

1 **WORKERS' COMPENSATION APPEALS BOARD**  
2 **STATE OF CALIFORNIA**  
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5 **OBDULIA HERNANDEZ,**

6 *Applicant,*

7 vs.

8 **ARAMARK; ACE/USA,**

9 *Defendants.*  
10

Case No. **ADJ8382115**  
(Santa Ana District Office)

**OPINION AND ORDER  
GRANTING RECONSIDERATION  
AND DECISION AFTER  
RECONSIDERATION**

11 Defendant seeks reconsideration of the May 28, 2013 Findings and Order issued by the workers'  
12 compensation administrative law judge (WCJ). Therein, the WCJ found, based on the parties' prior  
13 stipulations, that applicant, while employed on October 12, 2011, sustained admitted industrial injury to  
14 her right shoulder and left knee; that applicant claims to have sustained industrial injury to her right  
15 elbow and compensable consequence injuries in the form of psychiatric injury, sleep deprivation,  
16 headaches, altered gait, internal injuries, weight gain, gastrointestinal injuries, sexual dysfunction, and  
17 cognitive impairment; and that defendant had a validly formed medical provider network (MPN) at the  
18 time of applicant's injury. The WCJ further found that defendant failed to prove that applicant received  
19 timely and proper notice of her rights under the MPN and that defendant was neglectful in the provision  
20 of treatment due to its failure to follow up regarding applicant's treatment after a January 3, 2011  
21 examination done by James Murphy, M.D. The WCJ deferred the issues of need for further medical  
22 treatment and liability for self-procured medical treatment.

23 Defendant contends that the WCJ erred in finding that it failed to prove that applicant "received"  
24 proper MPN notices arguing that there is no legal requirement that it prove applicant "received" proper  
25 MPN notices but only that it tendered them. Defendant also argues that there is no proof in the record  
26 that any deficiency in notice resulted in neglect, refusal, or denial of medical treatment.

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1 Applicant filed an Answer. The WCJ issued a Report and Recommendation of Workers'  
2 Compensation. Judge on Petition for Reconsideration (Report) recommending that we deny  
3 reconsideration.

4 Based on our review of the record and for the reasons discussed below, we will grant  
5 reconsideration, rescind the WCJ's decision, and substitute it with new Findings of Fact finding that  
6 defendant did not neglect, refuse, or deny to provide reasonable medical treatment. We will otherwise  
7 restate the remaining findings made by the WCJ.

8 The employer is responsible for providing medical treatment that is reasonably required to cure or  
9 relieve an injured worker from the effects of his or her industrial injury. (Lab. Code, § 4600(a).) One  
10 way in which an employer may meet its obligation to provide reasonable medical treatment is by  
11 referring the employee to an MPN approved by the Administrative Director. (Lab. Code, §§ 4600(c),  
12 4616-4616.7; Cal. Code Regs., tit. 8, §§ 9767.1-9767.15; *Knight v. United Parcel Service*, (2006) 71  
13 Cal.Comp.Cases 1423, 1432 [Appeals Board en banc].)

14 In *Knight*, the Appeals Board held that a defendant's failure to provide an injured employee with  
15 notice of his or her rights with regard to obtaining medical treatment through a defendant's MPN, "that  
16 results in a neglect or refusal to provide reasonable medical treatment renders the employer or insurer  
17 liable for reasonable medical treatment self-procured by the employee." (*Knight, supra*, 71  
18 Cal.Comp.Cases at 1435.)

19 First, there is no dispute here that defendant had a validly formed MPN. The parties stipulated to  
20 that effect at the time of trial. There is, however, conflicting evidence about whether defendant properly  
21 notified applicant of her rights. While the WCJ questions whether defendant provided proper notification  
22 at the time applicant was hired in 2008 due to defendant's failure to submit a proof of service of MPN  
23 notices mailed by a third party, the WCJ acknowledges that applicant initially provided the employer  
24 with an incorrect mailing address. (Minutes of Hearing and Summary of Evidence (MOH) 4/17/13, at p.  
25 8:17-21.) Likewise, while it appears the WCJ is correct in noting that notices sent to applicant at the time  
26 the injury in 2011 and 2012 were sent to an incorrect address (*id.* at 8:14-15; applicant Exhibit 2;  
27 defendant's Exhibits D, H), defendant submitted evidence that it provided MPN notices to applicant's

1 former and current attorneys. By letters dated January 26, 2012 and February 22, 2012, defendant  
2 advised applicant's former attorney, Alfred Amezcua, that Rahil Khan, M.D., was not part of the Kaiser  
3 Permanente MPN and that applicant was not authorized to treat outside the MPN. Defendant also  
4 provided information pertaining to the MPN. (Defendant's letters dated 1/26/12 and 2/22/12, Exhibits I,  
5 J.) Then, by letters dated June 22, 2012 and August 8, 2012, defendant advised applicant's current  
6 attorney Richard A. Torres that defendant objected to applicant's treatment outside of the MPN and  
7 requested compliance with that MPN. Defendant also provided information on how to access online  
8 information about the MPN. (Defendant's letters dated 6/22/12 and 8/8/12, Exhibits L, N.) Yet, despite  
9 this contradictory evidence, it does appear that defendant's post-injury notices to applicant's attorneys  
10 fulfilled the MPN notice requirements. Moreover, these inquiries to applicant's attorneys starting on  
11 January 26, 2012 is evidence that defendant did not fail to "follow-up" after the January 3, 2012  
12 examination of James Murphy, M.D., a doctor with defendant's MPN. (See, Dr. Murphy's 1/3/12 report,  
13 defendant's Exhibit T.)

14 Second and more importantly, even if we were to assume there was defective notice, defendant in  
15 fact sent applicant to the MPN and she treated there for three months. At trial, applicant testified that  
16 "[s]he reported the injury to Matthew who sent her to a doctor at Kaiser" (MOH, 4/17/13, at p.7:20-21),  
17 that "[s]he treated at Kaiser about three months" (MOH, 4/17/13, at p. 7:22-23); that "she was sent to  
18 Kaiser for about three months" (MOH, 4/17/13, at p. 8:24-25); and that, after she treated at Kaiser, she  
19 hired Mr. Amezcua to represent her and that she then started treating with Dr. Khan. (MOH, 4/17/13 at  
20 p. 9:21-24.) Defendant submitted reports from MPN doctors dated October 13, 2011, October 17, 2011,  
21 October 31, 2011, and January 3, 2012. (Defendant's Exhibits E, F, S, T.) Therefore, any defective  
22 notice, even if it existed, did not result in a neglect or refusal to provide reasonable medical treatment  
23 pursuant to the holding in *Knight*.

24 Third, we note that Senate Bill (SB) 863 amended Labor Code section 4616.3(b) to provide that  
25 failure to provide notice "shall not be a basis for the employee to treat outside the network unless it is  
26 shown that the failure to provide notice resulted in a *denial* of medical care." (Lab. Code, § 4616.3(b), as  
27 amended by Stats. 2012 ch. 363 (SB 863) (emphasis added).) SB 863 became effective on

1 January 1, 2013 and uncoded section 84 of SB 863 provides that "[t]his act shall apply to all pending  
2 matters, regardless of date of injury, unless otherwise specified in this act, but shall not be a basis to  
3 rescind, alter, amend, or reopen any final award of workers' compensation benefits." Therefore, as of  
4 January 1, 2013, the aforementioned amendments to 4616.3(b) became applicable to any case still  
5 pending, except cases that were finally concluded subject only to the WCAB's continuing jurisdiction  
6 under sections 5803 and 5804. (Cf., e.g., *E & J Gallo Winery v. Workers' Comp. Appeals Bd. (Dykes)*  
7 (2005) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]; *Rio Linda Union School Dist. v.*  
8 *Workers' Comp. Appeals Bd. (Scheffner)* (2005) 131 Cal.App.4th 517, 531 [70 Cal.Comp.Cases 999];  
9 *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 916 [70 Cal.Comp.Cases 787];  
10 *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285–289 [70 Cal.Comp.Cases  
11 133].) Given the discussion above, we find no evidence of a denial of medical treatment.

12 Accordingly, based on the reasons stated herein, we will grant reconsideration, rescind the WCJ's  
13 decision, and substitute it with new Findings of Fact finding that defendant did not neglect, refuse, or  
14 deny to provide reasonable medical treatment. We will otherwise restate the remaining findings made by  
15 the WCJ.

16 For the foregoing reasons,

17 **IT IS ORDERED** that defendant's Petition for Reconsideration of the May 28, 2013 Findings  
18 and Order is **GRANTED**.


19 **IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers'  
20 Compensation Appeals Board, that the May 28, 2013 Findings and Order is **RESCINDED** and  
21 **SUBSTITUTED** with a new Award, as provided below.

#### 22 FINDINGS OF FACT


23 1. The Applicant, OBDULIA HERNANDEZ, born on September 5, 1952 while  
24 employed on October 12, 2011, at Anaheim, California, by Aramak, suffered an  
25 admitted specific injury to her right shoulder and left knee and also claims to have  
26 sustained injury arising out of and in the course of employment to her right elbow and  
27 compensable consequences in the form of psyche, sleep deprivation, headaches,  
altered gait, internal, weight gain, gastrointestinal, sexual dysfunction and cognitive  
impairment

- 1 2. At the time of injury the employer's workers compensation carrier was Ace/USA,  
2 as administered by Sedgwick CMS.  
3 3. Defendant had a validly formed MPN in place at the time of the applicant's injury.  
4 4. Defendants did not neglect, refuse, or deny to provide reasonable medical  
5 treatment.  
6 5. All other issues are deferred.

7 **WORKERS' COMPENSATION APPEALS BOARD**

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9 **ALFONSO J. MORESI**

10 **I CONCUR,**

11   
12 **DEPUTY**  
13 **NEIL P. SULLIVAN**

14   
15 **ACTING DEPUTY**  
16 **MERLE C. RABINE**



17 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**  
18 **AUG 13 2013**

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

21 **OBDULIA HERNANDEZ**  
22 **RICHARD TORRES**  
23 **SION ASSOCIATES**

24 **PAG/sye**

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