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MEDICAL PROVIDER NETWORKS

How Can They Be Effective?

By Corey A. Ingber

WITH COMMENTS FROM COREY ADDED POST VALDEZ (En Banc)

THE PRACTICAL PROBLEMS WITH THE MPN'S

➢ **MANY NOTORIOUS PHYSICIANS ARE IN THE MPN'S**

Some, but by no means all MPN's, are vast and large, covering extensive geographic areas. This means they can be structurally prone to be porous, permitting the inclusion of many of the so-called "known treating physicians," whom are known to treat excessively and refer to other medical specialties prolifically. These are the very physicians which were intended to be excluded from the MPN's.

We have found that in some of the larger Medical Provider Networks, often the so-called "leased networks" it is far more likely that a larger number of the known treating physicians are members within. Furthermore, even within some of the smaller, more selectively run MPN's some of the known treating physicians have infiltrated or have somehow "gotten in." It is a reality which few can readily deny.

➢ **WHY ARE SOME OF THE KNOWN TREATING PHYSICIANS IN THE MPN'S?**

There are a number of reasons for this:

(1) During the credentialing process, many MPN's don't realize that an excluded physician *may still be able to get in the "back door" by either buying his/her way into a clinic already in the MPN or becoming a "silent partner" or a Medical Director with a doctor who is in the MPN.*

(2) Another possible "end run" is when an admitted physician has an office in the MPN and within that practice, he/she "refers" to a doctor under his 'banner' but the physician to whom the patient is referred, is not in the MPN. So, the PTP is within the MPN but the secondary physician is not. This becomes even more confusing when 'both' doctors actually co-sign the medical report;

(3) I have found that some of the MPN's are simply reluctant to exclude or remove physicians for fear of a civil law suit. [Palm Medical v. SCIF];

- **IS IT WORTH THE EFFORT TO *TRANSFER* TREAMENT INTO THE MPN?**

Considering all of the conditions which can form exceptions to the transfer vehicle, in many cases it may not be practical to launch an effort to *transfer* treatment into the MPN, especially when a PTP can easily determine the condition to be a "serious chronic condition."[i]

Getting the treatment plan beyond the 90 days is easy and commonplace for the non-MPN PTP. If the PTP agrees the exception applies, then our remedy is to go through the Labor Code §4062 process and obtain a PQME on the issue of the serious and chronic condition, an effort which is likely to consume time and expense.

What are the chances this will be successful? We will still have to wait at least another 90 days to get a state QME panel issued from the DWC Medical Unit, then an examination within 60 days and the physician is then allowed another 30 days to issue a medical report. Ironically, by the time we even get a PQME evaluation on the issue, the applicant could be permanent and stationary.

- **THE TIMING ISSUES WERE TERRIBLE PRE VALDEZ!** (Maybe not –NOW)

IN THE DAYS PRIOR TO VALDEZ, if you had an admitted case and the applicant was treating outside of the MPN, under Labor Code §5502(b)(1) we could try and file for Expedited Hearing. But, the MPN is not one of the listed issues under the expedited hearing statute and few WCAB offices will permit the issue to go this way. So, we had to wait in frustration to have "our day in court." Meanwhile, the applicant "treated away" on a self-procured basis upon the continued confidence that those medical reports "would come in."

To no surprise, many WCAB District Offices have unwritten standing policy by which they *will not set a case on expedited hearing if the issue is MPN control.* Remember, the statute states "entitlement to medical treatment pursuant to Labor Code §4600." There is no clear mention of whether or not this relates to MPN issues.

There is no clear cut determination on this issue, so the issue of MPN control can be raised on a Declaration of Readiness to Proceed for Expedited Hearing, but don't expect a good outcome, since the matter will likely not be set on an expedited basis. Instead, you will likely face a regular conference and hearing calendar. [ii] Therefore, on a practical basis, we could be facing many months prior to a hearing on the issue.

NEW COMMENT FROM COREY INGBER:

In light of Valdez (en banc), this actually might not matter, because we can simply take the position that if the applicant has gone out of the MPN, then we owe neither treatment nor benefits, so let applicant's counsel file for TD or medical treatment on an Expedited Basis, since we don't pay benefits. Applicant can file for treatment or TD on an expedited basis (so can we) and the practical implication is that the WCAB will likely have to grant expedited hearing on the issues, since under Valdez, the reports from the out-of-network treatment physicians are not coming into evidence, provided we have a properly validated and noticed MPN. (This becomes part of the expedited trial proof).

- **CAN AN APPLICANT BE ORDERED TO RECEIVE TREATMENT IN THE MPN?** (PRE-VALDEZ "NO" –POST VALDEZ. Corey says the issue is "in play." *We cannot get a WCAB Judge to actually force an applicant to get treatment anywhere but why can't we ask for an order which declares that any and all treatment which is required, if any, will be within the MPN. This is the same result is it not?*

Under the WCAB Panel Decision in ***Lane v. Big Lots Stores***, the WCAB held that an applicant, who self-procures treatment outside of the MPN, cannot be ordered to treat within the network. *Corey says this case is mooted by Valdez.*

> "*Because section 4065 is within the same chapter as the sections authorizing a defendant to provide treatment through an MPN, it is apparent on the fact of section 4605 that an injured worker cannot be ordered to treat within an MPN if he or she chooses to provide a physician at his or her "own expense."*

This case or course is not controlling nor is even citable as legal precedent, but it may reflect the thinking of the WCAB, or at least three of its Commissioners, who signed the decision. Otherwise, the decision holds that should the applicant self-procure treatment, the employer is not liable for that treatment. *I don't think this statement actually holds up post Valdez, but we don't know for sure.*

NEW COMMENT FROM COREY INGBER:

The panel decision in Big Lots has been disavowed, at least to the holding that reports from non-MPN physicians are admissible. Therefore, I believe that the WCAB can and WOULD order the applicant to treat within the MPN or at least bar benefits from stemming from medical treatment resulting from out-of-network treatment. Now, this was not addressed in Valdez, so the issue remains unclarified. CAN THE APPLICANT BE ORDRED TO TREAT IN THE MPN? We still don't know.

- **SELF-PROCURED OUT-OF-NETWORK TREATMENT IS BECOMING COMMON. WHY?**

NEW COMMENT FROM COREY INGBER:

The ***following discussion was pre-Valdez. But, I am not convinced that this ends the practice of out-of-network self-procured treatment, since the Valdez decision (1) will likely be appealed to the Appellate Court; (2) the decision assumes that there has been full validity and proper notices afforded within the MPN. This still "keeps the door" open to self-procured treatment and the admissibility of reports from out-of-network physicians, where the defense cannot prove or establish both validity (compliance) and timely notices, including posting notices under Lab C4550.***

Under the reforms of SB 899, please recall that for injuries on or after 1/1/2005, neither party can go out and obtain their own QME medical-legal evaluation. Instead, disputes over injury, medical treatment, TD, PD, apportionment and future medical care are mandated to go through the Labor Code §§4060/4061/4062 process.

In the pre Valdez world, both applicant attorneys and the physicians had discovered that by simply ignoring the MPN, they could reprise "1989" all over again and therefore by simply self-procuring treatment outside of the MPN, they were able to effectively perform the following:

(1) They can treat with any doctor;

(2) *Either the PTP or even the law firm then refers the applicant for the psych, sleep, internal and other "sub specialties" without reservation or limit.*

Many applicant attorneys would then raise the WCAB Panel Decision in ***Lane v. Big Lots***, that these out-of-network reports from non-MPN treating physicians were still admissible. Are they? They might have been pre-Valdez but not now! They are not admissible and this changes the game.

For what it was worth, pre-Valdez, there were OTHER panel decisions, which held to the contrary.

In one recent panel decision, (***Forencio Casteneda v. WCAB*** 11/01/10) the WCAB would not agree that defendant should have had medical control, since they had not sent out the notice of MPN in the proper manner and that it was not in Spanish.

Clearly here, the WCAB, if they should decide that the employer has the right of control and that an applicant can be ordered back in the MPN, there has to be fastidious compliance with the notice regulations.

In another case involving transfer of care (***Michele Cain v. WCAB*** 11/1/09) the WCAB refused to order care transferred to the defendant's MPN, when the defendant failed to provide a copy of the transfer of care notice to the treating physician, as required under 8 CCR §9767.9(f).

NEW COMMENT FROM COREY INGBER:

EVEN IN THE POST-VALDEZ environment, don't expect to prevail at the WCAB unless there has been full and complete compliance with the MPN statutes, the affording of the employee benefit posting and pre and post injury notices and the timely offering of medical treatment per Lab C 5402(c), otherwise Valdez permits self—procured treatment and reports from the out-of-network physicians now come into evidence and will support a finding of benefit entitlement.

Of course, in a case where the notice may have been technically "defective" but medical treatment was authorized and the notice defect was corrected, the WCAB may conclude that the defect is not material and therefore the holding in **Knight v. UPS** would not apply. ***But we really don't know.***

THE MPN CONTROL CHECKLIST

1. Employer Witness. The name and address of an employer witness who can appear at a trial and testify to facts and details related to having provided the applicant notification of the following rights:

   (a) Pre- date of injury MPN information in Spanish and English;
   (b) Post-date of injury MPN information in English and Spanish;
   (c) The right to pre-designate a personal treating doctor;
   (d) The existence and contents of posted notice in a conspicuous area;
   (e) Providing a DWC-1 claim form to applicant;
   (f) Referral to an MPN/industrial clinic for treatment;
   (g) Providing a regional area list of MPN physicians.

2. Any documents in the insured's possession evidencing compliance with the above MPN notice requirements, including the claim form.

   Please note the applicable laws in this regard:

   (a) LC §4616 – list of network physicians;

   (b) LC §3550 – posting notice of MPN to employees (note, the regulations have changed as of 10/1/10.[iii] *The regulations require additional information regarding notices to new employees:*

      i) the right of the employee to pre-designate a personal physician or medical group;
      ii) description about Medical Provider Networks which is to include that the employer may be using an MPN, what is an MPN, the pre-designation exception from the MPN, when an employee must begin to use a physician from the MPN and how to request information about using an MPN.
      iii) The regulations also require the removal of any references to vocational rehabilitation.

      PRACTICAL POINT: APPLICANT ATTORNEYS MAY EXPLOIT THIS FAILURE TO POST THE NEW NOTICES AS THEIR MEANS BY WHICH TO DEFEAT NETWORK CONTROL.

(c) LC §4600, CCR §9767 et. seq. – notice of MPN prior to and at the time of injury;

(d) CCR 9782(b) – right to pre-designate a treating dr. for a work related injury.

3. A photograph of the insured's posted notice in Spanish and English on the property where the applicant was working at the time of the injury.

4. A copy of any proof of service of post-date of injury MPN notice in Spanish and English.

5. Copies of all medical reports of any MPN/industrial clinic.

6. Copies of claim administrator's letter(s), including proof(s) of service, showing that all such medical reports were served on applicant's counsel.

7. Copies of all letters sent to the applicant, applicant's counsel, and any self procured physicians regarding denial of authorization to treat due to non-MPN status.

8. In cases where applicant is self-procuring medical treatment outside of the MPN, copies of any letters sent to the applicant and applicant attorney demanding transfer into the MPN, including any regional lists of MPN providers that were sent.

HOW CAN THE EMPLOYER AND THE CLAIMS ADMINISTRATOR WORK TOGETHER TO PROMOTE THE MOST EFFECTIVE USE OF THE MPN?

- **POSTING NOTICE**

  Make sure that every employer location has the latest version (10/1/10) of the posting notice required under Labor Code 3550. Is the notice in English and Spanish? Is it in a location frequented by employees? Can the notice be easily read during the work day hours?

- **PROOF OF POSTING NOTICE**

  A photograph of the notice poster should be retained by the employer MPN contact individual, so that if and when the issue arises, a copy can be provided either electronically or by hard copy.

- **PRE-INJURY NOTICE**

  Is the notice to each employee in the new hiring packet or can it be accessed, if needed? Were the contents provided to the new employee? Were the issues discussed with the new employee? Did the applicant acknowledge by signing receipt?

- **POST-INJURY NOTICE**

  (SPANISH) Assure that the Spanish version of the notice is correct and intelligible. In one WCAB Panel Decision, (Guadalupe De La Mora v. WCAB (Van Nuys) the panel concluded that while the claims administrator had sent the post-injury notice in Spanish, the form as worded was unintelligible. Therefore, defendant had not satisfied the notice requirements.

- **TIMELY PROVISION OF MEDICAL TREATMENT**

  Make sure that we can document when we first became aware of the industrial injury and when we were first provided a claim form, since the allegation that we did not provide timely medical treatment would permit the applicant to self-procure treatment outside of the MPN.

- **DESIGNATING SOMEONE TO ACT AS THE LIAISON FOR MPN ISSUES**

  It is important that on any issue relating to medical treatment control within the MPN, that we have the ability to contact someone at the employer, who if necessary, can act as an employer witness at the WCAB. This is important since we may have to try the *facts around the process by which the applicant was provided notice of the MPN. In other words, is there an established process and procedure by which employees of the insured are provided notice of the MPN?*

- **THE ROLE OF THE CLAIMS EXAMINER**

  Upon notice and knowledge that the applicant has secured treatment outside of the MPN, did we provide notice to applicant's attorney and notice to the out-of-network treatment physician? Did this notice indicate that these physicians were not authorized to provide medical care and that we would object to any costs associated with this self-procured treatment?

- **ASK YOUR EMPLOYR TO BE A PRO-ACTIVE PARTNER**

  (1) Encourage the employer to provide information quickly to York as to whether or not the claim was timely reported and if so, to whom.

  (2) Work with the employer to identify any "red flags" in the claim, such as late reporting, unwitnessed injury, conflicting accounts of how the injury took place, initial refusal to obtain medical treatment followed by a late request for treatment, new body parts being alleged, employee under suspension or on performance warning prior to reported injury.

  (3) Request in your initial contact that the employer forward a copy of the employee's complete personnel file with the required MPN notices and photographs as discussed above to the claims examiner at the earliest possibility once an indemnity claim is reported.

APPENDIX

1. ***LC §3550***

§ 3550. Posting requirement; Consequences of failure to post; Misdemeanor

(a) Every employer subject to the compensation provisions of this division **shall post and keep posted in a conspicuous location frequented by employees**, and where the notice may be easily read by employees during the hours of the workday, **a notice that states the name of the current compensation insurance carrier of the employer, or when such is the fact, that the employer is self-insured, and who is responsible for claims adjustment.**

(b) Failure to keep any notice required by this section conspicuously posted shall constitute a misdemeanor, and shall be prima facie evidence of noninsurance.

(c) This section shall not apply with respect to the employment of employees as defined in subdivision (d) of Section 3351.

(d) The form and content of the notice required by this section shall be prescribed by the administrative director, after consultation with the Commission on Health and Safety and Workers' Compensation, and **shall advise employees that all injuries should be reported to their employer. The notice shall be easily understandable. It shall be posted in both English and Spanish where there are Spanish-speaking employees.** The notice shall include the following information:

(1) How to get emergency medical treatment, if needed.
(2) The kinds of events, injuries, and illnesses covered by workers' compensation.
(3) The injured employee's right to receive medical care.
(4) The rights of the employee to select and change the treating physician pursuant to the provisions of Section 4600.
(5) The rights of the employee to receive temporary disability indemnity, permanent disability indemnity, vocational rehabilitation services, and death benefits, as appropriate.
(6) To whom injuries should be reported.
(7) The existence of time limits for the employer to be notified of an occupational injury.
(8) The protections against discrimination provided pursuant to Section 132a.
(9) The location and telephone number of the nearest information and assistance officer.

(e) Failure of an employer to provide the notice required by this section shall automatically permit the employee to be treated by his or her personal physician with respect to an injury occurring during that failure.

(f) The form and content of the notice required to be posted by this section shall be made available to self-insured employers and insurers by the administrative director. Insurers shall provide this notice to each of their policyholders, with advice concerning the requirements of this section and the penalties for a failure to post this notice.

HISTORY:

Added Stats 1984 ch 1141 § 1. Amended Stats 1987 ch 1019 § 3. Amended Stats 2002 ch 6 § 44 (AB 749).

2. LC §3551

§ 3551. New employees

(a) Every employer subject to the compensation provisions of this code, except employers of employees defined in subdivision (d) of Section 3351, **shall give every new employee, either at the time the employee is hired or by the end of the first pay period, written notice of the information contained in Section 3550.** The content of the notice required by this section shall be prescribed by the administrative director after consultation with the Commission on Health and Safety and Workers' Compensation.

(b) The notice required by this section shall be easily understandable and available in both English and Spanish. In addition to the information contained in Section 3550, the content of the notice required by this section shall include:

(1) Generally, how to obtain appropriate medical care for a job injury.

(2) The role and function of the primary treating physician.

(3) A form that the employee may use as an optional method for notifying the employer of the name of the employee's "personal physician," as defined by Section 4600, or "personal chiropractor," as defined by Section 4601.

(c) The content of the notice required by this section shall be made available to employers and insurers by the administrative director. Insurers shall provide this notice to each of their policyholders, with advice concerning the requirements of this section and the penalties for a failure to provide this notice to all employees.

HISTORY:

Added Stats 1984 ch 1141 § 1. Amended Stats 2002 ch 6 § 45 (AB 749).

3. LC §5401

§ 5401. Claim form and notice of potential eligibility for benefits; Filing

(a) Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid, the employer shall provide, personally or by first-class mail, a claim form and a notice of potential eligibility for benefits under this division to the injured employee, or in the case of death, to his or her dependents. As used in this subdivision, "first aid" means any one-time treatment, and any follow-up visit for the purpose of observation of minor scratches, cuts, burns, splinters, or other minor industrial injury, which do not ordinarily require medical care. This one-time treatment, and follow-up visit for the purpose of observation, is considered first aid even though provided by a physician or registered professional personnel. "Minor industrial injury" shall not include serious exposure to a hazardous substance as defined in subdivision (i) of Section 6302. The claim form shall request the injured employee's name and address, social security number, the time and address where the injury occurred and the nature of and part of the body affected by the injury. Claim forms shall be available at district offices of the Employment Development Department and the division. Claim forms may be made available to the employee from any other source.

(b) Insofar as practicable, the notice of potential eligibility for benefits required by this section and the claim form shall be a single document and shall instruct the injured employee to fully read the notice of potential eligibility. The form and content of the notice and claim form shall be prescribed by the administrative director after consultation with the Commission on Health and Safety and Workers' Compensation. The notice shall be easily understandable and available in both English and Spanish. The content shall include, but not be limited to, the following:

(1) The procedure to be used to commence proceedings for the collection of compensation for the purposes of this chapter.

(2) A description of the different types of workers' compensation benefits.

(3) What happens to the claim form after it is filed?

(4) From whom the employee can obtain medical care for the injury.

(5) The role and function of the primary treating physician.

(6) The rights of an employee to select and change the treating physician pursuant to subdivision (e) of Section 3550 and Section 4600.

(7) How to get medical care while the claim is pending.

(8) The protections against discrimination provided pursuant to Section 132a.

(9) The following written statements:

(A) You have a right to disagree with decisions affecting your claim.

(B) You can obtain free information from an information and assistance officer of the state Division of Workers' Compensation, or you can hear recorded information and a list of local offices by calling [applicable information and assistance telephone number(s)].

(C) You can consult an attorney. Most attorneys offer one free consultation. If you decide to hire an attorney, his or her fee will be taken out of some of your benefits. For names of workers' compensation attorneys, call the State Bar of California at [telephone number of the State Bar of California's legal specialization program, or its equivalent].

(c) The completed claim form shall be filed with the employer by the injured employee, or, in the case of death, by a dependent of the injured employee, or by an agent of the employee or dependent. Except as provided in subdivision (d), a claim form is deemed filed when it is personally delivered to the employer or received by the employer by first-class or certified mail. A dated copy of the completed form shall be provided by the employer to the employer's insurer and to the employee, dependent, or agent who filed the claim form.

(d) The claim form shall be filed with the employer prior to the injured employee's entitlement to late payment supplements under subdivision (d) of Section 4650, or prior to the injured employee's request for a medical evaluation under Section 4060, 4061, or 4062. Filing of the claim form with the employer shall toll, for injuries occurring on or after January 1, 1994, the time limitations set forth in Sections 5405 and 5406 until the claim is denied by the employer or the injury becomes presumptively compensable pursuant to Section 5402. For purposes of this subdivision, a claim form is deemed filed when it is personally delivered to the employer or mailed to the employer by first-class or certified mail.

HISTORY:

Added Stats 1989 ch 892 § 46. Amended Stats 1990 ch 1550 § 54.7 (AB 2910); Stats 1993 ch 121 § 58 (AB 110), effective July 16, 1993, ch 1242 § 39 (SB 223); Stats 1994 ch 1118 § 8 (SB 1768); Stats 2002 ch 6 § 77 (AB 749).

NOTES:

Former Sections:

Former § 5401, similar to the present section, was enacted Stats 1937 ch 90 and repealed Stats 1989 ch 892 § 45.

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[i] Under 8 CCR 9767.9(e)(2) a serious and chronic condition is one which persists without cure or worsens over 90 days and requires ongoing treatment. Is this not most conditions?

[ii] On this position, Labor Code 4600© specifically refers to the MPN, so it is part of the statute and therefore should be part of the expedited hearing process.

[iii] 8 CCR 9767.12, 9880 and 9881, taking effect 10/1/10, requiring new versions of posted notice and employee notification pamphlet.