1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

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4 IRMA DE LEON, 5 *Applicant,* 6 vs. 7 SAFEWAY, INC., permissibly self-insured, 8 *Defendant.* 9	**Case No. ADJ8338903** **(Salinas District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

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11 In order to further study the issues, we previously granted defendant's petition for reconsideration 12 of the September 10, 2014 Findings Award And Order of the workers' compensation administrative law 13 judge (WCJ), who found in pertinent part that, "When a Defendant believes a physician in its Medical 14 Provider Network [MPN] is providing medical treatment that is not consistent with the MTUS [Medical 15 Treatment Utilization Schedule], its remedy is contractual and is not subject to the [utilization review 16 (UR)] provisions of Labor Code [section] 4610." and further found that "Had the Utilization 17 Review/Independent Medical Review [IMR] been appropriate in this matter, the IMR determination did 18 not comply with the [30-day] requirements of Labor Code § 4610.6(d)," and that pursuant to Labor Code 19 section 4616.6 "reports other than those prepared pursuant to Article 2.3 are not admissible to resolve 20 any controversy arising out of that Article; the UR/IMR reports offered as a exhibits herein are not 21 admissible." (Bracketed material added or substituted.) With those findings, the WCJ concluded that the 22 SpineOne Functional Restoration Program prescribed by applicant's treating physician was reasonable 23 medical treatment supported by substantial evidence, and the treatment was awarded for that reason.

24 It is admitted that applicant sustained industrial injury to her cervical spine as a result of a scalp 25 contusion while working for defendant as a deli clerk on January 25, 2012.

26 Defendant contends that the WCJ erroneously found that MPN treatment is not subject to UR and 27 IMR, that the WCJ had no authority to address the medical necessity of the proposed treatment in this

case because it is subject to IMR, and that the award of medical treatment is contrary to the IMR determination and is not supported by substantial medical evidence.

An answer was received. The WCJ provided a Report And Recommendation On Petition For Reconsideration (Report) recommending that reconsideration be denied.

The decision of the WCJ is reversed as the Decision After Reconsideration.[1] A request for authorization (RFA) to provide medical treatment by a physician in an MPN is subject to UR and IMR because the Legislature did not exclude MPN treatment from those processes.[2] The IMR determination in this case did not issue within the time specified by the Legislature in section 4610.6(d), but that does not affect the validity of the IMR because it is now established that the section 4610.6(d) time period for completion of IMR in a case like this is directory and not mandatory, and that a delay in the issuance of the IMR determination beyond that time frame does not render it invalid. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Margaris*) (2016) 248 Cal.App.4th 349 [81 Cal.Comp.Cases 561] (*Margaris*); *Arredondo v. Tri-Modal Dist. Services* 80 Cal.Comp.Cases 1050 (writ den.).) In that applicant did not establish grounds for appealing the IMR decision as set forth in section 4610.6(h), a finding is entered that the March 21, 2014 IMR determination is binding.

BACKGROUND

The WCJ describes the procedural background and reasons for his decision in his Report in pertinent part as follows:

> On 1/25/12, Applicant sustained an injury to her cervical spine as a result of a contusion to the right side of her scalp. At the time of the injury Applicant was employed as a deli clerk by Safeway, Inc., at Hollister, California. Applicant's primary treating physician is Allen Kaisler-Meza, MD. On 7/30/13, Dr. Kaisler-Meza requested authorization for Applicant to participate in the SpineOne Spine Rehabilitation Program (Track I). (Applicant's Exhibit '7'). On 8/8/13, EK Health submitted its UR non-certification decision. (Joint Exhibit '2') Dr. Kaisler-Meza submitted the Appeal of the Denial on 8/15/13, (Applicant's Exhibit '6') and on 9/3/13, Applicant submitted an Application for Independent Medical Review. (Applicant's Exhibit '5') The Notice of Assignment was issued on 10/11/13 (Joint Exhibit '3') and the Final Determination Letter was issued on 3/21/14. (Joint Exhibit '1')

[1] This decision does not preclude applicant's treating physician from submitting a new request for authorization to provide the treatment.

[2] Further statutory references are to the Labor Code.

1 The matter was tried on 7/17/14 and the parties were given a briefing schedule whereby the matter was submitted for decision as of 8/8/14. The
2 [Findings Award And Order] at issue herein was served on the parties on 9/10/14...
3
Pursuant to Labor Code §4616(a)(1) an insurer or employer may establish a
4 Medical Provider Network (MPN) for the provision of treatment to injured employees. As noted in Section 4616(a)(3), a physician entering into or
5 renewing 'an agreement by which the physician would be in the network,...' shall provide written acknowledgment in which the physician
6 affirmatively elects to be a member of the network. Clearly, the physician and the entity which established the MPN have entered into an agreement,
7 *i.e.*, a contract, whereby the physician will provide medical treatment to injured employees consistent with the MPN requirements. Section 4616(e)
8 requires all treatment provided by the MPN medical providers to be in accordance with the MTUS (Section 5307.2). Therefore, by entering into
9 the MPN contract, the physician has a contractual agreement which requires that he or she provide medical treatment which is consistent with
10 the MTUS. If the entity that established the MPN, a carrier or employer, believes a physician is providing treatment which does not comply with the
11 MTUS, then there is a contractual issue between the carrier/employer and the physician. Such a dispute does not involve the injured employee.
12 Article 2.3 (sections 4616, *et. seq.*) provides a remedy for an injured worker who disagrees with the recommendations of the PTP. The Article
13 provides no remedy for an insurer/employer who disagrees with the PTP other than the provisions regarding a 'terminated provider.'
14
The code sections establishing the Utilization Review (UR) and
15 Independent Medical Review (IMR) process are outside of, and inconsistent with, Article 2.3, the Article by which MPNs are established.
16 As such, those provisions are not applicable to MPN treatment issues.

17 Defendant argues that the UR/IMR provisions apply to MPN provider issues because the legislature did not intend to create two separate systems
18 for providing medical treatment. It is important to first point out that if the statutory language is clear then that language is to be applied as written and
19 legislative intent is not a relevant factor. However, within the context of the present issues, whether the legislature intended to do so or not, it
20 clearly created two different medical treatment systems.

21 If the employer/carrier <u>does</u> <u>not</u> have an MPN, the injured worker may choose any doctor, within a reasonable geographical area, to act as the
22 PTP. Applicant can change the PTP at any time he or she feels it is appropriate to do so. Absent a Petition to Change PTP, the
23 employer/carrier has no control over Applicant's choice of PTP. However, the employer/carrier does have UR/IMR to use its means of assuring that
24 the treatment provided to the injured worker is consistent with the MTUS.

25 If the employer/carrier <u>does</u> <u>have</u> an MPN, then the injured worker must seek treatment from a physician who has entered into a written agreement
26 with the employer/carrier to provide medical treatment within the MPN. Pursuant to the provisions of Article 2.3 (Labor Code §§4616, *et. seq.*) the
27 medical treatment provided will be in accordance with Labor Code §5307.27, *i.e.*, it will be consistent with the MTUS. Further, if the injured

worker does not agree with the treatment provided by the PTP, he or she may seek the opinion of another physician within the MPN and may seek the opinion of a third physician within the MPN. If after the third physician's opinion, the treatment remains disputed, the injured worker may request Independent Medical Review. It is important to note that despite Defendant's argument to the contrary, the Independent Medical Review provided by Labor Code §4616.4 is not the same as the Independent Medical Review provided in sections 4610.5 and 4610.6. The critical difference is that pursuant to section 4616.4 '...the Independent Medical Reviewer shall conduct a physical examination of the injured employee at the employee's discretion.' As such, this is clearly not the same IMR as that which is subsequent to Utilization Review (whereby an anonymous physician reviews medical reports and does not examine the injured worker).

Again, whether it intended to do so or not, the legislature has created two separate and distinct tracks for the provision of medical treatment for an injured worker. When there is not an MPN, the physician's medical treatment, which is legally required to be consistent with the MTUS is subject to UR/IMR review. When there is an MPN, the medical provider is by contract a member of the MPN which, pursuant to the provisions of Labor Code §4616 must provide treatment in accordance with the MTUS.

Having created two separate and distinct medical treatment systems, if the legislature had intended UR/IMR to be applicable to the MPN physicians, then Article 2.3 would contain that statutory language. Article 2.3, by which MPNs are created and regulated, was enacted well after the UR/IMR provisions were in place. As noted above, the provisions of Sections 4616, *et. seq.*, are not consistent with the provisions of Sections 4610, *et. seq.* There is no language in any of the code sections indicating that the UR/IMR provisions are applicable to medical treatment provided within an MPN. Having created a separate and distinct medical treatment system, had the legislature intended UR/IMR to be applicable, it would have included language within the Labor Code indicating same. Since the Labor Code does not have any language to that effect, it cannot be assumed that the legislature intended to have the UR/IMR provision apply to treatment provided by MPN physicians...

Labor Code Section 4616.6 states:

> 'No 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.'

By 'this Article', the section clearly refers to Article 2.3 by which MPNs where established. Based upon the clear language of the statue, when the treatment at issue has been provided by a physician within an MPN, no other reports are admissible to resolve any controversy arising from said treatment. Defendant's argument to the contrary quotes a different section and said argument does not apply to section 4616.6...

The reports of Kaisler-Meza, including the Appeal of the Utilization Review decision, when considered as a whole, explain in detail why the SpineOne Rehabilitation Program is appropriate treatment for Applicant's

> injury; the reports explain why Applicant is a good candidate for participating in the rehabilitation program and they explain why the treatment is consistent with the requirements of the MTUS. The reports constitute substantial evidence that the treatment at issue is reasonably necessary to cure or relieve from the effects of Applicant's injury. The Award of the medical treatment was based thereon and as such is appropriate. (Underlining in original.)

DISCUSSION

The WCJ correctly notes in his Report that the MPN statute and the UR and IMR statutes were enacted by the Legislature at different times. However, that does not mean that the UR and IMR processes do not apply to MPN providers. This is because a defendant is obligated to provide medical treatment "that is *reasonably required* to cure or relieve the injured worker from the effects of his or her injury." (Lab. Code, 4600, emphasis added.) Such treatment may or may not be provided through an MPN. (*Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc); *Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases 70 (Appeals Board en banc).) In either event, a dispute over whether proposed treatment is, in fact, "reasonably required" is addressed through UR and IMR.

In *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981] (*Sandhagen*), the Supreme Court examined the legislative intent underlying the UR process. In considering the statutory scheme for making determinations regarding medical treatment requests, the Court in *Sandhagen* concluded that the Legislature intended to require employers to conduct UR when considering a request for medical treatment, and summarized its reasoning and its holding in the majority opinion as follows:

> We conclude the Legislature intended to require employers to conduct utilization review when considering requests for medical treatment, and not to permit employers to use section 4062 to dispute employees' treatment requests. The language of sections 4610 and 4062 mandates this result; this conclusion is especially clear when the language of those statutes is read in light of the statutory scheme and the omnibus reforms enacted by the Legislature in 2003 and 2004...
>
> [T]he statutory language indicates the Legislature intended for employers to use the utilization review process when reviewing and resolving *any and all* requests for medical treatment...
>
> In summary, section 4062 simultaneously *precludes* employers from using its provisions to object to employees' treatment requests but *permits* employees to use its provisions to object to employers' decisions regarding

treatment requests. The Legislature's intent regarding employers' use of section 4062 to dispute treatment requests could not be more clear.

Taken together, the language of sections 4610 and 4062 demonstrates that (1) the Legislature intended for *employers* to use the utilization review process in section 4610 to review and resolve any and all requests for treatment, and (2) if dissatisfied with an employer's decision, an *employee* (and only an employee) may use section 4062's provisions to resolve the dispute over the treatment request. (*Sandhagen, supra,* 44 Cal.4th at pp. 233-234, 236-237, emphasis in original.)

The Legislature implemented the IMR process through Senate Bill 863 (SB 863) in 2013 *after* the Court issued its decision in *Sandhagen*. Importantly, SB 863 includes no provision that exempts treatment by MPN providers from either the UR or the IMR processes.

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286].) In most instances this can be accomplished by considering the plain meaning of a statute because the words of the statute, "generally provide the most reliable indicator of legislative intent." (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 277 [74 Cal. Comp. Cases 575], internal quotation marks omitted.) It is also important to consider the entire substance of the statute in order to construe the language in context and to harmonize the different parts of the statute. (*San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831; see also *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1194 [64 Cal.Comp.Cases 1].)

When the Legislature enacted the UR process, it provided that medical treatment decisions be evaluated using the MTUS promulgated by the Administrative Director (AD) pursuant to section 5307.27.[3] (Lab. Code, § 4610(c).) The use of the MTUS as part of UR process evidences the Legislature's intention to promulgate a uniform standard of reasonable medical treatment based upon "evidence-based, peer-reviewed, nationally recognized standards of care." (Lab. Code, § 5307.27.)

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[3] Section 5307.27 provides as follows: "On or before December 1, 2004, the administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5, and that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases."

It is apparent from the face of SB 863 that the Legislature subsequently enacted the IMR process in order to have medical professionals apply the MTUS and other treatment standards prescribed in section 4610.5(c)(2) to determine medical treatment disputes not resolved by UR.[4] If the Legislature intended to exempt MPN medical treatment from UR and IMR as concluded by the WCJ, it would have expressly excluded MPN providers and treatment from those statutes, but it did not. Instead, section 4610(b) requires *every* employer to establish a UR process, and section 4610(c) requires that UR policies and procedures "*shall* ensure that decisions based on the medical necessity to cure and relieve of proposed medical treatment services are consistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27." (Emphasis added.) In addition, section 4610.5 makes IMR applicable to "any dispute over a utilization review decision," and requires that any such dispute, "shall be resolved only" by IMR. (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (Appeals Board en banc) (writ den.) (*Dubon II*).)

Submitting MPN treatment proposals to UR and IMR is consistent with the legislative goal of assuring that medical treatment is uniformly provided by all defendants consistent with evidence-based, peer-reviewed, nationally recognized standards of care.

Turning to the effect to be given an IMR determination that issues outside the time period contained in section 4610.6(d), the Court of Appeal addressed this issue after the WCJ issued the decision in this case. The Court held in *Margaris* that the section 4610.6(d) time period for completion of IMR in a case like this is directory and not mandatory, and that a delay in the issuance of the IMR determination beyond the statutory time frame does not render it invalid. In the absence of a contrary decision of the Supreme Court or a published opinion of another Court of Appeal, the holding in *Margaris* is determinative on this issue and it is followed. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554].)

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[4] As set forth in section 4610.5(c)(2), the standards and the order they are to be applied are as follows: "(A) The guidelines adopted by the administrative director pursuant to Section 5307.27. (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service. (C) Nationally recognized professional standards. (D) Expert opinion. (E) Generally accepted standards of medical practice. (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious."

The statute provides that medical treatment disputes arising from timely UR be evaluated through the IMR process in order to assure that medical necessity is objectively and uniformly determined based upon the MTUS and other recognized standards of care, and this includes dispute arising from a treatment recommendation by an MPN physician. The contrary decision of the WCJ is reversed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the September 10, 2014 Award of the workers' compensation administrative law judge is **RESCINDED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 21, 2014 Independent Medical Review determination is received into evidence.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the March 21, 2014 Independent Medical Review determination is binding on applicant for the statutory period of time.

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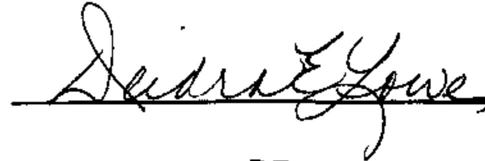
IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the case is **RETURNED** to the trial level.

WORKERS' COMPENSATION APPEALS BOARD

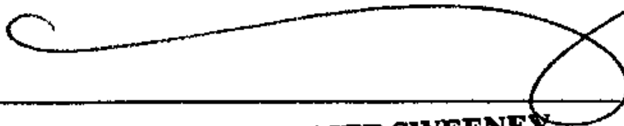


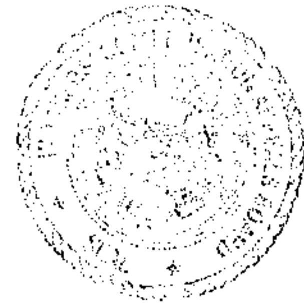
DEIDRA E. LOWE

I CONCUR,

FRANK M. BRASS

I CONCUR (SEE SEPARATE CONCURRING OPINION),





MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 1 9 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

IRMA DE LEON
SPRENKLE & GEORGARIOU
LAUGHLIN FALBO ET AL.

JFS/abs

SEPARATE CONCURRING OPINION OF COMMISSIONER SWEENEY

I concur with the majority that medical treatment proposed by an MPN provider is subject to the UR/IMR processes, and I agree that under the holding in *Margaris* the Appeals Board must find that an IMR determination that does not issue within the statutory time frames is still valid.

I write separately in order to address the point raised by the WCJ in his Report, that there are two separate and distinct medical review processes in the workers' compensation system, both of which are described as "Independent Medical Review." When an MPN treating physician makes a diagnosis or proposes a course of treatment, there are two separate statutory tracks to dispute that recommendation. Both the UR IMR dispute resolution process and the Second Opinion MPN-IMR process may be available depending upon which party raises a dispute with an MPN physician's medical treatment recommendation. One process is triggered by the *employer's* objection to a medical treatment determination; the other process is triggered by the *employee's* objection to an MPN medical treatment determination.

This case involves the employer's objection to a treatment recommendation by the MPN treating physician. This process is primarily governed by sections 139.5, 4610.5, 4610.6, and Administrative Director Rules 9792.10 through 9792.10.9. (Lab. Code, §§ 139.5, 4610.5, 4610.6; Cal. Code Regs., tit. 8, §§ 9792.10 et seq.) The process was implemented in 2013 following the enactment of Senate Bill 863 and, as discussed in the majority opinion, applies to all treating doctors regardless of whether the employer utilizes an MPN. (Sen. Bill No. 863 (2011-2012 Reg. Sess.) § 363.)

A different form of "independent medical review" regarding MPN treatment disputes has existed since 2004. That process applies when an *employee* disputes the treatment recommendation of his or her MPN doctor.[5] This process is primarily governed by sections 4616.3, 4616.4 and Administrative Director Rules 9768.1 through 9768.17. (§§ 4616.3, 4616.4; Cal. Code Regs., tit. 8, §§ 9768.1 et seq.) The process only applies when the employee is treating within an employer's MPN.

[5] MPN IMR can also be utilized to challenge the diagnosis of the MPN doctor as well as treatment disputes. However, the injured worker is not required to use the MPN IMR process to resolve diagnosis disputes and it appears many injured workers use the provisions of sections 4060 or 4062 to address diagnosis disputes.

The two "IMR" processes are not interchangeable, and are not mutually exclusive. Both may address the denial of medical treatment, but the regulatory and procedural requirements differ significantly for each, as shown by the following chart:

MPN IMR	UR IMR
Occurs where an employee challenges the MPN treating doctor's diagnosis or treatment.[6] (Lab. Code §§ 4616.3, 4616.4.)	Occurs where the treating doctor[7] requests treatment and the employer objects. (Lab. Code §§ 4610, 4610.5.)
The injured worker can obtain a second and third opinion from another MPN doctor. (Lab. Code § 4616.3(c).)	No second or third opinion process is provided by statute. (See Lab. Code § 4610.5.)
The IMR reviewer shall conduct a physical examination of the injured worker upon request. (Lab. Code § 4616.4(e).)	The IMR review is a records review only.[8] (Lab. Code § 4610.5(l) and (m).) The reviewer does not examine the injured worker and the identity of the reviewer is anonymous. (Lab. Code § 4610.6(f).) However, the reviewer may request additional records. (Lab. Code § 4610.6(b).)
The IMR reviewer may order additional diagnostic tests in order to make a correct determination. (Lab. Code § 4616.4(e).)	The IMR reviewer may not order additional diagnostic tests needed to determine the necessity of the medical treatment. (See Lab. Code § 4610.5.)
The Workers' Compensation Appeals Board (WCAB) may review all aspects of the IMR decision for error. (Lab. Code § 4604.)	The scope of the WCAB's review is limited. (Lab. Code §§ 4604, 4610.6(h) and (i).)

Here, the WCJ incorrectly concluded that the UR and IMR processes do not apply to the treatment dispute. However, since the objection to the proposed treatment in this case is by the employer, the UR IMR process properly applies to the dispute. Because authorization for the treatment was timely

[6] This can occur where the injured worker requests treatment and the MPN doctor disagrees, or where the MPN doctor recommends treatment and the injured worker disagrees.

[7] UR IMR applies to both MPN and non-MPN treating doctors equally.

[8] In addition to procedural differences, the requirements for the licensure of the reviewing physician differ between the two processes, with an MPN IMR reviewer required by statute to be licensed in the State of California. (Lab. Code, § 4616.4(a)(2) ["Only physicians licensed pursuant to Chapter 5 (commencing with Section 2000) of the Business and Professions Code may be independent medical reviewers"].) By contrast, section 139.5 provides in subdivision (d)(4)(B) that a UR independent medical review organization "shall give preference to the use of a physician licensed in California as the reviewer," but only requires only that UR IMR reviewers "shall be licensed physicians," which has been held to include, but not be limited to physicians licensed in this state. (Cf. Lab. Code, § 3209.3; *State Compensation Ins. Fund. v. Workers' Comp. Appeals Bd.* (*Arroyo*) (1977), 69 Cal.App.3d 884 [42 Cal.Comp.Cases 394].)

denied through UR, any challenge to the UR denial is raised through the 4610.5 IMR process. (*Dubon II, supra.*)

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 1 9 2016

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

IRMA DE LEON
SPRENKLE & GEORGARIOU
LAUGHLIN FALBO ET AL.

JFS/abs

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

IRMA DE LEON, *Applicant,* vs. SAFEWAY, INC., Permissibly Self-Insured, *Defendant.*	**Case No. ADJ8338903** **(Salinas District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on September 10, 2014.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **GRANTED**.

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above matter, all further correspondence, objections, motions, requests and communications shall be filed in writing only with the Office of the Commissioners of the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (PO Box 429459, San Francisco, CA 94142-9459), and shall *not* be submitted to any district office of the WCAB and shall *not* be e-filed in the Electronic Adjudication Management System.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DEC 0 1 2014

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

IRMA DE LEON
SPRENKLE & GEORGARIOU
LAUGHLIN, FALBO, LEVY & MORESI

abs

IRMA DE LEON v. **SAFEWAY, INC., (psi)**

ADJ8338903

TIMOTHY LEE HAXTON
Workers' Compensation
Administrative Law Judge

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Safeway, Inc., Defendant herein, filed a timely and verified Petition for Reconsideration of the Findings, Award and Order (FA&O) issued 9/10/14. The FA&O included the following Findings:

When a Defendant believes a physician in its Medical Provider Network is providing medical treatment that is not consistent with the MTUS, its remedy is contractual and is not subject to the provisions of Labor Code §§4610, *et. seq.*

The reports of Allen Kaisler-Meza, M.D., constitute substantial evidence that the SpineOne Functional Restoration Program is reasonable and necessary to cure or relieve from the effects of Applicant's injury; Applicant is in need of further medical treatment to cure or relieve from the effects of her injury.

Had the Utilization Review/Independent Medical Review been appropriate in this matter, the IMR determination did not comply with the requirements of Labor Code §4610.6(d).

Pursuant to Labor Code §4616.6, reports other than those prepared pursuant to Article 2.3 are not admissible to resolve any controversy arising out of that Article; the UR/IMR reports offered as a exhibits herein are not admissible.

Applicant was awarded further medical treatment including but not limited to the SpineOne Functional Restoration Program.

By its Petition, Defendant asserts that the Board does not have jurisdiction over medical treatment disputes, that each of the above-noted Findings was erroneous and

that award of further medical treatment was erroneous. Applicant filed an Answer to Defendant's Petition which asserts that the FA&O was factually and legally correct.

For the reasons more fully discussed below: (1) It appears that the legislature did in fact create two "separate tracks" for providing medical treatment to injured workers. One "track" is based upon Medical Provider Networks (MPN) and the other pertains to treatment by physicians who are not within an MPN. As such the UR/IMR process which is applicable to a non-MPN provider is outside the statutory provisions regarding the MPNs. (2) In this matter the reports of the primary treating physician (PTP) constitute substantial evidence that the treatment at issue is reasonable and necessary to cure or relieve from the effects of Applicant's injury. (3) Per Labor Code Section 4616.6, UR/IMR reports are not admissible to resolve a controversy regarding treatment within Defendant's MPN.

It is important to note that Defendant makes numerous arguments based upon its interpretation of the purposes or goals for "legislative enactments." Defendant's arguments are not supported by any evidence placed into the trial record and Defendant's arguments are internally inconsistent. For example, Defendant states that SB 228, SB 899 and SB 863 were intended "to provide better and more timely benefits to the injured worker…." However, Defendant did not explain how the March 21, 2014 IMR determination regarding Applicant's September 6, 2013 Request for Review constitutes "better and more timely benefits." An IMR determination that is issued more than six months after the Request for Review was received, clearly does not comply with the requirements of Labor Code §4610.5.

II
FACTS

There does not appear to be a factual dispute regarding the underlying injury claim; the following is a brief recitation of the facts relevant to the issues raised in the Petition:

On 1/25/12, Applicant sustained an injury to her cervical spine as a result of a contusion to the right side of her scalp. At the time of the injury Applicant was employed as a deli clerk by Safeway, Inc., at Hollister, California. Applicant's primary treating physician is Allen Kaisler-Meza, MD. On 7/30/13, Dr. Kaisler-Meza requested authorization for Applicant to participate in the SpineOne Spine Rehabilitation Program (Track I). (Applicant's Exhibit "7"). On 8/8/13, EK Health submitted its UR non-certification decision. (Joint Exhibit "2") Dr. Kaisler-Meza submitted the Appeal of the Denial on 8/15/13, (Applicant's Exhibit "6") and on 9/3/13, Applicant submitted an Application for Independent Medical Review. (Applicant's Exhibit "5") The Notice of Assignment was issued on 10/11/13 (Joint Exhibit "3") and the Final Determination Letter was issued on 3/21/14. (Joint Exhibit "1")

The matter was tried on 7/17/14 and the parties were given a briefing schedule whereby the matter was submitted for decision as of 8/8/14. The FA&O at issue herein was served on the parties on 9/10/14.

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III
DISCUSSION

MPN-UR/IMR

Pursuant to Labor Code §4616(a)(1) an insurer or employer may establish a Medical Provider Network (MPN) for the provision of treatment to injured employees. As noted in Section 4616(a)(3), a physician entering into or renewing "an agreement by which the physician would be in the network,..." shall provide written acknowledgment in which the physician affirmatively elects to be a member of the network. Clearly, the physician and the entity which established the MPN have entered into an agreement, *i.e.*, a contract, whereby the physician will provide medical treatment to injured employees consistent with the MPN requirements. Section 4616(e) requires all treatment provided by the MPN medical providers to be in accordance with the MTUS (Section 5307.2). Therefore, by entering into the MPN contract, the physician has a contractual agreement which requires that he or she provide medical treatment which is consistent with the MTUS. If the entity that established the MPN, a carrier or employer, believes a physician is providing treatment which does not comply with the MTUS, then there is a contractual issue between the carrier/employer and the physician. Such a dispute does not involve the injured employee. Article 2.3 (sections 4616, *et. seq.*) provides a remedy for an injured worker who disagrees with the recommendations of the PTP. The Article provides no remedy for an insurer/employer who disagrees with the PTP other than the provisions regarding a "terminated provider."

The code sections establishing the Utilization Review (UR) and Independent Medical Review (IMR) process are outside of, and inconsistent with, Article 2.3, the

Article by which MPNs are established. As such, those provisions are not applicable to MPN treatment issues.

Defendant argues that the UR/IMR provisions apply to MPN provider issues because the legislature did not intend to create two separate systems for providing medical treatment. It is important to first point out that if the statutory language is clear then that language is to be applied as written and legislative intent is not a relevant factor. However, within the context of the present issues, whether the legislature intended to do so or not, it clearly created two different medical treatment systems.

If the employer/carrier does not have an MPN, the injured worker may choose any doctor, within a reasonable geographical area, to act as the PTP. Applicant can change the PTP at any time he or she feels it is appropriate to do so. Absent a Petition to Change PTP, the employer/carrier has no control over Applicant's choice of PTP. However, the employer/carrier does have UR/IMR to use its means of assuring that the treatment provided to the injured worker is consistent with the MTUS.

If the employer/carrier does have an MPN, then the injured worker must seek treatment from a physician who has entered into a written agreement with the employer/carrier to provide medical treatment within the MPN. Pursuant to the provisions of Article 2.3 (Labor Code §§4616, *et. seq.*) the medical treatment provided will be in accordance with Labor Code §5307.27, *i.e.*, it will be consistent with the MTUS. Further, if the injured worker does not agree with the treatment provided by the PTP, he or she may seek the opinion of another physician within the MPN and

may seek the opinion of a third physician within the MPN. If after the third physician's opinion, the treatment remains disputed, the injured worker may request Independent Medical Review. It is important to note that despite Defendant's argument to the contrary, the Independent Medical Review provided by Labor Code §4616.4 is not the same as the Independent Medical Review provided in sections 4610.5 and 4610.6. The critical difference is that pursuant to section 4616.4 "...the Independent Medical Reviewer shall conduct a physical examination of the injured employee at the employee's discretion." As such, this is clearly not the same IMR as that which is subsequent to Utilization Review (whereby an anonymous physician reviews medical reports and does not examine the injured worker).

Again, whether it intended to do so or not, the legislature has created two separate and distinct tracks for the provision of medical treatment for an injured worker. When there is not an MPN, the physician's medical treatment, which is legally required to be consistent with the MTUS is subject to UR/IMR review. When there is an MPN, the medical provider is by contract a member of the MPN which, pursuant to the provisions of Labor Code §4616 must provide treatment in accordance with the MTUS.

Having created two separate and distinct medical treatment systems, if the legislature had intended UR/IMR to be applicable to the MPN physicians, then Article 2.3 would contain that statutory language. Article 2.3, by which MPNs are created and regulated, was enacted well after the UR/IMR provisions were in place. As noted above, the provisions of Sections 4616, *et. seq.*, are not consistent with the provisions

of Sections 4610, *et. seq*. There is no language in any of the code sections indicating that the UR/IMR provisions are applicable to medical treatment provided within an MPN. Having created a separate and distinct medical treatment system, had the legislature intended UR/IMR to be applicable, it would have included language within the Labor Code indicating same. Since the Labor Code does not have any language to that effect, it cannot be assumed that the legislature intended to have the UR/IMR provision apply to treatment provided by MPN physicians.

Admissibility of UR/IMR Reports

Labor Code Section 4616.6 states:

> "No 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."

By "this Article", the section clearly refers to Article 2.3 by which MPNs where established. Based upon the clear language of the statue, when the treatment at issue has been provided by a physician within an MPN, no other reports are admissible to resolve any controversy arising from said treatment. Defendant's argument to the contrary quotes a different section and said argument does not apply to section 4616.6.

PTP Reports

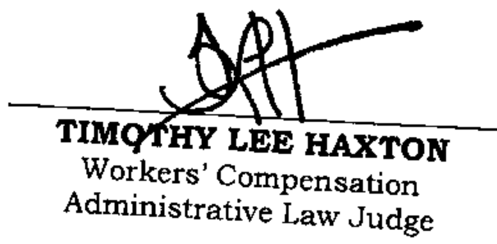
The reports of Kaisler-Meza, including the Appeal of the Utilization Review decision, when considered as a whole, explain in detail why the SpineOne Rehabilitation Program is appropriate treatment for Applicant's injury; the reports explain why Applicant is a good candidate for participating in the rehabilitation program and they explain why the treatment is consistent with the requirements of the MTUS. The reports

constitute substantial evidence that the treatment at issue is reasonably necessary to cure or relieve from the effects of Applicant's injury. The Award of the medical treatment was based thereon and as such is appropriate.

IV
RECOMMENDATION

For the reasons discussed herein, it appears that the UR/IMR reports were not admissible as evidence in the trial record and that the Award of medical treatment was appropriate. It is therefore recommended that the Petition for Reconsideration be denied.

Respectfully submitted,



TIMOTHY LEE HAXTON
Workers' Compensation
Administrative Law Judge

Filed and Served October 14, 2014 on the following: