WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARY DAVIS ***Applicant,*** **vs.** **INTERIM HEALTHCARE, ITT SPECIALTY RISK SERVICES, INC.; WAUSAU INSURANCE COMPANIES,** ***Defendants.***	**Case No. LAO 748301** **LAO 768192** **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On July 7, 2000, the Board granted applicant's petition for reconsideration of the Findings and Award issued by the workers' compensation administrative law judge (WCJ) on May 2, 2000. In the relevant portion of his decision, the WCJ stated that because Labor Code section 4062.9[1] was not listed by the parties as an issue at the mandatory settlement conference (MSC), it had been waived. In her petition for reconsideration, the applicant contends that she properly raised the section 4062.9 presumption at trial, as indicated by the October 21, 1999 Minutes of Hearing, and moreover, it need not be raised as a separate issue at any time, but is applicable by virtue of the statutory section alone.

Because of the important and novel legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an *en banc* decision. (Lab. Code, §115.) Based on our review of the relevant statutory and case law, we conclude that, although the prudent practitioner should raise the section 4062.9 presumption at the time of the MSC, along with all other issues, the section 4062.9 presumption may first be raised at trial, but not for the first time on

[1]Labor Code section 4062.9 provides a rebuttable presumption of correctness to the findings of the treating physician, and will be set out in full in the body of our decision. All further statutory references are to the Labor Code, unless otherwise indicated.

reconsideration.

I. BACKGROUND

Applicant sustained an admitted cumulative industrial injury to her low back, neck and left shoulder from October 8, 1996 through October 8, 1997 (LAO 748301), and an admitted specific injury to her left shoulder on October 8, 1997 (LAO 768192). Both injuries were sustained while applicant was employed as a nurse by Interim Healthcare, insured by ITT Specialty Risk Services from October 8, 1996 to September 26, 1997, and by Wausau Insurance Company from September 26, 1997 to October 8, 1997.

Applicant's primary treating physician for these industrial injuries was Dr. Robert Hunt. In his report dated March 23, 1999, Dr. Hunt stated that applicant's condition was permanent and stationary as of February 24, 1999, the date of his clinical evaluation. With respect to permanent disability, Dr. Hunt set forth various prophylactic work restrictions for the applicant's neck, spinal and shoulder injuries, and apportioned fifty percent of her right shoulder disability to a prior 1991 injury. Dr. Hunt also concluded that applicant was in need of further medical treatment, and that she was a candidate for vocational rehabilitation.

Dr. Hunt issued a supplemental report dated May 19, 1999. In that report, he disagreed with the opinion of Dr. Steven Wertheimer, defendant's qualified medical examiner (QME), as to applicant's permanent and stationary date, and with Dr. Wertheimer's assessment that applicant was not in need of a housekeeper to do her shopping and laundry. There was no indication that Dr. Hunt changed any of the conclusions reached in his March 23, 1999 report.

In Dr. Wertheimer's report of November 16, 1998, he concluded that applicant's condition was permanent and stationary, and that she was a qualified injured worker. Dr. Wertheimer prescribed future medical care in the form of light analgesic medications, and an occasional steroid injection, but stated that surgery was not recommended. He concluded, however, that physical therapy, which was being provided by Dr. Hunt, had not been effective. With respect to permanent

disability, Dr. Wertheimer opined that applicant was precluded from performing various work activities, but to a lesser extent than set forth in the opinion of Dr. Hunt.

Dr. Wertheimer also submitted a report dated February 16, 1999, in which, among other things, he noted that his earlier report had omitted the restrictions regarding applicant's cervical spine. Dr. Wertheimer submitted a final report dated October 8, 1999, after viewing a sub rosa videotape of the applicant. In that report, he changed his opinion as to applicant's qualified injured worker status, stating that "she should be able to perform her usual and customary duties as an LVN."

The MSC in this matter was held on July 22, 1999. At that proceeding, the parties submitted a statement of their stipulations and issues in dispute. Among the issues in dispute were temporary disability, permanent disability, apportionment, need for further medical treatment, attorney's fees, including commutation, and contribution between co-defendants. The treating physician presumption under section 4062.9 was not raised as an issue at the MSC.

This matter proceeded to trial on October 21, 1999, at which section 4062.9 was raised as an issue, over defendant's objection. The matter was then continued to December 16, 1999.

Following the proceeding of December 16, 1999, at which applicant testified, among other things, that she was still treating with Dr. Hunt, the WCJ referred the matter to the Disability Evaluation Unit, with rating instructions being given to the disability evaluator on January 19, 2000. It appears that the rating instructions were primarily drawn from Dr. Wertheimer's November 16, 1998 report. A permanent disability rating of 30 percent was issued by the disability evaluator. There was no request to cross-examine the disability evaluator or other challenge to the rating.

On May 2, 2000, the WCJ issued his Findings and Award, in which it was determined, among other things, that applicant's injuries caused temporary disability from October 9, 1997 through February 24, 1999 (the date Dr. Hunt opined that applicant was permanent and

stationary), permanent disability of 30 percent, and the need for further medical treatment "(as prescribed by Dr. Hunt, M.D., in his report dated March 23, 1999)." As to the issue of the treating physician presumption, raised by applicant at trial over defendant's objection, the WCJ stated in his Opinion on Decision, "Since Labor Code §4062.9 was not raised on the MSC statement, the issue is waived."

On May 8, 2000, applicant timely petitioned for reconsideration, contending that the opinion of the treating physician, Dr. Hunt, should have been followed because section 4062.9 was properly raised at trial, and moreover, that it need not be raised as a separate issue. Defendant did not file an answer to applicant's petition. Defendant had previously argued, however, in a trial brief filed on October 22, 1999, that the opinion of Dr. Wertheimer, who had acted in the capacity of an agreed medical examiner (AME) with respect to the applicant's prior orthopedic injury, was more persuasive on the issue of permanent disability given the lack of sufficient objective or subjective factors of disability to justify the significant work restrictions given by Dr. Hunt.

The WCJ responded to applicant's petition by reiterating in his Report and Recommendation (report) that the failure to raise section 4062.9 at the MSC constituted a waiver of that issue. For the reasons that follow, we conclude that, although a party should raise all issues at the MSC, including the section 4062.9 treating physician presumption, that issue may first be raised at trial, but may not be raised for the first time on reconsideration.

II. DISCUSSION

Labor Code section 4062.9 provides:

> "In cases where an additional comprehensive medical evaluation is obtained under Section 4061 or 4062, the findings of the treating physician are presumed to be correct. This presumption is rebuttable and may be controverted by a preponderance of medical opinion indicating a different

> level of impairment. However, this presumption shall not apply where both parties select qualified medical examiners."

Although not expressly stated by the WCJ, it is apparent that his determination of waiver for failure to raise the issue of section 4062.9 at the MSC, was made pursuant to section 5502(d)(3). Section 5502(d)(3) provides:

> "If the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits and disclosing witnesses. Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference."

Section 5502(d)(3) requires that all evidence be obtained by the time of the MSC and disclosed at that proceeding. It further requires the filing of a pretrial statement noting the specific issues in dispute. Where the dispute has not been resolved, authority is given to the WCJ under section 5502(d)(2) "to frame the issues and stipulations for trial."

Section 5502(d)(3) specifically addresses the situation where a party has not timely disclosed and/or obtained *evidence*. It makes that evidence inadmissible absent a showing that it was unavailable or could not have been discovered with due diligence prior to the MSC. A presumption, however, as stated by California Evidence Code section 600, "is not evidence," but rather, "an assumption of fact or group of facts found or otherwise established in the action." Thus, a presumption becomes operative at trial when the basic facts giving rise to the presumption

are established by the pleadings, by stipulation, by judicial notice, or by evidence. (See Comments to Evid. Code §§ 604, 606; *Barbera v. Sokol* (1980) 101 Cal.App.3d 725, 733.)

Pursuant to Evidence Code section 601, every rebuttable presumption "is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof."[2] As discussed in our en banc decision in *Minniear v. Mt. San Antonio Community College District* (1996) 61 Cal.Comp.Cases 1055, 1059-1060 [writ den. 61 Cal.Comp.Cases 1450], we concluded that the presumption in section 4062.9 was intended to affect the burden of proof because it was part of an effort by the Legislature to implement a public policy of reducing medical-legal costs and expediting resolution of medically related issues by restricting the number of medical evaluations. We also concluded that this presumption's legal effect, pursuant to Evidence Code section 606, was to impose on the party against whom it operates "the burden of proof as to the nonexistence of the presumed fact." (*Id*.) Therefore, if that party fails in its burden, the trier of fact must find that the presumed fact exists.

As stated previously, Labor Code section 4062.9 provides that the rebuttable presumption in favor of the treating physician's findings will apply only in those cases where a comprehensive medical evaluation in addition to that of the treater has been obtained under section 4061 and 4062, i.e., where either the applicant or the defendant disagrees with the treating physician's findings, but not where both parties have obtained such evaluations. Thus, in most cases where the presumption would apply, the exhibits at the MSC would have included the reports of the treating physician by one party and those of the other party's QME. Further, the issues to which the presumption may apply, such as permanent disability or need for further medical treatment, by necessity and by statute need to have been raised at the MSC. Therefore, in general, no new evidence would be required, so failure to raise the presumption at the MSC should not ordinarily preclude its

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[2]A presumption affecting the burden of producing evidence is a presumption "established to implement no public policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid. Code, § 603.) A presumption affecting the burden of proof is a presumption "established to implement some public

application. The presumption would only be applied to issues and evidence already raised and identified at the MSC. Accordingly, the same criteria set forth in section 5502(d)(3) with respect to untimely disclosed or obtained *evidence* does not apply to the issue of the treating physician's presumption.

In addition, section 5708 provides the WCJ with authority to conduct hearings in a manner "best calculated to ascertain the substantial rights of the parties." This includes discretion in setting forth issues for trial, including issues not previously identified by the parties. (*See Beckstead v. Workers' Comp. Appeals Bd*. (1997) 60 Cal.App.4th 787 [62 Cal.Comp.Cases 1646, 1648-1649]; *Moyer* v. *Workmen's Comp. Appeals Bd*. (1972) 24 Cal.App.3d 650 [37 Cal.Comp.Cases 219, 222]; *National Convenience Stores v. Workers' Comp. Appeals Bd*. (*Kessler*) (1981) 121 Cal.App.3d 420 [46 Cal.Comp.Cases 783, 785]; *Oakland Unified School District v. Workers' Comp. Appeals Bd*. (*Oler*) (1991) 56 Cal.Comp.Cases 139 (writ den.).)

Therefore, although we reiterate that all issues should be raised at the time of the MSC, a party may raise the treating physician's presumption for the first time at trial. However, if the opposing party can demonstrate prejudice by not having had notice of that issue at the MSC, the WCJ must take appropriate steps to remedy the prejudice.

While the treating physician's presumption under section 4062.9 may be raised for the first time at trial, we disagree with applicant that it need not be raised as a separate issue. In many cases, including those involving successive or multiple treating physicians where the identity of the primary treating physician may not be readily apparent, the parties will not be in agreement concerning the designation of the primary treating physician (whether or not the presumption has been specifically raised). Thus, unless these issues, including the presumption, have been raised, the trier of fact will not be on notice that they should be determined, and the medical evidence will be reviewed without consideration of the treating physician presumption. On reconsideration, the

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policy other than to facilitate the determination of the particular action in which the presumption is applied." (Evid.

party claiming to be aggrieved by the failure to apply the presumption will then attempt to "try" that issue before the Board, or have the case remanded to the WCJ to consider whether the presumption has been overcome.

Therefore, in the interest of judicial economy, the section 4062.9 presumption must be raised as a separate issue. This is consistent with the purpose of section 5502(d)(3) that issues be set forth and resolved as expeditiously as possible. (See *State Compensation Insurance Fund v. Workers' Comp. Appeals Bd*. (*Welcher*) (1995) 37 Cal.App.4th 675 [60 Cal.Comp.Cases 717, 724]*; County of Sacramento* v. *Workers' Comp. Appeals Bd*. (*Estrada*) 68 Cal.App.4th 1429 [64 Cal.Comp.Cases 26, 29]; *Zenith Insurance Co. v. Ramirez* (1992) 57 Cal.Comp.Cases 719, 727 (Board en banc).)

Furthermore, the treating physician's presumption will not be applied where it has been raised for the first time on reconsideration. (See *California Compensation Insurance Co. v. Worker's Comp. Appeals Bd*. (*Gale*) (1997) 62 Cal.Comp.Cases 961 (writ den.); *Ingram Micro v. Worker's Comp. Appeals Bd*. (*Ordonez*) (1999) 64 Cal.Comp.Cases 100 (writ den.); see also *Jobity v. Worker's Comp. Appeals Bd*. (1997) 62 Cal.Comp.Cases 978 (writ den.) [waiver of section 5402 presumption where issue not raised at trial, but for first time on reconsideration.[3]]; *Griffith v. Worker's Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145, 148] [re general policy that issues cannot first be raised on reconsideration].) The bases for this proscription include the following: prejudice to the opposing party due to delays and additional costs of having to relitigate an issue that should have been decided at trial; judicial economy, i.e., the displacement of other cases awaiting trial if cases had to be retried on the section 4062.9 issue; and the policies inherent in Article XIV, section 4 of the California Constitution and section 5502, etc., favoring expeditious resolution of workers' compensation cases.

Code, § 605.)

[3]Section 5402, which creates a rebuttable presumption of compensability where liability has not been rejected within 90 days after the filing of the claim form, is also a presumption affecting the burden of proof under Evidence Code

III. CONCLUSION

Although the prudent practitioner should raise all possible issues at the MSC, including the section 4062.9 presumption, that issue will not be deemed waived if raised for the first time at trial. If, however, the opposing party can demonstrate prejudice by not having had notice of that issue at the MSC, the WCJ must take appropriate steps to remedy the prejudice. Finally, a party may not raise the section 4062.9 treating physician presumption for the first time in a petition for reconsideration.

In the instant case, we will therefore rescind the WCJ's decision and return this matter to the trial level for consideration of whether the presumption under section 4062.9 has been rebutted, for such further proceedings as are appropriate, and for decision thereafter.

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For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Board (En Banc) that the Findings and Award of May 2, 2000, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with this opinion.

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section 605. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd.* (*Welcher*), *supra*, 37 Cal.App.4th

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Merle C. Rabine

MERLE C. RABINE, Chairman

/s/ Robert N. Ruggles

ROBERT N. RUGGLES, Commissioner

/s/ Colleen S. Casey

COLLEEN S. CASEY, Commissioner

/s/ Robert E. Burton

ROBERT E. BURTON, Commissioner

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

9/15/2000

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

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675 [60 Cal.Comp.Cases at pp. 721-722].)