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CLIENT ALERT

By Corey A. Ingber

WHAT ACTIONS, IF ANY, SHOULD BE TAKEN WHEN WE ARE STILL GETTING MEDICAL REPORTS FROM OUT-OF-NETWORK PHYSICIANS?

LIVING IN A POST VALDEZ WORLD

HOW DO WE DETERMINE WHETHER WE HAVE A DEFENSE?

Please recall the WCAB En Banc decision in **Valdez v. Warehouse Demo Services/Zurich** [ADJ7048296] where on 4/20/11, the WCAB Commissioners, with two partially dissenting opinions, held that where unauthorized medical treatment is obtained outside of a validly established and properly noticed MPN, the reports from these non-MPN doctors are *inadmissible* and *may not be relied upon*. What is the practical, claims handling and practice impact of this decision?

- **VALDEZ IS NOT CAST IN STONE—NOT YET**: You should know that applicant's attorneys have filed a petition for reconsideration from this decision. They contend, among other things, that the WCAB decision causes "mischief, exorbitant costs, and an absurd result."[i] It is therefore conceivable, but not likely, that the Commissioners could revisit the issue. On a procedural level, if the WCAB takes no action on the petition, then the petition for reconsideration is denied by operation of law within 60 days from the date of filing, per Lab Code 5909. Given the enormous importance of this issue, we expect the WCAB will act upon the petition, most likely by issuance of a simple denial before the 60 days. Assuming a denial is made, or a granting of the petition and then the issuance of a subsequent decision upholding the initial determinations, then applicant's attorneys will almost certainly file a writ of review. Therefore, it is highly likely this issue will not be put to its final rest before the end of 2011 if not beyond. For present purposes however, the current decision is "good law" and is therefore binding statewide unless and until the WCAB issues a new and contrary decision or an appellate court either stays or reverses the decision.

SUGGESTED DEFENSE PROTOCOLS

- **STEP ONE: IS OUR MPN HOUSE IN ORDER?** *Before considering an aggressive response to out-of-network treatment reports, be very aware that Valdez made the inadmissibility of these reports specifically conditional upon the MPN being both validity established and properly noticed. This means that in order to sustain a good defense, we need to make sure that there has been compliance with the applicable statutes and governing regulations. We need to be able to "prove" that the MPN is validly established, that the notice poster was up on the date of injury, the applicant was provided with the implementation notice before the date of injury and the full notice of MPN rights post-injury –AND- that we provided medical treatment both in compliance with Labor Code 5402(c) "1 working day" post claim form service and that we arranged for the initial MPN medical appointment within 3 business days following a request for treatment. So the check list is:*

  - ❖ Is the MPN properly established?

  - ❖ Was the required **posted notice** made in a conspicuous location frequented by employees (English and Spanish) noting that the regulations require *a new notice poster as of 10/8/10.?*[ii] The absence of this notice probably dooms this defense, since under the statutes and case law, the effect of not putting up the notice is to otherwise permit the applicant to treat out-of-network from day one. The failure to post *any* form of notice is probably not curable. For injuries on or after 10/1/08, the effect of retaining the "old" notice but not the new poster notice, is less certain, but possibly curable. We don't know.

  - ❖ Was **pre-date of injury MPN information** ("**Implementation Notice"**) given to the applicant and did it contain the required minimum information?[iii]

  - ❖ **Was post-date of injury MPN notice provided to the applicant "(Employee Notification"**)? This is the "full blown" information required, which incorporates the MPN essentials, including, MPN access standards and mileage, how to select physicians and change physicians within the MPN, the toll free number, an MPN contact person, how to obtain initial and subsequent medical care, the MPN directory access, including regional listings, how to obtain a specialist, the continuity of care policy, the transfer of care policy, the 2nd and 3rd opinion process and the securing of independent medical review, etc.[iv]

- **STEP TWO: TIMELY PROVISION OF CLAIM FORM AND TREATMENT AUTHORIZED**: **DID WE TIMELY PROVIDE THE DWC-1 TO THE EMPLOYEE? DID WE AUTHORIZE MEDICAL TREATMENT UNDER LABOR CODE 5402, 8 CCR 9767.6 and 8 CCR 9767.5(f)?** This is a potential "trap" since it appears we have **two** hurdles to overcome. First, we need to be able to establish that medical treatment was provided within one (1) working day after the filing of the claim form upon the employer –AND- that we arranged for the first visit to the MPN doctor **within three (3) business days** of a request for treatment within the MPN. This means that we have two different time rules to evaluate and even if we provided all of the notices required but the medical treatment was not provided timely, then this will be a major issue if the matter is heard before the WCAB. This aspect of the defense must be scrutinized.

- **STEP THREE: SENDING LETTER TO THE OUT-OF-NETWORK TREATING PHYSICIAN WITH CURRENT AND CONTINUING OBJECTIONS TO ANY AND ALL CHARGES.** The letter should make it clear that we are enforcing Valdez, that we object to all treatment on a current and ongoing basis, that we will move to strike any and all medical reports and that we will oppose any of this evidence to be used for any purpose in the WCAB proceedings. [SUGGESTION] *In the letter, you can also ask them to explain why they have the right to treat out-of-network. If they do not respond, but continue to treat, this fact can be used later on to support a request for costs, sanctions and attorney fees*].

- **STEP FOUR: FILING A NOTICE WITH THE WCAB**. This notice, in pleading form, would be filed and served upon the parties and any and all non-MPN physicians, stating that we oppose any intended use of these medical reports for any evidentiary purposes and that we further oppose the use of these reports as attachments or exhibits to be sent to any AME, primary treating physician, State Panel QME (SPQME) or Agreed State Panel QME (ASPQME). *This pleading then becomes part of our defense exhibits for hearing on the issue.*

- **STEP FIVE: PREVENTING THE MEDICAL REPORTS FROM COMING IN THE "SIDE DOOR" [GOING IN EX PARTE IF THE OTHER SIDE TRYS TO SEND THE REPORTS TO A PQME-ASKING FOR A DISCOVERY ORDER]** Making sure that we take the position that this inadmissible evidence should not become part of the Exhibit List for any SPQME, APQME, AME or treating physician evaluation and opposing by objection, the other side's effort to do so. If the other side provides 20 days notice of their intent to send these inadmissible reports to a PQME, then consider making an **ex parte attempt** have a WCAB Judge issue a **protective discovery order, prior to the examination or at least requesting a special hearing prior to the exam**. Otherwise, by not taking this stance, we might be permitting these medical reports to find their way into evidence through the admissible reports of an AME or PQME. (If these non MPN physician reports are reviewed by an AME or PQME, we should take the position that these opinions were potentially influenced by the inadmissible reports of the out-of-network physicians and

that in the case of a PQME, we should **RESERVE THE RIGHT TO OBJECT TO THE PQME** REPORT AND TO FURTHER REQUEST A NEW PANEL since the QME reports would be deemed compromised if they incorporated or relied upon this inadmissible evidence.

- **STEP SIX: [OPTIONAL] FILING A LIMITED DECLARATION OF READINESS TO PROCEED ON THE ISSUE OF MPN TREATMENT –REQUESTING A WCAB ORDER THAT TREATMENT IF ANY, WILL BE PROVIDED ONLY WITHIN THE MPN. CONSIDER ALSO REQUESTING SANCTIONS and COSTS.** Rather than permitting lien claims to build and the tainted evidence to mount, consider filing a DOR. Also, consider asking for costs and sanctions under Lab C 5813 and 8 CCR 10561, under the theory that the continued treatment out of network is being undertaken in disregard of the governing statutes and regulations as well as per Valdez. *Note, in light of Valdez, it is now unclear whether the WCAB could actually force the applicant to treat, **if at all, within the MPN**. I know that prior WCAB panel decisions seemed to indicate they would not, but now in light of this case, I believe the WCAB can and should make these orders. We can't force an applicant to obtain treatment but why can't we ask the WCAB for a limiting order that if treatment is to be provided, it will be within the MPN.*

We certainly recommend both an abundance of caution and care before deciding upon a case-by-case basis, whether these strategies should be initiated. It is very highly recommended that every claim and case be reviewed for compliance, before any of these strategies be initiated. Also, there are no published decisions which speak to the issue of **technical non-compliance**. We have a number of WCAB panel decisions, which while interesting, are certainly not dispositive. However, it seems that the "tone" of some of these decisions is that ***if pre or post injury notices were not provided, the omissions might be curable, if we can demonstrate that ALL medical treatment was afforded timely and that access to the MPN was made timely and that later notices were sent to the applicant to cure the technical defect.*** There is no certainty here but a timely provision of benefits seems to be the "critical key" to permitting the curing of the technical defect.

[i] Workcompcentral, 5/25/11, article by John P. Kamin, Legal Editor Page 1.
[ii] Lab C 3550, 8 CCR 9880, 9881, 9881.1
[iii] 8 CCR 9767.12. Information required here is much less extensive then in the post-injury notice, but there is minimum information required, including for new employees.
[iv] This notification is much more extensive and is set forth under 8 CCR 9767.12(f)