WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELAYNE VALDEZ, ***Applicant,*** **vs.** **WAREHOUSE DEMO SERVICES; ZURICH NORTH AMERICA, Adjusted By ESIS,** ***Defendants.***	**Case No. ADJ7048296** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On July 14, 2011, the Appeals Board granted reconsideration of the en banc decision issued in this matter on April 20, 2011, to further study the factual and legal issues in this case. The following is our Decision After Reconsideration.

For the reasons discussed below, we will affirm the April 20, 2011 en banc decision,[1] wherein we held that, where unauthorized treatment is obtained for an industrial injury outside a validly established and properly noticed medical provider network (MPN), the resulting non-MPN treatment reports are inadmissible and may not be relied upon to award benefits.

Applicant seeks reconsideration of our prior decision contending that (1) by the plain meaning of Labor Code section 4616.6,[2] "inadmissibility of non-MPN reports is limited to the independent medical review appeal;" (2) "ruling that 4616.6 is a broad rule of inadmissibility to all proceedings causes mischief, exorbitant costs, and an absurd result;" (3) the Appeals Board's decision "violates longstanding law;" (4) "defendant waived admissibility of the medical reports by failing to raise it at trial;" (5) the

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[1] En banc decisions of the Appeals Board (Lab. Code, § 115) 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, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

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

Appeals Board's decision "violates due process;" and (6) the Appeals Board's decision "lacks substantial evidence." Defendant filed a timely answer to applicant's petition, disputing each of applicant's contentions.[3]

In addition, as noted in our July 14, 2011 Opinion and Order Granting Reconsideration, Armando Saldivar (Saldivar), an applicant in another case (ADJ7516842), also filed a petition for reconsideration, or in the alternative, a petition for removal, from the Appeals Board's en banc decision of April 20, 2011. For the reasons discussed below, we will dismiss Saldivar's petition.

I. BACKGROUND

To briefly restate the facts, applicant was initially treated for the admitted October 7, 2009 industrial injury to her back, right hip and neck through the employer's MPN by Dr. Nagamoto, from approximately October 9, 2009 to October 31, 2009. For no apparent reason and without regard to following MPN procedures, applicant began treating with Dr. Nario, a non-MPN physician, upon referral from her attorney.

At the hearing held on July 22, 2010, on the issues of temporary disability and attorney's fees, the workers' compensation administrative law judge (WCJ) deferred any issues involving the MPN, which had been raised by the defendant, as "not relat[ing] to temporary disability." Relying on the non-MPN reports of Dr. Nario, the WCJ found that applicant was temporarily disabled from November 2, 2009 through February 10, 2010. In his Opinion on Decision, the WCJ rejected defendant's argument that "reports of non-MPN doctors are inadmissible."

Defendant filed a timely petition for reconsideration from the WCJ's decision, contending, among other things, that applicant's non-MPN medical reports were inadmissible. Applicant did not file an answer to defendant's petition. On April 20, 2011, the Appeals Board held en banc that where unauthorized treatment is obtained outside a validly established and properly noticed MPN, reports from

[3] Defendant also contends that applicant's petition for reconsideration was untimely. Where a final order, decision, or award is served by mail in California, a petition for reconsideration therefrom must be filed within twenty-five days. (Lab. Code § 5903; Code Civ. Proc., § 1013; Cal. Code Regs., tit. 8, § 10507(a)(1)). Here, the WCAB's en banc decision was served by mail on April, 20, 2011, and applicant timely filed her petition for reconsideration on Monday May 16, 2011, the 25th day having fallen on Sunday May 15, 2011. (Gov. Code, §§ 6700, 6706, 6707; *cf.*, Code Civ. Proc., §§ 10, 12-12b.)

the non-MPN doctors are inadmissible, and therefore may not be relied upon, and that defendant is not liable for the cost of the non-MPN reports. However, as the WCJ had deferred any issues concerning the MPN, we remanded the matter to the trial level for determination of whether defendant's MPN was validly established and that all proper notices regarding the MPN were provided to the applicant. (See Lab. Code, § 4616 et seq.; Cal. Code Regs., tit. 8, § 9767.1 et seq.; *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc).)

On May 16, 2011, applicant filed a timely petition for reconsideration. On July 14, 2011, we granted reconsideration to further study the factual and legal issues in this case.

II. DISCUSSION

A. Applicant's Petition

We first address applicant's contentions concerning section 4616.6 that the "plain meaning" of that section limits inadmissibility of non-MPN reports "to the independent medical review appeal" and that interpreting section 4616.6 as "a broad rule of inadmissibility to all proceedings causes mischief, exorbitant costs, and an absurd result."

Contrary to applicant's contentions, we acknowledged that section 4616.6, by its terms, specifically precludes the admissibility of non-MPN medical reports only with respect to disputed treatment and diagnosis issues, i.e., "any controversy arising out of this article." We, however, did not predominantly rely on that section to find that medical reports obtained outside a validly established and properly noticed MPN on other issues are inadmissible.[4] More specifically, we found persuasive the right to change treating physicians within the MPN (Lab. Code, § 4616.3(b)), the multi-level appeal process to dispute the opinions of MPN physicians regarding diagnosis and treatment (Lab. Code, §§ 4616.3(c), 4616.4(b)-(i)), the provisions requiring the primary treating physician [PTP] to "render opinions on all medical issues necessary to determine the employee's eligibility for compensation" (Lab. Code, § 4061.5; Cal. Code Regs., tit. 8, § 9785(d)), and the provisions for resolving disputes regarding

[4] We also note, however, that because section 4616.6 specifically precludes the admissibility of non-MPN medical reports on disputed issues of diagnosis, a report from a non-MPN treating physician finding an applicant to be temporarily disabled, for example, based on a different diagnosis from the MPN physician, should not be admissible under section 4616.6.

temporary and permanent disability under sections 4061 and 4062.

With respect to the opportunities to change treating physicians and to dispute opinions concerning diagnosis and treatment, we stated:

> "… [A]fter the initial medical evaluation arranged by the employer within the MPN pursuant to section 4616.3(a), '[t]he employer shall notify the employee of his or her right to be treated by a physician of his or her choice,' including 'the method by which the list of participating providers may be accessed by the employee.' (Lab. Code § 4616.3(b); Cal. Code Regs., tit. 8, § 9767.6(d).) In addition, AD Rule 9767.6(e) (Cal. Code Regs., tit. 8, § 9767.6(e)) provides that '[a]t any point in time after the initial evaluation with a MPN physician, the covered employee may select a physician of his or her choice from within the MPN.'
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> "Furthermore, pursuant to section 4616.3(c), where an injured worker 'disputes either the diagnosis or treatment prescribed by the treating physician,' he or she 'may seek the opinion of another physician in the [MPN],' and of 'a third physician in the [MPN],' if the diagnosis or treatment of the second physician is disputed.
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> "In addition, section 4616.4(b) provides that if the treatment or diagnostic service remains disputed after the third physician's opinion, 'the injured employee may request independent medical review.' Pursuant to section 4616.4(i), if 'the independent medical reviewer finds that the disputed treatment or diagnostic service is consistent with section 5307.27 or the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines, the injured employee may seek the disputed treatment or diagnostic service from a physician of his or her choice from within or outside the [MPN], and '[t]he employer shall be liable for the cost of any approved medical treatment in accordance with section 5307.1 or 5307.11.' "[5]

We then indicated that the definition of the PTP includes the physician selected "in accordance with the physician selection procedures contained in the [MPN] network pursuant to [section] 4616" (Cal. Code Regs., tit. 8, § 9785(a)(1)), that "[a]n employee shall have no more than one [PTP] at a time" (Cal. Code Regs., tit. 8, § 9785(b)(1)), and that it is the PTP who "shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation." (Lab. Code, § 4061.5; Cal. Code Regs., tit. 8, § 9785(d).) In addition, if an employee "disputes a medical determination made by the

[5] Section 4616.3(d)(2) also allows treatment by a specialist who is not a member of the MPN "on a case-by-case basis if the [MPN] does not contain a physician who can provide the appropriate treatment and the treatment is approved by the employer or the insurer." Thus, reports from these non-MPN physicians would be admissible notwithstanding section 4616.6.

[PTP]... the dispute shall be resolved under the applicable procedures set forth in [sections] 4061 and 4062," and "[n]o other [PTP] shall be designated by the employee unless and until the dispute is resolved." (Cal. Code Regs., tit. 8, § 9785(b)(3).) Thus, we concluded that under these provisions, where an applicant has left a validly established and properly noticed MPN and impermissibly sought treatment outside the MPN, the non-MPN physician cannot be the PTP; the MPN treater remains the PTP. However, while medical treatment and diagnosis issues must be resolved within the MPN, disputes concerning temporary or permanent disability are to be resolved outside the MPN using the medical-legal procedures of sections 4061 and 4062. Therefore, section 4616.6 does not prevent an applicant from disputing the determination of the MPN PTP on the issues of temporary and permanent disability under sections 4061 and 4062.

We also found persuasive the case of *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041 [65 Cal.Comp.Cases 477], which held that because the applicant was discharged from care by her PTP and she disputed his findings, applicant was not entitled to seek medical treatment with a new physician without first complying with the provisions of sections 4061 and 4062, which required submitting the issue of treatment to an agreed medical evaluator (AME) or a qualified medical evaluator (QME).[6] The Court stated, at 80 Cal.App.4th p. 1048 [65 Cal.Comp.Cases at p. 482]:

> "When there are disputes about the appropriate medical treatment, temporary or permanent disability, vocational rehabilitation, the disability rating, or the need for continuing medical care, Labor Code sections 4061 or 4062 apply. (*Keulen v. Workers' Comp. Appeals Bd*., supra, 66 Cal.App.4th at p. 1096.) Sections 4061 and 4062 of the Labor Code establish the procedures for resolving such disagreements. Rushing was, therefore required to follow the Labor Code sections 4061 and 4062 procedures to resolve the dispute before she could legitimately select a new [PTP]."

Applying the rationale in *Rushing* to the facts of this case, we concluded:

> "Similarly, here, and we reiterate that for purposes of this opinion we are proceeding under the assumption of a validly established and properly noticed MPN, the applicant could not select a new PTP outside the MPN. As set forth

[6] The fact that *Rushing* involved a treatment dispute (which, as set forth above, must be resolved within the MPN), while the issue here was entitlement to temporary disability indemnity, is of no consequence; it is the failure to follow the mandatory procedures set forth in sections 4061 and 4062 that is dispositive.

> above, she should have either changed treating physicians within the MPN and/or sought the opinion of a second or third MPN physician, etc. Therefore, the non-MPN physician is not authorized to be a PTP, and accordingly, is not authorized to report or render an opinion on 'medical issues necessary to determine the employee's eligibility for compensation' under section 4061.5 and AD Rule 9785(d). (Cal. Code Regs., tit. 8, § 9785(d).) Moreover, for disputes involving temporary and/or permanent disability, neither an employee nor an employer are allowed to unilaterally seek a medical opinion to resolve the dispute, but must proceed under sections 4061 and 4062. [fn. omitted]. Accordingly, the non-MPN reports are not admissible to determine an applicant's eligibility for compensation, e.g., temporary disability indemnity."

Therefore, contrary to the applicant's contentions, we have not solely, or even primarily, relied on section 4616.6 in reaching our holding. This also belies the applicant's contention that "[r]uling that [section] 4616.6 is a broad rule of inadmissibility to all proceedings causes mischief, exorbitant costs, and an absurd result." Much of applicant's argument with respect to this contention is based on false assumptions, speculation and unsupported allegations. For example, applicant states that "[b]y the WCAB's ruling, apportionment would not be provable if it is based on any medical record from a healthcare provide[r] outside of the MPN." Applicant then states that "[m]any of the medical reports and records finding apportionment predate the inception of the MPN system on January 1, 2005." However, our decision is applicable only where unauthorized industrial injury treatment reports are obtained outside a validly established and properly noticed MPN, and does not preclude admissibility of any other medical reports and records. Furthermore, as stated previously, disputes concerning permanent disability, including apportionment, are to be determined under the procedures set forth in sections 4061 and 4062 with medical-legal reports outside the MPN. Therefore, based on her false assumption regarding admissibility of medical evidence on apportionment, applicant has wrongly speculated that "[i]n all such instances, injured workers will move to strike these reports… and the employer will be unable to prove apportionment under [sections] 4663 and 4664 leading to unintended and exorbitant costs, surely a mischief and absurdity caused by this ruling."

Applicant next contends that our decision "violates longstanding law."

Applicant alleges that "[o]verlooked by [our decision] are numerous provisions of the law which require and mandate review and consideration of treating doctor medical reports and other health care

provider data irrespective of whether these health care providers are in [an] MPN." The provisions cited by applicant include those containing the term "treating physician" (Cal. Code Regs., tit. 8, § 35(a)(1); Lab. Code, §§ 4060(b), 4061(c), 4061(i), 4061.5, 4062(a) and 4062.3(a)), as well as the *American Medical Association () Guides to the Evaluation of Permanent Impairment* (AMA Guides).

Apparently because the provisions cited do not qualify the term "treating physician" in any way, i.e., do not specifically mention MPN physicians, or distinguish them from non-MPN physicians, applicant claims that they, without exception, compel admissibility of all treating physician reports, regardless of the existence of a validly established and properly noticed MPN. However, because many cases do not involve an MPN, and because MPN physicians are included in the definition of a treating physician or a PTP under AD Rule 9785(a)(1) (Cal. Code Regs., tit. 8, § 9785(a)(1)),[7] there is no reason for these provisions to specifically refer to MPN or non-MPN physicians, or to differentiate between them.

As expressed in our prior opinion, non-MPN treatment reports are inadmissible where unauthorized treatment has been obtained outside a validly established and properly noticed MPN because the non-MPN doctor is not the PTP.[8] We concluded:

> "Similarly, here, and we reiterate that for purposes of this opinion we are proceeding under the assumption of a validly established and properly noticed MPN, the applicant could not select a new PTP outside the MPN. As set forth above, she should have either changed treating physicians within the MPN and/or sought the opinion of a second or third MPN physician, etc. Therefore, the non-MPN physician is not authorized to be a PTP, and accordingly, is not authorized to report or render an opinion on 'medical issues necessary to determine the employee's eligibility for compensation' under section 4061.5 and AD Rule 9785(d). (Cal. Code Regs., tit. 8, § 9785(d)). . . "

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[7] That provision defines a PTP to include both MPN physicians, i.e., those selected "in accordance with the physician selection procedures contained in the [MPN] network pursuant to [section] 4616," and non-MPN physicians, i.e., those selected "pursuant to Article 2 commencing with section 4600) of Chapter 2 of Part of Division 4 of the Labor Code, or under the contract or procedures applicable to a Health Care Organization certified under section 4600.5 of the Labor Code."

[8] This determination was based on the fact that "[a]n employee shall have no more than one [PTP] at a time" (Cal. Code Regs., tit. 8, § 9785(b)(1)); it is the PTP who "shall render opinions on all medical issues necessary to determine the employee's eligibility for compensation" (Lab. Code, § 4061.5; Cal. Code Regs., tit. 8, § 9785(d)); and that where an employee disputes a medical determination made by the PTP, "[n]o other [PTP] shall be designated by the employee unless and until the dispute is resolved" (Cal. Code Regs., tit. 8, § 9785(b)(3)), as well as reliance on *Rushing, supra,* 80 Cal.App.4th 1041 [65 Cal.Comp.Cases 477].

Therefore, based on the foregoing, we are not persuaded that use of the term "treating physician," in and of itself, necessitates finding the reports of non-MPN physicians admissible.

Concerning the AMA Guides, which must be used to rate permanent disability under section 4660, applicant states that they "do not limit reporting to MPN doctors." We agree. Aside from the fact that many cases do not involve an MPN, disputes over permanent disability are to be determined under the procedures set forth in sections 4061 and 4062, i.e., outside the MPN.

In addition, applicant has cited two recent writ denied cases in which a WCJ relied on the opinion of the applicant's treating physician over that of the panel qualified medical evaluator (PQME).[9] However, neither case involved an MPN, and there was no issue regarding the admissibility of the reports of the treating doctors. Similarly, we also fail to see any relevance to the issues here in applicant's comment regarding section 4610, which involves the utilization review (UR) process that must be established by every employer, that "[t]here is no limit in [section] 4610 that the medical doctor must be in any MPN."

Applicant next contends that "defendant waived admissibility of the medical reports by failing to raise it at trial." This contention, however, is directly contrary to the evidence of record. As set forth in our en banc opinion of April 20, 2011, while the WCJ deferred "the issue of MPN,"[10] he nevertheless rejected defendant's argument that "reports of non-MPN doctors are inadmissible."

Applicant further contends that the Appeals Board's decision "violates [both substantive and procedural] due process." Specifically, with regard to substantive due process, applicant states:

> "The practical consequences of this violation of substantive due process by the wrongful judicial legislating of the WCAB in the ODAR [Order and Decision after Reconsideration] are to vastly worsen the costs and delays attendant in the workers' compensation system. Employers will have a nearly impossible time to prove apportionment which employers would rightfully be entitled to. Utilization review doctors and PQME's would have to be in the MPN or their medical opinions would not be admissible. A costly and delay-prone battle

[9] *California Institiute of Technology v. Workers' Comp. Appeals Bd.* (*Bonzo*) (2010) 75 Cal. Comp. Cases 735 and *Payless Shoesource, Inc*. v. *Workers' Comp. Appeals Bd.* (*Twine*) (2010) 75 Cal. Comp. Cases 1225.

[10] Applicant apparently contends that because at hearing it was indicated only that "[d]efendant wishes to raise the issue of [MPN]," she was not on notice that defendant was challenging the admissibility of her non-MPN medical reports. The WCJ, however, was apparently fully aware of the extent of defendant's concern, stating in his Opinion on Decision: "Defendant argues that reports from non-MPN doctors are inadmissible. This is incorrect."

would occur over MPN accreditation and notice issues in every single case. . . "

Applicant's conclusion is wrong. Records of treatment may still be subpoenaed, and UR and PQME reports may still be obtained.

Regarding the alleged denial of the substantive right to medical treatment under the California Constitution, applicant takes issue with our determination that section 4605[11] does not justify the admission of reports from non-MPN doctors where treatment was improperly obtained outside the MPN, and with the inadmissibility of such reports under section 4616.6. Contrary to applicant's assertion, our decision did nothing to restrict the right of any injured employee to treat with any physician of the employee's choice and at the employee's expense under section 4605. Moreover, we explained:

> "This determination [of inadmissibility] is supported by the reasons previously given for finding such non-MPN medical reports inadmissible: a validly established and properly noticed MPN; the opportunities within the MPN both to change treating physicians and to dispute opinions regarding diagnosis and treatment, including the limitations on admissibility under section 4616.6 for such disputes; the provisions requiring the PTP to 'render opinions on all medical issues necessary to determine the employee's eligibility for compensation' (Lab. Code, § 4061.5; Cal. Code Regs., tit. 8, § 9785(d)); and the provisions for resolving disputes regarding temporary and permanent disability under sections 4061 and 4062."

We remain of the opinion that our determination concerning section 4605 was justified for the reasons stated in the above paragraph.[12] In addition, consistent with the above paragraph, and as discussed previously, section 4616.6 was only part of the basis for finding that medical reports obtained outside a validly established and properly noticed MPN are inadmissible.

With respect to procedural due process, applicant first asserts, incorrectly—for the reasons discussed previously—that the issue of the admissibility of the non-MPN medical reports was not raised at trial. Moreover, because the WCJ deferred any issues concerning the MPN, no determination was

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

[12] For these same reasons, coupled with the discretionary language of section 5703(a), i.e., "[t]he appeals board *may* receive as evidence… [r]eports of attending or examining physicians" (italics added), our prior decision also concluded "that unauthorized non-MPN medical reports are not admissible under section 5703(a). That is, our discretion should not be used to admit medical reports or testimony in lieu of such reports resulting from an unauthorized departure outside the MPN."

made as to the validity of the MPN, or whether the applicant received the proper notices pursuant to *Knight, supra,* 71 Cal.Comp.Cases 1423. Thus, as to the admissibility of applicant's non-MPN reports, we remanded this matter for consideration of these issues. Therefore, the applicant and the defendant will have the opportunity to present documentary and testimonial evidence and fully litigate these issues in further proceedings. There has been no denial of procedural due process.

Applicant's last contention is that "[t]he decision of the WCAB lacks substantial evidence."[13] In support of this contention, applicant states only the following:

> "The decision by the WCAB must be supported by substantial evidence. In Garza v. WCAB 3 Cal.3d 312 (1970), the California Supreme Court held evidence based on guess, surmise, and conjecture is not substantial evidence and does not properly support a decision of the WCAB which must be annulled. See also Lamb v. WCAB 11 Cal.3d 274 (1974) and Place v. WCAB 3 Cal.3d 372 (1970).
>
> "There is no substantial evidence to support the ODAR."

Thus, applicant has presented no facts or argument whatsoever to support this conclusion. She has not demonstrated that the Appeals Board's decision or the evidence relied on was "based on guess, surmise, and conjecture," or that it fails to conform to the definition of substantial evidence quoted with approval by the California Supreme Court.

Finally, we again disagree with the assertion in the concurring and dissenting opinion of Commissioner Caplane that our decision effectively deprives injured workers from receiving compensation by making non-MPN medical reports inadmissible. On the contrary, it is those applicants who have chosen to disregard a validly established and properly noticed MPN, despite the many options to change treating physicians and to challenge diagnosis or treatment determinations within the MPN, who have removed themselves from the benefits provided by the Labor Code.

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[13] The term "substantial evidence" has been defined as evidence "which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as *a reasonable mind might accept as adequate to support a conclusion* … It must be *reasonable in nature, credible, and of solid value*…" (*Braewood Convalescent Hospital v. Workers Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566, 568] emphasis in original; internal quotes omitted.)

B. Saldivar's Petition

Saldivar contends that he "has been aggrieved" under section 5900(a) by the Appeals Board's en banc decision of April 20, 2011.[14]

Directly aggrieved persons are those whose rights and liabilities are affected by the proceedings, e.g., the parties (the injured employee, the employer or the insurance carrier). Indirectly aggrieved persons include nonparties who have some direct monetary or other real interest in the case, e.g., a lien claimant whose lien is disallowed or reduced or who is prejudiced by a priority granted another lien; an attorney not satisfied with the fee allowed (*Bentley v. Industrial Acc. Com* (*Martin*) (1946) 75 Cal.2d 547 [11 Cal.Comp.Cases 204]); an alleged but unjoined employer when another alleged employer is dismissed (*Arias v. Workers' Comp. Appeals Bd.* (*Aviles*) (1983) 146 Cal.App.3d 813 [48 Cal.Comp.Cases 659]). (See *California Workers' Compensation Practice* (Cont.Ed.Bar 4th ed. June 2011 update), Reconsideration, § 21.12, p. 1681.)

We interpret the language of section 5900(a) to mean that a person must be aggrieved in the case from which reconsideration is sought. Saldivar, who has a pending claim for workers' compensation benefits in Case No. ADJ7516842, is not a party in the present case, nor does he have a direct monetary or other real interest in this matter. Interpreting section 5900(a) as urged by Saldivar to allow him seek reconsideration here would mean that any party or nonparty in another case, anyone affected by an en banc decision of the Appeals Board, potentially thousands of litigants, could file petitions for reconsideration, and would also permit such petitions where reconsideration had not been sought by any of the case participants. This is an absurd result, and one we believe was not intended by section 5900(a). Moreover, should Saldivar subsequently be aggrieved by an adverse decision in his own case based on the en banc decision here, he may ultimately seek relief in the appropriate Court of Appeal.

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[14] Section 5900(a) provides: "*Any person aggrieved directly or indirectly* by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. . . " (emphasis added.)

Accordingly, we will dismiss Saldivar's petition.[15]

III. CONCLUSION

For the reasons discussed above, we affirm the Opinion and Decision After Reconsideration (En Banc) issued on April 20, 2011.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration or, in the alternative, Petition for Removal filed on behalf of Armando Saldivar, the applicant in case Case No. ADJ7516842, is **DISMISSED.**

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[15] An alternate ground for dismissal is Saldivar's failure to serve the adverse parties in his own case with this petition. (Lab. Code, § 5905; *Fisher v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 517 (writ den.).) Moreover, that Saldivar has "in the alternative" sought removal under section 5310, does not change his status in this case as a nonparty with no direct monetary or other real interest, or otherwise enable him or potentially numerous similarly situated petitioners from challenging Appeals Board en banc decisions via removal.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board (En Banc) that the Opinion And Decision After Reconsideration (En Banc) issued on April 20, 2011, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

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

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

I CONCUR in part and I DISSENT in part,
(See attached Concurring and Dissenting Opinion)

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

I CONCUR in part and I DISSENT in part,
(See attached Concurring and Dissenting Opinion)

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

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA 9/27/2011

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

ELAYNE VALDEZ
LAW OFFICES OF JEFFREY N. SARDELL
LAW OFFICES OF JOHN MENDOZA

VB/bgr

CONCURRING AND DISSENTING OPINION OF

COMMISSIONER BRASS

I concur with the majority in dismissing the petition for reconsideration or, in the alternative, petition for removal filed on behalf of Armando Saldivar, the applicant in Case No. ADJ7516842.

I also concur with the majority in affirming the en banc decision issued on April 20, 2011, because as I stated in that decision, it did not appear that applicant made even a good faith attempt to treat within defendant's MPN or to avail herself of the opportunities to change treating physicians and/or request another opinion. Rather, apparently on the advice of her attorney, she left the MPN after approximately three weeks. I remain of the opinion that such behavior should not be condoned. Accordingly, if the existence of a validly established and properly noticed MPN is determined in this case, I concur with the majority in finding the non-MPN reports inadmissible, thereby reversing the award of temporary disability benefits based on those reports.

I again dissent, however, because there may be situations when an injured worker has good reasons to seek care outside even a validly established and properly noticed MPN, and thus, an appropriate exercise of discretion under section 5703(a) would be to admit the reports of the non-MPN treating physician.

The majority's decision eliminates the discretion provided by section 5703(a) in *all* cases, and penalizes injured workers when it would be in their best interest to seek care outside a validly established and properly noticed MPN. There may be a misdiagnosis, a lack of effective treatment, and/or an unreasonable delay in providing care. An employee exercising his or her right under section 4605 to seek treatment outside a validly established and properly noticed MPN already has to pay for such treatment under the provisions of that statute (see also *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases 1423 (Appeals Board en banc)) and for the cost of any non-MPN reports. Furthermore, under the majority's opinion, injured workers exercising their right under section 4605 to seek and pay for their own medical treatment outside the MPN are also foreclosed from receiving any compensation based on the non-MPN reports.

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As correctly indicated by the majority, sections 4061 and 4062 require an injured worker to go outside the MPN to determine issues of temporary and permanent disability, if they are in dispute. Under the majority's decision, however, the opinion of the non-MPN treating physician on those issues, regardless of its worth, would not even merit consideration by the WCJ. I would again emphasize that receiving reports into evidence only means that they will be considered. They may not be relied on unless they constitute substantial evidence and are the most persuasive indication of the injured worker's condition.

Section 5703(a) states that "[t]he appeals board may receive as evidence… [r]eports of attending or examining physicians," and provides authority to admit the reports of non-MPN treating physicians. In situations which do not rise to the level of neglect or refusal to provide reasonable medical treatment, but where an injured worker has nevertheless appropriately sought care outside an MPN, the reports of the non-MPN treating physician should be admitted into evidence under section 5703(a) for consideration of any issue in dispute.

Finally, I wish to emphasize that the MPN provisions are not to be disregarded lightly, and while an injured worker cannot be prohibited from seeking treatment outside even a validly established and properly noticed MPN, in doing so, he or she runs the risk that any non-MPN reports will be inadmissible. On the other hand, if an injured worker has demonstrated a good reason for leaving the MPN, e.g., a misdiagnosis, a lack of effective treatment, and/or an unreasonable or detrimental delay in providing care, he or she should not be penalized for exercising that right. That the instant matter, assuming the existence of a validly established and properly noticed MPN, presents no justifiable grounds for disregarding the MPN statutes, should not be a basis for extending the majority's holding to all injured workers in every case, regardless of the circumstances.

/s/ Frank M. Brass

FRANK M. BRASS, Commissioner

CONCURRING AND DISSENTING OPINION OF

COMMISSIONER CAPLANE

I concur with the majority in dismissing the petition for reconsideration or, in the alternative, petition for removal filed on behalf of Armando Saldivar, the applicant in case ADJ7516842. However, with respect to the majority's disposition of the applicant's case, I dissent for the reasons stated in my prior dissenting opinion of April 20, 2011. More specifically, inadmissibility of non-MPN medical reports should be limited only as to issues of diagnosis and treatment arising under Article 2.3, sections 4616 – 4616.7. By holding that the medical reports of unauthorized, non-MPN treating doctors are inadmissible for any purpose, the majority extends the limitations in section 4616.6 beyond the language of the statute.

Article 2.3, sections 4616 – 4616.7, governs an employer's obligations in establishing and operating an MPN, and an injured worker's rights in respect to diagnosis, treatment and dispute resolution of medical issues that arise while treating within an MPN. To promote the exclusivity of the validly established, properly noticed MPN for diagnosis and medical treatment, Section 4616.6 prohibits the appeals board from ordering any additional examinations and precludes the admission of any other, i.e. non-MPN medical reports, "to resolve any controversy *arising out of this article."* (Emphasis added) *"This article,*" as referred to in section 4616.6, only pertains to diagnosis, treatment and disputes arising therefrom within the MPN. Statutes governing an injured worker's entitlement to compensation such as temporary and/or permanent disability are contained in Article 3, Sections 4650 – 4664. It was in this context that the proffered medical report in this case was offered.

It is a fundamental rule of statutory interpretation that the legislature is presumed to be aware of existing law (*Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd. (Scheftner)* (2005) 131 Cal. App. 4th 517, 530 [70 Cal. Comp. Cases 999, 1009]; *James v. Workers' Comp. Appeals Bd.* (1997) 55 Cal. App. 4th 1053, 1056 [62 Cal. Comp. Cases 757, 758], and that when construing the meaning of a statute, it should be done so as to harmonize with other code sections so that none are deprived of meaning and the statutory scheme as a whole is given effect. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal. Comp. Cases 286, 289-290; *Rea v. Workers' Comp. Appeals Bd.*

(2005) 127 Cal.App.4th 625, 641 [70 Cal. Comp. Cases 312, 318]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 914 [70 Cal. Comp. Cases 787, 792). In this case, by holding that the limitation on the inadmissibility of medical reports generated by unauthorized, non-MPN treating doctors in section 4616.6 applies to all situations, the majority strips sections 4605 and 5703(a) of all effectiveness, and in essence renders these sections meaningless.

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

Section 5703 sets forth what evidence the appeals board may receive as proof facts in dispute. Subsection (a) specifically names "[R]eports of attending or examining physicians."

The majority takes the position that an unauthorized, non-MPN doctor can not be a PTP and that the PTP continues to be the MPN doctor who initially treated the applicant. While this may make theoretical sense, as a practical matter it's untenable to expect that the MPN doctor with whom the applicant has severed ties will issue medical reports regarding an injured workers disability status. This is unreasonable and inconsistent with the provisions of sections 4605 and 5703(a). Holding that medical reports obtained from unauthorized, non-MPN treating doctors are inadmissible, even though the treatment is permitted under section 4605, deprives injured workers of the tools needed to prove entitlement to compensation under Article 3, and ultimately deprives them of benefits.

While legislative intent is not always apparent, it strains credulity to assume that in enacting section 4616.6, the legislature intended that by exercising the right to obtain medical treatment at their own expense, injured workers would preclude themselves from receiving benefits for their industrial injuries. Moreover, the majority has removed the discretion of the WCJ to admit the reports of non-MPN treating physicians in all cases and circumstances where there is a validly established and properly noticed MPN, apparently creating for the first time an exception to section 5703(a), which was enacted in 1937.

In most cases, the issue of entitlement to temporary and/or permanent disability indemnity is initiated by a medical report from the applicant's treating doctor. When served with that report, a defendant must either pay the benefits in question, or object and follow the procedures set forth in

sections 4061 and 4062 to resolve the dispute. However, as a consequence of the majority's holding that reports of non-MPN physicians are not admissible for any purpose, the defendant is no longer obligated to take any action when served with such reports, and the applicant has been deprived of the opportunity to even present a claim for temporary or permanent disability indemnity. Surely this is not the consequence that was intended by the legislature. It should also be emphasized that admitting non-MPN reports into evidence merely means they will be considered and not that they will necessarily be relied on to award compensation. Furthermore, the admissibility of these reports does not abrogate a defendant's right to obtain an opinion and report from a QME, as provided by sections 4061 and 4062, addressing the issue at hand on which the WCJ can rely.

In addition, while the majority continues to find "persuasive" the case of *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd.* (*Rushing*) (2000) 80 Cal.App.4th 1041 [65 Cal.Comp.Cases 477], I remain of the opinion that it is inapposite to the situation here. As I indicated in my prior dissent, *Rushing* "pre-dates the MPN statutes which were enacted under Senate Bill 899, and does not involve an applicant exercising the right to seek treatment under section 4605."

Accordingly, based on the applicant's right to seek treatment under section 4605, the specific restriction on admissibility to issues of diagnosis and treatment by section 4616.6 (the only issues under the scope of the MPN statutes under Article 2.3), and the discretion afforded by section 5703(a) to admit non-MPN medical reports on issues of compensation, I dissent. As indicated in my prior dissent, I would therefore affirm the WCJ's decision insofar as he properly exercised his discretion under section 5703(a) to admit the reports of the applicant's non-MPN treating physician on the issue of temporary disability. I would, however, return this matter to the trial level for the newly assigned WCJ to address the defendant's contention that these reports do not constitute substantial evidence. If so, the parties should then proceed under sections 4062(a) and 4062.2 to select either an agreed medical evaluator (AME) or a qualified medical evaluator (QME).

/s/ Ronnie G. Caplane

RONNIE G. CAPLANE, Commissioner