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Reposted to correct publication order date; no change to opinion text

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELAYNE VALDEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al. Respondents.	No. B237147 (W.C.A.B. No.ADJ7048296) WRIT OF REVIEW

Proceeding to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded. Charles Ringwalt, Administrative Law Judge.

Perona, Langer, Beck, Serbin & Mendoza, Ellen R. Serbin and John Mendoza, for Petitioner.

Grancell, Lebovitz, Stander, Reubens and Thomas, Timothy E. Kinsey, Sam L. Lebovitz and Steward Reubens for Respondent Warehouse Demo Services; Zurich North America.

Charles E. Clark; The Rondeau Law Firm and Charles R. Rondeau; Goldflam & Barth and Stuart I. Barth for California Applicants' Attorneys Association as Amicus Curiae.

A divided Workers' Compensation Appeals Board (WCAB) concluded that a medical report is inadmissible if it has been prepared by a person who is not part of a medical provider network established pursuant to Labor Code section 4616 et seq. We granted the petition for a writ of review filed by the employee, Elayne Valdez, because of the importance of the issues raised by the parties. We conclude that the rule of exclusion laid down by section 4616.6 applies only when there has been an independent medical review performed under the authority of section 4616.4. We therefore annul the decision of the WCAB and remand with directions for further proceedings that are consistent with this opinion.

FACTS

In a fall on October 7, 2009, petitioner Elayne Valdez sustained injuries to her back, hip and neck in the course and scope of her employment by Warehouse Demo Services, insured at that time by Zurich North America and administered by ESIS. At the time, Warehouse Demo Services had established a medical provider network (MPN). Petitioner began treatment with a physician who was a part of that MPN.

On October 23, 2009, petitioner's counsel wrote ESIS stating, among other things, that petitioner "demands a change of physician pursuant to Labor Code Section 4616.3(c)" and that neither petitioner nor her counsel knew the name of the physician within the MPN and also did not know the name of the MPN. The letter asked ESIS to provide these names to counsel.

On October 31, 2009 petitioner stopped treatment with the MPN physician and became a patient of "Advanced Care Specialists," specifically Mark Nario, D.C., at her own expense. Petitioner testified in a hearing before the workers' compensation administrative law judge (WCJ) that she stopped treatment with the MPN physician because it was doing her more harm than good. Her legal counsel referred her to Dr. Nario.

Petitioner testified that she had 24 physical therapy visits with Dr. Nario and approximately 20 acupuncture visits; following that she received decompression. She also saw a chiropractor.

Warehouse Demo Services, Zurich North America and ESIS (collectively respondents) contend that "petitioner did not avail herself of the ability to change her treating physician to another physician within the MPN." Petitioner contends that she was never told "how she could go about changing doctors within the MPN." The WCAB concluded that for "no apparent reason and without regard to following MPN procedures, [petitioner] began treating with Dr. Nario, a non-MPN physician, upon referral from her attorney."

Whether petitioner was actually informed of the MPN and the need to treat with physicians who were a part of the MPN are therefore contested issues. In light of our disposition of the petition, however, we need not address and resolve these issues; they remain to be resolved on remand.

PROCEDURAL HISTORY

On July 29, 2010, the WCJ made findings that petitioner sustained injuries to her right hip and neck in the course and scope of employment and that she was temporarily disabled from November 2, 2009 through February 10, 2010. The WCJ noted "an initial report of Dr. Nario, 11-2-2009" that estimated 8 to 12 weeks of temporary disability. The WCJ rejected the argument that reports from "non-MPN doctors are inadmissible," ruling that records from "treating doctors have always been admissible for the reason that such doctors are familiar with the patient, generally on a long time basis, and entitled to great weight."

Respondents petitioned for reconsideration. The WCAB granted reconsideration and issued two en banc opinions.

The issue, as formulated by the WCAB, was: "[I]f an applicant has improperly obtained medical treatment outside the employer's MPN, are the reports of the non-MPN treating physician admissible in evidence?"[1]

The WCAB found that the WCJ "relied on the non-MPN reports of Dr. Nario for this finding [temporary disability] and award of benefits." The WCAB also "assume[d] for purposes of this opinion that defendant had a validly established MPN, and that all proper notices required under the MPN were provided applicant." The WCAB noted that petitioner chose to treat with Dr. Nario, even though she would have had several opportunities to challenge the treatment she was receiving from the MPN physician.

Finding that an employee has the right to seek the opinion of a second and third physician in the MPN in case of a disagreement over diagnosis and treatment and has the further right to seek independent medical review after the third physician's opinion, the WCAB held that Labor Code section 4616.6 "precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnosis issues, i.e., 'any controversy arising out of this article.'"[2] The WCAB concluded that reports from non-MPN physicians are inadmissible and may not be relied on to award compensation.

The WCAB added an additional reason for finding Dr. Nario's report inadmissible: because Dr. Nario was not the primary treating physician (PTP) in the MPN, he was not qualified to render opinions on the medical issues necessary to determine petitioner's eligibility for compensation. According to the WCAB, there can be only one PTP and only the PTP can "render opinions on the medical issues necessary to determine petitioner's eligibility for compensation."

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[1] "On or after January 1, 2005, an insurer or employer may establish or modify a medical provider network for the provision of medical treatment to injured employees." (Lab. Code, § 4616, subd. (a)(1).) All further statutory references are to the Labor Code, unless otherwise noted.

[2] Section 4616.6 provides: "No additional examinations shall be ordered by the appeals board and no other reports shall be admissible to resolve any controversy arising out of this article."

For the latter point, the WCAB relied in large part on *Tenet/Centinela Hosp. Medical Ctr. v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 1041 (*Tenet*) to find that the petitioner could not select someone outside the MPN to serve as the PTP; because Dr. Nario was not authorized to be the PTP, he could not render an opinion on the medical issues necessary to determine petitioner's eligibility for compensation and his report was inadmissible.

The WCAB rejected the contention that section 4605 made Dr. Nario's report admissible.[3] According to the WCAB, section 4605 does not address the issue of the admissibility of medical reports, but merely allows the employee to consult or treat with a physician of choice at the employee's expense.

Two commissioners dissented and filed separate dissenting opinions. In substance, while the dissenters agreed with the WCAB that petitioner should not have unilaterally left the MPN physician, they found that the non-MPN medical report should be admissible at the WCAB's discretion.

In its second en banc opinion, the WCAB did not limit itself to holding that section 4616.6 made Dr. Nario's report inadmissible. The WCAB also based its decision on the conclusion that Dr. Nario was not the PTP and therefore could not render a medical opinion, which made his report inadmissible. The two dissenters maintained their positions.

DISCUSSION

1. The Purpose of Section 4616.6 and its Relationship to the Statutory Scheme

"The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be

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[3] Section 4605 provides: "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires."

harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)[4]

Section 4616.6 provides: "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." (Italics added.) This statute is in article 2.3, which is entitled "Medical Provider Networks," and includes only sections 4616 to 4616.7. Under those sections, if an injured employee disputes either the diagnosis or the treatment prescribed by the treating physician the employee has picked from the MPN, the employee has the right under section 4616.3, subdivision (c) to seek the opinion of a second, and then a third physician, both of whom must be in the MPN.

Subdivision (b) of section 4616.4 provides: "If, after the third physician's opinion, the treatment or diagnostic service remains disputed, the injured employee may request independent medical review regarding the disputed treatment or diagnostic service still in dispute after the third physician's opinion in accordance with Section 4616.3. The standard to be utilized for independent medical review is identical to that contained in the medical treatment utilization schedule established in Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate."

The criteria for the selection of a physician to conduct an "independent medical review" are contained in subdivision (a) of section 4616.4. The rigorous process of an independent medical review is also detailed in subdivisions (c), (d) and (e) of section 4616.4.[5]

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[4] Amicus Curiae CAAA has requested that we take judicial notice of the legislative history of these sections, along with two cases; we grant the motion as to the legislative materials, but deny as to the case reports.

[5] "Upon receipt of information and documents related to the application for independent medical review, the independent medical reviewer shall conduct a physical examination of the injured employee at the employee's discretion. The reviewer may

Subdivision (f) of section 4616.4 states in relevant part: "The independent medical reviewer shall issue a *report* to the administrative director, in writing, and in layperson's terms to the maximum extent practicable, containing his or her analysis and determination whether the disputed health care service was consistent with the medical treatment utilization schedule established pursuant to Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, within 30 days of the examination of the injured employee, or within less time as prescribed by the administrative director." (Italics added.)

The word "report" must mean the same thing in section 4616.4 subdivision (f) as in section 4616.6. "Where the same term or phrase is used in a similar manner in two related statutes concerning the same subject, the same meaning should be attributed to the term in both statutes unless countervailing indications require otherwise. [Citations]" (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356, rev. den.) Thus, the "report" that is admissible and not precluded by section 4616.6 is the report of the independent medical review that is prepared pursuant to subdivision (f) of section 4616.4. The controversy that it resolves is that which is the subject of the entire article – the use of the MPN.

Considering the thoroughness of an independent medical review, once that review has been concluded and the controversy of treatment or diagnosis has been resolved, the

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order any diagnostic tests necessary to make his or her determination regarding medical treatment. Utilizing the medical treatment utilization schedule established pursuant to Section 5307.27, or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, as appropriate, and taking into account any reports and information provided, the reviewer shall determine whether the disputed health care service was consistent with Section 5307.27 or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines based on the specific medical needs of the injured employee." (§ 4216.4, subd. (e).)

matter should be at an end. Further medical reports and examinations would not only be likely to be duplicative, but would also add time and expense to the process. This also explains why section 4616.6 specifically bars the WCAB from ordering additional medical examinations. "We must also give the provision a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the lawmakers, practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*In re McSherry* (2003) 112 Cal.App.4th 856, 862.)

It does not makes sense, however, to construe section 4616.6 as a general rule of exclusion, barring any use of medical reports other than those generated by MPN physicians. Section 4616.6 states nothing of the sort. If the Legislature intended to exclude all non-MPN medical reports, the Legislature could have said so; it did not.

The WCAB appears to have based its conclusion that section 4616.6 "precludes the admissibility of non-MPN medical reports with respect to disputed treatment and diagnoses issues" on the circumstance that an employee can select a physician within the MPN and is also afforded a "multi-level appeal process where treatment and/or diagnosis are disputed." The fact that process is available to allow physician choice within the MPN does not, however, demonstrate legislative intent to exclude from all proceedings relevant evidence of the employee's medical status.

While as the WCAB states in its brief submitted on this issue[6] that the question whether section 4616.6 is limited to cases where there has been an independent medical review does not arise because in this case there was no independent medical review, it was the WCAB's decision to derive an evidentiary exclusion from section 4616.6 that has led to this review.

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[6] We notified the parties pursuant to Government Code section 68801 that we were considering this question: Is section 4616.6 limited to cases where there has been an independent medical review under section 4616.4?

Based on the phrase "no other reports shall be admissible to resolve any controversy arising out of this article" Respondents contend that section 4616.6 makes inadmissible "any report addressing diagnosis or treatment obtained in violation [MPN] provisions." However, this is not what section 4616.6 states. Section 4616.6 nowhere refers to reports of "diagnosis or treatment obtained in violation MPN provisions." If the Legislature intended to bar for all purposes all medical reports that were not generated within the MPN, the Legislature could have said so; it did not.

Amicus California Workers' Compensation Institute suggests that, besides section 4616.6, there is a "much broader statutory scheme from which the Appeals Board determined that reports by non-MPN physicians are inadmissible into evidence for any purpose." Support for this suggestion, according to this amicus, comes from the circumstance that in other statutory contexts reports are limited to specifically designated documents.

In fact, the existence of such limitations in other contexts supports our conclusion. Given that in other contexts the Legislature has created rules of exclusion, but did not as to non-MPN reports, we can only conclude that the Legislature did not enact that limitation. "'While every word of a statute must be presumed to have been used for a purpose, it is also the case that every word excluded from a statute must be presumed to have been excluded for a purpose.'" (*Arden Carmichael v. County of Sacramento* (2001) 93 Cal.App.4th 507, 516.)

2. Tenet Does Not Create a Rule of Exclusion

The WCAB's decision is also based on the circumstance that Dr. Nario was not the "primary treating physician" (PTP), as that concept is defined by California Code of Regulations, title 8, section 9785(a), and that he was therefore not authorized to render an opinion on "'medical issues necessary to determine the employee's eligibility for compensation' under [Labor Code] section 4061.5 and [California Code of Regulations, title 8, section] 9785(d)." Drawing on *Tenet*, the WCAB concluded that this makes non-MPN medical reports inadmissible. (*Ibid.*)

Tenet involved an employee who disagreed with the PTP, Dr. Glousman, who had concluded that she was permanent and stationary[7] and could return to work; instead of selecting a qualified medical evaluator under section 4061 and 4062, she selected a physician on her own, Dr. Stokes. (*Tenet, supra*, 80 Cal.App.4th at p. 1044.) The WCJ treated Dr. Stokes as the PTP and did not rely on Dr. Glousman's report. (*Id.* at pp. 1044-1045.)

The Court of Appeal held that Dr. Glousman continued as the employee's PTP and that the employee therefore should have resorted to the dispute resolution procedures of section 4061 and 4062 (*Tenet, supra*, at pp. 1046, 1048). While it is manifest that the Court of Appeal in *Tenet* concluded that the WCJ should not have considered Dr. Stokes to be the PTP, the court did not conclude or state that Dr. Stokes' report was inadmissible. *Tenet* does not announce such a rule of exclusion, but instead only held that the physician selected by the employee could not be substituted by the WCJ for the duly serving PTP.

The WCAB noted that, as in *Tenet*, the employee was not free to ignore the dispute resolution mechanisms of sections 4061 and 4062. However, as is apparent, *Tenet* does not support the conclusion that "[a]ccordingly, the non-MPN reports are inadmissible to determine an applicant's eligibility for compensation."

The statutory scheme does not exclude from consideration medical reports prepared by non-MPN physicians, but in fact provides that medical reports prepared by the employee's treating physician may be submitted to the qualified medical evaluator.[8] There is no statutory requirement that the employee's treating physician be part of the

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[7] "Permanent and stationary" means that the person has reached maximal medical improvement and is unlikely to undergo a change within the next year.

[8] "Any party may provide to the qualified medical evaluator selected from a panel any of the following information: [¶] (1) Records prepared or maintained by the employee's treating physician or physicians. [¶] (2) Medical and nonmedical records relevant to determination of the medical issue." (§ 4062.3 subd. (a).)

employer's MPN. Rather, the statute provides that medical records "relevant to the determination of the medical issue" may be provided to the qualified medical evaluator. (Fn. 8.)

As the Legislature permitted the parties to submit non-MPN medical reports to the qualified medical evaluator, there is no basis to infer a legislative intent to preclude their use in other proceedings. It would be illogical to conclude that the qualified medical evaluator may consider non-MPN medical reports, but that those reports must be excluded if a party seeks to introduce them in other proceedings solely because they have not been prepared by MPN physicians.

Our conclusion is buttressed by the employee's undoubted right to contract with physicians of his or her choice. A rule excluding medical reports by such physicians for the sole reason that the report was not prepared by an MPN physician would eviscerate the right guaranteed by section 4605.

4. Conclusion

The decisions of the WCAB are annulled and the case is remanded for further proceedings consistent with this opinion.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ELAYNE VALDEZ, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and WAREHOUSE DEMO SERVICES et al., Respondents.	B237147 (W.C.A.B. No. ADJ7048296) ORDER CERTIFYING OPINION FOR PUBLICATION (NO CHANGE IN JUDGMENT)

THE COURT:

The unpublished opinion in this case having been filed on May 29, 2012, and request for certification for publication having been made,

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in rule 8.1105(b) of the California Rules of Court; and

ORDERED that the words "Not to be Published in the Official Reports" appearing on pages 1 and 10 of said opinion be deleted and the opinion herein be published in the Official Reports.

PERLUSS, P. J. WOODS, J. ZELON, J.