

WORKERS' COMPENSATION: WCAB DECISION REVERSED NON-MPN REPORTS ADMISSIBLE AS EVIDENCE

On May 29, 2012, the Second District Court of Appeals reversed the Workers' Compensation Appeals Board's (WCAB) en banc decision in *Elayne Valdez vs. Warehouse Demo Services and Zurich North America*. In the decision, the Court held that applicants have a right to present medical reporting generated by non-MPN doctors as evidence. This is certainly a blow to employers and insurance carriers in terms of medical evidence being presented to the WCAB.

On, June 18, 2012, the Court of Appeals, Second Appellate District, granted a request to publish its decision, which means that this case can now be used as authority on the issue of the admissibility of non-MPN physician reports.

The defendants in the case, Warehouse Demo Services and Zurich North America, have requested that the California Supreme Court review the opinion of the Second District.

BACKGROUND

Elayne Valdez (applicant,) filed a claim for industrial injury to her back, right hip, neck, right ankle, right foot, right lower extremity, lumbar spine and both knees, sustained while employed as a demonstrator for Warehouse Demo Services on October 7, 2009. The claim was accepted and she was sent for medical treatment with the medical provider network (MPN) physician, Dr. Nagamoto. The applicant treated with the MPN physician from approximately October 9, 2009 to October 31, 2009. The applicant then began treatment with Dr. Nario, a non-MPN physician, upon referral from her attorney.

This matter proceeded to trial on July 22, 2010, on the issues of temporary disability from October 7, 2009 and continuing, plus attorney's fees. The Workers' Compensation Judge (WCJ) deferred the issue regarding the MPN and self-procured medical treatment.

The applicant testified that her attorney sent her to Dr. Nario because the treatment provided by Dr. Nagamoto was not helping her.

The WCJ found that applicant was temporarily disabled from November 2, 2009 through February 10, 2010, for which indemnity was awarded less payments made by the Employment Development Department (EDD.) The WCJ relied on the reports of the non-MPN physician, Dr. Nario, for this finding and award of benefits. The WCJ rejected the defendant's argument that reports of non-MPN doctors are inadmissible.

The defendant filed a timely petition for reconsideration from the WCJ's decision, contending that (1) applicant's non-MPN medical reports are inadmissible; (2) there is no evidence to support any reimbursement to EDD for benefits paid to the applicant; and (3) if applicant is awarded temporary disability indemnity, there is no substantial evidence that applicant was temporarily disabled through February 10, 2010. The applicant did not file an answer to defendant's petition. On October 25, 2010, the WCAB granted reconsideration for further study.

On April 20, 2011, the WCAB issued an en banc decision which held that, where unauthorized medical treatment is obtained outside a validly established and properly noticed MPN, reports from the non-MPN doctors are inadmissible. On July 14, 2011, the WCAB issued an Opinion and Decision After affirming its April 20, 2011 en banc decision.

The applicant filed a Writ of Review before the 2nd District Court of Appeals. On May 29, 2012, the Second District Court of Appeals reversed the WCAB's en banc decision stating that as the Legislature permitted the parties to submit to non-MPN reports to qualified medical evaluators, that it would be unreasonable to conclude that the non-MPN reports are excluded in other proceedings.

The Appellate court based its conclusion on the employee's "undoubted right to contract with a physician of his or her choice. (Labor Code Section 4605 which states "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires.")

The Appellate Court annulled the WCAB decision and remanded the case for further proceeding.

As stated above, the defendants have requested the California Supreme Court review the Appellate Court's opinion.

WHAT'S NEXT?

Keenan will continue to aggressively defend cases wherein the applicant elects to treat outside of the MPN pending the decision by the California Supreme Court.

If you have any questions about the information contained in this briefing, please feel free to contact your Account Executive, Claims Analyst or Carmella Claridy, Assistant Vice President at (310) 212-0363, ext. 3738 or cclaridy@keenan.com.

Keenan & Associates is not a law firm and no opinion, suggestion, or recommendation of the firm or its employees shall constitute legal advice. Clients are advised to consult with their own attorney for a determination of their legal rights, responsibilities and liabilities, including the interpretation of any statute or regulation, or its application to the clients' business activities.