

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **BRUCE KNIGHT,**

5 *Applicant,*

6 **vs.**

7 **UNITED PARCEL SERVICE; and LIBERTY**
8 **MUTUAL INSURANCE COMPANY,**

9 *Defendants.*

Case Nos. AHM 127807
AHM 129147

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

10
11 **INTRODUCTION**

12 We granted defendant's petition for reconsideration of the December 9, 2005 Findings and
13 Award of the workers' compensation administrative law judge (WCJ) to further study issues raised
14 by this case regarding a medical provider network (MPN) established by an employer or insurer
15 to provide medical treatment pursuant to Labor Code sections 4616 through 4616.7.¹ Because of
16 the importance of the legal issues presented, and in order to secure uniformity of decision in the
17 future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case
18 to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)²

19 We hold that an employer or insurer's failure to provide required notice to an employee of
20 rights under the MPN that results in a neglect or refusal to provide reasonable medical treatment
21 renders the employer or insurer liable for reasonable medical treatment self-procured by the
22 employee. In this case, defendant is liable for medical treatment self-procured by applicant

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24 ¹ All further statutory references are to the Labor Code. Attached to the petition for reconsideration are copies of
25 documents that have already been received into evidence, or that have already been made part of the legal file. Such
documents are not to be attached as exhibits to petitions for reconsideration, and they have been recycled. (Cal. Code
Regs., tit.8, § 10842.)

26 ² The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and workers'
27 compensation administrative law judges. (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]; *Gee v. Workers' Comp.*
Appeals Bd. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

1 because it neglected or refused to provide reasonable medical treatment by failing to provide
2 required notice to applicant of his rights under the MPN. (See Section III at pp. 14-16, *infra.*)

3 **FACTS**

4 In 1973, applicant was first employed as a delivery person/driver with United Parcel
5 Service (UPS), insured by Liberty Mutual Insurance Company (Liberty). On February 22, 2005,
6 he was delivering a parcel in inclement weather when he slipped on a wet driveway and fell on his
7 right side, injuring his right wrist, arm and shoulder. Industrial injury was acknowledged and he
8 was referred by UPS to a U.S. HealthWorks clinic for examination and treatment. X-rays were
9 taken and medication was dispensed. He was released to light duty for two days and was then
10 returned to full duty. However, his elbow and shoulder symptoms worsened and he returned to
11 U.S. HealthWorks. U.S. HealthWorks referred him to Anthony Zoppi, M.D. for a consultation.³

12 In his April 26, 2005 report to Liberty, Dr. Zoppi provided a summary of his “examination,
13 findings, diagnosis and treatment recommendations” following his “initial orthopedic evaluation”
14 conducted that date “at the request of the treating physician” as authorized by Liberty. During his
15 examination, Dr. Zoppi noted tenderness and restricted range of motion in the wrist, tenderness in
16 the right elbow, and tenderness and “pain with impingement maneuver both Neer and Hawkins” in
17 the right shoulder. He provided a diagnosis of “Right shoulder pain/strain” and “Right wrist
18 scaphoid nonunion, old nonindustrial injury” and described his “consultation with the patient in
19 which the diagnosis was explained in laymen’s terms.” He noted a need to “see the patient back
20 following the completion of x-rays” of the shoulder to evaluate the potential for “underlying
21 acromioclavicular joint degenerative joint disease” but concluded that applicant “can continue
22 with his usual and customary work activities without the need for work restrictions.” He wrote
23 that “Treatment recommendations were discussed and/or communicated with the patient’s treating
24 physician.”

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27 ³ This opinion does not address the reasonableness of medical treatment provided during the first 30 days after the date of injury.

1 It appears that copies of Dr. Zoppi's report were sent to "Treating Physician" and
2 "U.S.HealthWorks Medical Group." However, there is no evidence that the report was ever sent
3 to applicant. Nor is there any evidence that either U.S. HealthWorks or Dr. Zoppi was part of an
4 MPN, or that applicant was being provided medical treatment through an MPN. There is no
5 evidence that applicant was notified that an MPN physician had been designated as his primary
6 treating physician. There is no evidence applicant was notified of his right to choose his primary
7 treating physician within the MPN after the first visit. Nor is there evidence of any notice to him
8 of his right to obtain second and third opinions regarding any MPN diagnosis or treatment plan.

9 Prior to attending his appointment with Dr. Zoppi, applicant had contacted an attorney
10 regarding his claim. In an April 22, 2005 letter, the attorney advised Liberty that applicant was
11 designating the Intercommunity Medical Group (Robert Hunt, M.D.) as his primary treating
12 physician. It appears that at some point Dr. Hunt contacted Liberty to confirm insurance coverage,
13 but was told he would not be paid for any services he provided because he was not in Liberty's
14 MPN.⁴

15 On May 11, 2005, Dr. Hunt contacted applicant's attorney and advised that he would not
16 treat applicant unless Liberty changed its position and authorized coverage. This is the first
17 evidence of any indication to applicant or his attorney that there was an MPN. That same date, the
18 attorney contacted Liberty by telephone and requested a list of MPN providers.

19 On May 13, 2005, Liberty telephoned the attorney's office and offered to "go over [the
20 MPN list] on the phone" or to send it by e-mail because it was "about 1,980 pages."

21 On May 16, 2005, Liberty was informed that the attorney did not have an e-mail address
22 and his staff again asked that the list be sent by regular mail. Liberty responded that the list of
23 MPN providers needed to be requested from the "California Division of Compensation."

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26 ⁴ Portions of the chronology of contacts between applicant's attorney, the physicians and Liberty are taken from
27 Applicant's Exhibit 7, which was received into evidence without objection. The exhibit purports to be the notes of
applicant's attorney's staff regarding their effort to obtain a list of MPN physicians from defendant. Quotations are
taken from that exhibit unless otherwise stated.

1 On May 19, 2005, the attorney's staff sent a written request for the MPN list to the address
2 provided by Liberty. A woman named Kathy "from California Division of Compensation"
3 telephoned the attorney's staff on May 24, 2005, and told them to contact Liberty for the list of
4 MPN providers. She also provided a telephone number for Liberty.

5 On May 25, 2005, the attorney's staff left a telephone message requesting a list of MPN
6 providers at the telephone number provided by Kathy. Another message requesting a list of the
7 MPN providers was left by the attorney on May 31, 2005.

8 On June 1, 2005, the attorney received a return telephone message that Liberty's adjuster
9 was out on medical leave. The attorney that same date sent another written request for the list of
10 MPN providers and left a voice message with another person at Liberty requesting the list. On
11 June 6, 2005, applicant's attorney's staff again directed verbal and written request by facsimile to
12 Chuck Allen at Liberty as follows:

13 "Please be advised we have requested a copy of the Medical
14 Provider Network List (MPN) from the following, claims adjuster
15 Mr. Frank Quesada on 5/11/05, who advised us we needed to
16 request list from California Division of Compensation. Request
17 was made on 5/19/05, Kathy advised our office to request it from
18 Ann Taintor. Request once again was made on 6/1/05, per Ms.
19 Taintor we now have to obtain it from you. *Due to this delay our
client is without medical care.*

18 "Request is hereby made we be provided with copy of Medical
19 Provider Network List (MPN) as soon as possible." (Emphasis
added.)

20 Not having received a list of MPN providers, the attorney on June 9, 2005, faxed a letter to
21 Mr. Quesada at Liberty advising that "Pursuant to Labor Code, sections 4600 and 4603.3 (sic) and
22 Section 9783 Of the Rules and Regulations" applicant was selecting his treating physician to be
23 Norwalk Orthopedic Surgery (Jacob Rabinovich, M.D.).⁵ Enclosed with that letter was a copy of
24 the attorney's letter to applicant confirming that an appointment was scheduled with Dr.
25 Rabinovich for June 16, 2005.

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⁵ There was no section 4603.3 at that time.

1 On June 14, 2005, Dana Preivity, a senior claims case manager with Liberty, sent a letter to
2 applicant as follows:

3 “Recent changes in California workers' compensation law,
4 specifically SB 899, now allow insurers and self-insured
5 employers to direct injured employees to a medical provider
6 network (MPN) for medical treatment. In response to these
7 changes, your employer has implemented the Liberty Mutual UPS
8 Medical Provider Network (MPN) effective, January 1, 2005, for
9 any workers' compensation claims.

10 “This letter is acknowledgement that you have a workers'
11 compensation injury or illness claim at implementation time of the
12 Liberty Mutual UPS MPN. Our records indicate that your current
13 treating provider, Dr. Robert Hunt is not part of the MPN.

14 “In order to confirm you continue to receive appropriate medical
15 care please take a few moments to verify the information that best
16 applies to your current treating physician by checking the
17 appropriate box below and returning you response within 10
18 days...

19 My current physician is part of the Liberty Mutual UPS MPN.
20 You may continue to treat with this provider. If you need further
21 treatment from another specialist, you and your physician must
22 select a specialist from within the MPN. Contact your employer or
23 the Claims Case Manager if you need assistance in locating an
24 MPN specialist.

25 My current physician is not part of the Liberty Mutual UPS
26 MPN. You may qualify to continue treatment with your current
27 provider under the Liberty Mutual UPS MPN Transfer of
Treatment (TOC) Plan if your condition is acute, serious or
chronic, if treatment is for remission, is to prevent deterioration, is
a terminal illness or for a scheduled surgery or procedure that will
occur within 180 days.

My current physician is not part of the Liberty Mutual UPS
MPN network. I do not have any of the conditions above;
therefore, I will secure services from another MPN physician. If I
need assistance in locating another physician, I will call my
employer or Claims Case Manager.

“You must receive confirmation from the MPN to continue using a
non-MPN provider. The MPN will contact your non-MPN
physician to confirm his/her willingness to continue providing you
with treatment under the MPN and the MPN will notify you as to
your physician’s decision. In the event the physician is not able to
continue providing you with medical treatment and services the

1 MPN will advise you to seek treatment from an MPN physician
2 immediately.” (Emphasis in original.)

3 The letter concluded with a request that any questions be directed to the employer or the Claims
4 Case Manager. A copy of the letter was sent to applicant’s attorney.

5 The June 14, 2005 letter from Dana Preivity is the first evidence of any written notice from
6 Liberty to applicant or his attorney that refers to the existence of an MPN. However, the letter did
7 not explain where and how applicant was to obtain medical treatment. The letter does not state
8 whether treatment was initiated in the MPN by the employer’s referral of applicant to U.S.
9 HealthWorks or by its referral of applicant to Dr. Zoppi. It does not identify any MPN physician
10 that had been designated as the primary treating physician. It does not notify applicant of his right
11 to change the primary treating physician and choose a new primary treating physician within the
12 MPN. It does not notify him of his right to obtain second and third medical opinions within the
13 MPN or of his right to obtain review by an independent evaluator. It does not transmit a list of
14 MPN physicians notwithstanding the numerous requests for the list by applicant’s attorney.

15 On a July 7, 2005, applicant’s attorney wrote Frank Quesada at Liberty:

16 “Please be advised that we are referring our client for medical
17 treatment pursuant to Labor Code section 4600. Our client
18 reported the injury but referral for medical treatment by the
19 employer has been refused and/or neglected.

20 “Be advised we shall seek penalties for each instance of refusal to
21 authorize or any unreasonable delay in authorizing all medical
22 treatment as indicated by our doctors(s).”

23 Applicant was seen again by Dr. Rabinovich on July 28, 2005. Following an MRI and
24 EMG and nerve conduction studies, Dr. Rabinovich in his report of July 28, 2005 diagnosed, “1)
25 Tendinitis/impingement syndrome, right shoulder per MRI scan. 2) Bilateral carpal tunnel
26 syndrome, per neurodiagnostic tests. 3) Bilateral ulnar nerve entrapment at the cubital fossae,
27 clinically on the left and per neurodiagnostic tests on the right.” Surgery was recommended.

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1 On August 31, 2005, Dana Previty on behalf of Liberty sent a letter to applicant, with a
2 copy to his attorney, as follows:

3 "This letter concerns the Liberty Mutual UPS Medical Provider
4 Network (MPN). It is our understanding that Robert W. Hunt, MD
5 (Intercommunity Medical Group) and Jacob Rabinovich (Norwalk
6 Orthopedic Surgery) are not participating in the Liberty Mutual
7 MPN.

8 "As you were aware the MPN was in place and decided to change
9 to a NON UPS MPN physician, we are considering any and all
10 treatment with these doctors self-procured. Therefore, you will be
11 responsible for all medical treatment and service charges.

12 "It is also important to note that if you elect to continue treating
13 with either of these doctors, you will be responsible for all medical
14 treatment and service charges.

15 "Please direct any questions regarding this letter to your attorney.
16 Thank you."

17 Also on August 31, 2005, Dana Previty on behalf of Liberty sent the following letter to
18 both Dr. Hunt and Dr. Rabinovich:

19 "This letter concerns the Liberty Mutual UPS Medical Provider
20 Network (MPN). It is our understanding that you are not
21 participating in the Liberty Mutual UPS MPN.

22 "As Mr. Knight was aware the MPN was in place and elected to
23 treat with you anyway, we are considering any and all treatment
24 with you self-procured. Therefore, Mr. Knight will be responsible
25 for all medical treatment and service charges.

26 "Also be advised that if Mr. Knight elects to continue treatment
27 with you, he will be responsible for all medical treatment and
28 service charges."

29 The physicians were requested to contact Liberty with any questions.

30 Also on August 31, 2005, Liberty wrote applicant's attorney:

31 "This letter concerns the Liberty Mutual UPS Medical Provider
32 Network (MPN).

33 "I received your letter requesting a copy of the UPS MPN list. The
34 file is very large, therefore I would like to email it to you. I spoke
35 with Irene in your office today and she advised you would be out
36 of the office until September 14, 2005. She was unable to give me
37

1 your email address. Therefore I have enclosed a copy of all UPS
2 MPN ortho's (sic) as of July 11, 2005.

3 "Please contact me with you email address so that I may supply
4 you with a copy of the UPS MPN list, should you desire a copy."

5 Any list of providers enclosed with that letter or otherwise sent by Liberty to applicant or his
6 attorney is not in evidence.

7 In none of the correspondence described above did Liberty explain where or how applicant
8 was to obtain medical treatment. He was never notified that treatment had or had not been
9 initiated in the MPN. He was never notified that an MPN physician had or had not been
10 designated as primary treating physician. He was never notified of his right to change any
11 designated primary treating physician and his right to select a new primary treating physician of
12 his choice within the MPN. He was never notified of his right to obtain second and third medical
13 opinions within the MPN or of his right to obtain review by an independent evaluator. Instead,
14 Liberty wrote only that the medical treatment he sought was unauthorized, without tendering any
15 information about how he was to obtain treatment for the admitted injury.

16 On October 7, 2005, applicant filed a Declaration of Readiness to Proceed to Expedited
17 Hearing on the issues of his entitlement to reasonable medical treatment and temporary disability
18 indemnity. Defendant admitted specific injury to applicant's right shoulder, right elbow, right
19 wrist and right upper extremity, and admitted a need for medical treatment. However, defendant
20 denied liability for all treatment self-procured by applicant outside the MPN.

21 At the hearing on November 29, 2005, the above described materials were received into
22 evidence along with applicant's testimony that he never received "any notice of his requirement to
23 belong to an M.P.N. prior to his injury or after his injury."⁶ On December 9, 2005, the WCJ
24 issued his decision, finding that defendant had waived its right to require medical treatment

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26 ⁶ Defendant offered no evidence of any notices to applicant other than as described above. Although Applicant
27 testified that he did not receive the June 14, 2005 letter from defendant because of a change of address, it appears a
copy was sent to applicant's attorney. In all events, the letter does not include information required by section 4613.3
and California Code of Regulations, title 8, section 9767.12(a).

1 through the MPN, and that it was estopped to deny coverage of medical treatment self-procured by
2 applicant.⁷ Applicant was awarded “surgery as recommended by Dr. Rabinovich.”

3 Defendant petitioned for reconsideration of the WCJ's findings and award, contending that
4 “all appropriate notices were sent to the applicant with regard to the Medical Provider Network”
5 and requested that he be directed “to obtain treatment with a doctor on the Medical Provider
6 Network list.”

7 We find on this record that defendant is liable for medical treatment self-procured by
8 applicant because it neglected or refused to provide reasonable medical treatment by failing to
9 provide required notice to applicant of his rights under the MPN.

10 DISCUSSION

11 **I. An Authorized MPN May Be Used To Satisfy The Obligation Of An Employer Or Insurer** 12 **To Provide Reasonable Medical Treatment.**

13 An employer or its insurer is obligated to provide all medical treatment “that is reasonably
14 required to cure or relieve the injured worker from the effects of his or her injury.” (Lab. Code, §
15 4600(a).) “In the case of his or her neglect or refusal reasonably to do so, the employer is liable
16 for the reasonable expense incurred by or on behalf of the employee in providing treatment.”
17 (Lab. Code, § 4600(a).) An employer will not be relieved of the duty to furnish medical care
18 absent good cause, and section 4600 has been liberally interpreted in favor of the employee’s right
19 to obtain reimbursement. (*California Union Ins. Co. v. Industrial Acc. Com. (Mitchell)* (1960) 183
20 Cal.App.2d 644 [25 Cal.Comp.Cases 172]; *Simien v. Industrial Acc. Com.* (1956) 138 Cal.App.2d
21 397 [21 Cal.Comp.Cases 10].)

22 Before January 1, 1976, an employee could not choose a physician to treat an industrial
23 injury if the employer made an unequivocal tender of medical treatment reasonably calculated to

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25 ⁷ Although both the WCJ's December 9, 2005 decision and defendant's petition for reconsideration reference Case
26 No. AHM 129147, that case involves a denied claim of cumulative trauma injury to various body parts. It was agreed
27 at trial that the only issues before the court were those presented in this Case No. AHM 127807 regarding the claim of
specific injury. The parties stipulated that Case No. AHM 129147 “has no impact upon the issues presented.”
Accordingly, Case No. AHM 129147 is not addressed as part of this decision. Because we find that defendant
neglected or refused to provide reasonable medical treatment, we do not reach the questions of waiver or estoppel.

1 cure or relieve from the effects of the injury. However, if the employer had notice of the injury, it
2 was obligated under section 4600 to promptly notify the employee about how and where to obtain
3 medical treatment. The employer could not be passive; instead it had an affirmative duty to be
4 active in offering treatment to the injured worker and in instructing the employee as to which
5 physician to see. (*United States Casualty Co. v. Industrial Acc. Com. (Moynahan)* (1954) 122
6 Cal.App.2d 427 [19 Cal.Comp.Cases 8]; *Draney v. Industrial Acc. Com.* (1949) 95 Cal.App.2d 64
7 [14 Cal.Comp.Cases 256] (*Draney*)). The failure to provide that required notice of information
8 was recognized to be neglect or refusal to provide reasonable medical treatment even if the
9 employee did not ask for medical attention before self-procuring care. (*Leadbetter v. Industrial*
10 *Acc. Com.* (1918) 179 Cal. 468 [5 I.A.C. 233]; *Bethlehem Steel Co. v. Industrial Acc. Com.*
11 (*Seaquist*) (1945) 70 Cal.App.2d 382 [10 Cal.Comp.Cases 171].) If the employer made an
12 equivocal and inadequate offer of medical treatment, the employee could select his or her own
13 physician and obtain reimbursement for the reasonable cost of reasonable self-procured medical
14 treatment pursuant to section 4600. (*Voss v. Workers' Comp. Appeals Bd.* (1974) 10 Cal.3d 583,
15 588 [39 Cal.Comp.Cases 56] (*Voss*); *Zeeb v. Workers' Comp. Appeals Bd.* (1967) 67 Cal.2d 496,
16 501-503 [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 86
17 [31 Cal.Comp.Cases 93] (*McCoy*)).

18 Effective January 1, 1976, section 4600 was amended to provide that “after 30 days from
19 the date the injury is reported, the employee may be treated by a physician of his own choice or at
20 a facility of his own choice within a reasonable geographic area.” (Lab. Code, § 4600(c).) In
21 addition, an employee was allowed under certain circumstances to select his or her personal
22 physician to provide treatment during the 30 day period following injury. (Lab. Code, § 4600(d).)
23 An employee also had an essentially unlimited ability to change treating physicians. (*Ralphs*
24 *Grocery Company v. Workers' Comp. Appeals Bd. (Lara)* (1995) 38 Cal.App.4th 820 [60
25 Cal.Comp.Cases 840] (*Lara*)). Thus, the employee had the choice to select any treating physician,
26 limited only by the employer’s right to show good cause in a petition to the Administrative
27 Director (AD) of the Division of Workers' Compensation that an order should issue directing the

1 employee to select a new treating physician from a list of five selected by the employer. (Lab.
2 Code, § 4603; Cal. Code Regs., tit. 8, § 9786.)

3 With the enactment of Senate Bill 899, section 4600(c) was again amended. It now
4 provides: “Unless the employer or the employer's insurer has established a medical provider
5 network as provided for in Section 4616, after 30 days from the date the injury is reported, the
6 employee may be treated by a physician of his or her own choice or at a facility of his or her own
7 choice within a reasonable geographic area.” This amendment added another method by which an
8 employer or insurer could meet its obligation to provide reasonable medical treatment by referring
9 the employee to an MPN. (Lab. Code, §§ 4600(c) and 4616-4616.7; see also Cal. Code Regs., tit.
10 8, §§ 9767.1-9767.15.)

11 An MPN is established by an employer or insurer subject to the approval of the AD. (Lab.
12 Code, § 4616; Cal. Code Regs., tit. 8, § 9767.3.) Among other things, the regulations require that
13 the employer or insurer’s application for approval of an MPN include a statement of how the MPN
14 will comply with the “employee notification process” and the “second and third opinion process.”
15 (Cal. Code Regs., tit. 8, §§ 9762.1 through 9762.3.) The statute and regulations also impose
16 several other obligations upon both the insurer/employer and the injured worker.

17 In this case, we specifically address the provisions of section 4616.3 and California Code
18 of Regulations, title 8, section 9767.12(a). Section 4616.3 provides in full:

19 “(a) When the injured employee notifies the employer of the injury
20 or files a claim for workers' compensation with the employer, the
21 employer shall arrange an initial medical evaluation and begin
treatment as required by Section 4600.

22 “(b) *The employer shall notify the employee* of his or her right to
23 be treated by a physician of his or her choice after the first visit
24 from the medical provider network established pursuant to this
article, and the method by which the list of participating providers
may be accessed by the employee.

25 “(c) If an injured employee disputes either the diagnosis or the
26 treatment prescribed by the treating physician, the employee may
27 seek the opinion of another physician in the medical provider
network. If the injured employee disputes the diagnosis or
treatment prescribed by the second physician, the employee may

1 seek the opinion of a third physician in the medical provider
2 network.”

(Emphasis added.)

3 California Code of Regulations, title 8, section 9767.12(a) provides in full:

4 *"An employer or insurer that offers a Medical Provider Network*
5 *Plan under this article shall notify each covered employee in*
6 *writing about the use of the Medical Provider Network 30 days*
7 *prior to the implementation of an approved MPN, at the time of*
8 *hire, or when an existing employee transfers into the MPN,*
9 *whichever is appropriate to ensure that the employee has received*
10 *the initial notification. The notification shall also be sent to a*
11 *covered employee at the time of injury. The notification(s) shall be*
12 *written in English and Spanish. The initial written notification*
13 *shall include the following information:*

14 (1) How to contact the person designated by the employer or
15 insurer to be the MPN contact for covered employees. The
16 employer or insurer shall provide a toll free telephone number of
17 the MPN geographical service area includes more than one area
18 code;

(2) A description of MPN services;

19 (3) How to review, receive or access the MPN provider directory.
20 Nothing precludes an employer or insurer from initially providing
21 covered employees with a regional area listing of MPN providers
22 in addition to maintaining and making available its complete
23 provider listing in writing. If the provider directory is also
24 accessible on a website, the URL address shall be listed;

(4) How to access initial care and subsequent care, and what the
access standards are under section 9767.5;

25 (5) How to access treatment if (A) the employee is authorized by
26 the employer to temporarily work or travel for work outside the
27 MPN's geographical service area; (B) a former employee whose
employer has ongoing workers' compensation obligations
permanently resides outside the MPN geographical service area;
and (C) an injured employee decides to temporarily reside outside
the MPN geographical service area during recovery;

(6) How to choose a physician within the MPN;

(7) What to do if a covered employee has trouble getting an
appointment with a provider within the MPN;

(8) How to change a physician within the MPN;

(9) How to obtain a referral to a specialist within the MPN or
outside the MPN, if needed;

- 1 (10) How to use the second and third opinion process;
2 (11) How to request and receive an independent medical review;
3 (12) A description of the standards for transfer of ongoing care into
4 the MPN and a notification that a copy of the policy shall be
5 provided to an employee upon request; and
6 (13) A description of the continuity of care policy and a
7 notification that a copy of the policy shall be provided to an
8 employee upon request."
9 (Emphasis added.)

10 Therefore, as relevant here, the employer is required to give the injured employee notice of
11 information about use of the MPN, notice of the right to be treated by an MPN physician of choice
12 after the first visit, notice of the method of accessing the list of MPN providers, and notice of the
13 employee's right to use the second and third opinion process if he or she disputes either the
14 diagnosis or the treatment prescribed by the MPN treating physician.⁸

15 **II. Failure To Provide Required Notice To An Employee Of Rights Under The MPN That
16 Results In A Neglect Or Refusal To Provide Reasonable Medical Treatment Renders The
17 Employer Or Insurer Liable For Reasonable Medical Treatment Self-Procured By The
18 Employee.**

19 Employers have long been obligated to provide notice of workers' compensation
20 information to their employees as part of the obligation to provide reasonable medical treatment
21 under section 4600. The duty to provide notice of workers' compensation information begins
22 before the report of an injury. An employer is required to provide new employees with written
23 notice of information about the workers' compensation process and about where and how to obtain
24 medical treatment at the time of hire or before the end of the first pay period. (Lab. Code, § 3551;
25 Cal. Code Regs., tit. 8, § 9880.) The employer is also obligated to post conspicuous notice in the
26 workplace of information about the workers' compensation process and where and how to obtain
27 medical treatment. (Lab. Code, § 3550; Cal. Code Regs., tit. 8, §§ 9881 and 9881.1.) The failure
to properly post such notice "shall automatically permit the employee to be treated by his or her
personal physician with respect to an injury occurring during that failure." (Lab. Code, § 3550(e).)

⁸ Also see section 4616.4(b) regarding the second and third opinion process.

1 Additional notice obligations are triggered at the time of an industrial injury. Within one
2 working day of receiving notice of injury, the employer must provide the employee with a claim
3 form, information about benefits available to the employee and the workers' compensation process.
4 (Lab. Code, §§5401 through 5402; Cal. Code Regs., tit. 8, §§ 9810 through 9812; see also Lab.
5 Code, §§ 138.3 and 138.4.) The failure to properly provide such notice may toll the statute of
6 limitations. (*Reynolds v. Workers' Comp. Appeals Bd.* (1974) 12 Cal.3d 726 [39 Cal.Comp.Cases
7 768]; *Buena Ventura Gardens v. Workers' Comp. Appeals Bd. (Novak)* (1975) 49 Cal.App.3d 410
8 [40 Cal.Comp.Cases 434].)

9 In the context of the provision of medical treatment, failure to provide other required
10 notices may be a neglect or refusal to provide medical treatment that renders the employer or
11 insurer liable for self-procured medical treatment. For example, failure to provide an injured
12 worker with adequate notice that a designated alternative physician is the primary treating
13 physician pursuant to section 4601 has been held to be such a neglect or refusal because the
14 employee is not properly informed of where and how to obtain medical treatment. (*Pinkerton, Inc.*
15 *v. Workers' Comp. Appeals Bd. (Samuel)* (2001) 89 Cal.App.4th 1019 [66 Cal.Comp.Cases 695];
16 *U.S. Flowers v. Workers' Comp. Appeals Bd. (Carranza)* (1997) 62 Cal.Comp.Cases 244 (writ
17 denied).)

18 Neglect or refusal to provide medical treatment in other situations has been held to render
19 the employer or insurer liable for the reasonable cost of reasonable medical treatment self-
20 procured by the employee. (*Voss, supra; Zeeb, supra; McCoy, supra; Draney, supra; County of L.*
21 *A. v. Industrial Acc. Com. (Allen)* (1936) 13 Cal.App.2d 69 [1 Cal.Comp.Cases 127]; see also
22 *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159
23 [48 Cal.Comp.Cases 566].)

24 We hold that an employer or insurer's failure to provide required notice to an employee of
25 rights under the MPN that results in a neglect or refusal to provide reasonable medical treatment
26 renders the employer or insurer liable for reasonable medical treatment self-procured by the
27 employee.

1
2 **III. Defendant’s Failure To Provide Applicant With Notice Of His Rights Under The MPN
In This Case Resulted In A Neglect Or Refusal To Provide Reasonable Medical Treatment.**

3 Defendant contends in its petition that applicant was required to use the MPN because he
4 was provided “appropriate notice” of information. However, as discussed above, a significant part
5 of an employer’s obligation to provide reasonable medical treatment includes the responsibility to
6 notify the injured worker about where and how to obtain that medical treatment.

7 The employee’s right to change physicians within an MPN, and the right to be notified how
8 to change physicians, is analogous to the right of an employee who is not being treated within an
9 MPN to change physicians. (Lab. Code, § 4601; *Lara, supra.*) Moreover, the right of an
10 employee to change physicians within an MPN – perhaps to a physician the employee trusts, or
11 relates better to, or has better communication with, or in whom he or she has more confidence – is
12 a crucial element of an employee’s treatment rights under an MPN. The Supreme Court has stated
13 that under section 4600, “a doctor-patient relationship which will inspire confidence in the patient
14 is an ingredient aiding in the success of the treatment...” (*Zeeb, supra, 67 Cal.2d 496, 502; Voss,*
15 *supra, 10 Cal.3d 589.*)

16 In regard to notice, the burden of proof rests on the party holding the affirmative of the
17 issue. (Lab. Code, § 5705.) In the event of a dispute about whether the injured worker was
18 provided notice of rights under an MPN, the employer carries the burden of proof. In this case,
19 defendant not only failed to carry its burden of proving that it provided notice to applicant of his
20 rights under the MPN, the evidence established that its failure to provide such notice was a neglect
21 or refusal to provide reasonable medical treatment rendering it liable for applicant’s self-procured
22 treatment.

23 Applicant testified that he *never* received written notice about the MPN from defendant
24 and there is no such written notice in evidence. This is contrary to the requirement that an
25 employee be notified “in writing about the use” of the MPN prior to its implementation and at the
26 time of injury. (Cal. Code Regs., tit. 8, § 9767.12(a).) Moreover, applicant was never notified if
27 treatment had or had not been initiated in the MPN. He was never notified that an MPN physician

1 had or had not been designated as primary treating physician. He was never provided notice of his
2 right to be treated by an MPN physician of his choice after the first visit as required by section
3 4616.3(b). He was never notified of his right under section 4613(c) to dispute an MPN diagnosis
4 and to obtain second and third opinions. The only evidence of notice regarding the “method” for
5 accessing the list of MPN physicians as required by section 4613(b) are the uncertain and
6 confusing references in the June 14, 2005 letter. Despite the June 6, 2005 letter from applicant’s
7 attorney notifying Liberty that applicant was without medical care, Liberty provided no guidance
8 on how he was supposed to obtain medical treatment.

9 Information about how to access medical treatment, how to choose and change physicians,
10 how to obtain independent medical review, and, thus, how to generally and specifically “use” the
11 MPN, are all crucial to the provision of reasonable medical treatment. In this case, defendant
12 failed to tender reasonable medical care through the MPN and failed to provide required notice to
13 applicant of his rights under the MPN. Instead, defendant informed applicant, Dr. Hunt and Dr.
14 Rabinovich that any medical treatment provided by those physicians would be deemed self-
15 procured and applicant would be financially responsible for their charges.

16 In sum, the record in this case compels the conclusion that defendant neglected and refused
17 to provide reasonable medical treatment by failing to provide applicant with required notice of his
18 rights under the MPN. Because reasonable medical treatment was neglected or refused, applicant
19 is entitled to self-procure reasonable treatment and defendant is liable under section 4600(a) for
20 that treatment.

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26 For the foregoing reasons,
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