WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BREANNA CLIFTON, ***Applicant,*** **vs.** **SEARS HOLDING CORPORATION (KMART CORPORATION), administered by SEDGWICK CMS, INC.,** ***Defendants.***	**Case No. ADJ7660641** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted defendant's petition for reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration. Defendant sought reconsideration of the Findings and Award dated September 9, 2011, and served on September 15, 2011, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a cashier on December 20, 2010, sustained industrial injury to her left knee, left foot, and left ankle, but not to her psyche. The WCJ found that applicant's injury resulted in temporary disability for the period February 11, 2011, to the present and continuing, payable at the rate of $148 per week, and that applicant is entitled to reimbursement of self-procured medical treatment, in an amount to be adjusted between the parties, and to further medical treatment. He found that applicant did not present sufficient evidence to sustain findings on penalties and sanctions, and he awarded an attorney's fee on the accrued and unpaid temporary disability indemnity through September 9, 2011.

Defendant contends the WCJ erred in awarding reimbursement for self-procured treatment and temporary disability indemnity based on the reporting of Dr. Edward Komberg, D.C., citing the Appeals Board's en banc decisions in *Valdez v. Warehouse Demo Services* (2011) 76 Cal.Comp.Cases 330 and 76 Cal.Comp.Cases 970 (*Valdez*), and arguing that defendant had a properly established and noticed medical provider network (MPN), and that the WCJ's "finding" that Dr Komberg is the primary treating physician is "not valid."

We have considered the Petition for Reconsideration, applicant's Answer, and the WCJ's Report and Recommendation on Petition for Reconsideration (Report), and we have reviewed the record in this matter.

For the reasons discussed below, we will amend the Findings and Award to defer the issues of temporary disability, self-procured treatment, and attorney's fees, otherwise affirm, and return the matter to the trial level for further proceedings and decision by the WCJ.

At trial on August 11, 2011, the parties stipulated that applicant sustained industrial injury to her left knee, left foot, and left ankle, and that she claims injury to her psyche. They also stipulated, "The primary treating physician is Dr. Edward Komberg, D.C." (August 11, 2011 Minutes of Hearing, p. 2.) The parties had also stipulated that Dr. Komberg was the primary treating physician in the July 14, 2011 pre-trial conference statement. Among the issues framed by the parties at trial were temporary disability and "Need for further medical treatment, with the employer seeking to rely upon *Valdez*...and liability for self-procured medical treatment." (August 11, 2011 Minutes of Hearing, p. 2.) The WCJ admitted into evidence various medical reports, including the reports of Dr. Komberg, and notices and correspondence offered by defendant regarding its MPN.

Defendant initially provided medical treatment with U.S. Healthworks. Applicant was referred for orthopedic consultation to Frank Giacobetti, M.D., who examined applicant on February 10, 2011. He reviewed x-rays of the left knee and left ankle and a February 2, 2011 MRI of the left knee. He recommended an MRI of applicant's left ankle and diagnosed "1. Left knee strain, resolved. 2. Left ankle sprain, rule out ligamentous cartilage injury." (Defendant's Exhibit C, p 5.) He opined that applicant "is able to work with the restriction of mostly sitting work." (*Id.*, at p. 6.)

Applicant began treating with Dr. Komberg, a non-MPN chiropractor, on February 11, 2011. He found her temporarily totally disabled and recommended "Physical therapy, Physiotherapy, Kinetic Activities x 17, Left ankle/foot MRI. Referrals: Ortho, FCE." (Applicant's Exhibit 3, p. 4.) On June 24, 2011, he again instructed applicant to remain off work and recommended acupuncture two to three times per week for six weeks, kinetic activities, and follow up with a orthopedic surgeon. In his July 22, 2011 report (Applicant's Exhibit 1), Dr. Komberg stated that applicant should remain off work until September

5, 2011. He recommended the following treatment: "Chiropractic 2-3 x per week for 6 weeks. Kinetic activities. requesting ankle brace. left knee MRI. Follow up: Ortho Surgeon."

Based on Dr. Komberg's opinion, the WCJ found that applicant was temporarily totally disabled commencing February 11, 2011, to the present and continuing. Based on the reports of Dr. Komberg and Dr. Giacobetti, he found applicant entitled to further medical treatment. As to self-procured treatment, the WCJ said,

> "There is no evidence that the physicians at U.S. Healthworks released Applicant from further treatment. Dr. Giacobetti, the orthopedic consultant, recommended an MRI of the left ankle. Pursuant to Labor Code Section 4600, the employer is responsible for the provision of reasonable medical treatment. If the employer neglects or refuses to do so, the employer is responsible for the expenses incurred with regard to self-procured treatment. Per Labor Code Section 4605, an employee may self procure treatment outside of a proper MPN, at the employee's expense. This record contains insufficient evidence of a properly established MPN. This record contains insufficient evidence of appropriate notice to Applicant with regard to an MPN. Accordingly, I find that the employer is liable for the reasonable self-procured medical treatment that Applicant has obtained from Dr. Komberg." (Opinion on Decision, pp. 5-6.)

Defendant filed a Petition for Reconsideration, contesting only the WCJ's decisions on temporary disability and self-procured treatment. Defendant further requested a finding that applicant may receive medical treatment only within the MPN. Neither party sought reconsideration of the WCJ's findings on psyche injury, temporary disability indemnity rate, or penalties and sanctions.

Both parties acknowledge that the MPN issues raised in this case are governed by the Appeals Board's en banc decisions in *Valdez* and in *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc) (*Knight*).

In *Valdez*, we held that, where there has been unauthorized treatment obtained outside a validly established and noticed MPN, reports from the non-MPN doctor are inadmissible and defendant is not liable for the cost. (76 Cal.Comp.Cases at pp. 331-332; 76 Cal.Comp.Cases at p. 971.) In *Valdez*, we explained the options available within the MPN for an injured employee to obtain a second opinion, third opinion, and independent medical review, if he or she disputes the initial MPN doctor's opinion on treatment or diagnosis (76 Cal.Comp.Cases at p. 334; Lab. Code, §§ 4616.3(c), 4616.4(b)), and we said,

"The foregoing provisions allow an applicant to treat with any physician of his or her choice within the MPN, and also afford a multi-level appeal process where treatment and/or diagnosis are disputed. Consistent with these provisions, section 4616.6 provides: '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.' Thus, section 4616.6 precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnosis issues, i.e., 'any controversy arising out of this article.' Here, for unknown reasons, the applicant almost immediately chose to go outside the MPN and seek treatment in violation of the MPN statutes and procedures. Subsequently, the WCJ awarded compensation, i.e., temporary disability indemnity, based on the reports of the unauthorized, non-MPN physician. As discussed below, the reports of non-MPN physicians are inadmissible and therefore may not be relied on to award compensation.

The definition of the 'primary treating physician' [PTP] set forth in AD Rule 9785(a)(1) (Cal. Code Regs., tit. 8, § 9785(a)(1) includes the physician selected 'in accordance with the physician selection procedures contained in the [MPN] network pursuant to [section] 4616.' AD Rule 9785(b)(1) (Cal. Code Regs., tit. 8, § 9785(b)(1) further provides that '[a]n employee shall have no more than one [PTP] at a time.' In addition, pursuant to AD Rule 9785(b)(3) (Cal. Code Regs., tit. 8 § 9785(b)(3)), if an employee 'disputes a medical determination made by the [PTP]...the dispute shall be resolved under the applicable procedures set forth in [sections] 4061 and 4062,' and '[n]o other [PTP] shall be designated by the employee unless and until the dispute is resolved.'[5] Thus, where an applicant has left a validly established and properly noticed MPN and impermissibly sought treatment outside the MPN, the non-MPN physician cannot be the PTP; the MPN treater remains the PTP.[6] As stated by section 4061.5 and AD Rule 9785(d) (Cal. Code Regs., tit. 8, § 9785(d)), the PTP 'shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation.'

[5] One of the disputes mentioned by AD Rule 9785(b)(3) is 'a determination that the employee shall be released from care.' Section 4062(a) sets forth procedures where either the employee or employer 'objects to a medical determination made by the treating physician concerning any medical issues not covered by Section 4060 or 4061 and not subject to Section 4610,' which, in addition to temporary disability, would also include medical treatment issues. As stated above, however, the MPN statutes contain specific provisions for addressing disputes over treatment and diagnosis within the MPN, and section 4616.6 provides that '[n]o 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.' Thus, while medical treatment and diagnosis issues must be resolved within the MPN, as discussed below, disputes concerning temporary or permanent disability are to be resolved under sections 4061 and 4062, i.e., outside the MPN.

[6] Of course, where an applicant has refused at the outset to treat within a validly established MPN, the fact that there has been no PTP within the MPN, does not render the non-MPN doctor a PTP."
(76 Cal.Comp.Cases at pp. 334-335.)

In *Knight*, we held "that an employer or insurer's failure to provide required notice to an employee of rights under the MPN **that results in a neglect or refusal to provide reasonable medical treatment** renders the employer or insurer liable for reasonable medical treatment self-procured by the employee." (71 Cal.Comp.Cases at pp. 1424. 1435.) (Emphasis added.) We explained that the defendant has the burden of proving that it gave all proper notices to the applicant regarding its MPN. (71 Cal.Comp.Cases at pp. 1424. 1435.) We found in *Knight* that the defendant in that case had failed to provide the notices required by Labor Code section 4616.3 and Administrative Director (AD) Rule 9767.12(a) (Cal. Code Regs., tit. 8, § 9767.12(a)). We also expressly found, based on the record in that case, that the defendant neglected and refused to provide reasonable medical treatment and that the defendant was, therefore, liable for treatment applicant self-procured from a doctor outside the MPN.

In the present case, as in *Valdez*, applicant abruptly began treatment with a non-MPN doctor for no apparent reason. She did not take advantage of the procedures for obtaining additional opinions from MPN doctors on her treatment; nor did she seek resolution of a dispute over temporary disability by seeking an agreed medical evaluator or panel qualified medical evaluator, as explained in *Valdez*. Instead, applicant apparently relied on her belief that there was no properly established or noticed MPN and that this justified seeking treatment outside the MPN.

The WCJ did not make a specific finding that defendant failed to provide any required notices or that defendant did not have a properly established MPN. He said in his Opinion on Decision that the record did not contain sufficient evidence of a properly established MPN. He did not discuss the evidence offered by defendant on this issue, however. Instead, he quoted from inapplicable sections of the information provided by defendant to applicant, such as the "Transfer of Care" policy, which explicitly applies to situations where the injured worker was already receiving treatment for a work-related injury before the MPN was established. The WCJ did not discuss the applicable information at all, such as the October 12, 2010 letter to applicant explaining that defendant has an MPN to provide treatment for industrial injuries and that the MPN became effective on April 1, 2009. (See Defendant's Exhibit A.)

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Moreover, although the WCJ concluded that applicant is entitled to reimbursement for her self-procured treatment, neither the Findings and Award nor the Opinion on Decision stated that any act or omission by defendant constituted "a neglect or refusal to provide reasonable medical treatment" — a necessary component of the *Knight* analysis. We did not hold in *Knight* that *every* violation of MPN notice requirements constitutes neglect or refusal to provide reasonable medical treatment. The WCJ misstated the law when he said on page 4 of his Report, "Per *Knight*, an employer neglects and refuses to provide medical treatment by failing to provide required notices of MPN rights." Without a determination that defendant's failure to give proper notice constituted neglect or refusal to provide reasonable medical treatment, applicant is not entitled to reimbursement for the cost of self-procured treatment.[1]

In addition to this determination, if the WCJ's decision was based on defendant's failure to provide one or more required notices, the WCJ should have specifically explained defendant's particular failure(s). Defendant offered into evidence the notices it sent to applicant. (See Defendant's Exhibit A.) Contrary to the implication in the WCJ's Report, defendant is not required, as part of its burden, to offer witnesses to testify that applicant received the notices addressed to her, or to obtain a stipulation from applicant that she received them. Defendant met its initial burden by offering proof of the notices. Applicant did not testify or offer any other evidence that she did not receive them. Furthermore, although applicant raised the issues of defendant's failure to comply with the notice requirements of Labor Code sections 3550 and 3551 at trial, the WCJ made no findings on those issues.

If the WCJ's decision in this case was based on defendant's failure to meet its burden of proving that it has a properly established MPN, the WCJ's general conclusion was an insufficient explanation of his reasoning. We also note that applicant's rigorous interpretation of defendant's burden on this issue is not justified by statute, regulation, or case law. In her Answer, applicant proposes a vast and often vague array of requirements for defendant's evidence that has not been recognized by the AD, the Appeals

[1] Without deciding the issue, we observe that a finding to that effect is improbable in this case where defendant admitted the injury and provided treatment within the MPN, applicant was referred within the MPN for orthopedic consultation, and she was never released from care by an MPN physician.

Board, the courts, or the Legislature. The WCJ appears to have been persuaded to follow applicant's interpretation of defendant's burden, despite its lack of authority and outrageous reach. For example, there is no evidence, or even a hint, in this case that any of defendant's MPN evidence is anything other than what it appears to be on its face, yet the WCJ now says in his Report that the evidence is insufficient because it is not "authenticated." Authentication is not a requirement ordinarily applied to evidence such as this. The WCJ's acceptance of applicant's hypervigilant interpretation of defendant's burden was unwarranted and inconsistent with the informality of WCAB proceedings. (See Lab. Code, §§ 5708, 5709.) While defendant is not correct in stating that an MPN is "presumed" to be properly established, a defendant's burden is certainly less onerous than applicant argues. The list of MPNs approved by the Division of Workers' Compensation is available on the AD's Web site, and a WCJ may simply take judicial notice of the inclusion of a defendant's MPN on that official and publicly available list.

In short, a defendant may satisfy its burden of proving it has a properly established and noticed MPN by asserting that it has an approved MPN and requesting judicial notice of the inclusion of its MPN in the list of approved MPNs on the AD's Web site, and by offering unrebutted evidence that it provided the required notices.

Because the basis for the WCJ's implied finding that applicant is entitled to treatment outside the MPN was not adequately explained, and because the WCJ misinterpreted the burden of proof on establishment of the MPN and improperly analyzed the issue of MPN notice under *Knight*, we will amend the WCJ's decision to defer the issues of temporary disability, self-procured treatment, and attorney's fees, and return this matter to the trial level for further proceedings as deemed appropriate by the WCJ and a new decision on these issues by the WCJ.

Defendant in this case argues that it has a properly established and noticed MPN and that applicant is not entitled to temporary disability indemnity based on the report of Dr. Komberg and to reimbursement for his treatment. Defendant argues that U.S. Healthworks did not release applicant from care, that applicant may have only one primary treating physician at a time (see Cal. Code Regs., tit. 8, § 9785(b)(1)), and that applicant did not properly "elect" Dr. Komberg as her primary treating physician. Defendant fails to explain, however, why it stipulated that Dr. Komberg is applicant's primary treating

physician.

While parties may enter into stipulations that are contrary to the evidence, and we will not generally set aside stipulations for that reason (see *County of Sacramento v. Workers' Comp Appeals Bd. (Weatherall)* (2000) 77 Cal.App.4th 1114 [65 Cal.Comp.Cases 1]), the intent of the stipulation in this case is not clear, in light of the contradictory *Valdez* issue raised at trial.

The WCJ held defendant to its stipulation that Dr. Komberg is applicant's primary treating physician. Ordinarily, that would be a reasonable action. In this case, however, further exploration of the inconsistency between the issues and stipulations is warranted. Defendant's position that it is not liable for applicant's treatment with Dr. Komberg, including its apparent challenge to the admissibility of his reports by citing *Valdez*, is contradictory to the stipulation that Dr. Komberg is applicant's primary treating physician.

Labor Code section 5702 provides that the WCAB "may" make findings based on the parties' stipulations. A WCJ is not required to accept the parties' stipulations. (*Turner Gas Company, Inc v. Workmen's Comp. Appeals Bd* (1975) 47 Cal.App.3d 286, 290 [40 Cal.Comp.Cases 253, 255]; *P.M. & Associates v. Workers' Comp. Appeals Bd. (Wagner)* 65 Cal.Comp.Cases 878, 882 (writ den.)

In the present case, despite defendant's inaccurate characterization, the WCJ made no actual finding regarding the primary treating physician. He also did not make an express finding adopting the parties' stipulation. Upon return of this matter, the WCJ should direct the parties to clarify the issues and stipulations to resolve the inherent inconsistency. If, after clarification of the issues and stipulations and application of the proper law and burden of proof, the WCJ finds that defendant's MPN was properly established and noticed, he should also consider the definition of "primary treating physician" in AD Rule 9767.1(a)(19): "'Primary treating physician' means a primary treating physician **within the medical provider network** and as defined by section 9785(a)(1)." (Cal. Code Regs., tit. 8, § 9767.1(a)(19).) (Emphasis added.) The WCJ should make actual findings on all fundamental and disputed issues.

Even if there had been an express finding in this case that Dr. Komberg was the primary treating physician and that his reports were therefore admissible, the WCJ's decision was not entirely supported

by the reporting of Dr. Komberg. The WCJ found applicant temporarily totally disabled from February 11, 2011, to the present and continuing. Dr. Komberg's reporting justifies a finding of temporary total disability only until September 5, 2011. Neither the WCJ nor applicant has cited any medical evidence supporting temporary total disability beyond that date.

We will not disturb the WCJ's general award of future medical treatment because even the MPN doctor recommended future treatment. We will not respond at this time, however, to defendant's request for a finding that applicant may receive medical treatment only within the MPN, as the WCJ will be reconsidering that issue in light of this opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award dated September 9, 2011, and served on September 15, 2011, is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

Findings of Fact Nos. 3, 4, and 7 are amended as set forth below:

FINDINGS OF FACT

3. The issue of temporary disability is deferred.
4. The issue of reimbursement for self-procured medical treatment is deferred.
7. The issue of attorney's fees is deferred.

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The Award is amended as set forth below:

AWARD

AWARD IS MADE in favor of **BREANNA CLIFTON** against **SEARS HOLDING CORPORATION (KMART CORPORATION)** of:

Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

Susan V Hamilton DEPUTY

SUSAN V. HAMILTON

I CONCUR,

DEPUTY

RICK DIETRICH

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JAN 12 2012

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

FLOYD, SKEREN & KELLY
HINDEN & BRESLAVSKY
BREANNA CLIFTON

CB/bea