which reads as follows: "Surveys conducted for the Department of Industrial Relations show that 80% of employees surveyed in 2008 were treated by MPNs, including 85% of those with back injuries;"

(15) The statement found on page 16 of the Opening Brief which reads as follows: "For example, in its letter in support of review, Amicus San Diego County and Imperial County Schools Risk Management

JPA reported that 'the MPN program has produced an approximately 30% savings' in 'reduced medical litigation costs' 'contributing directly to our member districts' ability to retain qualified teachers and avoid closure of schools.' (Risk Management JPA Letter, p. 1.);"

(16) The statement found on pages 16-17 of the Opening Brief which reads as follows: "The County of Riverside states that MPNs 'speak to the core' of its efforts to stem fraudulent claims and the county's 'ability to defend ourselves from the fraud and abuse that is rampant in the system.' (Cnty of Riverside letter, p.1);"

(17) The statement found on page 31 of the Opening Brief which reads as follows: "Since Valdez's actions are hardly unique, these attempts to side-step MPNs contribute to the flood of liens are swamping the WCAB. The 2011 CHSWC 'Liens Report' complains that this crisis is causing 'serious distress' on the workers' compensation system, consuming 'about 35% of the court's calendar' at an administrative expense to 'California employers and insurers' of 'roughly $200 million per year;'"

(18) The statement found on page 31 of the Opening Brief which reads as follows: "At the time of the report, the backlog of unprocessed liens at the Los Angeles office alone was growing by nearly 4,000 lien claims per month due to a lack of staffing;"

(19) The statement found on page 31 of the Opening Brief which reads as follows: "This has forced the WCAB to globally coerce settlements, resulting in the widespread reduction of valid claims and the payment of invalid ones, thereby undermining the system while significantly increasing costs;" and

(20) The statement found on page 32 of the Opening Brief which reads as follows: "In contrast, the Liens Report notes that MPNs 'largely avoid lien disputes arising from in-network providers.' Not surprisingly, '[w]here MPNs exist, the largest share of medical liens arises from out-of network providers.'"

This motion is made pursuant to *Evidence Code* §§352, 452, and 459 and *California Rules of Court*, Rules 8.54(a), 8.204(a)(1)(C), 8.252, 8.500(g)(3), 8.520(f) and 8.520(g) on the grounds that the matters identified above are outside the record or are based on inadmissible and irrelevant evidence. In addition, Respondents have not requested that this Court take judicial notice of matters outside the record and have not asked for permission to augment the record on appeal. Accordingly, Petitioner Valdez requests that this motion be granted and the identified portions of Respondents' Opening Brief on the Merits be stricken and/or disregarded.

This motion to strike has been filed concurrently with Petitioner's Answer Brief on the Merits and motion requesting judicial notice of the text of Senate Bill No. 863 (Stats 2012, ch. 363).

DATED: March 13, 2013.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

This case involves an injured worker's statutory [*Labor Code* §4605] and due process rights to select and pay for a physician of her own choice and to present medical reports by physicians outside the Medical Provider Network ("MPN") in support of her claim for temporary or permanent disability benefits under the Workers' Compensation Act. Respondents seek to overturn the well-reasoned opinion by the Second District Court of Appeal in *Valdez v. Workers' Comp. App. Bd.,* No. B237147, that reaffirmed these basic and fundamental rights.

In support of their arguments, Respondents have submitted an Opening Brief on the Merits containing numerous references to matters outside the record or that are unsubstantiated and unsupported by the record on appeal. Petitioner Valdez has identified 20 references or excerpts from the Opening Brief which fall within three categories.

The first category includes studies by RAND and the California Commission on Health and Safety and Workers' Compensation, which purportedly include statistical data touting the benefits of the MPN system. The second category includes amicus letters that were filed in support of

Respondents' petition to grant review. Finally, the third category includes "evidence" and unsubstantiated factual claims relating to Respondents' specious claim that it had a validly established and properly noticed MPN.

It is well settled that appellate review is generally limited to matters contained in the record. Factual matters that are not part of the appellate record should not be considered on appeal and such matters should not be referred to in the briefs. (*California 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].)

As discussed below, Respondents' Opening Brief on the Merits is replete with references to matters outside or unsupported by the record. In addition, these extraneous matters will not aid the Court in interpreting or explaining *Labor Code* §4616.6, and determining whether this statute excludes all non-MPN treating physician reports under *Labor Code* §4605. Accordingly, Petitioner respectfully requests that the Court strike and disregard the offending portions of Respondents' Opening Brief.

2. THIS COURT SHOULD STRIKE RESPONDENTS REFERENCE TO ALL MATTERS OUTSIDE OR UNSUPPORTED BY THE RECORD ON APPEAL

A. Anecdotal Statistical Data Contained in RAND and CHSWC Reports Touting the Benefits of the MPN System [Items 1-4, 13-14, 17 and 20]

California Rules of Court, Rule 8.204(a)(1)(C) states an appellate brief must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." This Court may decline to consider passages of a brief that do not comply with this rule. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 990 [94 Cal.Rptr.3d 802].)

In its Opening Brief, Respondents have discussed at length the results of anecdotal statistical surveys prepared by RAND and CHSWC to highlight the financial benefits of the MPN system. They have not cited to the page or volume where these surveys may be found in the record on appeal. In truth, these surveys have been raised for the first time in support of the Respondents' petition for review.

Together with the filing of its Opening Brief, Respondents could have, but did not, request that the court take judicial notice under *Evidence*

Code §452 of the RAND and CHSWC surveys. Judicial notice is "the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." (*Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [110 Cal.Rptr.2d 877].) "Judicial notice may not be taken of any matter unless authorized or required by law." (*Evidence Code* §450.) Matters that may be subject to judicial notice are identified in *Evidence Code* §§451 and 452.

Even if Respondents had made a request for judicial notice and it was granted, this Court could not accept the contents of these surveys, as true. "Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113 [55 Cal.Rptr.3d 621].) When judicial notice is taken of the existence of a document, "the truthfulness and proper interpretation of the document are disputable." (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457 [84 Cal.Rptr.2d 843].)

As the RAND and CHSWC surveys are not relevant to the issue under review [the interpretation of *Labor Code* §§4616.6 and 4605] and are not part of the record on appeal, they should be disregarded.

B. Amicus Letters in Support of the Petition for Review [Items 15 and 16]

To bolster their arguments regarding the alleged benefits of the MPN system, Respondents have also incorporated the content of the amicus letters submitted by San Diego County and Imperial County Schools and the County of Riverside in support of the petition for review. (Opening Brief, pgs. 16-17.) Once again, the contents of these amicus letters are not evidence or a part of the record on appeal. More important, the opinions expressed by these public entities about the virtues of the MPN system are not relevant in interpreting the plain and unambiguous language of *Labor Code* §§4616.6 or 4605, the issues under review.

Under *California Rules of Court*, Rule 8.520(f)(1), an entity must first seek permission of the Court before filing an amicus curiae brief. In this case, the Court has not granted any third party permission to file a brief in support of either side. Thus, the contents of the amicus letters are not

authority or part of the record on appeal and should not be referred to in the briefs.

C. Respondents' Factual Statements and Supporting Exhibits Regarding its MPN [Items 5-12]

Citing to the WCAB Record at 121-129 [Respondents' Exhibits "B" and "C"], Respondents contend that they had a "validly established and properly noticed MPN. . ." within which Petitioner had "her choice of over 90 different facilities for treatment. . ." They further argue that Petitioner received a copy of the MPN Employee Handbook and was provided information on how to change physicians and seek a second opinion. (Opening Brief pgs. 4-5.) These are not established facts based on evidence admitted at trial.

To start, neither the WCJ nor the WCAB ever made a finding that Respondents had a properly established and noticed MPN. In fact, the WCAB acknowledged in its en banc decisions that whether a valid MPN existed remained to be adjudicated. *(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.)

Moreover, the WCJ did not consider *any* evidence presented by Respondents regarding its MPN. At trial, the WCJ found that the question of whether Respondents had a validly established and noticed MPN did not relate to temporary disability and thus, deferred ruling on this issue. (WCAB Record, pg. 103:8-9.) In keeping with its ruling, the WCJ admitted Respondents' Exhibits "B" [ESIS letter dated December 16, 2009] and Exhibit "C" [designated employment records] *for identification only.* (WCAB Record, pgs. 103, 121-129.) *Neither Respondents' Exhibits "B" nor "C" were ever admitted into evidence.*

Respondents failed to preserve any of these evidentiary issues on appeal. After the WCJ made its ruling, Respondents did not file a motion with the WCJ to admit Exhibits "B" and "C" or file a petition for reconsideration with the WCAB to specifically set aside the WCJ's evidentiary ruling.

An appellate court generally "is not the forum in which to develop an additional factual record. . ." (*People v. Peevy* (1998) 17 Cal.4th 1184, 1207 [73 Cal.Rptr.2d 865].) "[W]hen reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3 [58 Cal.Rptr.2d 899].)

At this late stage, the Respondents should not be permitted to argue or supplement the factual record with exhibits that were never admitted into evidence and that are not material to the issues under review.

3. CONCLUSION

For the foregoing reasons, Petitioner, Elayne Valdez respectfully requests that this Court grant this motion and strike or disregard Items 1 through 20.

DATED: March 15, 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 MOTION TO STRIKE PORTIONS OF RESPONDENTS' OPENING 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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