WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHARON BABBITT, ***Applicant,*** **vs.** **OW JING dba NATIONAL MARKET; and GOLDEN EAGLE INSURANCE COMPANY,** ***Defendants.***	**Case No. STK 0174793** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

INTRODUCTION

Applicant petitioned for reconsideration of the October 18, 2006 Finding and Order wherein the workers' compensation administrative law judge (WCJ) found that "Defendant may require Applicant to obtain medical treatment within its Medical Provider Network" and ordered "that Applicant obtain medical treatment from physicians within Defendant's Medical Provider Network." Earlier, on April 8, 2003, applicant had obtained a stipulated award of further medical treatment for her admitted July 1, 1999 industrial injury. Applicant contends that she cannot be transferred into a medical provider network (MPN) because her date of injury and award predate the January 1, 2005 effective date of the MPN statutes enacted by the Legislature as part of Senate Bill 899 (SB 899) in April 2004. (Stats. 2004, ch. 34; Lab. Code, §§ 4600(c) and 4616 through 4616.7.) We granted reconsideration to study the legal issue presented. Because of its importance, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)[1]

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[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

We hold that a defendant may satisfy its obligation under Labor Code section 4600 to provide reasonable medical treatment by transferring an injured worker into an MPN in conformity with applicable statutes and regulations regardless of the date of injury or the date of an award of future medical treatment.[2]

BACKGROUND

Applicant, Sharon Babbitt, sustained admitted industrial injury to her back and neck on July 1, 1999, while employed as a stock clerk by Ow Jing, doing business as National Market, and insured by Golden Eagle Insurance Company. The claim was resolved on April 8, 2003, by an Order approving a stipulated award of 52% permanent disability and future medical treatment.

Thereafter, the Legislature enacted SB 899 in April 2004. (Stats. 2004, ch. 34.) The MPN statutes were enacted as part of that law to authorize employers and insurers to provide medical treatment through an authorized MPN beginning January 1, 2005.

On June 5, 2006, applicant filed a Declaration of Readiness to Proceed to Expedited Hearing regarding her entitlement to medical treatment. Applicant asserted that she is "not subject to MPN" and "has fully vested medical treatment rights and is long term patient of [Dr. Fine, her primary treating physician]."

The July 18, 2006 minutes of hearing show how the issue was framed by the WCJ:

> "This is on the matter of Sharon D. Babbitt which comes on for expedited hearing this date on the issue of whether applicant, who has an award of further medical treatment issued in 2003, shall be required to cease treating with her present physician, Dr. Frank Fine, and be ordered instead to select a physician from the defendant's Medical Provider Network (MPN) for further treatment."

According to the minutes, an offer of proof was made by applicant and agreed to by defendant as follows:

> "If called to testify under oath, applicant Sharon D. Babbitt would state that she entered into a Stipulation on 2-19-03 with an Order signed 4-8-03 indicating that there is a need for future medical treatment.

[2] All further statutory references are to the Labor Code.

> "In reliance on said Stipulation, on 8-30-02 (*sic*) applicant began treatment with Dr. Frank Fine as her treating physician and has continued to treat with him, her last treatment being 6-22-06.
>
> "Applicant has received the demand to change to an MPN and is satisfied with Dr. Fine's treatment. She does not want to change to the MPN and wants to continue treating with Dr. Frank Fine. She is happy and is trusting in his decisions as to her future medical care as to this injury."

The parties further agreed, "As to the nature of the MPN, the parties stipulate that the MPN is properly certified and therefore valid." No claim was made by applicant that she did not receive required notice of rights under the MPN. The matter was submitted solely upon the legal issue as framed by the WCJ.

On October 18, 2006, the WCJ issued his Finding and Order as described above. In his Opinion on Decision, the WCJ described the circumstances presented by the case and his reason for decision:

> "The sole issue is whether Defendant can require Applicant to seek further medical treatment through Defendant's Medical Provider Network (MPN), where Applicant has a stipulated award filed [February 19, 2003] awarding, inter alia, entitlement to further medical treatment. Applicant has been treating with Frank Fine, M.D., who is not a member of Defendant's MPN, and she wishes to remain with him. The parties have stipulated that the MPN is validly certified and proper procedures have been followed...
>
> "As also pointed out by Defendant, Applicant does fall within one of the four exceptions to immediate transfer to an MPN, i.e., a serious chronic condition. (*AD Rule 9767(e)(2)*.) That rule allows treatment by the prior doctor for up to one additional year, followed by transfer to the MPN. In the instant case the additional year was in fact provided, thus there is no impediment to transfer to the MPN.
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> "It is therefore held that Defendant may require Applicant to treat within its MPN."

In his Report and Recommendation on Petition for Reconsideration, the WCJ further explains that the regulations promulgated by the Administrative Director of the Division of Workers' Compensation (Administrative Director) pursuant to the MPN statutes authorized transfer of medical treatment into an MPN. He noted that such a transfer did not "reopen, rescind,

alter or amend" applicant's prior award of medical treatment, and wrote "It is only the manner by which it is furnished that has changed."

We agree that a defendant may satisfy its obligation to provide reasonable medical treatment through an MPN in cases where the date of injury and/or the award of future medical treatment are prior to January 1, 2005. This is because the MPN statutes make only a procedural change in the law by allowing the provision of reasonable medical treatment through an MPN and do not affect any substantive rights. Thus, we hold that a defendant may satisfy its obligation under section 4600 to provide reasonable medical treatment by transferring an injured worker into an authorized MPN in conformity with applicable statutes and regulations regardless of the date of injury or the date of an award of future medical treatment.

DISCUSSION

1. An Employer Or Insurer May Satisfy Its Obligation To Provide Reasonable Medical Treatment Under Section 4600 Through An Authorized MPN.

An injured worker has long been entitled under the workers' compensation law to medical treatment reasonably required to cure or relieve the effects of the injury. (Lab. Code § 4600; see generally *United States Fid. & Guar. Co. v. Department of Indus. Relations* (*Hardy*) (1929) 207 Cal. 144 [16 I.A.C. 69].) However, the way an employer or insurer may satisfy that obligation has changed over the years.

Before January 1, 1976, an employee had no right to choose a treating physician if the employer made an unequivocal tender of medical treatment reasonably calculated to cure or relieve from the effects of the injury. Upon receiving notice of the injury, the employer could notify the employee how and where to obtain medical treatment and which physician to see. (*United States Casualty Co. v. Industrial Acc. Com.* (*Moynahan*) (1954) 122 Cal.App.2d 427 [19 Cal.Comp.Cases 8]; *Draney v. Industrial Acc. Com.* (1949) 95 Cal.App.2d 64 [14 Cal.Comp.Cases 256] (*Draney*).) An employee could choose a treating physician only when the employer failed to provide required notice of information or otherwise neglected or refused to provide reasonable medical treatment. (*Voss v. Workmen's Comp. Appeals Bd.* (1974) 10 Cal.3d 583, 588 [39

Cal.Comp.Cases 56] (*Voss*); *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501-503 [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 86 [31 Cal.Comp.Cases 93] (*McCoy*); *Leadbettor v. Industrial Acc. Com.* (1918) 179 Cal. 468 [5 I.A.C. 233]; *Bethlehem Steel Co. v. Industrial Acc. Com.* (*Seaquist*) (1945) 70 Cal.App.2d 382 [10 Cal.Comp.Cases 171].)

Effective January 1, 1976, the Legislature amended section 4600 and limited the employer's ability to direct an employee to a physician to the first 30 days after the injury was reported.[3] Thereafter, the employee was allowed to choose a treating physician within a reasonable geographic area. (Lab. Code, § 4600(c).) The employee was also permitted to change treating physicians at any time. (Lab. Code, § 4601; *Ralphs Grocery Company v. Workers' Comp. Appeals Bd.* (*Lara*) (1995) 38 Cal.App.4th 820 [60 Cal.Comp.Cases 840].) However, the employee could be ordered by the Administrative Director to select a new treating physician from a list of five selected by the employer upon the employer's petition and a showing of good cause. (Lab. Code, § 4603; Cal. Code Regs., tit. 8, § 9786.)

As part of SB 899, the Legislature adopted an entirely new system for providing medical treatment by allowing an employer or insurer to satisfy its obligation through an MPN immediately upon receiving a report of an injury. (Lab. Code, §§ 4600(c) and 4616.3(a); see also Cal. Code Regs., tit. 8, § 9767.6.) In addition, the Legislature recognized, subject to the four exceptions specified in the statute, that upon the establishment of an authorized MPN injured workers could be transferred into it if they received required notice of rights. (Lab. Code, §§ 4616 et. seq.; see also Cal. Code Regs., tit. 8, § 9767.9; *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc) (*Knight*).)

Under the MPN statutes injured workers have the right to choose an MPN physician with recognized expertise or specialty in treating the particular injury or condition in question. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(6).) They have the right to

[3] Employees were also allowed under some circumstances to select their personal physician to provide treatment during the 30 day period following the injury. (Lab. Code, § 4600(d).)

change treating physicians within the MPN. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(8).) In addition, an employee may obtain second and third opinions from other MPN physicians regarding diagnoses or treatment plans. (Lab. Code, § 4616(c) and 4616.4(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(10).) There is a procedure to address and resolve disputes regarding diagnosis and treatment in the event of a dispute. (Lab. Code, § 4616.4(b); see also Cal. Code Regs., tit. 8, §§ 9762.1 through 9762.3 and 9767.9(h).)[4]

2. An MPN May Be Used To Provide Reasonable Medical Treatment Regardless Of The Date Of Injury Or The Date Of An Award.

In this case, applicant's date of injury and the date of her award are prior to the effective date of the MPN statutes. We conclude that these facts alone do not preclude the defendant from providing reasonable medical treatment through an authorized MPN.

Whether a statutory amendment is given prospective or retroactive effect depends upon whether it implements a procedural or substantive change in the law. (*Pebworth v. Workers' Comp. Appeals. Bd.* (2004) 116 Cal.App.4th 913 [69 Cal.Comp.Cases 199] (*Pebworth*); *State Comp. Ins. Fund v. Workers' Comp. Appeals. Bd.* (*Silva*) (1977) 71 Cal.App.3d 133 [42 Cal.Comp.Cases 493] (*Silva*).) Substantive changes in the law may only be applied prospectively, but procedural changes in the law may apply retroactively. Here, the Legislature's decision to allow the provision of reasonable medical treatment through an MPN makes only a procedural change in the law.

In *Silva*, the court addressed the effect of the 1976 amendment to section 4600 that allowed an employee to be treated by a physician of his own choice or at a facility of his own choice within a reasonable geographical area "after 30 days from the date the injury is reported." (Lab. Code, § 4600(c).) The court found that the amendment changed only the procedure by which medical treatment was furnished, not the employer's obligation to provide it or the injured worker's right to

[4] Administrative Director Rule 9767.9(h) provides in full: "If the employer or insurer or injured covered employee objects to the medical determination by the treating physician, the dispute regarding the medical determination made by the treating physician concerning the transfer of treatment shall be resolved pursuant to Labor Code section 4062." But see section 4616.6, which provides in full: "No additional examinations shall be ordered by the appeals board and no other reports shall be admissable (sic) to resolve any controversy arising out of this article."

receive it. Because the procedure for providing medical treatment was not a substantive right, the court in *Silva* held that the statutory modification of that procedure did not impinge on vested rights. Thus, the statutory change in the process was held to apply to all cases regardless of the date of injury.

> "In this case the change effected by the Legislature does not on its face impose a new or additional liability. Although it affects the privilege of the employer and his insurer to control the employee's medical care it does not do so retroactively. Care through December 31, 1975, was presumably furnished under the prior statute. The order can only affect the treatment of the employee by the selected physician after February 19, 1976, when notice was given as required by the new statute. There is no retroactive effect in applying the statute to medical treatment due from the employer after December 31, 1976 [*sic*, intended year is 1975]. Moreover, it is clearly the legislative policy that one treated in 1976 and thereafter for an injury that occurred after January 1, 1976, should have the privilege of being treated by a physician of his choice after 30 days from the date the injury was reported. *There is no reason why the same policy should be withheld and not apply to those who were injured previously.* The statute is effective after 30 days from the date the injury was reported." (71 Cal.App.3d at 139 [42 Cal.Comp.Cases at 497], emphasis added.)

In *Pebworth*, the court considered the application of an amendment to section 4646 that allowed the settlement of prospective vocational rehabilitation services. The court, relying upon the analysis in *Silva*, found that the amendment provided a new means for enforcing existing rights, and did not impose new or additional liability or substantially affect existing rights and obligations. Because the court found that the amendment was procedural in nature, it was held to apply to all cases pending at the time of its enactment. As the court wrote:

> "[W]hether a statute is procedural or substantive does not depend on the degree it changes prior law. The test is whether the statute imposes a new or additional liability or affects existing vested or contractual rights on the one hand or *merely changes the manner in which established rights or liabilities are invoked in the future*. Thus, a procedural statute may be applied to pending cases even if the event underlying the cause of action occurred before the statute took effect." (116 Cal.App.4th at 918 [69 Cal.Comp.Cases at 202], emphasis added.)

In *Silva*, the Legislature amended the statutes regarding the manner in which an employer could satisfy its duty to provide reasonable medical treatment. (Lab. Code, § 4600(c).) Here, as in *Silva*, the MPN statutes adopted as part of SB 899 also only change the manner in which reasonable medical treatment may be provided, and do not change any established rights or liabilities. As in *Pebworth*, the change in the law is procedural, not substantive.

Moreover, the MPN statutes do not limit the transfer of employees to situations involving injuries or awards occurring after the January 1, 2005 effective date. To the contrary, section 4616(a)(1) specifically provides that "on or after January 1, 2005" an MPN may be established "for the provision of medical treatment to injured employees." The term "injured employees" does not differentiate on the basis of date of injury or whether there has been a prior award of medical treatment.

In addition, the Legislature addressed the coordination and transfer of medical treatment inside and outside of an MPN by requiring that the employer or insurer file a written continuity of care policy with the Administrative Director. (Lab. Code, § 4616.2; see also Cal. Code Regs., tit. 8, § 9767.10.) This policy must be presented as part of the application to obtain authorization to use an MPN from the Administrative Director. (Lab. Code, § 4616; see also Cal. Code Regs., tit. 8, §§ 9767.2 and 9767.3.) The provisions of section 4616.2(a) through (c), which require an insurer or employer to create a continuity of care policy are consistent with the expansive definition of "injured employee" used in section 4616(a), and by implication demonstrate that the transfer of an injured worker into an MPN was contemplated by the Legislature.

Section 4616.2(d)(3) states that a medical provider terminated by the MPN may continue treatment when any of the following are present:

> (A) An acute condition. An acute condition is a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention and that has a limited duration. Completion of treatment shall be provided for the duration of the acute condition.
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> (B) A serious chronic condition. A serious chronic condition is a medical condition due to a disease, illness, or other medical problem or medical disorder that is serious in nature and that

> persists without full cure or worsens over an extended period of time or requires ongoing treatment to maintain remission or prevent deterioration. Completion of treatment shall be provided for a period of time necessary to complete a course of treatment and to arrange for a safe transfer to another provider, as determined by the insurer or employer in consultation with the injured employee and the terminated provider and consistent with good professional practice. Completion of treatment under this paragraph shall not exceed 12 months from the contract termination date.
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> (C) A terminal illness. A terminal illness is an incurable or irreversible condition that has a high probability of causing death within one year or less. Completion of treatment shall be provided for the duration of a terminal illness.
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> (D) Performance of a surgery or other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days of the contract's termination date.

Pursuant to the Legislature's direction that regulations be adopted to implement the MPN statutes, the Administrative Director incorporated the four conditions described in section 4616.2(d)(3) into the regulation describing the process for transferring an employee into an MPN. (Lab. Code, § 4616(g); Cal. Code Regs., tit. 8, § 9767.9.)[5] Here, the WCJ acknowledged that defendant

[5] Section 4616(d) provides in full: "On or before November 1, 2004, the administrative director, in consultation with the Department of Managed Health Care, shall adopt regulations implementing this article. The administrative director shall develop regulations that establish procedures for purposes of making medical provider network modifications."

California Code of Regulations, title 8, section 9767.9 provides in full:

(a) If the injured covered employee's injury or illness does not meet the conditions set forth in (e)(1) through (e)(4), the injured covered employee may be transferred into the MPN for medical treatment.

(b) Until the injured covered employee is transferred into the MPN, the employee's physician may make referrals to providers within or outside the MPN.

(c) Nothing in this section shall preclude an insurer or employer from agreeing to provide medical treatment with providers outside of the MPN.

(d) If an injured covered employee is being treated for an occupational injury or illness by a physician or provider prior to coverage of a medical provider network, and the injured covered employee's physician or provider becomes a provider within the MPN that applies to the injured covered employee, then the employer or insurer shall inform the injured covered employee and his or her physician or provider if his/her treatment is being provided by his/her physician or provider under the provisions of the MPN.

(e) The employer or insurer shall authorize the completion of treatment for injured covered employees who are being treated outside of the MPN for an occupational injury or illness that occurred prior to the coverage of the MPN and whose treating physician is not a provider within the MPN, including injured covered employees who pre-designated a physician and do not fall within the Labor Code section 4600(d), for the following conditions:

(1) An acute condition. For purposes of this subdivision, an acute condition is a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention

complied with the provisions regarding transfer of care for a serious chronic condition by allowing completion of treatment by Dr. Fine for a period of 12 months.

Applicant urges that the application of the MPN statutes in her case would violate section 47 of SB 899, which provides:

> "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, *unless otherwise specified*, but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision or award of the Workers' Compensation Appeals Board." (Stats. 2004, ch. 34, § 27, emphasis added.)

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and that has a duration of less than 90 days. Completion of treatment shall be provided for the duration of the acute condition.

(2) A serious chronic condition. For purposes of this subdivision, a serious chronic condition is a medical condition due to a disease, illness, catastrophic injury, or other medical problem or medical disorder that is serious in nature and that persists without full cure or worsens over 90 days and requires ongoing treatment to maintain remission or prevent deterioration. Completion of treatment shall be authorized for a period of time necessary, up to one year: (A) to complete a course of treatment approved by the employer or insurer; and (B) to arrange for transfer to another provider within the MPN, as determined by the insurer or employer. The one year period for completion of treatment starts from the date of the injured covered employee's receipt of the notification, as required by subdivision (f), of the determination that the employee has a serious chronic condition.

(3) A terminal illness. For purposes of this subdivision, a terminal illness is an incurable or irreversible condition that has a high probability of causing death within one year or less. Completion of treatment shall be provided for the duration of a terminal illness.

(4) Performance of a surgery or other procedure that is authorized by the insurer or employer as part of a documented course of treatment and has been recommended and documented by the provider to occur within 180 days from the MPN coverage effective date.

(f) If the employer or insurer decides to transfer the covered employee's medical treatment to the medical provider network, the employer or insurer shall notify the covered employee of the determination regarding the completion of treatment and the decision to transfer medical treatment into the medical provider network. The notification shall be sent to the covered employee's residence and a copy of the letter shall be sent to the covered employee's primary treating physician. The notification shall be written in English and Spanish and use layperson's terms to the maximum extent possible.

(g) If the injured covered employee disputes the medical determination under this section, the injured covered employee shall request a report from the covered employee's primary treating physician that addresses whether the covered employee falls within any of the conditions set forth in subdivisions (e)(1-4). The treating physician shall provide the report to the covered employee within twenty calendar days of the request. If the treating physician fails to issue the report, then the determination made by the employer or insurer referred to in (f) shall apply.

(h) If the employer or insurer or injured covered employee objects to the medical determination by the treating physician, the dispute regarding the medical determination made by the treating physician concerning the transfer of treatment shall be resolved pursuant to Labor Code section 4062.

(i) If the treating physician agrees with the employer's or insurer's determination that the injured covered employee's medical condition does not meet the conditions set forth in subdivisions (e)(1) through (e)(4), the transfer of treatment shall go forward during the dispute resolution process.

(j) If the treating physician does not agree with the employer's or insurer's determination that the injured covered employee's medical condition does not meet the conditions set forth in subdivisions (e)(1) through (e)(4), the transfer of treatment shall not go forward until the dispute is resolved.

However, nothing in the statute "specifies" that the MPN process is limited to injuries occurring after January 1, 2005. To the contrary, our decision is consistent with SB 899 by applying the MPN provisions prospectively from the date of enactment "regardless of the date of injury." (Stats. 2004, ch. 34, § 47.)

We also find that the section 5804 five-year limit on the rescission, alteration or amendment of an existing award does not preclude defendant from using the MPN to provide medical treatment.[6] Transferring medical treatment to an MPN does not rescind, alter or amend an award. To the contrary, applicant's substantive right to reasonable medical treatment is unchanged. Defendant continues to be liable under section 4600 and under the award to provide medical treatment reasonably required to cure or relieve applicant from the effects of her industrial injury. (*Knight*, *supra*.) The MPN statutes simply allow another method for providing that medical treatment.

3. An Injured Worker May Be Transferred To An Authorized MPN For Medical Treatment In Conformity With Applicable Statutes And Regulations.

Because of the unique aspects of the MPN statutes, we do not find that an employer or insurer must demonstrate that there has been a change of condition or defective or incomplete medical treatment before transferring an injured worker into an MPN. Unlike the statutes considered by the Supreme Court in *Voss*, *Zeeb* and *McCoy*, the MPN statutes do not give the employer complete control over the identity of a treating physician. To the contrary, injured workers under the MPN statutes have the right to select an MPN physician with recognized expertise or specialty in treating the particular injury or condition in question. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(6).) They also have the right to change treating MPN physicians if they desire. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit. 8,

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[6] Section 5804 provides in full: "No award of compensation shall be rescinded, altered, or amended after five years from the date of the injury except upon a petition by a party in interest filed within such five years and any counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in addition to those raised by such original petition. Provided, however, that after an award has been made finding that there was employment and the time to petition for a rehearing or reconsideration or review has expired or such petition if made has been determined, the appeals board upon a petition to reopen shall not have the power to find that there was no employment."

§ 9767.12(a)(8).) In addition, the MPN statutes, unlike the employer controlled process under the earlier statutes, allows injured workers to obtain second and third opinions from other MPN physicians regarding diagnoses or treatment plans. (Lab. Code, §§ 4616(c) and 4616.4(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(10).) These MPN provisions address the concern expressed by the Supreme Court in *Zeeb* that "the purpose of securing proper medical care and speedy recovery" might be adversely affected by a change in treating physicians. These MPN provisions assure that injured workers continue to receive appropriate medical treatment even if a pre-existing physician-patient relationship is disturbed.

Moreover, the MPN statutes and regulations identify four specific situations where continued treatment is allowed for a period of time with the physician selected by the employee. (Lab. Code, § 4616.2(d)(3); see also Cal. Code Regs., tit. 8, § 9767.9.) These exceptions would be rendered null and void by an additional requirement that the employers or insurers prove there has been defective or incomplete medical treatment, or a change in condition, before transferring employees into an authorized MPN. It would be contrary to the intent of the MPN statutes to render meaningless the four exceptions described in those statutes. It also is not within our purview to impose limitations on the transfer of medical treatment to an MPN beyond those specified by the Legislature.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Appeals Board (En Banc) that the October 18, 2006 Finding and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ Merle C. Rabine
MERLE C. RABINE, Commissioner

/s/ William K. O'Brien
WILLIAM K. O'BRIEN, Commissioner

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Janice Jamison Murray
JANICE JAMISON MURRAY, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

I CONCUR IN PART AND DISSENT IN PART
(See attached Concurring and Dissenting Opinion)

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
1/24/2007

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS

JFS/ams

CONCURRING AND DISSENTING OPINION OF COMMISSIONER BRASS

There may be cases when it is appropriate to transfer an injured worker into an authorized MPN for medical treatment. However, in the instant case, the evidence demonstrates that there is a lawfully established pre-existing physician-patient relationship between Frank Fine, M.D. and Sharron Babbitt and that she is satisfied with the relationship. There is no evidence of a change in her condition or that the medical treatment she is receiving is defective or incomplete. Consequently, I have chosen to be guided by the common sense of the Supreme Court, which has repeatedly held that a lawfully established physician-patient relationship should be preserved unless there is a change of condition or the treatment provided is defective or incomplete. (*Voss v. Workmen's Comp. Appeals Bd.* (1974) 10 Cal.3d 583 [39 Cal.Comp.Cases 56] (*Voss*); *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496 [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93] (*McCoy*).)

In my view, it is irrelevant if the physician-patient relationship was lawfully established following an award of medical treatment, or because 30 days passed from the date of injury as provided under section 4600(c), or because the employer neglected or refused to provide reasonable medical treatment as in *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc), or in some other way. Furthermore, I agree with the Supreme Court that an efficacious physician-patient relationship is an ingredient aiding in the success of medical treatment because it inspires confidence in the patient. Thus, a lawfully established physician-patient relationship should be preserved in the absence of a change of condition or defective or incomplete medical treatment.

In *McCoy*, the Supreme Court addressed "the extent of the employer's privilege to control the course of the injured employee's medical care" under section 4600, which at that time was not limited to the first 30 days. The Court held that by refusing to provide reasonable medical care, the employer "voluntarily terminated his right to control the course of medical treatment." (*Id*, 64 Cal.2d at 89.) For that reason, the injured worker was not obligated to inform the employer of the treating physician's diagnosis before he or she obtained the right to receive reimbursement for the

cost of reasonable self-procured medical treatment. As Justice Mosk noted, an injured worker's right to obtain reasonable medical treatment takes precedence over an employer's interest in trying to control costs by controlling treatment.

In *Zeeb*, the injured worker self-procured treatment after the employer's physician asserted that a flare-up of the employee's condition was not work related. Thereafter, the employer conceded that there was a need for continued treatment and directed the employee to return to the employer's physician. The Supreme Court affirmed its conclusion in *McCoy* that medical considerations take precedence over cost control interests and found that the employer's failure to provide reasonable medical treatment terminated its right to control treatment and rendered it liable for the cost of reasonable medical treatment self-procured by the injured worker. Justice Peters explained:

> "[W]here there is a conflict between the two purposes, *the purpose of securing proper medical care and speedy recovery must take precedence over the goal of minimization of cost*…In other words, considerations of expense must be either disregarded or, at most, given limited weight where there is a substantial danger that they will interfere with the employee's right to secure necessary medical treatment of injuries due to the industrial accident and to achieve speedy recovery." (67 Cal.2d at 501-502, emphasis added.)

The Court further addressed the importance of the physician-patient relationship in providing successful medical treatment and the limited circumstances that would allow the interruption of such a relationship:

> "Where, as in the present case, the employer has refused treatment causing the employee to procure his own medical treatment, medical considerations and adherence to the purposes of section 4600 would dictate that *a doctor-patient relationship which will inspire confidence in the patient is an ingredient aiding in the success of the treatment, and that, once such a relationship has been established, treatment should continue with the same doctor in the absence of a change of condition or evidence that the treatment is defective or additional treatment is necessary.* So far as appears from the record before us, petitioner is being treated by his private doctor whom he consulted after the employer's refusal to provide further necessary care, and *there is no evidence that there has been a change of condition or that the treatment provided is defective or incomplete. Accordingly, there is no*

> *substantial showing which would warrant an interruption of the existing treatment or commencement of new treatment*." (67 Cal.2d at 502, emphasis added.)

As found in *Zeeb*, the relevant medical consideration is the preservation of the lawfully established physician-patient relationship. Under *Zeeb*, that relationship may be disrupted *only* when there is evidence of "a change of condition or that the treatment provided is defective or incomplete." (*Id*, 67 Cal.2d at 502.)

In *Voss*, the Supreme Court reiterated that an employer may resume control of medical treatment "without the employee's consent only in limited situations." (*Id*, 10 Cal.3d at 589.) The Court affirmed the principle that medical considerations must predominate. In *Voss*, the referee found that the employee's "apparent propensity to demand excessive medical attention was a 'change of circumstances . . . and justifies the order which establishes control of medical treatment in the defendant.' " (*Id*, 10 Cal.3d at 589.) However, the Court disagreed, and Justice Sullivan wrote:

> "[I]t is clear that a change in the *circumstances concerning cost of treatment is not the kind of 'change of condition' which would justify restoring control* over medical treatment to the carrier. It would appear that *'change of condition' refers to a change in the physical condition of the employee*. In the typical case the carrier loses the right to control medical treatment by refusing further treatment because the carrier deems such treatment unnecessary, when in fact the employee's condition requires it. *Once the employee has satisfactorily obtained adequate treatment for this condition, he is entitled to have that treatment continued, subject to the limitation that only reasonable expenses will be reimbursed*.
>
> "However, if the employee's physical condition changes so that the condition which prompted the carrier to deny further treatment is not the employee's existing condition, it would seem proper for the carrier to resume control of the treatment of the condition as changed." (*Id*, 10 Cal.3d at 590, emphasis added.)

The four conditions described in section 4616.2(d) present situations where an established physician-patient relationship should not be disrupted. However, those are not the *only* four conditions where medical considerations require that such a relationship continue. As described in *Zeeb*, a physician-patient relationship that inspires confidence in the patient is an ingredient aiding

in the success of the treatment. It is contrary to the principles established by *Voss*, *Zeeb* and *McCoy* to terminate such a relationship and to compel an injured worker to pick a different physician from an MPN list in the absence of evidence of a change of condition or defective or incomplete treatment. Obtaining second and third opinions of physicians from the same MPN list when diagnosis or treatment is questioned will not "inspire confidence in the patient" which is an "ingredient aiding in the success of the treatment" as described in *Zeeb*. The purpose of securing proper medical care and speedy recovery must take precedence over the use of an MPN to control costs.

Honoring an established physician-patient relationship does not impose an unreasonable cost upon the employer. As Justice Peters stressed in *McCoy*:

> "And we emphasize also that, *whether the treatment is administered by a doctor chosen by the employee or one selected by the employer, the latter is liable for no more than the reasonable cost of such treatment as is reasonably required* to cure or relieve from the effects of the injury." (64 Cal.2d at 89, emphasis added.)

The same point was made in *Zeeb*, when the Court quoted *McCoy* and emphasized that, "Of course, the employer will only be liable for the 'reasonable cost of such treatment as is reasonably required to cure or relieve from the effects of the injury.' " (*Zeeb*, *supra*, 67 Cal.2d at 502-503.) Similarly, in *Voss*, the Court stressed that medical considerations did not leave the employer with no protection against uncontrolled costs because its liability is "subject to the limitation that only reasonable expenses will be reimbursed." (*Id*, 10 Cal.3d at 590.)

Moreover, the "reasonable cost" limitation of section 4600 identified in *Voss*, *Zeeb* and *McCoy* is not the only cost protection now in place. A number of additional statutory provisions balance the preservation of an established physician-patient relationship against the employer's interest in limiting costs. These additional protections include statutory and regulatory provisions requiring that treatment be provided in accordance with established medical treatment utilization schedules (Lab. Code, §§ 4604.5(a) and (c) [Guidelines of the American College of Occupational and Environmental Medicine (ACOEM) presumed correct on issue of extent and scope of medical

treatment pending development of guidelines by the Administrative Director pursuant to section 5307.27]); oversight provisions to assure that only reasonably required medical treatment is provided (Lab. Code, § 4610 [employer to establish utilization review process to manage medical care by approving, modifying, delaying, or denying treatment recommendations]; Cal. Code Regs., tit. 8, §§ 9792.6-9792.11 [use of ACOEM Guidelines in utilization review, etc.]; Lab. Code, § 4062(b), Cal. Code Regs., tit. 8, §§ 9788.01-9788.91 [second opinion for spinal surgery required from board-certified or board-eligible orthopedic surgeon or neurosurgeon]); absolute limits on certain kinds of medical treatment (Lab. Code, § 4604.5(d) [chiropractic and physical therapy limited to 24 visits per injury]); and the use of the Official Medical Fee Schedule (Lab. Code, § 5307.1; Cal. Code Regs., tit. 8, §§ 9789.10-9789.70).

These additional statutory protections assure that employers pay only for what they have always been liable to provide; medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury." (Lab. Code, § 4600(a).)

The medical considerations of securing proper care and a speedy recovery must take precedence over the minimization of cost. A physician-patient relationship that inspires confidence in the patient is an ingredient aiding in the success of treatment. A physician-patient relationship that has been lawfully established should be preserved unless there has been a change of condition or the treatment being provided is defective or incomplete.

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
1/24/2007

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS