

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **FRED T. HINES,**

5
6 *Applicant,*

7 **vs.**

8 **NEW UNITED MOTORS**
9 **MANUFACTURING, INC., and GREAT**
10 **AMERICAN RISK MANAGEMENT,**

11 *Defendant(s).*

Case Nos. SAL 0082124
SAL 0082125

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

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

17 Defendants contended, in substance, that (1) applicant had not suffered a work-related
18 flare-up of his condition and the treatment provided by the newly selected treating physician was
19 duplicative, unreasonable and unnecessary; (2) there was no evidence that applicant formally
20 designated Stephen A. Bernfeld, D.C., as his new treating physician, under Administrative
21 Director Rule 9785(b) (Cal. Code Regs., tit. 8, ("Rule 9785(b)"), after Massaud Nassari, D.C.,
22 applicant's original treating physician, released him from care; and (3) under the case of
23 *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd. (Rushing)* (2000) 80
24 Cal.App.4th 1041 [65 Cal.Comp.Cases 477], applicant was obligated to return to Dr. Nassari,
25 the original treating physician, and was not entitled to seek medical treatment from Dr. Bernfeld
26 under Rule 9785(b), without complying with the provisions of Labor Code sections 4061 and
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1 4062.¹ The applicant filed an answer to the petition for reconsideration.

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

6 Based on our review of the relevant statutory and case law, we conclude that where there
7 is an existing award of medical treatment to cure or relieve from the effects of an industrial
8 injury, an injured worker is not required to follow the procedures set forth in sections 4061 and
9 4062 before selecting a new primary treating physician. Such an award coupled with section
10 4600 entitles the injured worker to reasonable changes of treating physicians.²

11 I. **BACKGROUND**

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

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

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24 ¹ All further statutory references are to the Labor Code.

25 ² In, *Ralph's Grocery Co. v. Workers' Comp. Appeals Bd. (Lara)* (1995) 38 Cal.App.4th 820 [60 CCC, 840, 847],
26 the Court of Appeal held that under section 4600, Lara was entitled to her choice of physician and her request to
27 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.)

1 for his work-related low back injury.

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

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

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

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

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

1 treatment recommended by his newly selected treating physician, Dr. Bernfeld. Defendant
2 sought reconsideration from that decision, asserting, inter alia, that applicant was obligated to
3 return to the original treating physician and was not entitled to seek medical treatment from a
4 new treating physician under Rule 9785(b) without first complying with the provisions of
5 sections 4061 and 4062.³

6 **II. DISCUSSION**

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

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

21 ³ While we recognize that this contention was not specifically raised at the hearing, we will consider that issue
22 here. Section 5906 provides that '[u]pon the filing of a petition for reconsideration... the appeals board may with or
23 without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award
24 made and filed by the appeals board or the workers' compensation judge...' (§5906.) Similarly, section 5908
25 provides that '[a]fter ... a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the
26 original order, decision, or award. (§5908.) Finally, when the Board grants reconsideration, the entire record is
27 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.2d 201 [19 Cal.Comp.Cases 98, 99]; *Pacific Employers*
Insurance Company v. Industrial Acc. Com. (Mazzanti) (1956) 139 Cal.App.2d 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].)]

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

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

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

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

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

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26 ⁴ In *Lara*, the Court set forth that when a defendant is presented with such a request, the defendant's remedy is "not
27 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.)

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

3 **III. DISPOSITION**

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

7 For the foregoing reasons,

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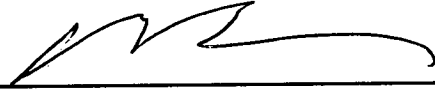
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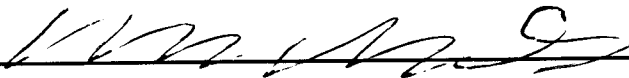
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1 **IT IS ORDERED** that, as the Decision After Reconsideration of the Board (en banc),
2 the Findings and Award of October 5, 2000, be, and the same hereby is, **AFFIRMED**.

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4 **WORKERS' COMPENSATION APPEALS BOARD (EN BANC)**

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7 **MERLE C. RABINE, Chairman**

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10 **ROBERT N. RUGGLES, Commissioner**

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13 **COLLEEN S. CASEY, Commissioner**

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15 **WILLIAM K. O'BRIEN, Commissioner**

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19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **APR 3 0 2001**

Albafioral

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

23 vpd/tab

