

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. STK 0174793**

4 **SHARON BABBITT,**

5 *Applicant,*

6 vs.

7 **OW JING dba NATIONAL MARKET; and**
8 **GOLDEN EAGLE INSURANCE COMPANY,**

9 *Defendants.*

**OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)**

10 **INTRODUCTION**

11
12 Applicant petitioned for reconsideration of the October 18, 2006 Finding and Order
13 wherein the workers' compensation administrative law judge (WCJ) found that "Defendant may
14 require Applicant to obtain medical treatment within its Medical Provider Network" and ordered
15 "that Applicant obtain medical treatment from physicians within Defendant's Medical Provider
16 Network." Earlier, on April 8, 2003, applicant had obtained a stipulated award of further medical
17 treatment for her admitted July 1, 1999 industrial injury. Applicant contends that she cannot be
18 transferred into a medical provider network (MPN) because her date of injury and award predate
19 the January 1, 2005 effective date of the MPN statutes enacted by the Legislature as part of Senate
20 Bill 899 (SB 899) in April 2004. (Stats. 2004, ch. 34; Lab. Code, §§ 4600(c) and 4616 through
21 4616.7.) We granted reconsideration to study the legal issue presented. Because of its
22 importance, and in order to secure uniformity of decision in the future, the Chairman of the
23 Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a
24 whole for an en banc decision. (Lab. Code, § 115.)¹

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26 ¹ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code
27 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 We hold that a defendant may satisfy its obligation under Labor Code section 4600 to
2 provide reasonable medical treatment by transferring an injured worker into an MPN in
3 conformity with applicable statutes and regulations regardless of the date of injury or the date of
4 an award of future medical treatment.²

5 **BACKGROUND**

6 Applicant, Sharon Babbitt, sustained admitted industrial injury to her back and neck on
7 July 1, 1999, while employed as a stock clerk by Ow Jing, doing business as National Market, and
8 insured by Golden Eagle Insurance Company. The claim was resolved on April 8, 2003, by an
9 Order approving a stipulated award of 52% permanent disability and future medical treatment.

10 Thereafter, the Legislature enacted SB 899 in April 2004. (Stats. 2004, ch. 34.) The MPN
11 statutes were enacted as part of that law to authorize employers and insurers to provide medical
12 treatment through an authorized MPN beginning January 1, 2005.

13 On June 5, 2006, applicant filed a Declaration of Readiness to Proceed to Expedited
14 Hearing regarding her entitlement to medical treatment. Applicant asserted that she is “not subject
15 to MPN” and “has fully vested medical treatment rights and is long term patient of [Dr. Fine, her
16 primary treating physician].”

17 The July 18, 2006 minutes of hearing show how the issue was framed by the WCJ:

18 “This is on the matter of Sharon D. Babbitt which comes on for
19 expedited hearing this date on the issue of whether applicant, who
20 has an award of further medical treatment issued in 2003, shall be
21 required to cease treating with her present physician, Dr. Frank
22 Fine, and be ordered instead to select a physician from the
23 defendant's Medical Provider Network (MPN) for further
24 treatment.”

22 According to the minutes, an offer of proof was made by applicant and agreed to by defendant as
23 follows:

24 “If called to testify under oath, applicant Sharon D. Babbitt would
25 state that she entered into a Stipulation on 2-19-03 with an Order
26 signed 4-8-03 indicating that there is a need for future medical
27 treatment.”

27 ² All further statutory references are to the Labor Code.

1 “In reliance on said Stipulation, on 8-30-02 (*sic*) applicant began
2 treatment with Dr. Frank Fine as her treating physician and has
continued to treat with him, her last treatment being 6-22-06.

3 “Applicant has received the demand to change to an MPN and is
4 satisfied with Dr. Fine’s treatment. She does not want to change to
5 the MPN and wants to continue treating with Dr. Frank Fine. She
is happy and is trusting in his decisions as to her future medical
care as to this injury.”

6 The parties further agreed, “As to the nature of the MPN, the parties stipulate that the MPN is
7 properly certified and therefore valid.” No claim was made by applicant that she did not receive
8 required notice of rights under the MPN. The matter was submitted solely upon the legal issue as
9 framed by the WCJ.

10 On October 18, 2006, the WCJ issued his Finding and Order as described above. In his
11 Opinion on Decision, the WCJ described the circumstances presented by the case and his reason
12 for decision:

13 “The sole issue is whether Defendant can require Applicant to seek
14 further medical treatment through Defendant’s Medical Provider
15 Network (MPN), where Applicant has a stipulated award filed
[February 19, 2003] awarding, inter alia, entitlement to further
16 medical treatment. Applicant has been treating with Frank Fine,
M.D., who is not a member of Defendant’s MPN, and she wishes
17 to remain with him. The parties have stipulated that the MPN is
validly certified and proper procedures have been followed...

18 “As also pointed out by Defendant, Applicant does fall within one
19 of the four exceptions to immediate transfer to an MPN, i.e., a
serious chronic condition. (*AD Rule 9767(e)(2)*.) That rule allows
20 treatment by the prior doctor for up to one additional year,
followed by transfer to the MPN. In the instant case the additional
21 year was in fact provided, thus there is no impediment to transfer
to the MPN.

22 “It is therefore held that Defendant may require Applicant to treat
23 within its MPN.”

24 In his Report and Recommendation on Petition for Reconsideration, the WCJ further
25 explains that the regulations promulgated by the Administrative Director of the Division of
26 Workers’ Compensation (Administrative Director) pursuant to the MPN statutes authorized
27 transfer of medical treatment into an MPN. He noted that such a transfer did not “reopen, rescind,

1 alter or amend” applicant’s prior award of medical treatment, and wrote “It is only the manner by
2 which it is furnished that has changed.”

3 We agree that a defendant may satisfy its obligation to provide reasonable medical
4 treatment through an MPN in cases where the date of injury and/or the award of future medical
5 treatment are prior to January 1, 2005. This is because the MPN statutes make only a procedural
6 change in the law by allowing the provision of reasonable medical treatment through an MPN and
7 do not affect any substantive rights. Thus, we hold that a defendant may satisfy its obligation
8 under section 4600 to provide reasonable medical treatment by transferring an injured worker into
9 an authorized MPN in conformity with applicable statutes and regulations regardless of the date of
10 injury or the date of an award of future medical treatment.

11 DISCUSSION

12 **1. An Employer Or Insurer May Satisfy Its Obligation To Provide Reasonable Medical 13 Treatment Under Section 4600 Through An Authorized MPN.**

14 An injured worker has long been entitled under the workers’ compensation law to medical
15 treatment reasonably required to cure or relieve the effects of the injury. (Lab. Code § 4600; see
16 generally *United States Fid. & Guar. Co. v. Department of Indus. Relations (Hardy)* (1929) 207
17 Cal. 144 [16 I.A.C. 69].) However, the way an employer or insurer may satisfy that obligation has
18 changed over the years.

19 Before January 1, 1976, an employee had no right to choose a treating physician if the
20 employer made an unequivocal tender of medical treatment reasonably calculated to cure or
21 relieve from the effects of the injury. Upon receiving notice of the injury, the employer could
22 notify the employee how and where to obtain medical treatment and which physician to see.
23 (*United States Casualty Co. v. Industrial Acc. Com. (Moynahan)* (1954) 122 Cal.App.2d 427 [19
24 Cal.Comp.Cases 8]; *Draney v. Industrial Acc. Com.* (1949) 95 Cal.App.2d 64 [14 Cal.Comp.Cases
25 256] (*Draney*).) An employee could choose a treating physician only when the employer failed to
26 provide required notice of information or otherwise neglected or refused to provide reasonable
27 medical treatment. (*Voss v. Workmen’s Comp. Appeals Bd.* (1974) 10 Cal.3d 583, 588 [39

1 Cal.Comp.Cases 56] (*Voss*); *Zeeb v. Workmen's Comp. Appeals Bd.* (1967) 67 Cal.2d 496, 501-
2 503 [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v. Industrial Acc. Com.* (1966) 64 Cal.2d 82, 86 [31
3 Cal.Comp.Cases 93] (*McCoy*); *Leadbetter v. Industrial Acc. Com.* (1918) 179 Cal. 468 [5 I.A.C.
4 233]; *Bethlehem Steel Co. v. Industrial Acc. Com. (Sequist)* (1945) 70 Cal.App.2d 382 [10
5 Cal.Comp.Cases 171].)

6 Effective January 1, 1976, the Legislature amended section 4600 and limited the
7 employer's ability to direct an employee to a physician to the first 30 days after the injury was
8 reported.³ Thereafter, the employee was allowed to choose a treating physician within a
9 reasonable geographic area. (Lab. Code, § 4600(c).) The employee was also permitted to change
10 treating physicians at any time. (Lab. Code, § 4601; *Ralphs Grocery Company v. Workers' Comp.*
11 *Appeals Bd. (Lara)* (1995) 38 Cal.App.4th 820 [60 Cal.Comp.Cases 840].) However, the
12 employee could be ordered by the Administrative Director to select a new treating physician from
13 a list of five selected by the employer upon the employer's petition and a showing of good cause.
14 (Lab. Code, § 4603; Cal. Code Regs., tit. 8, § 9786.)

15 As part of SB 899, the Legislature adopted an entirely new system for providing medical
16 treatment by allowing an employer or insurer to satisfy its obligation through an MPN
17 immediately upon receiving a report of an injury. (Lab. Code, §§ 4600(c) and 4616.3(a); see also
18 Cal. Code Regs., tit. 8, § 9767.6.) In addition, the Legislature recognized, subject to the four
19 exceptions specified in the statute, that upon the establishment of an authorized MPN injured
20 workers could be transferred into it if they received required notice of rights. (Lab. Code, §§ 4616
21 et. seq.; see also Cal. Code Regs., tit. 8, § 9767.9; *Knight v. United Parcel Service* (2006) 71
22 Cal.Comp.Cases 1423 (Appeals Board en banc) (*Knight*).)

23 Under the MPN statutes injured workers have the right to choose an MPN physician with
24 recognized expertise or specialty in treating the particular injury or condition in question. (Lab.
25 Code, § 4616.3(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(6).) They have the right to

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27 ³ Employees were also allowed under some circumstances to select their personal physician to provide treatment during the 30 day period following the injury. (Lab. Code, § 4600(d).)

1 change treating physicians within the MPN. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit.
2 8, § 9767.12(a)(8).) In addition, an employee may obtain second and third opinions from
3 other MPN physicians regarding diagnoses or treatment plans. (Lab. Code, § 4616(c) and
4 4616.4(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(10).) There is a procedure to address and
5 resolve disputes regarding diagnosis and treatment in the event of a dispute. (Lab. Code, §
6 4616.4(b); see also Cal. Code Regs., tit. 8, §§ 9762.1 through 9762.3 and 9767.9(h).)⁴

7 **2. An MPN May Be Used To Provide Reasonable Medical Treatment Regardless Of The**
8 **Date Of Injury Or The Date Of An Award.**

9 In this case, applicant’s date of injury and the date of her award are prior to the effective
10 date of the MPN statutes. We conclude that these facts alone do not preclude the defendant from
11 providing reasonable medical treatment through an authorized MPN.

12 Whether a statutory amendment is given prospective or retroactive effect depends upon
13 whether it implements a procedural or substantive change in the law. (*Pebworth v. Workers’*
14 *Comp. Appeals. Bd.* (2004) 116 Cal.App.4th 913 [69 Cal.Comp.Cases 199] (*Pebworth*); *State*
15 *Comp. Ins. Fund v. Workers’ Comp. Appeals. Bd. (Silva)* (1977) 71 Cal.App.3d 133 [42
16 Cal.Comp.Cases 493] (*Silva*)). Substantive changes in the law may only be applied prospectively,
17 but procedural changes in the law may apply retroactively. Here, the Legislature’s decision to
18 allow the provision of reasonable medical treatment through an MPN makes only a procedural
19 change in the law.

20 In *Silva*, the court addressed the effect of the 1976 amendment to section 4600 that allowed
21 an employee to be treated by a physician of his own choice or at a facility of his own choice within
22 a reasonable geographical area “after 30 days from the date the injury is reported.” (Lab. Code,
23 § 4600(c).) The court found that the amendment changed only the procedure by which medical
24 treatment was furnished, not the employer’s obligation to provide it or the injured worker’s right to

25 ⁴ Administrative Director Rule 9767.9(h) provides in full: “If the employer or insurer or injured covered employee
26 objects to the medical determination by the treating physician, the dispute regarding the medical determination made
27 by the treating physician concerning the transfer of treatment shall be resolved pursuant to Labor Code section 4062.”
But see section 4616.6, which provides in full: “No additional examinations shall be ordered by the appeals board and
no other reports shall be admissible (sic) to resolve any controversy arising out of this article.”

1 receive it. Because the procedure for providing medical treatment was not a substantive right, the
2 court in *Silva* held that the statutory modification of that procedure did not impinge on vested
3 rights. Thus, the statutory change in the process was held to apply to all cases regardless of the
4 date of injury.

5 “In this case the change effected by the Legislature does not on its
6 face impose a new or additional liability. Although it affects the
7 privilege of the employer and his insurer to control the employee's
8 medical care it does not do so retroactively. Care through
9 December 31, 1975, was presumably furnished under the prior
10 statute. The order can only affect the treatment of the employee by
11 the selected physician after February 19, 1976, when notice was
12 given as required by the new statute. There is no retroactive effect
13 in applying the statute to medical treatment due from the employer
14 after December 31, 1976 [*sic*, intended year is 1975]. Moreover, it
15 is clearly the legislative policy that one treated in 1976 and
16 thereafter for an injury that occurred after January 1, 1976, should
17 have the privilege of being treated by a physician of his choice
18 after 30 days from the date the injury was reported. *There is no*
19 *reason why the same policy should be withheld and not apply to*
20 *those who were injured previously.* The statute is effective after 30
21 days from the date the injury was reported.” (71 Cal.App.3d at 139
22 [42 Cal.Comp.Cases at 497], emphasis added.)

23 In *Pebworth*, the court considered the application of an amendment to section 4646 that
24 allowed the settlement of prospective vocational rehabilitation services. The court, relying upon
25 the analysis in *Silva*, found that the amendment provided a new means for enforcing existing
26 rights, and did not impose new or additional liability or substantially affect existing rights and
27 obligations. Because the court found that the amendment was procedural in nature, it was held to
apply to all cases pending at the time of its enactment. As the court wrote:

28 “[W]hether a statute is procedural or substantive does not depend
29 on the degree it changes prior law. The test is whether the statute
30 imposes a new or additional liability or affects existing vested or
31 contractual rights on the one hand or *merely changes the manner*
32 *in which established rights or liabilities are invoked in the future.*
33 Thus, a procedural statute may be applied to pending cases even if
34 the event underlying the cause of action occurred before the statute
35 took effect.” (116 Cal.App.4th at 918 [69 Cal.Comp.Cases at 202],
36 emphasis added.)

1 In *Silva*, the Legislature amended the statutes regarding the manner in which an employer
2 could satisfy its duty to provide reasonable medical treatment. (Lab. Code, § 4600(c).) Here, as in
3 *Silva*, the MPN statutes adopted as part of SB 899 also only change the manner in which
4 reasonable medical treatment may be provided, and do not change any established rights or
5 liabilities. As in *Pebworth*, the change in the law is procedural, not substantive.

6 Moreover, the MPN statutes do not limit the transfer of employees to situations involving
7 injuries or awards occurring after the January 1, 2005 effective date. To the contrary, section
8 4616(a)(1) specifically provides that “on or after January 1, 2005” an MPN may be established
9 “for the provision of medical treatment to injured employees.” The term “injured employees” does
10 not differentiate on the basis of date of injury or whether there has been a prior award of medical
11 treatment.

12 In addition, the Legislature addressed the coordination and transfer of medical treatment
13 inside and outside of an MPN by requiring that the employer or insurer file a written continuity of
14 care policy with the Administrative Director. (Lab. Code, § 4616.2; see also Cal. Code Regs., tit.
15 8, § 9767.10.) This policy must be presented as part of the application to obtain authorization to
16 use an MPN from the Administrative Director. (Lab. Code, § 4616; see also Cal. Code Regs., tit. 8,
17 §§ 9767.2 and 9767.3.) The provisions of section 4616.2(a) through (c), which require an insurer
18 or employer to create a continuity of care policy are consistent with the expansive definition of
19 “injured employee” used in section 4616(a), and by implication demonstrate that the transfer of an
20 injured worker into an MPN was contemplated by the Legislature.

21 Section 4616.2(d)(3) states that a medical provider terminated by the MPN may continue
22 treatment when any of the following are present:

23 (A) An acute condition. An acute condition is a medical condition
24 that involves a sudden onset of symptoms due to an illness, injury,
25 or other medical problem that requires prompt medical attention
26 and that has a limited duration. Completion of treatment shall be
27 provided for the duration of the acute condition.

(B) A serious chronic condition. A serious chronic condition is a
medical condition due to a disease, illness, or other medical
problem or medical disorder that is serious in nature and that

1 persists without full cure or worsens over an extended period of
2 time or requires ongoing treatment to maintain remission or
3 prevent deterioration. Completion of treatment shall be provided
4 for a period of time necessary to complete a course of treatment
5 and to arrange for a safe transfer to another provider, as
6 determined by the insurer or employer in consultation with the
injured employee and the terminated provider and consistent with
good professional practice. Completion of treatment under this
paragraph shall not exceed 12 months from the contract
termination date.

7 (C) A terminal illness. A terminal illness is an incurable or
8 irreversible condition that has a high probability of causing death
within one year or less. Completion of treatment shall be provided
for the duration of a terminal illness.

9 (D) Performance of a surgery or other procedure that is authorized
10 by the insurer or employer as part of a documented course of
11 treatment and has been recommended and documented by the
provider to occur within 180 days of the contract's termination
date.

12 Pursuant to the Legislature's direction that regulations be adopted to implement the MPN statutes,
13 the Administrative Director incorporated the four conditions described in section 4616.2(d)(3) into
14 the regulation describing the process for transferring an employee into an MPN. (Lab. Code,
15 § 4616(g); Cal. Code Regs., tit. 8, § 9767.9.)⁵ Here, the WCJ acknowledged that defendant

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17 ⁵ Section 4616(d) provides in full: "On or before November 1, 2004, the administrative director, in consultation with
18 the Department of Managed Health Care, shall adopt regulations implementing this article. The administrative
director shall develop regulations that establish procedures for purposes of making medical provider network
modifications."

19 California Code of Regulations, title 8, section 9767.9 provides in full:

20 (a) If the injured covered employee's injury or illness does not meet the conditions set forth in (e)(1) through (e)(4),
the injured covered employee may be transferred into the MPN for medical treatment.

21 (b) Until the injured covered employee is transferred into the MPN, the employee's physician may make referrals to
providers within or outside the MPN.

22 (c) Nothing in this section shall preclude an insurer or employer from agreeing to provide medical treatment with
providers outside of the MPN.

23 (d) If an injured covered employee is being treated for an occupational injury or illness by a physician or provider
prior to coverage of a medical provider network, and the injured covered employee's physician or provider becomes a
provider within the MPN that applies to the injured covered employee, then the employer or insurer shall inform the
injured covered employee and his or her physician or provider if his/her treatment is being provided by his/her
physician or provider under the provisions of the MPN.

24 (e) The employer or insurer shall authorize the completion of treatment for injured covered employees who are being
treated outside of the MPN for an occupational injury or illness that occurred prior to the coverage of the MPN and
whose treating physician is not a provider within the MPN, including injured covered employees who pre-designated
a physician and do not fall within the Labor Code section 4600(d), for the following conditions:

25 (1) An acute condition. For purposes of this subdivision, an acute condition is a medical condition that involves a
26 sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention
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1 complied with the provisions regarding transfer of care for a serious chronic condition by allowing
2 completion of treatment by Dr. Fine for a period of 12 months.

3 Applicant urges that the application of the MPN statutes in her case would violate section
4 47 of SB 899, which provides:

5 "The amendment, addition, or repeal of, any provision of law made
6 by this act shall apply prospectively from the date of enactment of
7 this act, regardless of the date of injury, *unless otherwise specified*,
8 but shall not constitute good cause to reopen or rescind, alter, or
9 amend any existing order, decision or award of the Workers'
10 Compensation Appeals Board." (Stats. 2004, ch. 34, § 27,
11 emphasis added.)

12 and that has a duration of less than 90 days. Completion of treatment shall be provided for the duration of the acute
13 condition.

14 (2) A serious chronic condition. For purposes of this subdivision, a serious chronic condition is a medical condition
15 due to a disease, illness, catastrophic injury, or other medical problem or medical disorder that is serious in nature and
16 that persists without full cure or worsens over 90 days and requires ongoing treatment to maintain remission or
17 prevent deterioration. Completion of treatment shall be authorized for a period of time necessary, up to one year: (A)
18 to complete a course of treatment approved by the employer or insurer; and (B) to arrange for transfer to another
19 provider within the MPN, as determined by the insurer or employer. The one year period for completion of treatment
20 starts from the date of the injured covered employee's receipt of the notification, as required by subdivision (f), of the
21 determination that the employee has a serious chronic condition.

22 (3) A terminal illness. For purposes of this subdivision, a terminal illness is an incurable or irreversible condition
23 that has a high probability of causing death within one year or less. Completion of treatment shall be provided for the
24 duration of a terminal illness.

25 (4) Performance of a surgery or other procedure that is authorized by the insurer or employer as part of a
26 documented course of treatment and has been recommended and documented by the provider to occur within 180 days
27 from the MPN coverage effective date.

(f) If the employer or insurer decides to transfer the covered employee's medical treatment to the medical provider
network, the employer or insurer shall notify the covered employee of the determination regarding the completion of
treatment and the decision to transfer medical treatment into the medical provider network. The notification shall be
sent to the covered employee's residence and a copy of the letter shall be sent to the covered employee's primary
treating physician. The notification shall be written in English and Spanish and use layperson's terms to the maximum
extent possible.

(g) If the injured covered employee disputes the medical determination under this section, the injured covered
employee shall request a report from the covered employee's primary treating physician that addresses whether the
covered employee falls within any of the conditions set forth in subdivisions (e)(1-4). The treating physician shall
provide the report to the covered employee within twenty calendar days of the request. If the treating physician fails
to issue the report, then the determination made by the employer or insurer referred to in (f) shall apply.

(h) If the employer or insurer or injured covered employee objects to the medical determination by the treating
physician, the dispute regarding the medical determination made by the treating physician concerning the transfer of
treatment shall be resolved pursuant to Labor Code section 4062.

(i) If the treating physician agrees with the employer's or insurer's determination that the injured covered employee's
medical condition does not meet the conditions set forth in subdivisions (e)(1) through (e)(4), the transfer of treatment
shall go forward during the dispute resolution process.

(j) If the treating physician does not agree with the employer's or insurer's determination that the injured covered
employee's medical condition does not meet the conditions set forth in subdivisions (e)(1) through (e)(4), the transfer
of treatment shall not go forward until the dispute is resolved.

1 However, nothing in the statute “specifies” that the MPN process is limited to injuries occurring
2 after January 1, 2005. To the contrary, our decision is consistent with SB 899 by applying the
3 MPN provisions prospectively from the date of enactment “regardless of the date of injury.”
4 (Stats. 2004, ch. 34, § 47.)

5 We also find that the section 5804 five-year limit on the rescission, alteration or
6 amendment of an existing award does not preclude defendant from using the MPN to provide
7 medical treatment.⁶ Transferring medical treatment to an MPN does not rescind, alter or amend an
8 award. To the contrary, applicant’s substantive right to reasonable medical treatment is
9 unchanged. Defendant continues to be liable under section 4600 and under the award to provide
10 medical treatment reasonably required to cure or relieve applicant from the effects of her industrial
11 injury. (*Knight, supra.*) The MPN statutes simply allow another method for providing that
12 medical treatment.

13 **3. An Injured Worker May Be Transferred To An Authorized MPN For Medical Treatment**
14 **In Conformity With Applicable Statutes And Regulations.**

15 Because of the unique aspects of the MPN statutes, we do not find that an employer or
16 insurer must demonstrate that there has been a change of condition or defective or incomplete
17 medical treatment before transferring an injured worker into an MPN. Unlike the statutes
18 considered by the Supreme Court in *Voss, Zeeb and McCoy*, the MPN statutes do not give the
19 employer complete control over the identity of a treating physician. To the contrary, injured
20 workers under the MPN statutes have the right to select an MPN physician with recognized
21 expertise or specialty in treating the particular injury or condition in question. (Lab. Code,
22 § 4616.3(b); see also Cal. Code Regs., tit. 8, § 9767.12(a)(6).) They also have the right to change
23 treating MPN physicians if they desire. (Lab. Code, § 4616.3(b); see also Cal. Code Regs., tit. 8,

24 _____
25 ⁶ Section 5804 provides in full: “No award of compensation shall be rescinded, altered, or amended after five years
26 from the date of the injury except upon a petition by a party in interest filed within such five years and any
27 counterpetition seeking other relief filed by the adverse party within 30 days of the original petition raising issues in
addition to those raised by such original petition. Provided, however, that after an award has been made finding that
there was employment and the time to petition for a rehearing or reconsideration or review has expired or such
petition if made has been determined, the appeals board upon a petition to reopen shall not have the power to find that
there was no employment.”

1 § 9767.12(a)(8).) In addition, the MPN statutes, unlike the employer controlled process under the
2 earlier statutes, allows injured workers to obtain second and third opinions from other MPN
3 physicians regarding diagnoses or treatment plans. (Lab. Code, §§ 4616(c) and 4616.4(b); see also
4 Cal. Code Regs., tit. 8, § 9767.12(a)(10).) These MPN provisions address the concern expressed
5 by the Supreme Court in *Zeeb* that “the purpose of securing proper medical care and speedy
6 recovery” might be adversely affected by a change in treating physicians. These MPN provisions
7 assure that injured workers continue to receive appropriate medical treatment even if a pre-existing
8 physician-patient relationship is disturbed.

9 Moreover, the MPN statutes and regulations identify four specific situations where
10 continued treatment is allowed for a period of time with the physician selected by the employee.
11 (Lab. Code, § 4616.2(d)(3); see also Cal. Code Regs., tit. 8, § 9767.9.) These exceptions would be
12 rendered null and void by an additional requirement that the employers or insurers prove there has
13 been defective or incomplete medical treatment, or a change in condition, before transferring
14 employees into an authorized MPN. It would be contrary to the intent of the MPN statutes to
15 render meaningless the four exceptions described in those statutes. It also is not within our
16 purview to impose limitations on the transfer of medical treatment to an MPN beyond those
17 specified by the Legislature.

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3 For the foregoing reasons,

4 **IT IS ORDERED** as the Decision After Reconsideration of the Appeals Board (En Banc)
5 that the October 18, 2006 Finding and Order is **AFFIRMED**.

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

7 */s/ Joseph M. Miller*
8 ***JOSEPH M. MILLER, Chairman***

9 */s/ Merle C. Rabine*
10 ***MERLE C. RABINE, Commissioner***

11 */s/ William K. O'Brien*
12 ***WILLIAM K. O'BRIEN, Commissioner***

13 */s/ James C. Cuneo*
14 ***JAMES C. CUNEO, Commissioner***

15 */s/ Janice Jamison Murray*
16 ***JANICE JAMISON MURRAY, Commissioner***

17 */s/ Ronnie G. Caplane*
18 ***RONNIE G. CAPLANE, Commissioner***

19 ***I CONCUR IN PART AND DISSENT IN PART***
20 ***(See attached Concurring and Dissenting Opinion)***

21 */s/ Frank M. Brass*
22 ***FRANK M. BRASS, Commissioner***

23
24 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***
1/24/2007

25 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL***
26 ***ADDRESS RECORD EXCEPT LIEN CLAIMANTS***

27 ***JFS/ams***

1 **CONCURRING AND DISSENTING OPINION OF COMMISSIONER BRASS**

2 There may be cases when it is appropriate to transfer an injured worker into an authorized
3 MPN for medical treatment. However, in the instant case, the evidence demonstrates that there is
4 a lawfully established pre-existing physician-patient relationship between Frank Fine, M.D. and
5 Sharron Babbitt and that she is satisfied with the relationship. There is no evidence of a change in
6 her condition or that the medical treatment she is receiving is defective or incomplete.
7 Consequently, I have chosen to be guided by the common sense of the Supreme Court, which has
8 repeatedly held that a lawfully established physician-patient relationship should be preserved
9 unless there is a change of condition or the treatment provided is defective or incomplete. (*Voss v.*
10 *Workmen’s Comp. Appeals Bd.* (1974) 10 Cal.3d 583 [39 Cal.Comp.Cases 56] (*Voss*); *Zeeb v.*
11 *Workmen’s Comp. Appeals Bd.* (1967) 67 Cal.2d 496 [32 Cal.Comp.Cases 441] (*Zeeb*); *McCoy v.*
12 *Industrial Acc. Com.* (1966) 64 Cal.2d 82 [31 Cal.Comp.Cases 93] (*McCoy*).

13 In my view, it is irrelevant if the physician-patient relationship was lawfully established
14 following an award of medical treatment, or because 30 days passed from the date of injury as
15 provided under section 4600(c), or because the employer neglected or refused to provide
16 reasonable medical treatment as in *Knight v. United Parcel Service* (2006) 71 Cal.Comp.Cases
17 1423 (Appeals Board en banc), or in some other way. Furthermore, I agree with the Supreme
18 Court that an efficacious physician-patient relationship is an ingredient aiding in the success of
19 medical treatment because it inspires confidence in the patient. Thus, a lawfully established
20 physician-patient relationship should be preserved in the absence of a change of condition or
21 defective or incomplete medical treatment.

22 In *McCoy*, the Supreme Court addressed “the extent of the employer’s privilege to control
23 the course of the injured employee's medical care” under section 4600, which at that time was not
24 limited to the first 30 days. The Court held that by refusing to provide reasonable medical care,
25 the employer “voluntarily terminated his right to control the course of medical treatment.” (*Id.*, 64
26 Cal.2d at 89.) For that reason, the injured worker was not obligated to inform the employer of the
27 treating physician’s diagnosis before he or she obtained the right to receive reimbursement for the

1 cost of reasonable self-procured medical treatment. As Justice Mosk noted, an injured worker's
2 right to obtain reasonable medical treatment takes precedence over an employer's interest in trying
3 to control costs by controlling treatment.

4 In *Zeeb*, the injured worker self-procured treatment after the employer's physician asserted
5 that a flare-up of the employee's condition was not work related. Thereafter, the employer
6 conceded that there was a need for continued treatment and directed the employee to return to the
7 employer's physician. The Supreme Court affirmed its conclusion in *McCoy* that medical
8 considerations take precedence over cost control interests and found that the employer's failure to
9 provide reasonable medical treatment terminated its right to control treatment and rendered it
10 liable for the cost of reasonable medical treatment self-procured by the injured worker. Justice
11 Peters explained:

12 "[W]here there is a conflict between the two purposes, *the purpose*
13 *of securing proper medical care and speedy recovery must take*
14 *precedence over the goal of minimization of cost...* In other words,
15 considerations of expense must be either disregarded or, at most,
16 given limited weight where there is a substantial danger that they
will interfere with the employee's right to secure necessary medical
treatment of injuries due to the industrial accident and to achieve
speedy recovery." (67 Cal.2d at 501-502, emphasis added.)

17 The Court further addressed the importance of the physician-patient relationship in
18 providing successful medical treatment and the limited circumstances that would allow the
19 interruption of such a relationship:

20 "Where, as in the present case, the employer has refused treatment
21 causing the employee to procure his own medical treatment,
22 medical considerations and adherence to the purposes of section
23 4600 would dictate that *a doctor-patient relationship which will*
24 *inspire confidence in the patient is an ingredient aiding in the*
25 *success of the treatment, and that, once such a relationship has*
26 *been established, treatment should continue with the same doctor*
27 *in the absence of a change of condition or evidence that the*
treatment is defective or additional treatment is necessary. So far
as appears from the record before us, petitioner is being treated by
his private doctor whom he consulted after the employer's refusal
to provide further necessary care, and *there is no evidence that*
there has been a change of condition or that the treatment
provided is defective or incomplete. Accordingly, there is no

1 *substantial showing which would warrant an interruption of the*
2 *existing treatment or commencement of new treatment.”* (67
3 Cal.2d at 502, emphasis added.)

4 As found in *Zeeb*, the relevant medical consideration is the preservation of the lawfully
5 established physician-patient relationship. Under *Zeeb*, that relationship may be disrupted *only*
6 when there is evidence of “a change of condition or that the treatment provided is defective or
7 incomplete.” (*Id.*, 67 Cal.2d at 502.)

8 In *Voss*, the Supreme Court reiterated that an employer may resume control of medical
9 treatment “without the employee’s consent only in limited situations.” (*Id.*, 10 Cal.3d at 589.) The
10 Court affirmed the principle that medical considerations must predominate. In *Voss*, the referee
11 found that the employee’s “apparent propensity to demand excessive medical attention was a
12 ‘change of circumstances . . . and justifies the order which establishes control of medical treatment
13 in the defendant.’ ” (*Id.*, 10 Cal.3d at 589.) However, the Court disagreed, and Justice Sullivan
14 wrote:

15 “[I]t is clear that a change in the *circumstances concerning cost of*
16 *treatment is not the kind of ‘change of condition’ which would*
17 *justify restoring control over medical treatment to the carrier. It*
18 *would appear that ‘change of condition’ refers to a change in the*
19 *physical condition of the employee. In the typical case the carrier*
20 *loses the right to control medical treatment by refusing further*
21 *treatment because the carrier deems such treatment unnecessary,*
22 *when in fact the employee's condition requires it. Once the*
23 *employee has satisfactorily obtained adequate treatment for this*
24 *condition, he is entitled to have that treatment continued, subject*
25 *to the limitation that only reasonable expenses will be reimbursed.*

26 “However, if the employee's physical condition changes so that the
27 condition which prompted the carrier to deny further treatment is
28 not the employee's existing condition, it would seem proper for the
29 carrier to resume control of the treatment of the condition as
30 changed.” (*Id.*, 10 Cal.3d at 590, emphasis added.)

31 The four conditions described in section 4616.2(d) present situations where an established
32 physician-patient relationship should not be disrupted. However, those are not the *only* four
33 conditions where medical considerations require that such a relationship continue. As described in
34 *Zeeb*, a physician-patient relationship that inspires confidence in the patient is an ingredient aiding

1 in the success of the treatment. It is contrary to the principles established by *Voss*, *Zeeb* and
2 *McCoy* to terminate such a relationship and to compel an injured worker to pick a different
3 physician from an MPN list in the absence of evidence of a change of condition or defective or
4 incomplete treatment. Obtaining second and third opinions of physicians from the same MPN list
5 when diagnosis or treatment is questioned will not “inspire confidence in the patient” which is an
6 “ingredient aiding in the success of the treatment” as described in *Zeeb*. The purpose of securing
7 proper medical care and speedy recovery must take precedence over the use of an MPN to control
8 costs.

9 Honoring an established physician-patient relationship does not impose an unreasonable
10 cost upon the employer. As Justice Peters stressed in *McCoy*:

11 “And we emphasize also that, *whether the treatment is*
12 *administered by a doctor chosen by the employee or one selected*
13 *by the employer, the latter is liable for no more than the*
14 *reasonable cost of such treatment as is reasonably required to cure*
or relieve from the effects of the injury.” (64 Cal.2d at 89,
emphasis added.)

15 The same point was made in *Zeeb*, when the Court quoted *McCoy* and emphasized that, “Of
16 course, the employer will only be liable for the ‘reasonable cost of such treatment as is reasonably
17 required to cure or relieve from the effects of the injury.’ ” (*Zeeb, supra*, 67 Cal.2d at 502-503.)
18 Similarly, in *Voss*, the Court stressed that medical considerations did not leave the employer with
19 no protection against uncontrolled costs because its liability is “subject to the limitation that only
20 reasonable expenses will be reimbursed.” (*Id*, 10 Cal.3d at 590.)

21 Moreover, the “reasonable cost” limitation of section 4600 identified in *Voss*, *Zeeb* and
22 *McCoy* is not the only cost protection now in place. A number of additional statutory provisions
23 balance the preservation of an established physician-patient relationship against the employer’s
24 interest in limiting costs. These additional protections include statutory and regulatory provisions
25 requiring that treatment be provided in accordance with established medical treatment utilization
26 schedules (Lab. Code, §§ 4604.5(a) and (c) [Guidelines of the American College of Occupational
27 and Environmental Medicine (ACOEM) presumed correct on issue of extent and scope of medical

1 treatment pending development of guidelines by the Administrative Director pursuant to section
2 5307.27]); oversight provisions to assure that only reasonably required medical treatment is
3 provided (Lab. Code, § 4610 [employer to establish utilization review process to manage medical
4 care by approving, modifying, delaying, or denying treatment recommendations]; Cal. Code Regs.,
5 tit. 8, §§ 9792.6-9792.11 [use of ACOEM Guidelines in utilization review, etc.]; Lab. Code,
6 § 4062(b), Cal. Code Regs., tit. 8, §§ 9788.01-9788.91 [second opinion for spinal surgery required
7 from board-certified or board-eligible orthopedic surgeon or neurosurgeon]); absolute limits on
8 certain kinds of medical treatment (Lab. Code, § 4604.5(d) [chiropractic and physical therapy
9 limited to 24 visits per injury]); and the use of the Official Medical Fee Schedule (Lab. Code,
10 § 5307.1; Cal. Code Regs., tit. 8, §§ 9789.10-9789.70).

11 These additional statutory protections assure that employers pay only for what they have
12 always been liable to provide; medical treatment “reasonably required to cure or relieve the
13 injured worker from the effects of his or her injury.” (Lab. Code, § 4600(a).)

14 The medical considerations of securing proper care and a speedy recovery must take
15 precedence over the minimization of cost. A physician-patient relationship that inspires
16 confidence in the patient is an ingredient aiding in the success of treatment. A physician-patient
17 relationship that has been lawfully established should be preserved unless there has been a change
18 of condition or the treatment being provided is defective or incomplete.

19
20 /s/ *Frank M. Brass*
21 *FRANK M. BRASS, Commissioner*

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23 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***
24 *1/24/2007*

25 ***SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL***
26 ***ADDRESS RECORD EXCEPT LIEN CLAIMANTS***
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