WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GREGORY PARRENT, ***Applicant,*** **vs.** **SBC-PACIFIC BELL TELEPHONE COMPANY, Permissibly Self-Insured; administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,** ***Defendants.***	**Case No. ADJ339088 (SDO 0304788)** **OPINION AND DECISION AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant, Gregory Parrent, filed a Petition for Reconsideration[1] from the Findings of Fact, issued September 8, 2015, in which a workers' compensation administrative law judge (WCJ) found the Workers' Compensation Appeals Board lacks jurisdiction to consider the medical treatment recommended by applicant's primary treating physician in defendant's Medical Provider Network (MPN), as that issue is subject to independent medical review (IMR).

Through detailed and overlapping arguments concerning the statutory framework of the MPN system, applicant argues that defendant is precluded from pursuing Utilization Review (UR) of a treatment recommendation by a physician who is in defendant's MPN and further, that a WCJ has jurisdiction to determine whether to award the recommended treatment as reasonable and necessary medical treatment under Labor Code section 4600. Applicant contends the WCJ improperly concluded that defendant was entitled to refer the primary treating physician's treatment recommendation to UR under Labor Code section 4610.

[1] We accept applicant's request for leave to file a Petition for Reconsideration in excess of the 25 page limitation in Appeals Board Rule 10205.12(a)(10).

Defendant has filed an Answer to the Petition for Reconsideration and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration, recommending that we deny applicant's petition.

Following our review of the record, and for the reasons set forth below, we will affirm the WCJ's determination that following the UR denial of the MPN treating physician's treatment recommendation, that issue must proceed through IMR, as the Appeals Board lacks jurisdiction to determine the medical necessity of the recommended treatment.

I.

Applicant sustained an industrial injury to his bilateral upper extremities while employed by SBC-Pacific Bell Telephone Company as a service representative during the period May 10, 1999 through November 17, 2002. He settled his claim by Stipulation with Request for Award, approved on April 26, 2004, for 64% permanent disability and further medical treatment.

He has received medical treatment from Dr. Blake Thompson, a physician within defendant's MPN. Dr. Thompson diagnosed applicant with chronic pain syndrome, carpal tunnel syndrome and cubital tunnel syndrome. On November 14, 2014, Dr. Thompson submitted a Request for Authorization on DWC Form RFA for prescription topical medications, Gralise 600 mg and GFL #1 cream. Defendant submitted Dr. Thompson's treatment request to its UR organization. By a timely issued determination on November 20, 2014, the UR physician partially approved Dr. Thompson's recommended treatment, allowing one month of Gralise to allow applicant to taper off the medication, but disallowed the GFL #1 cream.

The matter was heard at an expedited hearing on May 5, 2015. Applicant contended that UR in this case is limited to Labor Code section 4616(f) and that UR IMR procedures Labor Code section 4610 and 4610.5 do not apply to applicant's primary treating physician because he is in defendant's MPN. Defendant raised the issue of whether the WCJ had jurisdiction to decide the medical necessity of the disputed treatment. The expedited hearing was converted to a regular hearing to allow the parties to submit post-trial briefs. On September 8, 2015, the WCJ found that since the parties had stipulated that the UR was timely, the WCAB does not have jurisdiction to address the disputed medical treatment

issue, which issue must proceed through the IMR process. The judge also found that an MPN physician is included in the definition of a primary treating physician, and that "applicant's participation in defendant's MPN does not preclude defendant from referring an RFA to UR."

II.

Applicant contends the WCJ erred in concluding an MPN physician's medical treatment recommendation is subject to UR and IMR, arguing that the UR-IMR provisions in Labor Code sections 4610, 4610.5 and 4610.6 do not apply to medical recommendations made by physicians in an MPN. Applicant argues that the MPN statutory provisions essentially create a separate system for delivery of medical care, and that the existing MPN dispute resolution process provides more options to resolve disputes than the process provided in Labor Code section 4610. Applicant also argues that the employer has the exclusive right to pick the physicians in its MPN, and that there are statutory quality assurance requirements that distinguish the MPN provisions from those in Labor Code section 4610, et seq. Applicant also argues that differences in the IMR review process and the MPN-IMR appeal are indicative of intent to create within the MPN a "separate and distinctive medical dispute resolution process." Applicant also points to the MPN utilization review provisions in 4616(f) and 8 CCR 9767.3 and raises the question as to why it was necessary to create a separate utilization review provision for MPNs if the UR process in Labor Code section 4610, et seq. was intended to apply to MPNs. Applicant makes several other arguments to the effect that MPN treatment and dispute resolution processes were intended to be distinct from non-MPN treatment and therefore not subject to UR. For example, applicant points to language in *Valdez v. Workers' Comp. Appeals. Bd.* (2013) 57 Cal.4th 1231 [78 Cal.Comp.Cases 1209], that describes the MPN process as a separate delivery system. Applicant also points to the various treatment delivery systems in the Labor Code besides MPNs, such as the provisions in Labor Code section 4600(d) referring to Knox-Keene, group disability, Taft-Hartley health and welfare plans, and health care organization provided in Labor Code section 4600.3, each of which he argues have their own procedures for delivering treatment and resolving disputes.

III.

In 2004, the Legislature established the MPN system to meet an employer's obligation to provide

medical treatment to injured workers. The MPN system implemented a dispute resolution process as set forth in Labor Code section 4616 et seq. and the applicable rules promulgated by the Administrative Director of the Division of Workers' Compensation in AD Rules 9767 et seq. The process allows an injured worker who disputes the diagnosis or treatment recommendation of an MPN treating physician, to obtain a second opinion from another MPN physician. If the injured worker disputes the second opinion physician's recommendation, the injured worker may then select a third physician to provide an opinion on the disputed diagnosis or treatment recommendation of the treating physician or of the second opinion physician. The second and third opinion physicians must provide a written alternative diagnosis or treatment recommendation, if applicable. (Labor Code section 4616.3(c) & (d); AD Rule 9767.7.) If the injured worker accepts the alternative recommendation of either the second or third treating physician, the employer "shall permit the employee to obtain the recommended treatment" within the MPN or outside the MPN if the MPN does not include a physician who can provide the recommended treatment. (AD Rule 9767.7(g).)

However, if, after receipt of the third MPN physician's opinion, the injured worker still disputes the diagnosis or treatment recommendation, he or she may request an MPN Independent Medical Review. (Labor Code section 4616.4(b); AD Rule 9767.7(h).)

The MPN-IMR process is set forth in Article 3.6, Rules 9768.1 – 9768.17, and provides that the MPN-IMR process may be activated by an injured worker if he or she disputes the findings of the third opinion physician. (AD Rule 9768.9(b).)

Thus, if an injured worker has a dispute concerning the diagnosis or treatment recommendations provided by the MPN treating physician selected by the employer, or the physician selected by the injured worker after the first visit with the employer selected MPN physician, the MPN system provides an injured worker with a mechanism to obtain a second, and potentially a third opinion, from other MPN physicians. This is consistent with the requirement of Labor Code section 4616(f), that only a physician may "modify, delay, or deny requests for authorization of medical treatment." If the injured worker still disputes the diagnosis or treatment recommendations provided by the primary treating physician after obtaining the second and third opinions, the injured worker may request the dispute be submitted to the

MPN-IMR. (Labor Code section 4616.4(b).) The MPN-IMR physician "shall conduct a physical examination of the injured employee at the employee's discretion," and determine whether the disputed medical treatment recommendation are consistent with the medical treatment utilization schedule (MTUS) as provided in Labor Code section 5307.27, or the ACOEM guidelines (Labor Code section 4616.4(e).) The determination of the MPN-IMR physician "shall" be immediately adopted by the Administrative Director and the MPN-IMR determination approves the disputed treatment recommendation, the injured worker is entitled to "seek the disputed treatment from a physician of his or her choice" from within or outside the MPN, at the employer's expense. (Labor Code section 4616.4(h) & (i).)

Applicant asserts that "medical disputes controversies under the MPN system are not resolvable under § 4610.5, they are resolvable under either the second and third opinion processes, then the IMR process set forth in the MPN or by the process of going before the WCAB (as demonstrated by this instant case). Therefore, there is no limit on judicial review contained in §§ 4616-4616.7. This provides that *either the employer or the employee* may go to the WCAB to resolve medical disputes either immediately or after a second or third opinion by a physician in the MPN. Thus both parties benefit from having the right to go to the WCAB for a judicial determination." (Petition at 9:24-28; 10:1-3. Emphasis in original.) This is incorrect. The MPN dispute resolution process is *only* available to an injured worker who disputes the diagnosis or treatment recommendation of the treating physician. In Labor Code section 4616 et seq., the Legislature did not provide a process for an employer to raise a dispute with the diagnosis or treatment recommendation of an MPN treating physician. An employer is not entitled to initiate the second and third opinion process or reach the MPN-IMR process. Labor Code section 4616.3(c), which describes the dispute resolution mechanism, provides that this process is available only to an injured worker who disputes the MPN physician's diagnosis or treatment recommendation. If an injured worker accepts the MPN physician's diagnosis or treatment recommendation, there is no mechanism for the employer to initiate a dispute under Labor Code sections 4616 - 4616.7.

In contrast to the injured worker's MPN dispute resolution process, the Legislature created a separate process for employers and insurers to dispute a treating physician's treatment recommendation

by mandating that every employer establish directly, or through its insurer, a UR process to "review and approve, modify, delay, or deny in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians . . . ." (Labor Code section 4610; *SCIF v. Workers' Comp. Appeals. Bd. (Sandhagen)* (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981].) As noted in *Sandhagen,*

> the Legislature intended utilization review to ensure quality, standardized medical care for workers in a prompt and expeditious manner. To that end, the Legislature enacted a comprehensive process that balances the dual interests of speed and accuracy, emphasizing the quick resolution of treatment requests, while allowing employers to seek more time if more information is needed to make a decision.
> [73 Cal. Comp. Cases 981, 989.]

A UR determination of medical necessity that is timely issued is not subject to review by the Appeals Board, (*Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 [Appeals Board en banc]), but is subject to IMR, through the process set forth in Labor Code section 4610.7.

These dispute resolution procedures were enacted for the purpose of providing quality medical care in a prompt and expeditious manner, using the Medical Treatment Utilization Schedule (MTUS) to provide a uniform standard of reasonable medical treatment based upon "evidence-based, peer-reviewed, nationally recognized standards of care." (Labor Code section 5307.27.) The MPN second opinion process, the UR process and both IMR systems, for MPN and non-MPN medical treatment recommendations, apply this uniform standard of care to medical treatment.

There is nothing in the statutory provisions creating the MPN system that evinces a legislative intent to exempt the MPN medical treatment recommendations from UR. Had the Legislature so intended to exclude MPN physicians' treatment recommendations from UR, it would have expressly excluded them. Rather, every employer is mandated to implement a UR process that applies a uniform standard of review based upon the MTUS. This advances the legislative goal of ensuring that injured workers are provided medical treatment consistent with uniform "evidence-based, peer-reviewed, nationally recognized standards of care."

The Administrative Director's Rules provide further indication that the treatment recommendations of MPN treating physicians are subject to UR. Rule 9792.6.1 defines the UR standards that apply to all treatment requests by treating physicians. Rule 9792.6.1(t)(1) requires that all requests

for authorization of medical treatment must be submitted by a "treating physician" on a Request for Authorization (DWC Form RFA). A "completed" Request for Authorization "must identify both the employee and the provider, identify with specificity a recommended treatment or treatments, and be accompanied by documentation substantiating the need for the requested treatment." (AD Rule 9792.6.1(t)(2).) It is this recommended treatment on Form RFA that, if not approved by a claims adjuster, is subject to UR. There is no indication that MPN treating physicians are exempt from submitting a Form RFA when they seek approval of a recommended course of treatment. Rule 9785(a)(1) identifies as a primary treating physician as "the physician selected . . . in accordance with the physician selection procedures contained in the medical provider network pursuant to Labor Code section 4616." Thus, the employer or insurer that receives a Form RFA from an MPN physician must either approve the requested treatment or submit the request for authorization to UR as mandated by Labor Code section 4610. This is the process applicant's MPN treating physician followed in the instant case when he submitted a Form RFA requesting authorization for the disputed prescription medication.

We reject applicant's analysis of the interplay between Labor Code sections 4610 and 4616.3, that an insurer is not entitled to dispute a medical treatment recommendation from an MPN treating physician, but must authorize any recommendation submitted.

IV.

The issue of the applicability of the UR/IMR medical treatment dispute resolution process to medical treatment recommendations of an MPN treating physician was previously addressed by an Appeals Board panel in *Stock v. Camarillo State Hospital*, 2014 Cal. Wrk. Comp. P.D. LEXIS 471. In that decision, a panel of the Appeals Board held:

> We concur with the WCJ that applicant's required participation in her employer's MPN does not prohibit defendant from referring an MPN physician's request for authorization of medical treatment to UR and Independent Medical Review.
>
> Contrary to applicant's contentions, by its adoption of the MPN system, the Legislature did not evince an intent to preclude a defendant from seeking UR review of an MPN physician's request for authorization of medical treatment. The law and the implementing administrative rules provide mechanisms for review of disputed treatment recommendations through UR, whether or not the treating physician is in the employer's MPN. Both the UR provisions and the MPN provisions of the Labor Code provide that

> a treating physician's request for authorization of medical treatment must be reviewed by a physician competent to evaluate the specific clinical issues, without distinction as to whether the physician is selected through the MPN. [citation omitted.]

We concur with the determination in *Stock*, that the treatment recommendations of an MPN physician, if disputed by the insurer, are required to be reviewed through the UR process. To conclude otherwise would deny the insurer the right to obtain review of the challenged recommendation through the procedure expressly designed to advance the legislative goal of ensuring that injured workers are provided medical treatment consistent with uniform "evidence-based, peer-reviewed, nationally recognized standards of care."

Accordingly, we will affirm the WCJs' Findings of Fact.

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For the foregoing reasons,

IT IS ORDERED that, as our Decision After Reconsideration, the Findings of Fact, issued September 8, 2015, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

DEIDRA E. LOWE

I CONCUR (See Separate Concurring Opinion),

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 3 0 2016

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

GREGORY PARRENT
ROBERT MCLAUGHLIN
LAW OFFICES OF RUDY H. LOPEZ

SV/*pc*

CONCURRING OPINION

I concur with the determination to affirm the WCJ's finding that he did not have jurisdiction to address the issue of the medical necessity of the treatment recommended by applicant's MPN treating physician, where the defendant submitted the request for authorization to utilization review (UR) pursuant to Labor Code section 4610 et seq. I concur that defendant may submit an MPN treating physician's request for authorization to UR if it disputes the request.

I write separately to emphasize that if an insurer raises a dispute with the MPN treating physician's treatment recommendation and submits the issue to UR, the injured worker is not then precluded from initiating the second opinion process provided in Labor Code section 4616.3, or from changing treating physicians within the MPN. The UR IMR dispute resolution process and the Second Opinion MPN-IMR process may both be available depending upon which party raises a dispute with an MPN physician's medical treatment recommendation.

When an MPN treating physician makes a diagnosis or proposes a course of treatment, there are two separate tracks for the parties to follow to dispute that recommendation. As we explained herein, if an injured worker agrees with the recommendation but an insurer does not, the insurer must submit the treating physician's request for authorization to UR by a physician pursuant to Labor Code section 4610. (See *SCIF v. Workers' Comp. Appeals. Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230 [73 Cal.Comp.Cases 981].)

An injured worker who disputes the treatment recommended by the MPN treating physician has additional means of resolving the dispute. He or she may initiate the second and third opinion process provided in Labor Code section 4616.3, which may ultimately lead to the MPN IMR process if the injured worker disputes the opinions of the second and third physician. This process "is akin to that of a Qualified Medical Evaluator, providing additional expert guidance on the need for additional or different treatment than found by the primary treating physician." (*Fernandez v. Kmart,* 2016 Cal. Wrk. Comp. P.D. LEXIS 18, Concurring Opinion.)

Alternatively, an injured worker may at any time after the initial medical evaluation set up by the employer, exercise his or her right to change treating physicians within the MPN, pursuant to Rule

9767.6(e). Selecting a new primary treating physician within the MPN may be made for any reason and does not require that the injured worker raise a dispute with the prior physician's diagnosis or treatment recommendations. Additionally, if the injured worker has initiated the second opinion process, and accepts the treatment recommendation of the second or third opinion physician, the injured worker "may obtain the recommended treatment by changing physicians to the second opinion physician, third opinion physician, or other MPN physician." (Rule 9767.7(g).)

Each of these dispute resolution processes may be initiated at the option of applicant, pursuant to Labor Code section 4616.3, or defendant pursuant to Labor Code section 4610.

Thus, even if an insurer raises a dispute with the treating physician's recommendation and submits the issue to UR, an injured worker may exercise his or her right to initiate the second opinion process provided in Labor Code section 4616.3, or change treating physicians within the MPN.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 3 0 2016

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