WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISPIN MENDEZ-CORREA, ***Applicant,*** **vs.** **VEVODA DAIRY; ZENITH INSURANCE COMPANY,** ***Defendants.***	**Case No. ADJ6588140** **(Van Nuys District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We earlier granted applicant's petition for reconsideration of the October 23, 2012 Findings And Award of the workers' compensation administrative law judge (WCJ) who found that applicant incurred industrial injury to his nose and lumbar spine while employed by defendant as a cow milker/calf feeder on July 31, 2008, causing 7% permanent disability and need for future medical treatment. The WCJ further found that applicant, "self-procured medical treatment outside of defendant's MPN [Medical Provider Network] at his own expense under Labor Code section 4605," and that "Self-procured medical treatment liens for treatment obtained by applicant outside of the defendant's MPN are not the liability of defendant and are disallowed."[1]

Applicant contends that the WCJ did not provide complete reasoning for his decision in his Opinion on Decision, that defendant failed to carry its burden of proving both that it had a valid MPN and that it complied with MPN notice requirements, and that the WCJ's finding that applicant self-procured treatment at his own expense outside of the MPN pursuant to section 4605 is not supported by the record.

/ / /

[1] Further statutory references are to the Labor Code. Section 4605 provides in pertinent part as follows: "Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires..."

An answer was received from defendant. The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report) recommending that applicant's petition be denied.

We have carefully reviewed the record and considered the allegations of the petition for reconsideration, the answer, and the WCJ's Report with respect thereto. For the reasons stated by the WCJ in his Report, which we adopt and incorporate by this reference except as discussed below, and for the reasons below, we affirm the WCJ's October 23, 2012 decision, but rescind the finding that applicant self-procured treatment outside of the MPN at his own expense pursuant to section 4605. As to that finding, the record shows that applicant obtained treatment outside of the MPN, but it does not establish that when he obtained those services he intended to self-procure them at his own expense pursuant to section 4605.

BACKGROUND

The facts are detailed in the WCJ's Report and are not repeated herein. Applicant admittedly sustained industrial injury to his nose and lower back on July 31, 2008, when a cow he was milking kicked him in the face at his place of employment in Humboldt County. Applicant initially received medical treatment that was provided by defendant through its MPN. On October 30, 2008, Paul Windham, M.D., applicant's then MPN primary treating physician, opined that applicant's condition had reached maximum medical improvement.

Applicant, acting in pro per at that time, obtained a Panel Qualified Medical Examiner report from Edward Eyster, M.D. In his January 15, 2009 report, Dr. Eyster agreed with Dr. Windham that applicant's condition was permanent and stationary, and further noted the hope that applicant "can be encouraged to reenter the work force." However, the employer did not offer to return applicant to work. Thereafter, applicant moved to Southern California where he obtained an attorney who designated Khalid Ahmed, M.D., as primary treating physician notwithstanding defendant's objection that the doctor was not in defendant's MPN. Numerous other non-MPN providers subsequently filed treatment, medical-legal and other liens in the case.

In his Report, the WCJ explains why he concluded that applicant was obligated to treat within defendant's MPN, and we agree with and incorporate his discussion of that issue. However, we do not

agree that the record supports the WCJ's finding that medical treatment provided by Dr. Ahmed and other lien claimants outside of the MPN was at applicant's expense pursuant to section 4605.

DISCUSSION

As the WCJ notes in his Report, applicant testified at trial that he self-procured evaluations by ear, nose and throat (ENT) physicians, Stephanie Huang, M.D., in Santa Rosa, and Noel Goldthwaite, M.D., in Daly City, and a finding that the services of those two physicians were self-procured by applicant at his own expense pursuant to section 4605 might be appropriate based upon that testimony. However, the WCJ's finding is much broader than that, and on its face it applies to all non-MPN lien claimants that provided medical treatment.

There is little discussion of the issue in the Report, but the WCJ expresses the view therein that "the applicant, in designating Dr. Khalid Ahmed as his non-MPN PTP, obtained self-procured medical treatment outside defendant's MPN at his own expense under Labor Code section 4605." It appears from that statement and the finding that the "medical treatment liens for treatment obtained by applicant outside the defendant's MPN are not the liability of defendant" that the WCJ incorrectly concluded that any and all medical treatment obtained outside of a properly noticed MPN is necessarily self-procured by the injured worker at his own expense pursuant to section 4605. However, that is not the law.

Section 4605 provides that an injured worker may select any attending and/or consulting physicians he or she chooses, "the sole condition being that such physician must be retained at the expense of the injured employee." (*Credit Bureau of San Diego, Inc. v. Johnson* (1943) 61 Cal.App.2d Supp. 834 [8 Cal.Comp.Cases 289] (*Johnson*).) Moreover, section 4903 authorizes the Appeals Board to determine and allow as liens against any sum to be paid as compensation the "reasonable expense incurred by or on behalf of the injured employee" for medical treatment.

If there is a question whether treatment was self-procured by an injured worker pursuant to section 4605, the Appeals Board is authorized by section 4903 to "hear and determine any issue growing out of a controversy *as to whether or not the physician was supplied by the employer or chosen by the employee at his own expense*." (*Johnson, supra*, emphasis added.) However, the authority to determine if a bill is the *injured worker's obligation* under section 4605 is not the same as exercising jurisdiction

under section 4903 to allow and determine a *lien against compensation.* Instead, a lien against compensation for medical treatment that is subject to section 4903 is based upon the *employer's obligation* to provide reasonable medical treatment.

An employer is not liable for medical treatment self-procured by an injured worker outside of an MPN if the employer has not neglected or refused to provide it through the MPN. (*Knight v. Liberty Mut. Ins. Co.* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc); cf. *Babbitt v. Ow Jing* (2007) 72 Cal.Comp.Cases 70 (Appeals Board en banc).)

Nevertheless, when a provider treats an industrially injured worker and takes certain actions such as submitting reports and billing statements to the employers' insurance carrier, accepting payment from that carrier and/or seeking to obtain payment by filing a lien claim, the WCAB obtains exclusive jurisdiction over the payment dispute. (Lab. Code, §§ 5304(a), (e) and (f); *Perrillo v. Picco & Presley* (2007) 157 Cal.App.4th 914 [exclusive remedy doctrine precluded payment in civil suit for medical-legal services that were compensable through the workers' compensation system and agreement to the contrary was void and unenforceable] (*Perrillo*); *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800 [65 Cal.Comp.Cases 1402] (*Vacanti)*; *Bell v. Samaritan Medical Clinic, Inc.* (1976) 60 Cal.App.3d 486 [41 Cal.Comp.Cases 415] [provider may not sue to recover fees for services rendered to an injured employee] (*Bell*); *Workmen's Comp. Appeals Bd. v. Small Claims Court* (*Early-Winston-Drake*) (1973) 35 Cal.App.3d 643 [physician may not sue to recover fees for testimony at a WCAB hearing]; cf. Lab. Code, §§ 5300 and 5304; *Tomlinson* v. *Superior Court* (1944) 66 Cal.App.2d 640 [9 Cal.Comp.Cases 316].)[2]

/ / /

[2] Section 5300 provides in pertinent part as follows: "All the following proceedings shall be instituted before the appeals board and not elsewhere...(a) For the recovery of compensation, or concerning any right or liability arising out of or incidental thereto....(e) For obtaining any order which by Division 4 the appeals board is authorized to make. (f) For the determination of any other matter, jurisdiction over which is vested by Division 4..."

Section 5304 provides in full as follows: "The appeals board has jurisdiction over any controversy relating to or arising out of Sections 4600 to 4605 inclusive, unless an express agreement fixing the amounts to be paid for medical, surgical or hospital treatment as such treatment is described in those sections has been made between the persons or institutions rendering such treatment and the employer or insurer."

Regardless of whether a lien claim is filed, the injured worker is only liable for medical treatment of an industrial injury that he or she intended to self-procure at his or her own expense pursuant to section 4605. This point was addressed by the Court in *Bell, supra*, as follows:

> "[S]ection [4605] simply recognizes that any injured employee is free to seek medical treatment and/or consultation in addition to, or independent of, that for which his employer is responsible. In such case, the employee is personally responsible for that expense; and it is a matter which is not within the jurisdiction of the Board.
>
> "When, however, a physician undertakes to treat an industrially injured patient and the employer accepts liability under section 4600, the exclusive jurisdiction of the Board attaches with respect to *any* controversy relating to the amounts to be paid for the services rendered by the physician." (Citation deleted, emphasis in original.)

If applicant intentionally self-procured medical treatment pursuant to section 4605 he would be personally liable under that section for the cost of the treatment, and the Appeals Board would have no jurisdiction to determine its reasonable value or to hold defendant liable for it as part of the applicant's workers' compensation. (*Johnson, supra*; *Bell, supra*; *Perrillo, supra.*)

However, in this case there is no evidence that applicant intended to self-procure medical treatment from any lien claimants *at his own expense* pursuant to section 4605 following his move to Southern California, and lien claims for medical treatment of an industrial injury that would be a workers' compensation liability of the employer are subject to the exclusive jurisdiction of the WCAB. (*Johnson, supra; Bell, supra; Perrillo, supra*; *Vacanti, supra*; cf. *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal.3d 148 [52 Cal.Comp.Cases 27] [action is barred by the exclusiveness clause regardless of its name or technical form if the usual conditions of coverage are satisfied]; *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744 [57 Cal.Comp.Cases 355] [liability of employer for industrial injury is limited to workers' compensation remedies].)

///

///

///

///

///

Accordingly, we rescind the WCJ's finding that applicant self-procured services for medical treatment at his own expense from all lien claimants who are not in defendant's MPN pursuant to section 4605. In all other respects, the WCJ's October 23, 2012 decision is affirmed for the reasons set forth in his Report.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board that that the October 23, 2012 Findings And Award of the workers' compensation administrative law judge is **AFFIRMED**, except that Finding of Fact (7) is **RESCINDED** and the following is **SUBSTITUTED** in its place:

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

FINDINGS OF FACT

****

(7) The applicant, designating Dr. Khalid Ahmed as his non-MPN PTP, obtained medical treatment outside the defendant's MPN. There is good cause to deny the defendant's motion to strike from evidence the reports of Dr. Khalid Ahmed (Applicant's Exs. 4-16, 25), Dr. Murray Grossan (Applicant's Ex. 3), Dr. Norman Reichwald (Applicant's Ex. 17), Dr. Khalid Nur (Applicant's Ex. 18), Dr. Jeffrey A. Smith (Applicant's Ex/ 19), Dr. Stephanie Su Huang (Applicant's Ex. 20), Dr. Noel D. Goldthwaite (Applicant's Ex. 21), Dr. Sean Johnston (Applicant's Exs. 22-24), as reports from physicians outside the employer's medical provider network (MPN).

****

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

MARGUERITE SWEENEY

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 13 2013

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

JFS/abs

SERVICE LIST

CRISPIN MENDEZ-CORREA
DORDULIAN LAW GROUP
CHERNOW AND LIEB
1ST MEDICAL SUPPLY INC.
ABC INTERNATIONAL
ABCDE TRANSPORTATIN LLC
ACCURATE MEDICAL. ASSESSMENT RATING CTR.
ANIL K. MODI M.D., INC.
APEX PAIN MANAGEMENT
ASSOCIATED LIEN
AV MANAGEMENT COLLECTION
CALIFORNIA IMAGING
CALIFORNIA SPORTS AND REHAB
COMPLETE CLAIMS
COMPREHENSIVE OUTPATIENT SURG CTR.
DELTA MEDICAL SERVICES
ESSENTIAL DIAGNOSTICS
FIRST CHOICE MED. INTERPRETING
GEMMA T.H. KO, M.D., INC.
IMPRESSIVE DIAGNOSTICS
INDUSTRIAL HEALTHCARE
INNOVATIVE MEDICAL MGT.
INTEGRATED SOLUTIONS
JAMES FALLMAN LTD.
JR INTERPRETING SERVICES
KHALID AHMED
KYLE ALEXIS
LILIA RAMIREZ
LR BILLING SERVICES
MAJJIDA AHMED
MATRIX DOCUMENTS IMAGING
MED LEGAL PHOTOCOPY SVCS.
MEDICAL LIEN MANAGEMENT
MGM LIEN SERVICE
NATIONWIDE MED BILL
OMEGA DME LLC
ORTHOPEDIC SPORTS AND SPINE MED. GRP.
PAIN MANAGEMENT CARE
PHYSICAL REHABILITATION SVCS.
PRECISION INTERPRETING, LLC
RONCO DRUGS
EMPLOYMENT DEVELOPMENT DEPT.
SUPERIOR MED SURGICAL, INC.
TECHNICAL SURGERY SUPPORT, INC.
TONY BARRIERE
UNIVERSAL PSYCHIATRIC
UNIVERSAL PSYCHIATRIC MEDICAL CTR.

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRISPIN MENDEZ-CORREA, *Applicant,* **vs.** **VEVODA DAIRY; ZENITH INSURANCE COMPANY,** *Defendants.*	**Case No. ADJ6588140** **(Van Nuys District Office)** **OPINION AND ORDER GRANTING RECONSIDERATION**

Reconsideration has been sought by applicant, with regard to a decision filed on October 23, 2012.

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**.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case(s), 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 the Van Nuys District Office or any other district office of the WCAB and shall *not* be e-filed in the Electronic Adjudication Management System.

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

FRANK M. BRASS
CONCURRING, BUT NOT SIGNING

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
JAN 14 2013

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

abs

SERVICE LIST

1ST MEDICAL SUPPLY INC.
ABC INTERNATIONAL
ABCDE TRANSPORTATION LLC
ACCURATE MEDICAL ASSESSMENT RATING CTR.
ANIL K MODI MD INC.
APEX PAIN MANAGMENT
ASSOCIATED LIEN
AV MANAGEMENT COLLECTION
CALIFORNIA IMAGING
CALIFORNIA SPORTS AND REHAB
CHERNOW & LIEB
COMPLETE CLAIMS
COMPREHENSIVE OUTPATIENT SURG CTR
CRISPIN MENDEZ CORREA
DORDULIAN LAW
ESSENTIAL DIAGNOSTICS
FIRST CHOICE MEDICAL INTERPRETING
GEMMA TH KO MD INC.
IMPRESSIVE DIAGNOSTICS
INDUSTRIAL HEALTHCARE
INNOVATIVE MEDICAL MANAGEMENT
INTEGRATED SOLUTIONS
JAMES FALLMAN LTD
JR INTERPRETING SERVICES
KHALID AHMED
KYLE ALEXIS
LILIA RAMIREZ
LR BILLING SERVICES
MAJJIDA AHMED
MATRIX DOCUMENTS IMAGING
MED LEGAL PHOTOCOPY SERVICES
MEDICAL LIEN MGT.
MGM LIEN SERVICE
NATIONWIDE MED BILL
OMEGA DME LLC
ORTHOPEDIC SPORTS AND SPINE MEDICAL GROUP
PAIN MANAGEMENT CARE
PHYSICAL REHABILITATION SERVICES
PRECISION INTERPRETING LLC
RONCO DRUGS
EMPLOYMENT DEVELOPMENT DEPARTMENT

SUPERIOR MED SURGICAL INC. (2)
TECHNICAL SURGERY SUPPORT INC.
TONY BARRIERE
UNIVERSAL PSYCHIATRIC
UNIVERSAL PSYCHIATRIC MEDICAL CENTER

CASE NO. ADJ 6588140

CRISPIN MENDEZ CORREA	v.	VEVODA DAIRY; ZENITH INSURANCE
DATE OF INJURY:		JULY 31, 2008
WORKERS' COMPENSATION JUDGE:		RALPH ZAMUDIO
DATE:		DECEMBER 21, 2012

REPORT OF WORKERS' COMPENSATION JUDGE
ON PETITION FOR RECONSIDERATION

INTRODUCTION

Applicant, Crispin Mendez Correa, born 3/27/1974, while employed on July 31, 2008, as a cow milker/calf feeder, occupational group number 491, at Ferndale, California by Vevoda Dairy, then insured for workers' compensation by Zenith Insurance, sustained injury arising out of and in the course of employment to the nose and lumbar spine, and claims to have sustained injury arising out of and in the course of employment to the ear, hearing loss, left leg, left foot, right knee and right foot.

The applicant timely filed a verified petition for reconsideration on 11/14/2012 of the Findings and Award served on 10/23/2012, wherein among other things, it was found the defendant had a valid MPN requiring the applicant treat within the MPN at the employer's expense, that the applicant's PTP within the defendant's MPN is Dr. Paul Windham, and that the applicant, in designating Dr. Khalid Ahmed as his non-MPN PTP, obtained self-procured medical treatment outside defendant's MPN at his own expense under Labor Code section 4605.

The applicant asserts that by the order, decision or award, the board acted without or in excess of its powers, the evidence does not support the findings of fact, and the findings of fact do not support the order, decision or award.

By his petition for reconsideration, the applicant contends the defendant, bearing the burden of proof, presented no evidence it had a properly established MPN, presented no evidence it complied with the MPN notice requirements of Labor Code sections 3550 and 3551 or 8 Cal. Reg. § 9767.12, and presented no evidence the applicant was ever provided the report of Dr. Windham, thereby entitling the applicant to reasonably self-procured treatment outside the MPN at the employer's expense. The applicant further contends the undersigned WCJ's decision fails to comply with Labor Code section 5313 because it contains "little to no discussion [of the applicant's self-procured medical treatment reports] and summarily indicates that the medical reports relied upon by the defense were 'better reasoned and more persuasive' without providing the basis for that conclusion as required by Labor Code section 5313." [Petition for Reconsideration dated 11/13/2012 at pages 3:21-4:12.]

Contrary to WCAB Rule 10842, requiring the applicant separately state and clearly set forth each contention and fairly state all of the material evidence relative to the point or point at issue, it appears the applicant also disputes the findings and decision made as to TD [which found the injury caused TD from 8/3/2008 to 9/4/2009] because at the conclusion of the petition for reconsideration he makes brief reference to TD stating therein, "In light of the fact that the defense completely failed to meet their burden of proof with regard to proving notice and posting requirements as mandated by Labor Code section 3550 and 3551, this court must find that the Applicant appropriately self-procured and is entitled to TD pursuant to her self-procured doctor's

report." [Petition for Reconsideration dated 11/13/2012 at page 15:1-5; see also, Petition for Reconsideration at page 13:15-17.] The petition for reconsideration fails to separately and clearly set forth applicant's contention as to TD and fails to fairly state all of the material evidence relative to the issue of TD. As such, it is subject to dismissal. (It appears the applicant does not seek reconsideration of the findings made as to other disputed issues adjudicated by the Findings and Award of 10/22/2012, i.e., parts-of-body injured, PD, apportionment, and attorney fees as there is no specific contention raised or reference made thereto by the petition for reconsideration.)

The defendant filed an answer to the petition for reconsideration disputing each of applicant's contentions.

FACTS

The applicant, while employed on July 31, 2008, as a cow milker/calf feeder, at Ferndale, California by Vevoda Dairy, then insured for workers' compensation by Zenith Insurance, sustained an admitted industrial injury to the nose and lumbar spine, and claims to have sustained injury arising out of and in the course of employment to the ear, hearing loss, left leg, left foot, right knee and right foot. He was referred by the employer for medical treatment, and the applicant received emergency room medical treatment for the nose injury, and saw specialists, and then was followed by the MPN primary treating physician, Dr. Paul Windham, for medical treatment. He was ultimately seen by a PQME while in pro per. He later moved to southern California and was referred by his current attorney of record to treating physicians outside the defendant's MPN.

At trial, the applicant testified that approximately 15 minutes after having been kicked by the cow he reported the injury to the owner's son, telling him he had been

kicked by the cow and was in a lot of pain. The employer instructed him to continue working and they would see how he felt later. When asked by the owner's son if he needed to go to a doctor, the applicant replied yes and was taken to the emergency room where he was seen on about four occasions. The applicant also testified he was eventually told he needed to be seen by a specialist, and he saw Dr. John Biteman and Dr. Paul Windham. He testified he did not improve with the treatment received from Dr. Windham. He testified he remained symptomatic with respect to the nose and sinuses, and his right eye fracture, and had complaints to the neck, back, right arm, and a few months after the injury developed complaints to the right shoulder, right knee and ankle. When he attempted to return to work, he was told by the employer there was no modified work. Applicant testified he self-procured evaluations with ENT physicians, Dr. Stephanie Huang in Santa Rosa, and another specialist [Dr. Goldthwaite] near San Francisco. The applicant testified he later retained an attorney in Los Angeles who selected Dr. Khalid Ahmed as his PTP, who recommended back and shoulder surgery and who referred him to other specialists, and he denied being informed by the employer it had an MPN for its injured workers. [MOH/SOE dated 11/7/2011 at pages 6:14-7:21.]

On cross-examination, the applicant admitted there was a poster at the employer's work place providing information to the workers, but he did not read the poster. He testified he did not know whether or not he received a package of materials from Zenith Insurance, including a pamphlet about an MPN. He denied any knowledge Zenith Insurance had an MPN when he began treating in Southern California. Applicant admitted no one at the employer denied him medical treatment. [MOH/SOE dated 11/7/2011 at page 8:11-16; 9:10-11.] He also testified on cross-examination that

when he attempted to return to work while in pro per he was asked if he had recovered and he informed his employer he was still having problems, and the employer told him they had no work for him (meaning no modified work) and that the employer suggested he return to Dr. Windham. The applicant testified that he did return to Dr. Windham who continued to treat the applicant. [MOH/SOE dated 1/30/2012 at page 3:17-22.] On cross-examination, he also testified he could not recall when it was he first sought to change treating physicians, but remembered it was later when he sought to move to southern California. He obtained the second opinion consultations from Drs. Huang and Goldthwaite while in northern California because he was not in agreement with what Dr. Windham was indicating. He denied that while in southern California he received notice from Zenith Insurance it had a list of southern California doctors from which he could select. He affirmed at trial he has not attempted to treat with a MPN physician while in southern California, and denied having been sent a letter informing him about Continuity of Care and changing physicians and the process of transferring into a MPN. [MOH/SOE dated 1/30/2012 at pages 4:9-17; 5:6-10.] At a subsequent hearing held on 7/23/2012, the applicant made an offer-of-proof that if called to testify he would state he had no understanding he would be liable for self-procured treatment. [MOH dated 7/23/2012 at page 3:17-24.]

Trial in this matter initially commenced on 8/22/2011, and additional hearings were held on 11/7/2011 and 1/30/2012. Thereafter, a Findings and Award & Order issued in the on 4/30/2012, awarding the applicant, among other things, permanent disability of 7%, without apportionment, relying upon *Valdez v. Warehouse Demo Services* (2011) 76 Cal. Comp. Cases 970 (en banc), the undersigned trial WCJ having excluded from evidence multiple medical reports of the self-procured treating physicians outside

the defendant's MPN, i.e., the claimed PTP and claimed secondary/consulting treating physician and diagnostic testing reports of Dr. Khalid Ahmed (Applicant's Exhibits 4-16, 25), Dr. Murray Grossan (Applicant's Exhibit 3), Dr. Norman Reichwald (Applicant's Exhibit 17), Dr. Khalid Nur (Applicant's Exhibit 18), Dr. Jeffrey A. Smith (Applicant's Exhibit 19), Dr. Stephanie Su Huang (Applicant's Exhibit 20), Dr. Noel D. Goldthwaite (Applicant's Exhibit 21), Dr. Sean Johnston (Applicant's Exhibits 22-24). The applicant timely filed a petition for reconsideration, asserting, among other things, error in the findings made the defendant had a valid MPN requiring the applicant treat within the MPN, and by implication error in the exclusion from evidence the multiple reports of the non MPN self-procured treating physician. Accordingly, an Order Rescinding Findings and Award & Order issued on 6/1/2012 setting the matter for further hearing on 7/23/2012 in light of the subsequent appellate court decision in *Valdez v. Workers' Comp. Appeals Bd.* (2012) 207 Cal.App.4th 1 [77 Cal. Comp. Cases 506] (annulling the en banc decision and holding the rule of exclusion laid down by L.C. § 4616.4 applies only when there has been an IMR performed under L.C. § 4614.4), and the Court in *Valdez* having further indicated *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041 [65 Cal. Comp. Cases 477] does not create a rule of exclusion.

At the hearing held on 7/23/2012, the applicant's medical reports previously excluded were now received in evidence [Applicant's Exhibit 3; Applicant's Exhibits 4-16; Applicant's Exhibits 17-24; Applicant's Exhibit 25][1] and additional lien claimants of

[1] Although the Court of Appeal issued its decision in *Valdez, supra,* annulling the board's en banc decision and holding the rule of exclusion laid down by L.C. § 4616.4 applies only when there has been an IMR performed under L.C. § 4614.4, the California Supreme Court, on 10/10/2012, unanimously voted to grant the petition for review of

record were identified, and the applicant, addressing the question as to liability for self-procured treatment outside defendant's MPN, if one is established to limit defendant's liability for treatment only within the MPN, made an offer-of-proof as set forth at pages 3:17-4:5 of the Minutes of Hearing, that if called to testify he would state he had no understanding that he would be liable for self-procured treatment, and the applicant's attorney argued that such self-procured treatment liens cannot attach against any indemnity due.

Having again reviewed the entire record, and having considered the above-referenced applicant's self-procured treatment reports of Dr. Khalid Ahmed (Applicant's Exhibits 4-16, 25), Dr. Murray Grossan (Applicant's Exhibit 3), Dr. Norman Reichwald (Applicant's Exhibit 17), Dr. Khalid Nur (Applicant's Exhibit 18), Dr. Jeffrey A. Smith (Applicant's Exhibit 19), Dr. Stephanie Su Huang (Applicant's Exhibit 20), Dr. Noel D. Goldthwaite (Applicant's Exhibit 21), and Dr. Sean Johnston (Applicant's Exhibits 22-24), the undersigned WCJ found, in pertinent part, the defendant had a valid MPN requiring the applicant treat within the MPN at the employer's expense, that the applicant's PTP within the defendant's MPN is Dr. Paul Windham, and that the applicant, in designating Dr. Khalid Ahmed as his non-MPN PTP, obtained self-procured medical treatment outside defendant's MPN at his own expense under Labor Code section 4605.

It is from the above-noted Findings and Award served on 10/23/2012 the applicant now seeks reconsideration.

---

the appellate court's decision. Because of the Supreme Court's grant of review, the Court of Appeal's published opinion is automatically decertified (Cal. Rules of Court, Rule 8.1105(e)(1)); hence there is no citable or binding authority currently on the issues presented in *Valdez*.

DISCUSSION

The applicant contends the decision is erroneous because defendant failed to meet its burden of proof it had a properly established MPN, and that it complied with the MPN notice requirements of Labor Code sections 3550 and 3551 and 8 Cal. Reg. § 9767.12. He argues the defendant failed to comply with Labor Code section 3550 requiring that every employer subject to the compensation provisions of the Labor Code post and keep posted in a conspicuous location frequented by employees, and where notice may be easily read by employees during work hours, a notice stating the name of the employer's current workers' compensation carrier and who is responsible for claims adjustment. The applicant argues the defendant's alleged failure to comply with said statutory requirement permits the applicant to self-procure medical treatment at the employer's expense, citing subsection (e) of Labor Code section 3550 which provides, "Failure of an employer to provide the notice required by this section shall automatically permit the employee to be treated by his or her personal physician with respect to an injury occurring during that failure." Citing *Knight v. United Parcel Service* (2006) 71 Cal. Comp. Cases 1423 (en banc), he argues the defendant carries the burden of proof that it complied with various notice requirements, including whether the injured worker was provided with notice of his rights under the MPN. The applicant contends his trial testimony about recalling having seen posters in the workplace but not reading them is insufficient evidence to meet defendant's burden of proof by preponderance of evidence it complied with the posting of notice requirements under Labor Code section 3550.

The applicant further argues the defendant failed to comply with Labor Code section 3551(a) which requires the employer to provide every new employee at the time

of hire or by the end of the first pay period written notice of the information contained in Labor Code section 3550. He further argues the defendant failed to comply with the MPN notice requirements set forth in 8 Cal. Reg. § 9767.12(a) which provides that the employer or insurer that offers a MPN shall notify every covered employee in writing about use of the MPN prior to implementation of an approved MPN, and that an implementation notice shall be provided to a new employee at the time of hire. The applicant argues the language of the regulation is mandatory and so the employer is required to provide the MPN notice before the industrial injury and at the time of injury, citing *Knight, supra,* and a recent board panel decision in *Zarco v. Alldrin Orchards, Inc.* 2012 Cal. Wrk. Comp. P.D. LEXIS 4 wherein the board found the defendant failed to meet its burden of proof regarding MPN notice requirements at time of implementation, hire, or injury pursuant to Labor Code section 4616.3 and 8 Cal. Code Reg. §§ 9767.6 and 9767.12, its burden of proof regarding notification of how the MPN worked and of continuity of care, and for arranging the initial medical evaluation within one day of the applicant's injury and that it began to provide treatment, and of the applicant's right to change treating physicians within the MPN and of his right to second and third opinions regarding diagnosis and treatment plans, or proof it made a proper attempt to transfer the applicant's care into the MPN pursuant to 8 Cal. Code Reg. § 9767.9.

The applicant argues in the case at bar the defendant provided no proof it gave the applicant any notices at time of hire, or by the end of the first pay period. He argues the only evidence of notice placed in the evidentiary record is the letter to the applicant dated 8/11/2008 (Applicant's Exhibit 1), eleven days after the July 31, 2008 industrial injury, enclosing among other things, the Facts For Injured Workers pamphlet

(Defendant's Exhibit X). The applicant argues the letter and pamphlet fail to satisfy the MPN notice requirements. He further argues there is no evidence linking the remaining notice documents contained in Defendant's Exhibit X, i.e., a DWC-1 Claim Form, and Notice of MPN ["ZMPN Employee Notice (English/Spanish)" and "Continuity of Care Policy (English/Spanish)"] (Defendant's Exhibit X) with the letter of 8/11/2008. He argues the evidence is completely silent as to what documents were contained in the attached pamphlet. He argues the undersigned WCJ erred in failing to give credence to the applicant's testimony denying receipt of any such notices. He argues the defendant failed to provide evidence the applicant was provided a claim form and information about industrial benefits available and the workers' compensation process within one working day of the reported industrial injury. He cites *Carillo Mantacias v. Milk Maid Dairy*, 2012 Cal. Wrk. Comp. P.D. LEXIS 88, a board panel decision, in support of his argument the defendant is not entitled to control the applicant's medical treatment within the MPN because it failed to prove it had a validly established MPN, and failed to prove the applicant was notified in 2009 he could challenge the opinion of Dr. Windham when released from care. He notes the defendant in the case at bar never requested the board take judicial notice of the defendant MPN having been included in the list of approved MPNs on the AD's website, and no such finding was made by the undersigned WCJ. He argues there is no evidence the PTP report of Dr. Windham was served upon the injured worker while he was in pro per, and so he should be allowed to self-procure appropriate medical treatment.

The applicant further contends the undersigned WCJ's decision fails to comply with Labor Code section 5313 because it contains "little to no discussion [of the applicant's self-procured medical treatment reports] and summarily indicates that the

medical reports relied upon by the defense were 'better reasoned and more persuasive' without providing the basis for that conclusion as required by Labor Code section 5313." In skeletal fashion, he further asserts applicant " . . . is entitled to TD pursuant to her self-procured doctor's report" but fails to separately and clearly set forth in the petition his contention as to TD and fails to fairly state all of the material evidence relative to the issue of TD, including upon what report or reports he contends establish entitlement to TD, and the basis thereof, in violation of WCAB Rule 10842.

For the reasons noted by defendant in its answer to the petition for reconsideration, and as explained below, there is no merit to the applicant's petition for reconsideration.

The record shows the employer did post the required notices in the workplace as confirmed by the applicant's trial testimony. That the applicant apparently chose not to read the notices does not result in a breach by the employer of its duty to post. While it is correct there is no evidence submitted the employer provided the MPN notices to the applicant at time of MPN implementation, time of hire or at the time of injury, the defendant did submit credible and convincing evidence it cured any such defect or breach when on the eleventh day following the industrial injury it did serve upon the applicant by mail documentation, including a DWC-1 Claim Form, a Facts for Injured Workers pamphlet, and Notice of MPN ["ZMPN Employee Notice (English/Spanish)" and "Continuity of Care Policy (English/Spanish)"] (Defendant's Exhibit X) providing the required notices as set forth in the proof of service by mail form dated 8/11/2008 wherein the claims assistant, Yvonne Miller, affirms under penalty of perjury service was made upon the applicant at his address in Fortuna, California of, among other things, "Facts about Workers' Compensation" and "ZMPN Employee Notice

(English/Spanish)" and "Continuity of Care Policy (English/Spanish)." In the package sent to the applicant is described the ZMPN Employee Notice, Continuity of Care Policy, Pre-Designation of Personal Physician, and Medical Authorization Form in English and Spanish wherein his MPN rights are explained, including procedures within the MPN and how to change treating physicians within the MPN, obtaining a Second or Third Opinion within the MPN, and IMR. The applicant's testimony denying receipt of said package and MPN notification was not found credible by the undersigned trier of fact.

The evidence further shows the employer and its insurer at all times provided the applicant with reasonable medical treatment following the industrial injury by referring the applicant to emergency room physicians, then to ENT consulting treating physician, Dr. Biteman, and to the orthopedic primary treating physician, Dr. Windham, and ultimately to Dr. Eyster, the PQME, as the in pro per applicant apparently chose to dispute the findings made by the MPN PTP, Dr. Windham. There was never a neglect or refusal to provide reasonable medical treatment by the employer. In fact, when the applicant later relocated to southern California and retained his current attorney of record and in February of 2010 designated a non-MPN physician (Dr. Ahmed) as his treating doctor, the defendant did object to the non-MPN treating physician on 3/16/2010 and offered the applicant medical treatment through the ZMPN by providing applicant's counsel with a regional area listing, a 1-800 phone number he could utilize to speak with a Zenith customer service representative about selecting an appropriate provider, and informed the attorney he could check Zenith's website (Defendant's Exhibit W). Again, at no time did the defendant neglect or fail to provide the applicant medical treatment through its MPN.

The applicant's contentions that the defendant's earlier failure to give notice of the MPN permits the applicant to treat with Dr. Ahmed as his primary treating physician at the employer's expense is not supported by the record as there was never any neglect or refusal of medical treatment by defendant. As explained by the appeals board en banc in *Knight, supra,* at 71 CCC 1423, 1424:

> "We hold 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." (Emphasis added).

Here, there was no neglect or refusal to provide medical treatment by defendant. It is the applicant and his attorney who elected to knowingly treat outside the MPN. (See, *Chavez v. T.D. Hayes Communications,* 2012 Cal. Wrk. Comp. P.D. LEXIS 403; *Jakes v. State of California,* 2010 Cal. Wrk. Comp. P.D. LEXIS 293; *Santamaria v. Romberg's Landscaping and Tree Service,* 2009 Cal. Wrk. Comp. P.D. LEXIS 604.)

Insofar as the applicant contends the defendant failed to prove it had a validly authorized MPN, there is no merit to the contention. As noted by the defendant in its answer to the petition for reconsideration, the applicant did not clearly raise the issue of whether the employer had a validly authorized MPN at trial. Had the applicant done so, the defendant would have requested this board take judicial notice of the DWC's website indicating Zenith Insurance Company's MPN was approved on 12/31/2004. The Minutes of Hearing dated 8/22/2011 outlining the disputed facts and issues, at page 4:3-8, references the issue of primary treating physician and whether the applicant's right to designate a PTP is subject to an employer's MPN. It was not specifically framed in terms of whether or not there was a validly approved MPN. To

the extent the applicant for the first time on reconsideration makes the specific assertion there was no validly approved MPN at the time of injury, due process requires this board take judicial notice of the DWC website:

(www.dir.ca.gov/dwc/mpn/ListApprovedMPN.pdf)

The DWC website, at MPN Log No. 0024, confirms Zenith Insurance Company did have an approved MPN, named Zenith Medical Provider Network (ZMPN), approved on 12/30/2004.

Insofar as the applicant contends the Opinion on Decision fails to comply with Labor Code section 5313, there is equally no merit to the contention as the opinion does detail the evidence considered that supports the findings made. While it is correct there is no detailed discussion of the contrary medical opinion expressed by the non-MPN physician, Dr. Ahmed, it does not mean the undersigned WCJ did not consider his contrary medical opinion concerning the nature and extent of the applicant's injury and disability. Interestingly, the applicant on reconsideration also fails to discuss the report or reports of Dr. Ahmed, with any specificity, and fails to state all the material evidence relative to the point he seeks to assert with respect to the opinion of Dr. Ahmed contrary to WCAB Rule 10842. The undersigned did consider his reports, and found his opinions not persuasive or convincing, and lacking. For example, Dr. Ahmed, in his permanent and stationary report dated 7/6/2011 (Applicant's Exhibit 25) reports the applicant was struck in the face by the cow and ". . . immediately fell backward losing consciousness." There is testimony or evidence in the record of the applicant having lost consciousness immediately or any time after being struck by the cow. In fact, the contemporaneous medical record documents the contrary occurred. He did not lose consciousness. The applicant suffered a nasal facture and lumbar sprain injury. He

received appropriate and reasonable medical treatment for the injury by the emergency room and MPN primary and consulting physicians. The opinions of Dr. Windham and the PQME are substantial evidence to support the findings made as further explained below.

The applicant while milking a cow on the morning of July 31, 2008 was kicked in the nose by the cow and fell backwards. He was provided emergency medical treatment at Redwood Memorial Hospital and seen by Dr. Glenn Siegfried on 7/31/2008. The physician diagnosed "acute nasal contusion and abrasion - cannot rule out nasal fracture." His chief complaint was the nasal injury. He complained of a very mild headache. He had no other complaints. He was treated and discharged in stable condition, and was advised to follow up with a physician of choice in seven days for recheck if his nose did not improve and to return to the emergency department sooner if his condition changed or worsened in any way.

The applicant was seen on 8/3/2008 by Dr. Clayton Overton at Redwood Memorial Hospital for bloody nose complaint. The doctor noted he had been kicked in the nose two days previously by a cow. The doctor noted he had a significant amount of epistaxis at that time which spontaneously resolved. He noted that on the morning of 8/3/2008 the applicant blew his nose and began bleeding out of the right nostril and the bleeding had not stopped. The applicant denied losing consciousness when kicked in the face by the cow. The doctor noted he still had nose and face discomfort from the kick, "but does not have pain anywhere else." He had no other problems or complaints. An x-ray of the nasal bone was done showing he did have a nasal bone fracture. The applicant was treated, and Rhino Rocket nasal tampons were placed within the anterior aspect of both nostrils. The bleeding stopped with the treatment. The doctor noted he

would have the applicant follow up with Dr. John Biteman, an otolaryngologist in Humbolt County in two days for re-evaluation. The applicant was given a prescription for penicillin and Vicodin. He was "given a work note for the next two days." He was asked to return to the emergency room in 48 hours to have the nasal packing removed.

The applicant was seen on 8/5/2008 by Dr. John E. Tveten at Redwood Memorial Hospital who removed the nasal packing. The doctor noted he should be evaluated by an ENT, and he gave the applicant Dr. Biteman's phone number, and offered to assist the applicant in contacting Dr. Biteman should he have any difficulty in doing so. The applicant was discharged in stable condition.

The applicant returned to Dr. Siegfried on 8/8/2008 with chief complaint of back pain. The doctor noted applicant's history of injury, and that he had undergone a nasal bone x-ray indicating a fracture. He had some nasal bleeding and nasal packing was placed on 8/3/2008, subsequently removed. His chief complaint was back pain. A lumbar x-ray was done showing no obvious acute fracture, and a possible abnormality at L5-S1 junction. The physician diagnosed "acute low back pain, possibly secondary to musculoskeletal strain." The physician recommended ibuprofen for pain, and discharged the applicant in stable condition. He recommended follow up with a physician of choice in three to four days for recheck as needed or return to the emergency department sooner if his condition changed or worsened in any way.

The employer through its insurer notified the applicant (who was then in pro per) of its acceptance of the industrial injury by letter on 8/11/2008 (Applicant's Exhibit 1), and served him by mail with various documents, including a DWC-1 Claim Form, a Facts for Injured Workers pamphlet, and Notice of MPN ["ZMPN Employee Notice

(English/Spanish)" and "Continuity of Care Policy (English/Spanish)"] (Defendant's Exhibit X).

The applicant was seen on 8/11/2008 by Dr. Victor Wallenkampf at Redwood Memorial Hospital with chief compliant of low back pain. The doctor noted the applicant had been seen several days previously for low back pain and that he returned because the pain had not improved. The doctor noted the pain was just over the S1 joint area and did not radiate. He had no bowel or bladder dysfunction. He denied any new trauma and had no dysesthesias to the legs. The doctor noted, "However, he works milking cows and he has to lift up to 5 gallon pails of milk and it is hard for him to bend over and to pick them up. Hence, he comes back today." Dr. Wallenkampf diagnosed low back pain, undifferentiated and possible degenerative disc disease. His physical exam was normal and x-rays done previously showed no bony abnormalities. He noted the applicant was taking ibuprofen. The doctor further noted, "At this point, I wrote a note for him to go back to work but to do no bending and to not lift over 5 pounds for the next seven days." He prescribed ibuprofen and indicated the applicant could follow up with his doctor.

The applicant was seen on 8/14/2008 by Dr. Paul C. Windham at St. Joseph's Hospital Eureka. He took a history of the injury and examined the applicant. He noted the applicant had been kicked in the face while milking a cow on 7/31/2008 and sustained a nasal fracture. He noted the applicant had been treated for the injury by physicians at Redwood Memorial Hospital, and subsequently developed low back pain complaints and was evaluated by the doctors at Redwood Memorial. He noted x-rays taken during those visits showed straightening of the lumbar spine consistent with spasm, but no fractures. Dr. Windham further reported, "The patient finally was

referred here for care. He reports that his back is bothering him more than his nose. He rates his back pain at 4 to 5 out of 10 and his nasal pain at 1 to 2 out of 10." He noted the applicant had no sciatica. "The pain is primarily across the right posterior iliac crest from the midline towards the posterior axillary line." He diagnosed nasal fracture and lumbar strain. Under his treatment plan, Dr. Windham noted, "With respect to his back, I have released him to modified duty with no crouching, heavy lifting or repeated bending or stooping. I have given him Motrin 600 mg #60 to take up to 4 a day for pain. I am requesting physical therapy twice a week for 3 weeks at Eureka Physical Therapy in Fortuna. I will see the patient back next week to see how all of this is going for him."

The applicant was seen on 8/21/2008 by Dr. Windham at St. Joseph's Hospital Eureka for follow up. He noted the physical therapy had now been authorized. The applicant had not heard from the physical therapy department in Fortuna. The doctor noted, "He reports he is off work, as his employer will not accommodate his restrictions." Under his treatment plan, Dr. Windham noted, "I have advanced the patient's duty status. His only restriction now is no lifting, pushing, pulling or carrying more than 40 pounds. He may increase his Motrin up to 4 a day for pain and I have given him the phone number for the physical therapy department to arrange his PT." The doctor would see the applicant in two weeks.

The applicant was seen on 8/29/2008 by Dr. John Biteman in Arcata for ENT consultation. With respect to the nasal injury, the doctor noted, "Currently his symptoms are only an awareness that if he occludes either side of his nose and blows hard that there is a movement in the medial canthal area of his left eye, indicating a small crack in the ethmoid or lacrimal bone that allows the pressure of the air in his nose to push through the crack and move the skin. It is not affecting his vision or

tearing, and it has not produced any infection." He diagnosed "nondisplaced fracture of left ethmoid," and "nasal injury with nondisplaced fractures," and "septal deviation, which may be old or new but is not severely enough displaced to warrant any treatment, and it is not symptomatic." He explained to applicant the cause of the soft tissue movement with blowing air and told him it could be permanent. He noted at this juncture there would be no treatment. He opined, "I believe this is a stationary and non-ratable situation and does not prevent him from returning to his normal work on the dairy ranch." The doctor noted the applicant had not been back to work because his back was still bothering him.

The applicant was seen on 9/4/2008 by Dr. Windham at St. Joseph's Hospital Eureka. He noted the applicant had been released to modified duty but it had not been made available to him. He still had some tenderness but no pain in the nose, and reported continued 5/10 back pain. Under his treatment plan, the doctor noted, "I have advanced the patient for a trial of full duty status. He will continue with his physical therapy, (his second visit is this afternoon). I will see him back in 5 days to see how his is tolerating full duty but would like to keep him at that status since the intensity of the complaints still do not correlate with objective findings and positive Waddell's signs are noted."

The applicant was seen on 9/9/2008 by Dr. Windham. The doctor noted, "Unfortunately, he reports that his employer does not want him to work until he is pain-free so he has not yet been back to work even though he was released to full duty status." He noted there was no improvement whatsoever despite 2 physical therapy visits. The applicant reported increased pain during and after physical therapy. Under his treatment plan, Dr. Windham noted, "The patient will continue at full duty status

since his examination is benign. He will continue with his Motrin and physical therapy and we will see him back here in 2 weeks. Further physical therapy may be indicated. Alternatively, we might try sending him to Dr. Fogg in Fortuna where he resides; however, in the presence of positive Waddell sign, prolonged and incomplete recovery is anticipated. I would very much like to see this gentleman returned to work, as I believe that would certainly speed his recovery."

The applicant was seen on 10/13/2008 by Dr. Windham. He noted the ENT consult, Dr. Biteman, and concurred there is no treatment for the nasal fracture. Concerning the low back, Dr. Windham noted, "The patient has now been through his physical therapy and was very reactive there. His examination has been relatively benign, so he was released to full duty status in early September. The patient has still not been back to work since his date of injury. He is still complaining of 8/10 back pain now with radiation down both posterior thighs to the knees." He diagnosed back pain with sciatica and nasal fracture. Under his treatment plan, Dr. Windham noted, "The patient simply does not believe that he can return to work in any capacity but I have released him now to modified duty with simply no heavy work and no heavy lifting. I do not believe he will return to work even with restrictions as he has not returned to work with the previous work restrictions. He will continue with his ibuprofen. I have encouraged him to do his home exercise program, but he reports that is too painful and he has not been doing that either. At least today he passes axial load testing for the first time. Because of his persistent complaints of pain in the posterior thighs, I have requested an MRI of the lumbosacral spine." He noted he would see the applicant in two weeks. If the MRI did not show a surgical lesion, Dr. Windham felt the applicant

will have reached "his point of maximum medical improvement." He observed the "intensity of the complaints does not correlate with the objective findings."

The applicant was seen on 10/25/2008 by Dr. Donald Wheeler at Saint Joseph Hospital Diagnostic Imaging Services for a MRI lumbar spine without contrast. The doctor's impression was "Minor right-sided disc bulge at L5-S1 of doubtful clinical significance."

The applicant was seen on 10/30/2008 by Dr. Windham. He noted the history of applicant's injury and medical care and evaluation received. He noted the applicant had not returned to the work site since his injury, and the applicant reported continued 8/10 pain in the back, continued nasal congestion and continued sciatica down both posterior thighs to the knees. He again performed a physical exam. He reviewed the MRI studies noting they were essentially normal. "There is a 2-mm right sided disk bulge at L5-S1 that the radiologist reviews as, 'doubtful clinical significance.' The neuroforamin are widely patent. There is no central stenosis or disk herniation." He diagnosed chronic low back pain with sciatica and nasal fracture. Under his treatment plan, Dr. Windham opined, "I believe the patient has reached his point of maximum medical improvement as of today and is suitable for a permanent impairment rating. He is permanently precluded from heavy work, very heavy lifting and repeated bending or stooping. He will continue with his Motrin. I have encouraged him to continue with his home exercise program and remain as active as possible. I will see him back in a month to guide him through the QME process."

The applicant was seen on 11/24/2008 by Dr. Windham. He noted the applicant had reached MMI on 10/30/2008 and was suitable for QME but had not yet heard anything from the insurance company about a QME by another physician. His

complaints were unchanged. His diagnosis was the same. The P&S work restriction was the same. He noted the applicant would continue with Motrin as needed for pain, and he encouraged the applicant to continue with his home exercise program. He noted he would see the applicant again in one month. He further noted, "*Thereafter, I anticipate releasing him from care with followup as needed.*" [Emphasis added.]

The claims administrator sent the applicant a notice dated 12/2/2008 advising him the defendant would not pay TD because he had reached maximum medical improvement having been declared P&S by Dr. Windham on 10/30/2008 indicating his restrictions were now permanent and his employer was unable to offer the applicant permanent modified duties. (Defendant's Exhibit Y).

The applicant was seen on 12/22/2008 by Dr. Windham. He noted the applicant finally had a QME scheduled for 1/15/2009 with "Dr. Edwards" [Dr. Edward Fletcher Eyster] in Willits. He noted the applicant self-procured an evaluation with "a Dr. Goldthwaite in Daly City" who apparently recommended lumbar epidural steroid injection, and likewise saw an ENT in Santa Rosa who suggested possible surgery. Dr. Windham opined, "I believe this is contraindicated." Under his treatment plan, Dr. Windham opined, "As above, the patient has long since reached his point of maximum medical improvement. I have given him Motrin 600 mg, #60 with five refills to take as needed for pain and encouraged him to continue with his home exercises, his current work restrictions are simply no heavy work and no heavy lifting, but the patient remains unemployed. I scheduled him for followup in two months and I hope to review his permanent impairment evaluation at that time. Lumbar epidural steroid injections may be of some benefit to him, but given his positive Waddell's signs, I doubt that any treatment modality will be of much benefit for him."

The applicant was seen on 1/15/2009 for Panel Qualified Medical Evaluation by Dr. Edward Fletcher Eyster, a neurosurgeon, in Willits, California. The PQME examined the applicant, took a history of injury, and reviewed medical reports, records and diagnostic testing. He diagnosed chronic lumbar strain, degenerative lumbar disc disease and nondisplaced nasal fractures. At page 4 of his report dated 1/15/2009, the PQME explained as follows:

> "This is a 34-year old Spanish speaking male with no preceding history of any significance. He received a blow to the face from a kick from a cow on July 31, 2008. He was thrown backwards. He has had chronic back pain as well as face pain since that time. ENT has found him permanent and stationary without any need for disability related to his ENT injuries. The patient continues to have chronic back pain. He has been unresponsive to conservative care. He has no evidence of any neurologic deficit. He has no radicular component. He has no instability and Dr. Windham is correct that further invasive procedures are not indicated. The patient is permanent and stationary and can be rated." (Defendant's Exhibit R).

The PQME at page 5 of his report dated 1/15/2009 opined the applicant would qualify under Chapter 15, AMA Guidelines, DRE 2 with 5% whole body impairment. He noted under the old guidelines, the applicant would have restrictions for very heavy lifting. He opined there is no apportionment. As far as need for future medical, the PQME further noted as follows:

> "Future medical care is supportive physical therapy for flares as consistent with ACOEM and ODG Guidelines, anti-inflammatories and muscle relaxants for flares. There is no need for invasive procedures. The patient is not a surgical candidate. Further spinal evaluation is not indicated."

On or about 1/15/2009, the applicant retained an attorney, James Fallman, LTD, and filed an Application for Adjudication of Claim received on 1/20/2009.

The applicant was seen on 2/13/2009 by Dr. Windham for recheck. He noted the applicant underwent the PQME on 1/15/2009, but the PTP did not receive a copy of the PQME's report. The applicant continued to complain of back pain. Dr. Windham noted, as follows:

> "He is now also complaining of upper back pain and for the past two weeks he has had glove-like paresthesias in both upper extremities. He remains off work and has not worked for many months. With respect to his upper extremity paresthesias, I have asked him to see his primary care physician because this is clearly unrelated to his injury of last summer."

The applicant was seen on 2/27/2009 by Dr. Windham for follow up on his chronic back pain and so the PTP could review the PQME report of Dr. Eyster. He noted the applicant continued to complain of chronic nasal congestion and "severe low and mid back pain." "He rates his pain as 10 out of 10 when he tries to lift anything." Dr. Windham reviewed the PQME report and agreed the applicant has a 5% WPI because of his non-verifiable radicular complaints. He also agreed with the PQME's work restriction, "that very heavy lifting is probably precluded" but Dr. Windham felt applicant "should be able to go forward with the dairy work and should be tried back at his usual and customary work." He also noted, "Future medical is only for supportive physical therapy, anti-inflammatories, and muscle relaxants." He noted, "I will release him from our care." "He may return if he needs further refills on his ibuprofen."

Subsequently, the applicant was seen on 6/29/2009 by Dr. Robert Brick at St. Joseph's Hospital Eureka occupational medicine clinic. The applicant sought the visit and was referred to occupational medicine staff concerning two problems. The first was for a month-long history of postnasal drip, nasal congestion, and right maxillary area

pressure associated with purulent nasal discharge. Given the history of prior nasal fracture, the applicant believed his recent complaint may relate to the nasal fracture. The second problem involved an approximate 1-week history of right knee to foot pain though he noted on said visit the knee pain was improving. The applicant complained of pain in the foot more towards the great toe metatarsophalangeal area associated with foot swelling. He noted the right knee pain was initially constant, but significantly worse with movement and weightbearing that had since improved. He had no associated swelling with that, whereas the foot pain and swelling was persistent and had not improved despite taking ibuprofen. The applicant recalled no specific incident that would have led to his leg and foot pain though he assumed it related to his low back pain. Dr. Brick further noted, as follows:

> "Coincidentally, he brings with him today a fax copy of an assessment from the Employment Development Department, City of California [sic] done by a primary care physician in Fortuna. He had been referred to this physician by the EDD concerning his application in the middle of 04/09 for disability. The patient has brought this not so much to reopen his status with the occupational medicine clinic here, but apparently more for information sake." (Defendant's Exhibit T).

Dr. Brick, in addition to taking the applicant's history, performed a physical examination. He diagnosed "possible right maxillary sinusitis" and "possibility of gout episode or some sort of arthritic or vascular problem with respect to his foot." He treated the sinusitis. With respect to the leg and foot problem, Dr. Brick opined, in pertinent part, as follows:

> "The risk factor is foot and leg problem. I told him that the findings and history are not consistent with this as relating to his previously

documented back pain. I believe this is a separate episode that is not work related. . . ."

At some point, the applicant relocated to Southern California from Northern California. He was seen by Dr. Murray Grossan on 1/6/2010 for an ENT evaluation, a self-procured physician outside of the defendant's MPN. He dismissed his attorney, James Fallman, LTD, by Notice of Dismissal of Attorney dated 2/16/2010 and concurrently substituted the Dordulian Law Group as his attorney of record in place of himself. The Dordulian Law Group scheduled the applicant to be seen on 3/3/2010 by Dr. Khalid Ahmed as a primary treating physician via appointment letter dated 2/25/2010 (Applicant's Exhibit 2). [*No medical report of Dr. Ahmed for an exam occurring on 3/3/2010 (if any) has been placed in evidence. The earliest report of Dr. Ahmed entered in the legal record is a report dated 5/12/2010 (Applicant's Exhibit 16).*]

The defendant timely objected on 3/16/2010 to the applicant's selection of Dr. Khalid Ahmed as his PTP. The claims adjuster's letter to the Dordulian Law Group dated 3/16/2010 made clear the basis for defendant's objection noting that Zenith Insurance Company had in place a valid MPN since 2/1/2008, and that Dr. Ahmed was not a member treating physician within Zenith's MPN. The objection letter made clear the defendant was not authorizing the non-MPN self-procured treatment:

> "At this time, we can neither authorize treatment nor provide disability payments based upon reporting from this provider. We have advised Dr. Ahmed that Zenith will not be remitting payment for your medical care unless they are a member of the ZMPN." (Defendant's Exhibit W.)

To assist the applicant and his attorney in finding a provider who is a member of the ZMPN, the claims adjuster enclosed a regional area listing, provided a 1-800 phone number he could utilize to speak with a Zenith customer service representative about

selecting an appropriate provider, and informed the applicant's attorney he could check Zenith's website (Defendant's Exhibit W). At no time did the defendant neglect or fail to provide the applicant medical treatment through its MPN.

The applicant failed to select a provider within the defendant's MPN and instead self-procured treatment with Dr. Ahmed and other secondary and consulting physicians outside the MPN, including, but not limited to, Dr. Norman Reichwald, Dr. Khalid Nur, and Dr. Jeffrey Smith. [Currently, there are at least 35 disputed medical liens of record posted in the EAMS system.] Said self-procured medical treatment is not the liability of the defendant.

RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the petition for reconsideration be DENIED.

Dated:
Filed and Served by mail on
above date on all interested parties
on the Official Address Record.
By: _____
Mary Garcia

RALPH ZAMUDIO
WORKERS' COMPENSATION JUDGE