WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAMELA WILLOUGHBY, ***Applicant,*** **vs.** **HOGE, FENTON, JONES & APPEL; AMERICAN HOME ASSURANCE COMPANY/AIG,** ***Defendants.***	**Case No. ADJ164815 (SAL 0049263)** **OPINION AND DECISION AFTER RECONSIDERATION**

Defendant's petition for reconsideration of the October 21, 2014 Findings And Award of the workers' compensation administrative law judge (WCJ) was previously granted in order to further study the record and issues.[1] The WCJ found in pertinent part in Finding of Fact 4 as follows:

> When an employer/carrier has a Medical Provider Network (MPN) established pursuant to the requirements of Labor Code §§ 4616, *et. seq.*, if the employer/carrier believes a physician who is in its MPN is providing medical treatment that is not consistent with the MTUS [Medical Treatment Utilization Schedule], its remedy is contractual and is not subject to the [Independent Medical Review (IMR)] provisions of Labor Code §§ 4610, *et. seq.* (Bracketed material added.)

It is admitted that applicant sustained industrial injury to her face, head and other body parts while in defendant's employ on May 4, 1987, and a stipulated award of future medical treatment for that injury issued on April 11, 1991.

Defendant contends that treatment proposed by an MPN physician is subject to IMR, and that the WCJ has no authority to determine the medical necessity of the proposed treatment. Defendant further contends that the award of medical treatment is not supported by substantial medical evidence.

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[1] Following the grant of reconsideration, Commissioner Caplane retired and Commissioner Sweeney was appointed to her place on the current panel.

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

The WCJ's finding that treatment proposed by an MPN physician is not subject to UR and IMR and the additional findings and award of treatment that flow from that finding are rescinded as the Decision After Reconsideration. The Legislature did not exclude MPN treatment from utilization review (UR) and IMR as described in Labor Code sections 4610 et seq., and a request for authorization to provide medical treatment by a physician in an MPN is subject to those processes.[2] In that UR denied authorization for the proposed treatment any further dispute is subject to the IMR process.[3]

BACKGROUND

The WCJ provides the factual and procedural background along with the reasons for his decision in his Report in pertinent part as follows:

> Applicant, Pamela McGowne Willoughby, was employed as a legal secretary when she sustained an injury on 5/4/87 to the left side of her face. She was struck by a softball while playing in an employer-sponsored baseball game. This caused injury to her trigeminal nerve, fracturing her jaw, crushing the eye orbit, fracturing her nose, crushing the sinus area and her teeth. She has undergone reconstructive surgery to the eye orbit and sinuses, as well as her jaw, on at least 12 occasions.
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> The physicians reconstructed her face, implanting a silastic eye orbit which had to be surgically removed because of an allergic reaction. She continues to have difficulty breathing if she does [not] take the prescription medication Nasonex. She has had six surgeries to the sinus area. There are floating bone fragments and silastic implant fragments remaining in her left sinus. The left sinus is completely blocked at this time, and she breathes only from the right side. She has not been able to sleep on her left side since the injury.
>
> The trigeminal nerve has scar tissue surrounding it, causing facial pain and numbness. As a result of the medications, she has developed dry mouth. This has caused dental problems which have required treatment. Some of the treatment was provided the Defendant; some has not. Also, the teeth roots have been resorbed by the continual sinus infections, causing her to lose her teeth. Her dentist has recommended a triple bridge because her bones have disintegrated. It is difficult for Applicant to sleep because of

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

[3] In that the award of treatment is rescinded, we do not address defendant's contention that it is not supported by substantial medical evidence.

her difficulties breathing breath at night and also because of pain medications that have been terminated.

Applicant has migraine headaches which caused white bodies to form in the left side of her head. Three neurologists have indicated that these are a result of her migraine headaches. At his deposition, Dr. Mangar indicated as long as the migraine headaches persist, the white bodies will probably continue to develop, and it is medically probable that she could develop Multiple Sclerosis symptoms. Pain medications have been denied to treat her migraine headaches.

Ms. Willoughby continued working until the fall of 2013. At that time she went through 'withdrawal' because her pain medications were not approved by Defendant and she was unable to continue working. She tried to return to work in July of 2014 but because of her ongoing symptoms, she was unable to continue working.

At the time of the dispute herein, Applicant was being treated by Dr. John E. Massey, a member of Defendant's MPN. On 3/18/14, Dr. Massey requested that Defendant authorize a prescription for Ambien, Zolpidem and Nasonex (Applicant's Exhibit '5'). In his 6/16/14 report, Dr. Massey requested that Defendant authorize a pain psychiatric program. The prescriptions and the psychiatric treatment were denied by Utilization Review.

The matter was tried on 8/21/14. Applicant filed a trial brief on the day of trial; Defendant was given until on or before 9/10/14, to file a response; the matter was submitted for Decision as of 9/11/14. The Findings and Award were served 10/21/14. Defendant timely filed its Petition and Applicant filed a timely Answer.

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.

It has been argued 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.

Defendant also argues that Labor Code §4610.3 indicates the legislature intended that UR/IMR applies to treatment provided by MPN doctors. The code section actually states (in part) that:

> 'Regardless of whether an employer has established a medical provider network pursuant to Section 4616 or entered into a contract with a health care organization pursuant to Section 4600.5, an employer that authorizes medical treatment shall not rescind or modify that authorization after the medical treatment has been provided....'

The section simply does not state that UR/IMR is applicable to MPN providers. It specifically applies to treatment already authorized and should not be interpreted to the contrary. The section does not suggest that the legislature intended that the UR/IMR process applies to MPN treatment disputes.

Finally, Defendant is correct that there was no evidence submitted at trial regarding the contract between the MPN entity and the MPN physician. However, as stated above, Section 4616 explicitly states that there is an agreement between the MPN entity and the physician who is a member thereof. The section also requires that medical treatment provided by an MPN physician will comply with the MTUS. Since the contract is a statutory requirement, the actual contract need not be submitted at trial...

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 the primary treating physician (PTP), John E. Massey, MD explain in detail why the treatment at issue is reasonable and necessary treatment of Applicant's industrial injury. The reports, including the Requests for Authorization, when considered as a whole, constitute

> substantial evidence that the pain psychiatric program and the prescription medications Nasonex, Ambien and Zolpidem are reasonable and necessary to cure or relieve from the effects of Applicant's injury. 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.

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...
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> [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...
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> 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.)

As held in *Sandhagen*, employers must use utilization review to address "any and all request for treatment." After the Court issued its decision in *Sandhagen*, the Legislature implemented the IMR process through Senate Bill 863 (SB 863). Importantly, SB 863 includes no provision that exempts treatment by MPN providers from either the UR or the IMR processes. It is presumed that the Legislature was aware of a judicial decision construing the effect of its statutory language when it subsequently enacts another statute. (*Vera v. Workers' Comp. Appeals Bd.* (2007) 154 Cal.App.4th 996 [72 Cal.Comp.Cases 1115]; *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654.)

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].)

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When the Legislature enacted the UR process, it provided that medical treatment decisions be determined consistent with the MTUS promulgated by the Administrative Director (AD) pursuant to section 5307.27.[4] (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.)

When the Legislature subsequently enacted the IMR process it required medical professionals to apply the MTUS and other treatment standards prescribed in section 4610.5(c)(2) to determine medical treatment disputes not resolved by UR.[5] 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.

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[4] 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."

[5] 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 WCJ's finding that the MPN treatment proposal in this case is not subject to UR and IMR is incorrect and that finding and the related findings and award based upon it are rescinded. A new finding is entered that the medical treatment proposed by applicant's MPN physician is subject to UR and IMR.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 21, 2014 Findings And Award of the workers' compensation administrative law judge are **RESCINDED** and the following is **SUBSTITUTED** in their places:

FINDINGS OF FACT

1. Applicant, born while employed on 5/4/87 by Hoge, Fenton, Jones & Appel, sustained injury arising out of and in the course of employment.

2. At the time of Applicant's injury, the employer's workers' compensation carrier was American Home Assurance Company/AIG.

3. Applicant's primary treating physician is John E. Massey, M.D.

4. Medical treatment proposed by applicant's treating physician in the employer's Medical Provider Network is subject to the Utilization Review and Independent Medical Review provisions of Labor Code sections 4610, et seq.

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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 2 0 2016

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

PAMELA WILLOUGHBY
WILSON & WISLER
LAW OFFICE OF DENNIS ISAAC
HAWORTH BRADSHAW

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. 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 treating physician. As such, the dispute is subject to the IMR process established and promulgated in sections 139.5, 4610.5, 4610.6, and AD Rules 9792.10 through 9792.10.9. (Lab. Code, §§ 139.5, 4610.5, 4610.6; Cal. Code Regs., tit. 8; cf. Lab. Code, §§ 9792.10 et. seq.) As discussed in the majority opinion, this IMR process was implemented in 2013 following the enactment of Senate Bill 863, and it applies to all treating doctors regardless of whether the employer utilizes an MPN to satisfy its obligation to provide reasonable medical treatment. (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.[6] That process is primarily governed by sections 4616.3, 4616.4 and AD Rules 9768.1 through 9768.17 (Lab. Code, §§ 4616.3, 4616.4; Cal. Code Regs., tit. 8, §§ 9768.1 et seq.), and it only applies when the employee is treating within an employer's MPN.

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[6] 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.[7] (Lab. Code, §§ 4616.3, 4616.4.)	Occurs where the treating doctor[8] 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.[9] (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).)

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[7] 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.

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

[9] 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].)

Here, the WCJ incorrectly concluded that the UR and IMR processes do not apply to the treatment dispute. However, the objection to the proposed treatment in this case is by the employer, and therefore the UR IMR process properly applies to the dispute. In that authorization for the treatment was timely denied by UR, a challenge to the UR is raised via the 4610.5 IMR process. (*Dubon II, supra.*)

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 2 0 2016

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

PAMELA WILLOUGHBY
WILSON & WISLER
LAW OFFICE OF DENNIS ISAAC
HAWORTH BRADSHAW

JFS/abs

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PAMELA WILLOUGHBY, ***Applicant,*** **vs.** **HOGE, FENTON, JONES & APEL; AMERICAN HOMES ASSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ164815 (SAL 004263)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on October 21, 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

RONNIE G. CAPLANE

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 15 2016

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

PAMELA WILLOUGHBY
WILSON & WISLER, LLP
LAW OFFICES OF DENNIS P. ISAAC

abs

PAMELA MCGOWNE WILLOUGHBY, **v.** **HOGE, FENTON, JONES & APPEL and AMERICAN HOME ASSURANCE COMPANY/AIG**

TIMOTHY LEE HAXTON
Workers' Compensation
Administrative Law Judge

ADJ164815

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

HOGE, FENTON, JONES & APPEL and American Homes Assurance Company (hereinafter collectively, Defendant) filed a timely and verified Petition for Reconsideration of the 10/21/14 Findings and Award. It is noted that the last day to file the Petition was on the weekend; as such, the Petition having been filed on the following Monday was timely.

The issues raised by Defendant's Petition are in regard to the following Findings:

"4. When an employer/carrier has a Medical Provider Network (MPN) established pursuant to the requirements of Labor Code §§ 4616, *et. seq.*, if the employer/carrier believes a physician who is in its MPN 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.*

5. The reports of John E. Massey, MD, considered as a whole are substantial evidence that the pain psychiatric program and the prescription medications Nasonex, Ambien and Zolpidem, constitute medical treatment which 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.

6. 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."

Defendant argues that: 1. Treatment recommended by an MPN physician is subject to Utilization Review and IMR. 2. Labor Code §4610.3 shows the "legislative intent" to make Utilization Review applicable to MPN doctors. 3. There is no evidence of a contract between the Defendant insured and the MPN physician, so the finding that

Defendant's remedy is contractual was not supported by substantial evidence. 4. The provisions of Labor Code §4616.6 are not applicable in the present matter; and 5. The reports of the primary treatment physician do not constitute substantial evidence that the treatment at issue was reasonably and necessary.

As more fully discussed below, the legislature has clearly created two separate and distinct systems for providing medical care to injured workers. One system is subject to Utilization Review/IMR the other system involves the Medical Provider Network (MPN) system and the labor code provisions specifically applicable thereto. The Findings and Award are consistent with the provisions of the Labor Code, Division 4, Part 2, Chapter 2, Article 2.3 (sections 4616, *et. seq.).* As such, it is recommended that Defendant's Petition be denied.

II
FACTS

There was no testimony taken at trial. Counsel for Applicant made an "offer of proof" which was accepted into the record without objection from Defendant. The following is a summary of the relevant facts based upon the offer of proof, the medical record and the April 11, 1991 Stipulations With Request for Award/Award:

Applicant, Pamela McGowne Willoughby, was employed as a legal secretary when she sustained an injury on 5/4/87 to the left side of her face. She was struck by a softball while playing in an employer-sponsored baseball game. This caused injury to her trigeminal nerve, fracturing her jaw, crushing the eye orbit, fracturing her nose, crushing the sinus area and her teeth. She has undergone reconstructive surgery to the eye orbit and sinuses, as well as her jaw, on at least 12 occasions.

The physicians reconstructed her face, implanting a silastic eye orbit which had to be surgically removed because of an allergic reaction. She continues to have difficulty breathing if she does take the prescription medication Nasonex. She has had six surgeries to the sinus area. There are floating bone fragments and silastic implant fragments remaining in her left sinus. The left sinus is completely blocked at this time,

and she breathes only from the right side. She has not been able to sleep on her left side since the injury.

The trigeminal nerve has scar tissue surrounding it, causing facial pain and numbness. As a result of the medications, she has developed dry mouth. This has caused dental problems which have required treatment. Some of the treatment was provided the Defendant; some has not. Also, the teeth roots have been resorbed by the continual sinus infections, causing her to lose her teeth. Her dentist has recommended a triple bridge because her bones have disintegrated. It is difficult for Applicant to sleep because of her difficulties breathing breath at night and also because of pain medications that have been terminated.

Applicant has migraine headaches which caused white bodies to form in the left side of her head. Three neurologists have indicated that these are a result of her migraine headaches. At his deposition, Dr. Mangar indicated as long as the migraine headaches persist, the white bodies will probably continue to develop, and it is medically probable that she could develop Multiple Sclerosis symptoms. Pain medications have been denied to treat her migraine headaches.

Ms. Willoughby continued working until the fall of 2013. At that time she went through "withdrawal" because her pain medications were not approved by Defendant and she was unable to continue working. She tried to return to work in July of 2014 but because of her ongoing symptoms, she was unable to continue working.

At the time of the dispute herein, Applicant was being treated by Dr. John E. Massey, a member of Defendant's MPN. On 3/18/14, Dr. Massey requested that Defendant authorize a prescription for Ambien, Zolpidem and Nasonex (Applicant's Exhibit "5"). In his 6/16/14 report, Dr. Massey requested that Defendant authorize a pain psychiatric program. The prescriptions and the psychiatric treatment were denied by Utilization Review.

The matter was tried on 8/21/14. Applicant filed a trial brief on the day of trial; Defendant was given until on or before 9/10/14, to file a response; the matter was submitted for Decision as of 9/11/14. The Findings and Award were served 10/21/14. Defendant timely filed its Petition and Applicant filed a timely Answer.

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.

It has been argued 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.

Defendant also argues that Labor Code §4610.3 indicates the legislature intended that UR/IMR applies to treatment provided by MPN doctors. The code section actually states (in part) that:

> "Regardless of whether an employer has established a medical provider network pursuant to Section 4616 or entered into a contract with a health care organization pursuant to Section 4600.5, an employer that authorizes medical treatment shall not rescind or modify that authorization after the medical treatment has been provided...."

The section simply does not state that UR/IMR is applicable to MPN providers. It specifically applies to treatment already authorized and should not be interpreted to the contrary. The section does not suggest that the legislature intended that the UR/IMR process applies to MPN treatment disputes.

Finally, Defendant is correct that there was no evidence submitted at trial regarding the contract between the MPN entity and the MPN physician. However, as stated above, Section 4616 explicitly states that there is an agreement between the MPN entity and the physician who is a member thereof. The section also requires that

medical treatment provided by an MPN physician will comply with the MTUS. Since the contract is a statutory requirement, the actual contract need not be submitted at trial.

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 the primary treating physician (PTP), John E. Massey, MD explain in detail why the treatment at issue is reasonable and necessary treatment of Applicant's industrial injury. The reports, including the Requests for Authorization, when considered as a whole, constitute substantial evidence that the pain psychiatric program and the prescription medications Nasonex, Ambien and Zolpidem are reasonable and necessary to cure or relieve from the effects of Applicant's injury. 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: the UR/IMR process does not apply to MPN treatment disputes, the UR/IMR reports were not admissible as evidence in the trial record, Dr. Massey's reports are substantial evidence that the treatment at issue is reasonable and necessary, and as such, 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 11/26/14 on the following: