WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ANA RAMIREZ FARIAS, *Applicant,* vs. **ABLE BUILDING MAINTENANCE; ZURICH NORTH AMERICA,** *Defendants.*	**Case No. ADJ9285089** **(Los Angeles District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

On February 4, 2016, the Appeals Board granted reconsideration of the October 7, 2015 Findings and Order. This is our Decision After Reconsideration.

The case was arbitrated pursuant to a Labor Code section 3201.7[1] Alternative Dispute Resolution (ADR) agreement. In the October 7, 2015 decision, the workers' compensation arbitrator found that applicant, while employed from February 28, 2005 through January 22, 2014 by Able Building Maintenance, sustained an injury arising out of and in the course of her employment to her neck, back, right wrist, and right shoulder and claims to have sustained an injury to her psyche, sleep, and skin. The arbitrator found that applicant was entitled to self-procure treatment with Arthur Harris, M.D. from the date the claim was denied until the claim was accepted on June 30, 2015 and that on June 30, 2015, medical control was transferred to the exclusive provider network.

Applicant contends that she is entitled to continue to self-procure medical treatment because the medical treatment provisions of the carve-out agreement diminishes the entitlement of the injured worker to medical treatment in violation of Section 3201.5(b).

We have considered the petition for reconsideration, and we have reviewed the record in this matter. The arbitrator filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that the petition be denied.

[1] All further references are to the Labor Code.

For the reasons discussed by the arbitrator in his report, which we adopt and incorporate by reference and for the reasons discussed below, we will affirm the arbitrator's decision.

The issues presented to the arbitrator for resolution were "No. 1, medical control. Issue No. 2, would be whether applicant must treat in the ADR approved exclusive medical provider list or whether applicant can continue to treat with ...Arthur Harris." (Arbitration transcript, pp. 4-5.) The arbitrator found that applicant could self-procure treatment with Arthur Harris from the date the claim was denied up until the date the claim was accepted. The arbitrator also found that on the date the claim was accepted, medical control was transferred to the exclusive provider network list.

The ADR agreement states: "In any instance of conflict, the provisions of the ADR Agreement shall take precedence over provisions of the Law, so far as permitted by the provisions of Labor Code 3201.7 of the State of California." (Exh. C, Section 2.7.) The agreement further states: "All medical and hospital services required by Employees, subject to this ADR Agreement, as the result of a compensable injury, shall be furnished by health care professionals and facilities authorized by the JLM Committee." (*Id.* at 4.1.)

Section 3201.5(a) provides that certain employers may enter into a collective bargaining agreement with a union "that establishes any of the following: (1) An alternative dispute resolution system...(2) The use of an agreed list of providers of medical treatment that may be the exclusive source of all medical treatment provided under this division."

Section 3201.5(b) states that:

> (1) Nothing in this section shall allow a collective bargaining agreement that diminishes the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in this division. The portion of any agreement that violates this paragraph shall be declared null and void.
>
> (2) The parties may negotiate any aspect of the delivery of medical benefits and the delivery of disability compensation to employees of the employer or group of employers that are eligible for group health benefits and nonoccupational disability benefits through their employer.

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Section 4603.2(a)(2) addresses transfer of treatment into a medical provider network (MPN)[2] and provides that: "If the employer objects to the employee's selection of the physician on the grounds that the physician is not within the medical provider network used by the employer, and there is a final determination that the employee was entitled to select a physician pursuant to Section 4600, the employee shall be entitled to continue to treat with that physician at the employer's expense in accordance with this division, notwithstanding Section 4616.2."

An agreed list of medical providers in an ADR agreement differs from an MPN established pursuant to Section 4616. MPNs are regulated by the Administrative Director and subject to statutory constraints, such as Section 4603.2(a)(2). Section 3201.5 allows the use of an agreed list of treaters and allows the parties to the agreement to "negotiate any aspect of the delivery of medical treatment." The MPN statutes, including Section 4603.2, do not apply to medical treatment negotiated pursuant to a collective bargaining agreement. Accordingly, we will affirm the arbitrator's decision.

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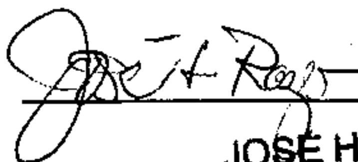
[2] An MPN is established by an employer or insurer subject to the approval of the Administrative Director. (Lab. Code, § 4616; Cal. Code Regs., tit. 8, § 9767.3.)

For the foregoing reasons,

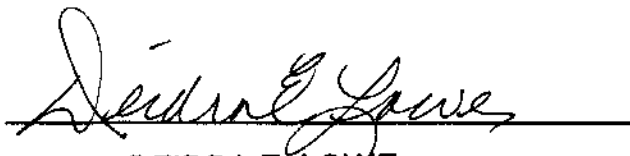
IT IS ORDERED as our Decision After Reconsideration that the October 7, 2015 Findings and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD



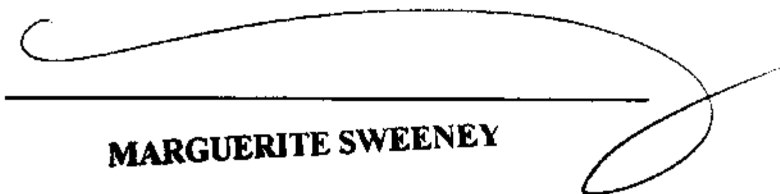
JOSÉ H. RAZO

I CONCUR,



DEIDRA E. LOWE

I DISSENT. (SEE ATTACHED DISSENTING OPINION)



MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 2 4 2016

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

ALTMAN, LUNCH & BLITSTEIN, ATTN.: MARK L. KAHN, ARBITRATOR
ANA RAMIREZ FARIAS
CLAYTON PERRY LAW OFFICE
PEARLMAN, BORSKA & WAX

MWH/ebc

DISSENTING OPINION OF COMMISSIONER SWEENEY

I respectfully dissent. Under the power expressly granted to it by the California Constitution, the Legislature has established a complete system of workers' compensation. The purpose of workers' compensation is to extend its benefits for the protection of persons injured on the job. (Lab. Code, § 3202.) To carry out this purpose, we must liberally construe the Labor Code in favor of the injured worker. Unions may not bargain away rights provided by the Labor Code. (Lab. Code, § 3201.5(b); *Judson Steel Corp. v. Workers' Comp. Appeals Bd (Maese)* (1978), 22 Cal.3d 658, 665, fn. 5 [43 Cal.Comp.Cases 1205].)

In this case, the ADR agreement is silent on the issue of transfer of care after an applicant has self-procured treatment from a provider who is not on the agreed provider list. The agreement also does not provide a dispute resolution process for resolving transfer of care disputes. Therefore, we should look to the Labor Code. Given that the ADR agreement is silent, I would apply Section 4603.2(a)(2) which allows the employee to continue treatment with a doctor outside an employer's MPN when there has been a final determination that the employee was entitled to treat outside the MPN.

In the alternative, as discussed above, if the collective bargaining agreement diminishes applicant's entitlement to medical treatment, the provisions of the agreement that diminish applicant's entitlement to benefits are void. In the majority's interpretation, absent the collective bargaining agreement, applicant's employer would not be able to require applicant to change physicians, but because the agreement includes a list of agreed physicians, the employer can require the applicant to change physicians. Requiring applicant to transfer care is a diminishment of applicant's entitlement to medical benefits and, pursuant to Section 3201.5(b), that portion of the agreement is void.

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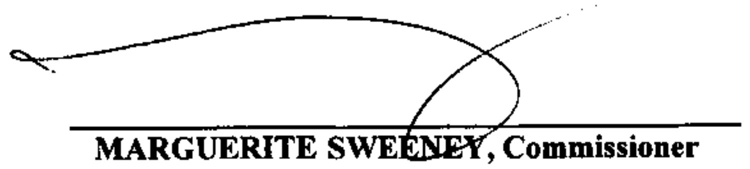
Accordingly, I would amend the arbitrator's order to allow applicant to continue to treat with Dr. Harris.



MARGUERITE SWEENEY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 2 4 2016

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

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1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3

4 ANA RAMIREZ FARIAS, 5 *Applicant,* 6 vs. 7 ABLE BUILDING MAINTENANCE; ZURICH NORTH AMERICA, 8 9 *Defendants.*	**Case No. ADJ9285089** **(Los Angeles District Office)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

10

11 Reconsideration has been sought by applicant with regard to the decision filed on October 7,
12 2015.

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

19 For the foregoing reasons,

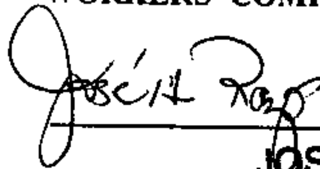
20 **IT IS ORDERED** that Reconsideration is **GRANTED.**

21 **IT IS FURTHER ORDERED** that pending the issuance of a Decision After Reconsideration in
22 the above case, all further correspondence, objections, motions, requests and communications *relating to*
23 *the petition* shall be filed only with the Office of the Commissioners of the Workers' Compensation
24 Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA
25 94102) or its Post Office Box address (P.O. Box 429459, San Francisco, CA 94142-9459), and shall *not*
26 be submitted to the district office from which the WCJ's decision issued or to any other district office of
27 the Workers' Compensation Appeals Board, and shall *not* be e-filed in the Electronic Adjudication

Management System (EAMS). Any documents relating to the petition for reconsideration lodged in violation of this order shall neither be accepted for filing nor deemed filed.

All trial level documents not related to the petition for reconsideration shall continue to be e-filed through EAMS or, to the extent permitted by the Rules of the Administrative Director, filed in paper form.[1] If, however, a proposed settlement is being filed, the petitioner for reconsideration should promptly notify the Appeals Board because a WCJ cannot act on a settlement while a case is pending before the Appeals Board on a grant of reconsideration. (Cal. Code Regs., tit. 8, § 10859.)

WORKERS' COMPENSATION APPEALS BOARD



JOSÉ H. RAZO

I CONCUR,

DEIDRA E. LOWE

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 0 4 2016

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

ANA RAMIREZ FARIAS
THE CLAYTON PERRY LAW OFFICE FOR INJURED WORKERS
PEARLMAN, BORSKA & WAX
ALTMAN, LUNCHE & BLITSTEIN, ATTN: MARK L. KAHN, ARBITRATOR

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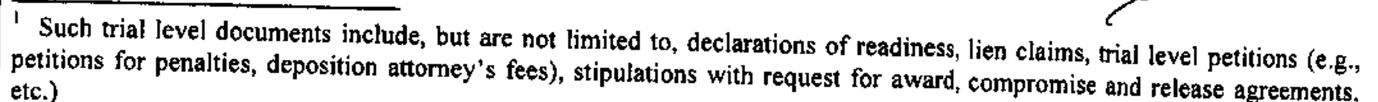

[1] Such trial level documents include, but are not limited to, declarations of readiness, lien claims, trial level petitions (e.g., petitions for penalties, deposition attorney's fees), stipulations with request for award, compromise and release agreements, etc.)

MARK L. KAHN, ARBITRATOR
ALTMAN, LUNCHE & BLITSTEIN
A Professional Corporation
16255 Ventura Boulevard, Suite 1110
Encino, California 91436-2319
(818) 995-0080

ARBITRATION BEFORE SEIU-USWW & JANITORIAL CONTRACTORS OF CALIFORNIA COLLECTIVELY BARGAINED WORKERS' COMPENSATION PROGRAM

ANA RAMIREZ aka ANA J. RAMIREZ FARIAS, Applicant, vs. ABLE BUILDING MAINTENANCE; ZURICH NORTH AMERICA, Defendants.	CASE NO.: J-ADR-2841 ARBITRATOR'S REPORT AND RECOMMENDATION ON RECONSIDERATION

INTRODUCTION

The above-captioned matter having been set for a second Arbitration on August 20, 2015 before Mark L. Kahn, Arbitrator, the Arbitrator finds as follows:

The parties Stipulated that Ana Ramirez was employed from February 28, 2005 through January 22, 2014 by Able Building Maintenance who was insured for workers' compensation by Zurich North America and sustained an injury arising out of and occurring in the course of her employment to her neck, back, right wrist and right shoulder and claims to have sustained an injury to her psyche, sleep and skin.

The parties at the Arbitration raised the following issues:

1. Who has medical control?

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2. Does the applicant have to obtain medical treatment from a physician from the ADR approved Exclusive Medical Provider Network list?

3. Can the applicant continue to treat with Arthur Harris, M.D.?

4. Applicant objected to defendant's Exhibits "A" through "E" being admitted into evidence (not filed sufficient days before the Arbitration).

5. That the Arbitrator cannot consider arguments contained in this defendant's Brief because it was late.

Issues four and five were ruled on at the Arbitration hearing and the decision is contained in the transcript of that hearing. The Ruling was that the exhibits were admissible and the arguments of defendant would be considered by the Arbitrator and any due process violation would be cured by applicant's counsel being given additional time to evaluate the evidence and present rebuttal evidence.

On October 7, 2015 an Arbitrator's Findings and Order issued by the undersigned finding as follows:

1. The applicant could self-procure treatment with Arthur Harris, M.D. from the date the claim was denied up until the date the claim was accepted and medical control was transferred back into the "Exclusive" Medical Provider Network list. Therefore, applicant had medical control on a self-procured basis from the time of the first evaluation with Dr. Harris in June of 2014 up through June 30, 2015.

2. On June 30, 2015 medical control was transferred to the "Exclusive" Medical Provider Network list and medical control is now within that "Exclusive" Medical Provider Network as agreed to in the collective bargaining agreement.

3. The Arbitrator is only ruling on the issue of medical control and is not ruling on other issues regarding the treatment by Dr. Harris, including whether the treatment was reasonable and necessary. This decision is limited to the sole issue of medical control, as that was the only issue raised by the parties at the Arbitration.

4. The applicant must obtain treatment from the "Exclusive" Medical Provider Network list as agreed to by the terms of the collective bargaining agreement.

Applicant has filed a Petition for Reconsideration from the Findings and Order of October 7, 2015 on the following grounds:

1. The medical treatment provisions of the carve-out are void because they violate Labor Code §3201.5(b) in that it diminishes the entitlement of the injured worker to medical treatment.

2. The applicant contends that the combined effect of the carve-out sections essentially takes away applicant's rights under the *Knight* case to self-procure in the event of a denial of care which occurred in this case.

3. The carve-out abrogates the right to self-procured treatment pursuant to the *Knight* case because the doctor cannot be paid under the terms of the agreement.

4. The carve-out does not permit self-procuring of medical treatment.

5. Applicant's constitutional rights to full provision for such medical-surgical, hospital and other remedial treatment, as required to cure or relieve from the effects of such injury, was violated by the terms of the carve-out.

The Arbitration decision filed on October 7, 2015 and the Petition for Reconsideration is, dated December 4, 2015 and therefore, the Petition for Reconsideration was not filed timely. However, the applicant's attorney alleges that he did not receive the Petition for Reconsideration because of an incorrect ZIP Code. The Arbitrator agrees the improper ZIP Code was used when the decision was sent to the applicant. The applicant's attorney however, does not indicate when in fact, he received the decision. Therefore, the Arbitrator leaves the decision of timeliness to the WCAB and answers the petition on the merits.

FACTS

The matter came up for Arbitration hearing on August 20, 2015 and the parties submitted on the present records, which was consistent of the exhibits as outlined below and contained in the Arbitrator's file.

EXHIBITS OF APPLICANT

1. Doctor's First Report of Work Injury, dated June 23, 2014 from Arthur Harris, M.D.

2. Medical report of Arthur Harris, M.D., dated July 7, 2014

3. Notice of Denial of Workers' Compensation Benefits from Zurich North America, dated May 4, 2014.

4. Medical report of Mark Greenspan, M.D., dated August 4, 2014.

EXHIBITS OF ZURICH NORTH AMERICA

A. The letter, dated June 30, 2015, to Ana Ramirez titled Notice of Denial of Benefits.

B. Page 12 of the transcript of applicant's deposition taken on May 7, 2015.

C. Collective Bargaining Agreement with the Joint Labor Committee of Able Building Maintenance, dated January 10, 2012.

D. The Order Dismissing Application, dated July 28, 2014.

E. The Mediation Statement and Orders, dated November 14, 2014.

The Arbitrator, based on the Stipulations of the parties and the exhibits offered into evidence, made the following findings of fact:

1. Applicant was hired by Able Building Maintenance on February 28, 2005.

2. The applicant filed an Application for Adjudication of Claim for a continuous trauma injury from February 28, 2005 to January 22, 2014, claiming injury to the neck, back, upper extremity, skin, sleep and "unclassified" injuries with the WCAB.

3. On February 13, 2012, the applicant's Union entered into a Binding Collective Bargaining Agreement with the Joint Labor Committee of Able Building Maintenance. The contract required all work-related claims for work injuries be handled by way of the Alternative Dispute Resolution process and treatment for such work injuries shall be obtained from selected and approved facilities, as set forth in the Collective Bargaining Agreement. (Exhibit C)

4. The applicant's Application before the Appeals Board was dismissed for lack of jurisdiction. The claim was dismissed because jurisdiction of the claim came under the Alternative Dispute Resolution system agreed to between Able Building Maintenance and the Union. The WCAB lacked jurisdiction over the claim. (Exhibit D)

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5. The matter then proceeded to the Alternative Dispute Resolution system under case J-ADR-2841.

6. Applicant was first seen by Arthur Harris, M.D. on June 23, 2014. Dr. Harris saw the applicant again on July 7, 2014 and wrote a report of the same date. Dr. Harris saw the applicant again on July 21, 2014 and wrote a report of the same date. (Exhibits 1 and 2). The applicant treated for his industrial injury with Dr. Harris.

7. On May 4, 2014, Zurich North America (Exhibit 3) issued a Notice of Denial of Workers' Compensation Benefits. The notice goes on to indicate the employer shall authorize the provision of all treatment, consistent with the applicable treatment guidelines, for the alleged injury and shall continue to provide such medical treatment until the claims administrator accepts or denies liability for the claim. Until the date the claim is accepted or rejected, liability for medical treatment under this Labor Code Section shall be limited to a maximum of $10,000.00.

8. The applicant was examined by Mark Greenspan, M.D., as an Agreed Medical Evaluator in orthopedic surgery. Dr. Greenspan in a report, dated August 4, 2014, basically concluded applicant's claim was industrially related. (Exhibit 4)

9. On November 14, 2014 the matter came up for Mediation in the Alternative Dispute Resolution system. The Mediation Minutes indicate the parties had not reached an agreement regarding the issue of injury or applicant's claim that she can seek treatment outside the "Exclusive" Medical Provider Network list. The disposition was that after receipt of the report of the Agreed Medical Evaluator, the parties were to confer and if they could not agree, the matter would be referred to Arbitration.

10. On June 30, 2015 defendants issued a Notice of Partial Denial of Workers' Compensation Benefits indicating they were denying injury to applicant's claim for psychiatric, sleep and skin and admitting injury to the neck, back, right wrist and right shoulder per the report of the Agreed Medical Evaluator. (Exhibit A).

The matter was set for Arbitration before the undersigned on the issues set forth above on August 20, 2015 and the parties submitted on the record, which consisted of the exhibits as outlined above.

On October 7, 2015 the Arbitrator issued a decision as set forth above which applicant now file this Petition for Reconsideration.

LAW

Labor Code §3201.5

(a) Except as provided in subdivisions (b) and (c), the Department of Industrial Relations and the courts of this state shall recognize as valid and binding any provision in a collective bargaining agreement between a private employer or groups of employers engaged in construction, construction maintenance, or activities limited to rock, sand, gravel, cement and asphalt operations, heavy-duty mechanics, surveying, and construction inspection and a Union that is the recognized or certified exclusive bargaining representative that establishes any of the following:

(1) An alternative dispute resolution system governing disputes between employees and employers or their insurers that supplements or replaces all or part of those dispute resolution processes contained in this division, including, but not limited to, mediation and arbitration. Any system of arbitration shall provide that the decision of the arbiter or board of arbitration is subject to review by the appeals board in the same manner as provided for reconsideration of a final order, decision, or award made and filed by a workers' compensation administrative law judge pursuant to the procedures set forth in Article 1 (commencing with Section 5900) of Chapter 7 of Part 4 of Division 4, and the court of appeals pursuant to the procedures set forth in Article 2 (commencing with Section 5950) of Chapter 7 of Part 4 of Division 4, governing orders, decisions, or awards of the appeals board. The findings of fact, award, order, or decision of the arbitrator shall have the same force and effect as an award, order, or decision of a workers' compensation administrative law judge. Any provision for arbitration established pursuant to this section shall not be subject to Sections 5270, 5270.5, 5271, 5272, 5273, 5275, and 5277.

(2) The use of an agreed list of providers of medical treatment that may be the exclusive source of all medical treatment provided under this division.

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(3) The use of an agreed, limited list of qualified medical evaluators and agreed medical evaluators that may be the exclusive source of qualified medical evaluators and agreed medical evaluators under this division.

(4) Joint labor management safety committees.

(5) A light-duty, modified job or return-to-work program.

(6) A vocational rehabilitation or retraining program utilizing an agreed list of providers of rehabilitation services that may be the exclusive source of providers of rehabilitation services under this division.

(b) (1) Nothing in this section shall allow a collective bargaining agreement that diminishes the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in this division. The portion of any agreement that violates this paragraph shall be declared null and void.

(2) The parties may negotiate any aspect of the delivery of medical benefits and the delivery of disability compensation to employees of the employer or group of employers that are eligible for group health benefits and non-occupational disability benefits through their employer.

(c) Subdivision (a) shall apply only to the following:

(1) An employer developing or projecting an annual workers' compensation insurance premium, in California, of two hundred fifty thousand dollars ($250,000) or more, or any employer that paid an annual workers' compensation insurance premium, in California, of two hundred fifty thousand dollars ($250,000) in at least one of the previous three years.

(2) Groups of employers engaged in a workers' compensation safety group complying with Sections 11656.6 and 11656.7 of the Insurance Code, and established pursuant to a joint labor management safety committee or committees, that develops or projects annual workers' compensation insurance premiums of two million dollars ($2,000,000) or more.

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1 (3) Employers or groups of employers that are self-insured in compliance with
2 Section 3700 that would have projected annual workers' compensation costs that meet the
3 requirements of, and that meet the other requirements of, paragraph (1) in the case of employers,
4 or paragraph (2) in the case of groups of employers.

5 (4) Employers covered by an owner or general contractor provided wrap-up insurance
6 policy applicable to a single construction site that develops workers' compensation insurance
7 premiums of two million dollars ($2,000,000) or more with respect to those employees covered
8 by that wrap-up insurance policy.

9 (d) Employers and labor representatives who meet the eligibility requirements of this
10 section shall be issued a letter by the administrative director advising each employer and labor
11 representative that, based upon the review of all documents and materials submitted as required
12 by the administrative director, each has met the eligibility requirements of this section.

13 (e) The premium rate for a policy of insurance issued pursuant to this section shall
14 not be subject to the requirements of Section 11732 or 11732.5 of the Insurance Code.

15 (f) No employer may establish or continue a program established under this Section
16 until it has provided the administrative director with all of the following:

17 (1) Upon its original application and whenever it is renegotiated thereafter, a copy of
18 the collective bargaining agreement and the approximate number of employees who will be
19 covered thereby.

20 (2) Upon its original application and annually thereafter, a valid and active license
21 where that license is required by law as a condition of doing business in the state within the
22 industries set forth in subdivision (a) of Section 3201.5.

23 (3) Upon its original application and annually thereafter, a statement signed under
24 penalty of perjury, that no action has been taken by any administrative agency or court of the
25 United States to invalidate the collective bargaining agreement.

26 (4) The name, address, and telephone number of the contact person of the employer.

27 (5) Any other information that the administrative director deems necessary to further
28 the purposes of this section.

(g) No collective bargaining representative may establish or continue to participate in a program established under this section unless all of the following requirements are met:

(1) Upon its original application and annually thereafter, it has provided to the administrative director a copy of its most recent LM-2 or LM-3 filing with the United States Department of Labor, along with a statement, signed under penalty of perjury, that the document is a true and correct copy.

(2) It has provided to the administrative director the name, address, and telephone number of the contact person or persons of the collective bargaining representative or representatives.

(h) Commencing July 1, 1995, and annually thereafter, the Division of Workers' Compensation shall report to the Director of Industrial Relations the number of collective bargaining agreements received and the number of employees covered by these agreements.

(i) The data obtained by the administrative director pursuant to this section shall be confidential and not subject to public disclosure under any law of this state. However, the Division of Workers' Compensation shall create derivative works pursuant to subdivision (h) based on the collective bargaining agreements and data. Those derivative works shall not be confidential, but shall be public. On a monthly basis the administrative director shall make available an updated list of employers and unions entering into collective bargaining agreements containing provisions authorized by this section.

Labor Code §3201.7

(a) Except as provided in subdivision (b), the Department of Industrial Relations and the courts of this state shall recognize as valid and binding any labor-management agreement that meets all of the following requirements:

(1) The labor-management agreement has been negotiated separate and apart from any collective bargaining agreement covering affected employees.

(2) The labor-management agreement is restricted to the establishment of the terms and conditions necessary to implement this section.

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1 (3) The labor-management agreement has been negotiated in accordance with the
2 authorization of the administrative director pursuant to subdivision (d), between an employer or
3 groups of employers and a union that is the recognized or certified exclusive bargaining
4 representative that establishes any of the following:

5 (A) An alternative dispute resolution system governing disputes between employees
6 and employers or their insurers that supplements or replaces all or part of those dispute
7 resolution processes contained in this division, including, but not limited to, mediation and
8 arbitration. Any system of arbitration shall provide that the decision of the arbitrator or board of
9 arbitration is subject to review by the appeals board in the same manner as provided for
10 reconsideration of a final order, decision, or award made and filed by a workers' compensation
11 administrative law judge pursuant to the procedures set forth in Article 1 (commencing with
12 Section 5900) of Chapter 7 of Part 4 of Division 4, and the court of appeals pursuant to the
13 procedures set forth in Article 2 (commencing with Section 5950) of Chapter 7 of Part 4 of
14 Division 4, governing orders, decisions, or awards of the appeals board. The findings of fact,
15 award, order, or decision of the arbitrator shall have the same force and effect as an award, order,
16 or decision of a workers' compensation administrative law judge. Any provision for arbitration
17 established pursuant to this section shall not be subject to Sections 5270, 5270.5, 5271, 5272,
18 5273, 5275, and 5277.

19 (B) The use of an agreed list of providers of medical treatment that may be the
20 exclusive source of all medical treatment provided under this division.

21 (C) The use of an agreed, limited list of qualified medical evaluators and agreed
22 medical evaluators that may be the exclusive source of qualified medical evaluators and agreed
23 medical evaluators under this division.

24 (D) Joint labor management safety committees.

25 (E) A light-duty, modified job, or return-to-work program.

26 (F) A vocational rehabilitation or retraining program utilizing an agreed list of
27 providers of rehabilitation services that may be the exclusive source of providers of rehabilitation
28 services under this division.

(b) (1) Nothing in this section shall allow a labor-management agreement that diminishes the entitlement of an employee to compensation payments for total or partial disability, temporary disability, vocational rehabilitation, or medical treatment fully paid by the employer as otherwise provided in this division; nor shall any agreement authorized by this section deny to any employee the right to representation by counsel at all stages during the alternative dispute resolution process. The portion of any agreement that violates this paragraph shall be declared null and void.

(2) The parties may negotiate any aspect of the delivery of medical benefits and the delivery of disability compensation to employees of the employer or group of employers that are eligible for group health benefits and non-occupational disability benefits through their employer.

(c) Subdivision (a) shall apply only to the following:

(1) An employer developing or projecting an annual workers' compensation insurance premium, in California, of fifty thousand dollars ($50,000) or more, and employing at least 50 employees, or any employer that paid an annual workers' compensation insurance premium, in California, of fifty thousand dollars ($50,000), and employing at least 50 employees in at least one of the previous three years.

(2) Groups of employers engaged in a workers' compensation safety group complying with Sections 11656.6 and 11656.7 of the Insurance Code, and established pursuant to a joint labor management safety committee or committees, that develops or projects annual workers' compensation insurance premiums of five hundred thousand dollars ($500,000) or more.

(3) Employers or groups of employers, including cities and counties, that are self-insured in compliance with Section 3700 that would have projected annual workers' compensation costs that meet the requirements of, and that meet the other requirements of, paragraph (1) in the case of employers, or paragraph (2) in the case of groups of employers.

(4) The State of California.

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1 (d) Any recognized or certified exclusive bargaining representative in an industry not
2 covered by Section 3201.5, may file a petition with the administrative director seeking
3 permission to negotiate with an employer or group of employers to enter into a labor-
4 management agreement pursuant to this section. The petition shall specify the bargaining unit or
5 units to be included, the names of the employers or groups of employers, and shall be
6 accompanied by proof of the labor union's status as the exclusive bargaining representative. The
7 current collective bargaining agreement or agreements shall be attached to the petition. The
8 petition shall be in the form designated by the administrative director. Upon receipt of the
9 petition, the administrative director shall promptly verify the petitioner's status as the exclusive
10 bargaining representative. If the petition satisfies the requirements set forth in this subdivision,
11 the administrative director shall issue a letter advising each employer and labor representative of
12 their eligibility to enter into negotiations, for a period not to exceed one year, for the purpose of
13 reaching agreement on a labor-management agreement pursuant to this section. The parties may
14 jointly request, and shall be granted, by the administrative director, an additional one-year period
15 to negotiate an agreement.

16 (e) No employer may establish or continue a program established under this section
17 until it has provided the administrative director with all of the following:

18 (1) Upon its original application and whenever it is renegotiated thereafter, a copy of
19 the labor-management agreement and the approximate number of employees who will be
20 covered thereby.

21 (2) Upon its original application and annually thereafter, a statement signed under
22 penalty of perjury, that no action has been taken by any administrative agency or court of the
23 United States to invalidate the labor-management agreement.

24 (3) The name, address, and telephone number of the contact person of the employer.

25 (4) Any other information that the administrative director deems necessary to further
26 the purposes of this section.

27 (f) No collective bargaining representative may establish or continue to participate in
28 a program established under this section unless all of the following requirements are met:

(1) Upon its original application and annually thereafter, it has provided to the administrative director a copy of its most recent LM-2 or LM-3 filing with the United States Department of Labor, where such filing is required by law, along with a statement, signed under penalty of perjury, that the document is a true and correct copy.

(2) It has provided to the administrative director the name, address, and telephone number of the contact person or persons of the collective bargaining representative or representatives.

(g) Commencing July 1, 2005, and annually thereafter, the Division of Workers' Compensation shall report to the Director of Industrial Relations the number of labor-management agreements received and the number of employees covered by these agreements.

(h) The data obtained by the administrative director pursuant to this section shall be confidential and not subject to public disclosure under any law of this state. However, the Division of Workers' Compensation shall create derivative works pursuant to subdivision (g) based on the labor-management agreements and data. Those derivative works shall not be confidential, but shall be public. On a monthly basis, the administrative director shall make available an updated list of employers and unions entering into labor-management agreements authorized by this section.

BASIS FOR ARBITRATORS DECISION

Applicant's attorney takes the position that the carve-out agreement is unenforceable pursuant to Labor Code §3201.5(b).

The Arbitrator finds that the collective bargaining agreement was entered into between the employer and The Union, and was approved by the Administrative Director following the procedure set forth in the Labor Code for creating an Alternative Dispute Resolution system (carve-out). Once the carve-out agreement is approved by the Administrative Director, the Arbitrator has no jurisdiction or power to find the agreement is unenforceable.

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1 Applicant's attorney next argues that language regarding an "Exclusive" Medical
2 Provider Network is invalid in so much as allowing defendant to re-establish medical treatment
3 on denied cases would abrogate applicant's rights under the "*Knight* case" and therefore, is
4 invalid pursuant to Labor Code §3201.5(b). 9767.9 ?

5 Under the Regulations of the Administrative Director (9976.9), medical treatment can be
6 transferred back into an MPN in a case where injury is originally denied and later in time the
7 injury is accepted. Therefore, applicant's argument that allowing defendant to re-establish
8 medical treatment control in a case where injury was originally denied and where injury is later
9 accepted, would abrogate the "*Knight* case" is incorrect based on Rule 9976.9 which allows for
10 such procedure before the Appeals Board in cases involving treatment within an approved MPN.

11 The Arbitrator finds that as set forth in the Labor Code and once approved by the
12 Administrative Director, a medical system in an Alternative Dispute Resolution system that uses
13 an "Exclusive" Medical Provider Network is valid. It was the intent of the Labor Code that in
14 Alternative Dispute Resolution systems, The Union and the employer could agree to use such
15 "Exclusive" Medical Provider Network lists to provide treatment to an injured worker.

16 The medical control provided for in the Alternative Dispute Resolution system in the
17 opinion the Arbitrator, would be the same as if the matter were being litigated before the Appeals
18 Board regarding a Medical Provider Network. Therefore, the applicant is bound to obtain
19 treatment within the "Exclusive" Medical Provider Network list while the claim is being
20 investigated and before it is accepted or denied up to the $10,000.00 provided for in the Labor
21 Code.

22 After the claim is accepted, the case would remain in the "Exclusive" Medical Provider
23 Network list for treatment.

24 If the claim is denied, the applicant can self-procure medical treatment at his own risk
25 outside of the "Exclusive" Medical Provider Network list.

26 In the opinion of the Arbitrator, the "*Knight* case" would apply and if the defendant
27 refuses or neglects to provide treatment, the applicant can self-procure treatment at his own risk
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subject to proving injury, reasonableness and necessity and his right to treat outside the "Exclusive" Medical Provider Network.

If the defendants originally deny the injury and later admit the injury, defendant can move to transfer care back into the "Exclusive" Medical Provider Network list. This is the same procedure as allowed per the Regulations (9967.9) transferring care back into a Medical Provider Network.

In addition, the Notice of Denial sent out by the defendant on May 14, 2014, indicated that applicant needed to treat within the "Exclusive" Medical Provider Network list up to $10,000.00 until the injury was accepted or denied. This is the same procedure as set forth in the Labor Code for all cases.

The facts of this case establish that defendant issued a Notice of Denial of Claim on May 4, 2014. (Exhibit 3) Once the defendants issued the Notice of Denial on May 4, 2014, the applicant could self-procure treatment outside the "Exclusive" Medical Provider Network at his own risk.

In June 2014 applicant came under the care of Dr. Harris. Because the defendants have denied the claim, applicant was entitled to self-procured treatment at ~~his~~ her own risk with Dr. Harris.

The parties then agreed to use an Agreed Medical Evaluator in orthopedic surgery to resolve the disputes regarding injury and other issues.

Following the evaluation and receipt of the reports from the Agreed Medical Evaluator, on June 30, 2015, Zurich North America issued a notice they were continuing to deny the psychiatric, sleep and skin portion of the case, but were admitting the injury to applicant's neck, back, right wrist and right shoulder.

When the defendant accepted the case, they had the right to transfer care back into the "Exclusive" Medical Provider Network.

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Based on the facts set forth above, the Arbitrator found that the applicant had a right to seek medical treatment outside the "Exclusive" Medical Provider Network lists from the time the denial issued up through the time defendant accepted the claim on June 30, 2015. Therefore, applicant had a right to treat with Dr. Harris from June 2014 through June 30, 2015.

The law allows for a transfer of care back into a MPN when an injury is denied and later defendants change the decision and accept the case. The law would also allow the transfer of care back into an "Exclusive" Medical Provider Network list when an injury is later accepted. Therefore, when the defendants change the original decision to deny the claim and later accept a claim, they have the right to transfer applicant's treatment back into the "Exclusive" Medical Provider Network.

Based on these findings, applicant can no longer treat with Dr. Harris and must treat within the "Exclusive" Medical Provider Network list and must choose a physician off the "Exclusive" Medical Provider Network list. Medical control as of June 30, 2015, must be within the "Exclusive" Medical Provider Network treatment list as required by the collective bargaining agreement.

Applicant's attorney next argues that the "Exclusive" Medical Provider Network failed to treat applicant adequately and failed to produce reports which are substantial medical evidence resulting in a denial of care under and allowing applicant to self-procure medical treatment.

In the opinion of the Arbitrator, applicant has introduced no evidence on this issue and evidence on this issue is unnecessary, once the defendants denied injury, applicant was able to treat outside the "Exclusive" Medical Provider Network list up until the time defendants admitted the injury and requested that treatment be transferred back into the "Exclusive" Medical Provider Network list. Applicant has introduced no evidence that Zurich North America has denied treatment after June 30, 2015.

Applicant's attorney next argues that based on the terms of the collective bargaining agreement, that when the parties chose to utilize a term of art like "Medical Provider Network" that portion of the contract is most reasonably interpreted to mean "Medical Provider Network" as discussed in Labor Code §4616. If "Exclusive Medical Provider Network" means something

different and gives more rights to defendants than what is ordinarily referred to as a "Medical Provider Network" in the carve-out agreement, is clearly unenforceable and applicant is not bound by it.

The collective bargaining agreement on page 6 indicates that all medical and hospital services required by employees, subject to the agreement, as a result of a compensable injury, shall be furnished by healthcare professionals and facilities selected by the employee from a list of healthcare professionals and facilities authorized by the committee. The list, hereafter referred to as "Exclusive Medical Provider list," shall constitute an exclusive list of all medical providers eligible to treat employees under the jurisdiction of the program.

By the terms of the agreement, as outlined above, the parties agreed to use the "Exclusive" Medical Provider Network list that was jointly agreed upon. As stated above, the Arbitrator found this provision valid and binding. Therefore, the applicant must treat with this group for any compensable injury.

As outlined above, in the opinion of the Arbitrator, the ADR system is the same as the MPN system and therefore, treatment must be obtained within the "Exclusive" Medical Provider Network List when the injury is accepted. If the injury is denied, the applicant can self-procure treatment at his own risk.

The collective bargaining agreement, by it terms, proves that treatment must be obtained from the "Exclusive" Medical Provider Network list if there is a compensable injury. In the opinion of the Arbitrator, there is no compensable injury until the injury is either accepted or found compensable by an Arbitrator. Therefore, in this case, the applicant had a right to obtain medical treatment outside the "Exclusive" Medical Provider Network list from the time the claim was denied until it was accepted and defendants requested treatment be transferred back into the "Exclusive" Medical Provider Network list based on the terms of the agreement.

Applicant's attorney next argues, if the carve-out agreement is most reasonably interpreted as giving defendant exclusive medical control regardless of whether or not the doctors provide adequate medical treatment and reporting and thus, whether or not applicant suffered a denial of care under the "*Knight* case" and regardless of whether or not the doctors

refused to treat the injured worker at all, then the carve-out agreement violates Labor Code §3201.5(b) and is unenforceable.

As stated above, the Arbitrator found that the "Exclusive" Medical Provider Network list operates similar to the MPN list before the Appeals Board. Therefore, if the applicant can show a denial of injury, denial of treatment or inadequate treatment the applicant can treat outside the "Exclusive" Medical Provider Network list. In this case, the applicant has introduced no evidence that selecting a physician as of June 2015 off the "Exclusive" Medical Provider Network list would result in a denial of care or inadequate care. In fact, the applicant has never attempted to treat with a physician within the "Exclusive" Medical Provider Network list as far as the evidence showed. The only physician the applicant has ever seen is Dr. Harris.

Applicant' s attorney next argues that the carve-out imposes an additional restriction on injured workers in making defendant's Medical Provider Network "Exclusive" eliminating their rights to self-procured medical treatment under any circumstances. If this is the interpretation, the carve-out agreement is unenforceable.

As stated above, the Arbitrator finds that the "Exclusive" Medical Provider Network list system is the same law as the MPN system by law and the terms of the agreement and therefore, the applicant was able to treat outside the MPN and could self-procure treatment from the time the injury was denied until the time the injury was accepted and defendant requested treatment be transferred back into the "Exclusive" Medical Provider Network.

By the terms of the collective bargaining agreement, the agreement applies to compensable injuries and in the opinion the Arbitrator, that requires that the injury be either admitted or found industrially related and therefore, applicant can self-procure treatment when the injury is denied by defendant.

Applicant's attorney next argues the "Exclusive Medical Provider Network" means something different and gives more rights to defendants than what is ordinarily referred to as a "Medical Provider Network" in the carve-out agreement, is clearly unenforceable and applicant is not bound by it.

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In the opinion of the Arbitrator, as set forth above, the "Exclusive" Medical Provider Network list system applies the same law as the MPN system as is required by the terms of the agreement and the Labor Code and therefore, the defendants have no greater rights than they would have if the case were before the Appeals Board.

However, the Labor Code does allow ADR systems to choose a list of "exclusive" providers to treat the applicant for a compensable injury and that was what was agreed to in this case. Those lists can be more limiting than MPN lists and are consistent with the above described Labor Code and do not violate any other Labor Code Sections or applicant's rights.

Further, it should be that in the MPN system, medical treatment can be transferred back into the MPN.

ISSUE ONE

Who has medical control?

Based on the facts of this case, as set forth above and the opinions of the Arbitrator, as set forth above, the applicant could self-procure treatment with Dr. Harris from the date the claim was denied up until the date the claim was accepted and medical control was transferred back into the "Exclusive" Medical Provider Network list. Therefore, applicant had medical control on a self-procured basis up through June 30, 2015 and could obtain treatment from Dr. Harris. On June 30, 2015 medical control was transferred to the "Exclusive" Medical Provider Network and medical control is now within that network.

The Arbitrator is only ruling on the issue of medical control and is not ruling on any other issues regarding the treatment by Dr. Harris including whether the treatment was reasonable and necessary. This decision is limited to the sole issue of medical control and that was the only issue raised by the parties.

ISSUE TWO

Does the applicant have to obtain medical treatment from a physician from the ADR approved Exclusive Medical Provider Network list?

For the reasons that are set forth above as of June 30, 2015, the applicant must obtain treatment from the "Exclusive" Medical Provider Network list.

ISSUE THREE

Can the applicant continue to treat with Dr. Harris?

Based on the finding above, the applicant can no longer treat with Dr. Harris as of June 30, 2015, unless the applicant desires to continue that treatment at his own expense.

DISCUSSION OF ISSUES RAISED ON RECONSIDERATION

Applicant first argues in his Petition for Reconsideration that the provisions of the carve-out our void because they violate Labor Code §3201.5(b) in that it diminishes the entitlement of the injured worker to medical treatment by taking away the applicant's rights under the *Knight* case to self-procure treatment in the event of a denial of care which occurred in applicant's case when the denial issued on May 5, 2014. Applicant further contends that the carve-out denies the applicant's care because there is no way for a self-procured physician to be paid under the terms of the agreement. The carve-out agreement does not permit self-procuring in any circumstances, and this diminishes the applicant's rights in violation of Labor Code §3201.5(b).

The Arbitrator ruled that when defendant issued a Notice of Denial of Claim on May 4, 2014, the applicant could self-procure treatment outside the "Exclusive" Medical Provider Network. The Arbitrator ruled that in June 2014, when applicant came under the care of Dr. Harris, he was entitled to treat with Dr. Harris because the defendants had denied the claim. The Arbitrator found that applicant was entitled to treat outside the "Exclusive" Medical Provider Network with Dr. Harris and that defendant was liable for the treatment with Dr. Harris, however the Arbitrator left the amount owed to be adjusted because that issue was not before the Arbitrator.

Applicant's attorney is arguing that the carve-out agreement is invalid because it does not allow for self-procured treatment or for the payment for that treatment. However, the Arbitrator did rule that applicant had the same rights to self-procured treatment pursuant to Labor Code and the carve-out agreement, the same as if this case were filed under the general workers' compensation laws and not the carve-out agreement. The Arbitrator ruled that the applicant could self-procure treatment from the date of denial of injury and medical treatment.

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The above finding was not appealed by the defendant. Therefore, the Arbitrator fails to understand the argument of the applicant's attorney that the carve-out agreement is invalid because the applicant cannot self-procure treatment pursuant to its terms, as the Arbitrator did rule, the applicant had a right to self-procured treatment once the denial was issued.

Further the applicant's attorney argues that there is no method to pay the physician. The Arbitrator did rule the physician was entitled to be paid, which was not Appealed, but did not rule on the amount as that issue was not brought up in the Arbitration.

The parties then agreed to use an Agreed Medical Evaluator in orthopedic surgery to resolve the disputes regarding injury and other issues. Following the evaluation and receipt of the reports from the Agreed Medical Evaluator, on June 30, 2015, Zurich North America issued a notice they were continuing to deny the psychiatric, sleep and skin portion of the case, but were admitting the injury to applicant's neck, back, right wrist and right shoulder.

When the defendant accepted the case, the next issue became, did defendant have the right to transfer care back into the "Exclusive" Medical Provider Network for the admitted body parts? Another issue became, if defendant can transfer care back into the provider network what rules should apply regarding the transfer of care. The carve-out agreement was silent on this issue. The Arbitrator ruled, once defendants accepted the claim they could transfer care back into the provider network and the transfer of care rules issued by the Administrative Director should be applied to the carve-out.

The Arbitrator further ruled defendants had met the requirement to transfer care back into the "Exclusive" Medical Provider Network.

The Arbitrator ruled that the same rules apply to carve-out as to general Workers' Compensation Law and applied the transfer care rules and allowed for the transfer of care back into the provider network, as if this case were under Medical Provider Regulations.

Neither the applicant, nor the defendant appealed this ruling.

Applicant next argues in his Petition for Reconsideration that the provisions of the carve-out are void because they violate Labor Code §3201.5(b) in that it diminishes the entitlement of the injured worker to medical treatment.

The Arbitrator found that, as set forth in the Labor Code and once approved by the Administrative Director, a medical system in an Alternative Dispute Resolution system that uses an "Exclusive" Medical Provider Network is valid. It was the intent of the Labor Code that in Alternative Dispute Resolution systems The Union and the employer could agree to use such "Exclusive" Medical Provider Network lists to provide treatment to an injured worker. In this case, because the employer and the Labor Union agreed to an "Exclusive" Medical Provider Network and the Administrative Director has approved the carve-out agreement and the "Exclusive" Medical Provider Network the Arbitrator found that the applicant is bound by that list and the list had met the minimum standards because the carve-out was reviewed and approved by the Administrative Director.

Lastly, the applicant argues that the applicant's constitutional rights to full provision of such medical, surgical, hospital and other remedial treatment to cure or relieve from the effects of such injury have been violated. This appears to be a constitutional challenge to the carve-out agreement and the Arbitrator has no jurisdiction over this issue. Further, the Arbitrator is of the opinion that since the carve-out was reviewed and approved by the Administrative Director, as set forth in the Labor Code, the carve-out agreement providing for an "Exclusive" Medical Provider Network list is valid.

RECOMMENDATION

Based on the above, it is recommended that reconsideration be denied.

DATED: December 21, 2015

Respectfully submitted,

By:
MARK L. KAHN,
ARBITRATOR