WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRED T. HINES, *Applicant,* vs. NEW UNITED MOTORS MANUFACTURING, INC., and GREAT AMERICAN RISK MANAGEMENT, *Defendant(s).*	Case Nos. SAL 0082124 SAL 0082125 **OPINION AND DECISION AFTER RECONSIDERATION (EN BANC)**

On December 22, 2000, the Workers' Compensation Appeals Board (Board) granted reconsideration of the Findings and Award of October 5, 2000, wherein the workers' compensation administrative law judge ("WCJ") found that applicant had properly selected a new treating physician and was entitled to further medical treatment.

Defendants contended, in substance, that (1) applicant had not suffered a work-related flare-up of his condition and the treatment provided by the newly selected treating physician was duplicative, unreasonable and unnecessary; (2) there was no evidence that applicant formally designated Stephen A. Bernfeld, D.C., as his new treating physician, under Administrative Director Rule 9785(b) (Cal. Code Regs., tit. 8, ("Rule 9785(b)"), after Massaud Nassari, D.C., applicant's original treating physician, released him from care; and (3) under 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], applicant was obligated to return to Dr. Nassiri, the original treating physician, and was not entitled to seek medical treatment from Dr. Bernfeld under Rule 9785(b), without complying with the provisions of Labor Code sections 4061 and

4062.[1] The applicant filed an answer to the petition for reconsideration.

Because of the important and recurring issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Workers' Compensation Appeals Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an en banc decision. (§ 115.)

Based on our review of the relevant statutory and case law, we conclude that where there is an existing award of medical treatment to cure or relieve from the effects of an industrial injury, an injured worker is not required to follow the procedures set forth in sections 4061 and 4062 before selecting a new primary treating physician. Such an award coupled with section 4600 entitles the injured worker to reasonable changes of treating physicians.[2]

I. BACKGROUND

Applicant sustained industrial injury to his lower back while employed as a truck conveyer worker on August 18, 1998. On June 14, 2000, Dr. Nassiri, applicant's treating physician located in Saratoga, California, indicated applicant was permanent and stationary, noted that applicant would be moving to Santa Maria, stated that applicant should "continue to see a chiropractor, on an as-needed basis, while he is in Santa Maria for any flare-ups he may have," and concluded applicant's "condition necessitates the provision for future medical chiropractic care." He specifically recommended a gym membership for applicant for a minimum of 6 months to start strengthening exercises and rehabilitation of his back.

On June 27, 2000, applicant sought treatment from Dr. Bernfeld, of Central City Chiropractic in Santa Maria, who recommended conservative care and an exercise regime. On June 29, 2000, Dr. Bernfeld reported that applicant requested chiropractic care and evaluation

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

[2] In, *Ralph's Grocery Co.* v. *Workers' Comp. Appeals Bd. (Lara)* (1995) 38 Cal.App.4th 820 [60 CCC, 840, 847], the Court of Appeal held that under section 4600, Lara was entitled to her choice of physician and her request to change treatment to another physician should not have been unilaterally denied. The court found that under existing law, Lara could make changes of physicians, subject to the test of reasonableness or within the bounds of reason. (See *Lara*, at p. 846.)

for his work-related low back injury.

On July 20, 2000, the parties submitted stipulations which provided that applicant sustained industrial injury to his back and that "there is need for medical treatment to cure or relieve from the effects of said injury." On July 21, 2001, an award issued based upon the stipulations.

On August 3, 2000, defendant sent a letter to Dr. Bernfeld objecting to his treatment of applicant stating it was "excessive and exceeds the recommendations of Mr. Hines (sic) treating physician Dr. Nassiri."

On August 8, 2000, applicant again sought treatment from Dr. Bernfeld "for a severe flare-up of a work-related injury, which affected his lumbar thoracic, and pelvic osseous structures." Dr. Bernfeld described a treatment plan of spinal and extremity mobilization techniques, physiotherapy modalities as needed, "soft tissue [and] deep tissue rehabilitative techniques," at-home or gymnasium performed rehabilitative exercises, and spinal mobilization. Dr. Bernfeld also opined that applicant should be seen two to three times a week for six to eight weeks.

On August 23, 2000, defendant advised that it would not authorize a completely new program with a new chiropractor, noting that applicant was released by Dr. Nassiri to return only as needed, that Dr. Bernfeld's letter of August 8, 2000 indicated the flare-up was due to non-industrial lifting of furniture during the move to Santa Maria, and that this was a non-industrial aggravation which was not the responsibility of defendant.

Applicant requested an expedited hearing on the issue of entitlement to medical treatment under section 4600. At the expedited hearing of September 22, 2000, applicant denied personally moving any furniture during his relocation to Santa Maria. It was also noted that applicant selected Dr. Bernfeld as his primary treating physician. The case was submitted for decision on the sole issue of whether the medical treatment provided by Dr. Bernfeld related to the work-related injury or whether that medical treatment was for a nonindustrial flare-up of applicant's condition. The WCJ found that applicant was entitled to the further medical

treatment recommended by his newly selected treating physician, Dr. Bernfeld. Defendant sought reconsideration from that decision, asserting, inter alia, that applicant was obligated to return to the original treating physician and was not entitled to seek medical treatment from a new treating physician under Rule 9785(b) without first complying with the provisions of sections 4061 and 4062.[3]

II. DISCUSSION

Where there is a dispute regarding the need for continuing medical care or the extent and scope of medical treatment, sections 4061 and 4062 contain procedures for the resolution of that dispute. Additionally, Rule 9785(b), requires that there shall be no more than one primary treating physician at a time and that when the primary treating physician discharges the employee from further treatment and there is a dispute concerning the need for continuing treatment, no other primary treating physician shall be identified unless and until the dispute is resolved. Rule 9785(b), also provides that if it is determined there is no need for continuing treatment, then the physician who discharged the employee shall remain the primary treating physician, and that if it is determined that there is need for continuing treatment, a new primary treating physician may be selected.

Based on these sections, the Court in *Rushing* concluded that when the primary physician has declared the employee's injury to be permanent and stationary, released the employee to return to work, and prescribed no further doctor-involved treatment or visits, the employee was discharged from care and was thus required to comply with the provisions of

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[3] While we recognize that this contention was not specifically raised at the hearing, we will consider that issue here. Section 5906 provides that '[u]pon the filing of a petition for reconsideration... the appeals board may with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge...' (§5906.) Similarly, section 5908 provides that '[a]fter ... a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award. (§5908.) Finally, when the Board grants reconsideration, the entire record is open for review and the Board has jurisdiction to reconsider and decide all issues. (See, *State Comp. Insurance Fund* v. *Industrial Acc. Com.(George)* (1954) 125 Cal.App.2nd 201 [19 Cal.Comp.Cases 98, 99]; *Pacific Employers Insurance Company* v. *Industrial Acc. Com. (Mazzanti)* (1956) 139 Cal.App.2nd 22 [21 Cal.Comp.Cases 46]; *Uniroyal, Inc.* v. *Workers' Comp. Appeals Bd. (Davis)* (1982) 47 Cal.Comp.Cases 1337, 1339 (writ den.).) Thus, once reconsideration has been granted, the Board has the full power to reconsider its previous findings and to make new and different findings, even with respect to issues not raised in the petition for reconsideration before it. (See also, *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262 [8 Cal.Comp.Cases 79].)]

Rule 9785(b), and sections 4061 and 4062, before being allowed to change primary treating doctors. That is, under the facts of that case, the *Rushing* court determined that the injured worker must object to the original treating physician's discharge report and follow procedures set forth in sections 4061 and 4062. Thus, the *Rushing* principle was based upon a finding that the original treating physician had released or discharged the injured worker from further medical treatment and thereafter a dispute arose as to the need for treatment.

In this case, there was, and is, no dispute regarding the need for continuing medical treatment. The parties stipulated that "there is need for medical treatment" and an award issued providing for continuing medical treatment. Since there was no dispute, there was no necessity to object to the original treating physician's report, and the applicant was entitled to change his treating physician. Thus, applicant properly designated Dr. Bernfeld as his primary treating physician.

We hold that, once there is an existing award for medical treatment, the applicant is entitled to reasonable changes of treating physicians without the necessity of following the procedures set forth in sections 4061 and 4062. As noted in *Lara, supra*, the applicant may exercise his right to a free choice of physician within the scope of section 4600, subject to the standard of reasonableness.[4]

Moreover, when continuing medical treatment has been awarded, as here, Rule 9785(b), is rendered inapplicable. The award resolves any potential dispute over the need for continuing medical treatment; hence, the condition precedent in Rule 9785(b), that there be a "dispute" does not exist.

Finally, with respect to the contention that Dr Bernfeld's treatment was unreasonable and unnecessary, it appears from our review of the record and for the reasons stated by the WCJ, that the treatment plan and treatment by Dr. Bernfeld was reasonable and necessary. The WCJ

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[4] In *Lara*, the Court set forth that when a defendant is presented with such a request, the defendant's remedy is "not to unilaterally refuse to allow the change but to follow one of the avenues available to bring the matter to the attention of the Board." (Id. P. 849.) (Emphasis added.)

specifically noted there was no evidence presented that the medical treatment provided was unreasonable, and we concur with that opinion.

III. DISPOSITION

Because we conclude that the WCJ properly held that the applicant could select a new treating physician and that applicant was entitled to the recommended further medical treatment, we will affirm the WCJ's decision.

For the foregoing reasons,

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IT IS ORDERED that, as the Decision After Reconsideration of the Board (en banc), the Findings and Award of October 5, 2000, be, and the same hereby is, **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

MERLE C. RABINE, Chairman

ROBERT N. RUGGLES, Commissioner

COLLEEN S. CASEY, Commissioner

WILLIAM K. O'BRIEN, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 3 0 2001

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

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