

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

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5 **DEANN DODD,**

6 *Applicant,*

7 **vs.**

8 **MENTAL HEALTH SYSTEMS, INC.;**  
9 **ZENITH INSURANCE COMPANY,**

10 *Defendants.*

Case No. ADJ7008917  
(Bakersfield District Office)

11 **OPINION AND ORDER GRANTING**  
12 **RECONSIDERATION AND DECISION**  
13 **AFTER RECONSIDERATION**

14 Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ)  
15 Findings of Fact of October 15, 2013 wherein it was found that "Applicant is entitled to have her surgery  
16 [performed by Alan] Moelleken[, M.D.]." In this matter, while employed as a facility manager on  
17 August 8, 2009, applicant sustained industrial injury to her neck and back.

18 Defendant contends that the WCJ erred in finding that applicant is entitled to have surgery  
19 performed by Dr. Moelleken, outside of the defendant's medical provider network (MPN). We have  
20 received an Answer, and the WCJ has filed a Report and Recommendation on Petition for  
21 Reconsideration (Report).

22 As explained below, the WCJ erred in finding that applicant was entitled to have her surgery  
23 performed by Dr. Moelleken. We will therefore grant reconsideration, rescind the Findings of Fact of  
24 October 15, 2013, and issue a new decision reflecting that applicant's medical treatment be provided  
25 within the defendant's MPN.

26 Applicant sustained industrial injury on August 8, 2009, and began receiving treatment from  
27 Dr. Moelleken, who was then part of the MPN established by the defendant pursuant to Labor Code  
sections 4616 et seq. However, on or before March 20, 2012, while the applicant was still under

1 Dr. Moelleken's care, Dr. Moelleken was terminated from defendant's MPN.<sup>1</sup>

2 Pursuant to Labor Code section 4616.2(d), an employer or insurer is required to provide treatment  
3 with a terminated provider only when the following circumstances exist at the time of the provider's  
4 termination:

5 "(A) An acute condition. An acute condition is a medical condition that  
6 involves a sudden onset of symptoms due to an illness, injury, or other  
7 medical problem that requires prompt medical attention and that has a  
8 limited duration. Completion of treatment shall be provided for the  
9 duration of the acute condition.

10 (B) A serious chronic condition. A serious chronic condition is a  
11 medical condition due to a disease, illness, or other medical problem or  
12 medical disorder that is serious in nature and that persists without full  
13 cure or worsens over an extended period of time or requires ongoing  
14 treatment to maintain remission or prevent deterioration. Completion of  
15 treatment shall be provided for a period of time necessary to complete a  
16 course of treatment and to arrange for a safe transfer to another provider,  
17 as determined by the insurer, employer, or entity that provides physician  
18 network services, in consultation with the injured employee and the  
19 terminated provider and consistent with good professional practice.  
20 Completion of treatment under this paragraph shall not exceed 12 months  
21 from the contract termination date.

22 (C) A terminal illness. A terminal illness is an incurable or  
23 irreversible condition that has a high probability of causing death within  
24 one year or less. Completion of treatment shall be provided for the  
25 duration of a terminal illness.

26 (D) Performance of a surgery or other procedure that is authorized by  
27 the insurer, employer, or entity that provides physician network services  
as part of a documented course of treatment and has been recommended  
and documented by the provider to occur within 180 days of the  
contract's termination date." (Lab. Code, § 4616.2, subd. (d)(3).)

28 Immediately after Dr. Moelleken's termination from the MPN, defendant informed applicant that  
29 she would have to immediately begin treating within the MPN because none of the above four  
30 circumstances applied to her condition. (Cal. Code Regs., tit. 8, § 9767.10, subd. (d)(1).) The applicant

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<sup>1</sup> The actual correspondence terminating Dr. Moelleken is not included in the evidentiary record. However, the evidentiary record contains a March 20, 2012 letter to Dr. Moelleken stating, "You were recently notified of your termination from the Zenith Medical Provider Network." It is uncontested that by March 20, 2012, Dr. Moelleken had been terminated from the MPN.

1 objected to this determination on the grounds that she was entitled to continuing care from Dr. Moelleken  
2 because her condition constituted a serious chronic condition under section 4616.2(d)(3)(B).<sup>2</sup> Applicant  
3 continued her care under Dr. Moelleken pursuant to Cal. Code Regs., tit. 8, § 9767.10(d)(5), which states  
4 that "the injured covered employee shall continue to treat with the terminated provider until the dispute is  
5 resolved."

6 On March 29, 2012, applicant filed a Declaration of Readiness to Proceed (DOR) on the issue of  
7 whether she was still entitled to treat with Dr. Moelleken. The case was set for hearing on April 25,  
8 2012. However, prior to the hearing, applicant's counsel sought a continuance due to a calendar conflict.  
9 The hearing was reset to June 22, 2012.

10 At the June 22, 2012 hearing, the parties jointly requested that the matter be taken off-calendar so  
11 that the issue of whether the applicant was entitled to continuing care with Dr. Moelleken could be  
12 submitted to agreed medical evaluator orthopedist Roger S. Sohn, M.D. pursuant to Cal. Code Regs., tit.  
13 8, § 9767.10, subd. (d)(3), and Labor Code sections 4062 and 4062.2.

14 Dr. Sohn issued a report dated July 31, 2012. In his report, Dr. Sohn wrote:

15 "She does have some chronic back pain which is lifelong, but I am not  
16 sure this is a serious chronic condition. It is more a residual of her overall  
17 back problems. I felt that it would be safe to transfer her to a provider  
18 within the MPN at his point. The question, is it 'safe' to transfer her at  
19 this point, I would say probably it is...."

20 Although Dr. Sohn's report was dated July 31, 2012, it was not signed until August 29, 2012.

21 On October 17, 2012, the defendant filed a DOR on the issue of "MPN control." On October 23,  
22 2012, applicant filed an objection to the defendant's DOR on the grounds that discovery was ongoing.

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23 <sup>2</sup> The adjudication file in this matter contains a March 20, 2012 letter from Dr. Moelleken to the defendant, in which Dr.  
24 Moelleken asserts that applicant falls under the serious chronic condition exception contained in section 4616.2(d)(3)(B).  
25 Although this document is in the adjudication file, it was never admitted into evidence. "The filing of a document does not  
26 signify its receipt in evidence, and, except for the documents listed in section 10750 of these Rules, only those documents that  
27 have been received in evidence shall be included in the record of proceedings on the case." (Cal. Code Regs., tit. 8, § 10600.)  
Despite the failure to admit this document into evidence, there is no assertion by the defendant that applicant failed to comply  
with Cal. Code Regs., tit. 8, § 9767.10, subd. (d)(2), which requires an applicant objecting to a defendant's continuity of care  
determination to obtain a report from the physician addressing whether the applicant falls within one of the Labor Code  
section 4616.2(d)(3) exceptions.

1 The case was set for a November 20, 2012 hearing. At the hearing, the parties made a joint request for a  
2 continuance, and the matter was continued to January 8, 2013. However, prior to the January 8, 2013  
3 hearing, the matter was taken off-calendar by joint request of the parties.

4 Around this time, on November 14, 2012, Dr. Moelleken recommended that the applicant  
5 undergo surgery to her cervical spine. In a report dated November 28, 2012, Dr. Sohn recommended that  
6 the surgery be approved by the defendant. Although Dr. Sohn's report is dated November 28, 2012, it  
7 was not served until January 7, 2013.

8 Defendant filed a new DOR on the issue of MPN control on February 11, 2013. The case was set  
9 for hearing on March 19, 2013. At the March 19, 2013 hearing, the parties again made a joint request for  
10 a continuance. The matter was continued to April 25, 2013. A Mandatory Settlement Conference took  
11 place on April 25, 2013, and the matter was set for trial almost six months later on October 15, 2013.

12 The sole issue at trial was identified as "Medical treatment within the MPN, transfer of care."  
13 The WCJ found that applicant is entitled to surgery provided by Dr. Moelleken but that applicant was  
14 then required to transfer care to within the MPN for any follow-up care. If the applicant decided against  
15 surgery, she was to transfer within the MPN forthwith.

16 We need not decide whether the applicant's condition was a serious and chronic condition  
17 because, even assuming the "serious and chronic" exception was met, that exception expressly states that  
18 "Completion of treatment under this paragraph shall not exceed 12 months from the contract termination  
19 date." Since Dr. Moelleken was terminated on or before March 20, 2012, even assuming the applicant's  
20 condition satisfied section 4616.2(d)(3)(B), Dr. Moelleken's treatment was required to be completed by  
21 March 20, 2013. This period had already long expired by the time that the matter was decided by the  
22 WCJ.

23 In his Opinion on Decision and in his Report, the WCJ states that the 12-month period prescribed  
24 in section 4616.2(d)(3)(B) should be suspended because Dr. Sohn recommended approval of the  
25 applicant's surgery within the 12-month period, but defendant did not approve the surgery until after the  
26 12-month period had expired. In the Report, the WCJ wrote "Zenith should be estopped from arguing a  
27 twelve month completion period by its own delaying tactics, noting the continued dispute until after the

1 May 23, 2013 Deposition of Dr. Sohn.”

2       However, regardless of the applicant’s general entitlement to cervical surgery, the defendant  
3 raised a timely and legitimate objection to Dr. Moelleken’s continued treatment of the applicant before  
4 surgery was ever recommended. Since this dispute was still unresolved by the time that Drs. Moelleken  
5 and Sohn recommended surgery, it cannot be said that the denial of a surgery *performed by*  
6 *Dr. Moelleken* was unreasonable. The defendant’s position that applicant’s condition was not a serious  
7 chronic condition or that it was safe to transfer care into the MPN cannot be considered unreasonable  
8 given that it was corroborated by the AME in his July 31, 2012 report. Our review of the record shows  
9 that defendant did nothing to delay resolution of the issue of whether the section 4616.2(d)(3)(B)  
10 exception applied to this matter. All the requests for continuances or to take the matter off-calendar were  
11 made by applicant or made jointly by both parties. Prior to the request for surgery, *defendant* filed a  
12 DOR on the issue of continuity of care, and *applicant* objected to the DOR. In fact, defendant filed two  
13 DORs on the continuity of care issue prior to expiration of the twelve-month period. Dr. Moelleken’s  
14 recommendation for surgery eight months after he was terminated from the MPN did not moot  
15 defendant’s reasonable standing objection to providing any treatment outside the MPN.

16       In making our decision, we are sympathetic to applicant’s desire to continue treatment with  
17 Dr. Moelleken, who achieved satisfactory results for the applicant in a prior surgery. However, under the  
18 Labor Code, the applicant’s control over her treatment is subject to the limitations of the medical  
19 provider network provisions contained in Labor Code sections 4616 et seq.

20       We will therefore grant reconsideration, rescind the Findings of Fact of October 15, 2013, and  
21 issue a new decision reflecting that applicant is no longer entitled to treatment, including cervical  
22 surgery, outside the MPN. We note that the only issue identified at trial was “[m]edical treatment within  
23 the MPN, transfer of care.” Since the issue is not before us, we do not reach any issue regarding liability  
24 for medical treatment provided by Dr. Moelleken after his termination from the MPN. If this issue is in  
25 dispute, the parties may resolve it in further proceedings. We express no opinion on that matter.

26       For the foregoing reasons,

27       **IT IS ORDERED** that reconsideration of the Findings of Fact of October 15, 2013 is hereby

1 **GRANTED.**

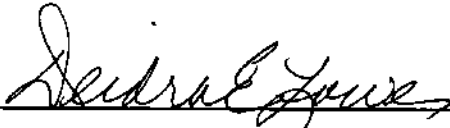
2 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
3 Compensation Appeals Board that the Findings of Fact of October 15, 2013 is hereby **RESCINDED** and  
4 that the following is **SUBSTITUTED** therefor:

5 **"FINDING OF FACT**

6 1. Applicant is not entitled to prospective medical treatment  
7 outside defendant's medical provider network including cervical surgery  
8 performed by Alan Moelleken, M.D."

9 **WORKERS' COMPENSATION APPEALS BOARD**

10  
11  
12 **I CONCUR,**

  
13 **DEIDRA E. LOWE**

14  
15   
16 **MARGUERITE SWEENEY**

17 **CONCURRING, BUT NOT SIGNING**  
18 **RONNIE G. CAPLANE**



19  
20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **JAN 03 2014**

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

24 **DEANN DODD**  
25 **LAW OFFICES OF WILLIAM T. BERRY**  
26 **CHERNOW AND LIEB**

27 **DW/ebc**

**DODD, DEANN**