

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. **ADJ916063 (VNO 0541860)**

TERRY SCUDDER,

Applicant,

vs.

**VERIZON CALIFORNIA, INC.; Permissibly
Self-Insured, Administered by SEDGWICK
CMS,**

Defendants.

**OPINION AND DECISION
AFTER RECONSIDERATION**

On December 24, 2010, we granted defendant's Petition for Reconsideration in order to allow sufficient opportunity to further study the factual and legal issues in this case. This is our Decision After Reconsideration.

Applicant, while employed as a cable splicer on February 14, 2006, sustained an industrial injury to his left knee, internal (deep vein thrombosis), and low back.¹ The employer has established a medical provider network (MPN) pursuant to Labor Code section 4616 et seq.² However, applicant pre-designated Eric D. Feldman, M.D., as his treating physician pursuant to section 4600(d). Therefore, he was not required to treat within the MPN.

Applicant saw Dr. Feldman twice (Defendant's Exhibit H). Then Dr. Feldman referred him to Douglas W. Jackson, M.D. (Defendant's Exhibit E), who continued to treat him, and referred him to Stanley Majcher, M.D. (Defendant's Exhibit I), for treatment of his deep vein thrombosis. He was examined by Manuel Anel, M.D., as a panel qualified medical evaluator (QME) on February 6, 2007 (Defendant's Exhibit F).

¹ Applicant filed another claim for a cumulative trauma injury ending on June 9, 2006. That claim was dismissed by Order dated January 19, 2010.

² Unless otherwise specified, all statutory references are to the Labor Code.

1 After the evaluation by Dr. Anel, applicant retained counsel. It appears that counsel
2 designated Philip Sobol, M.D. (Applicant's Exhibit 1 for identification), as primary treating
3 physician (see Summary of Evidence dated April 13, 2010, page 8, lines 3-4). Dr. Sobol referred
4 applicant to Arthur Lipper, M.D. (Applicant's Exhibit 2 for identification), for further treatment.

5 At trial on April 13, 2010, the parties raised the following issues: permanent and stationary
6 date; apportionment; need for further medial treatment; liability for self-procured medical
7 treatment; liens; and attorney's fees (page 3).³ The WCJ also recorded the following issue: "The
8 admissibility of the medical reports from Dr. Sobol and Dr. Lipper. They are alleged as being self-
9 procured, duplicative, unauthorized, unnecessary, and are not in the MPN per multiple objections.
10 In that light, the primary issue that the Court has to deal with is the issue that the Court and the
11 parties framed together. That is: If an MPN does exist, does [Administrative Director Rule]
12 9780.1 [Cal. Code Regs., tit. 8, § 9780.1] allow applicant to select a doctor under [section] 4600
13 after 30 days?" (page 3).

14 On October 27, 2010, the WCJ issued a Findings and Award, finding in relevant part that
15 applicant sustained permanent disability of 65% after apportionment; that his condition became
16 permanent and stationary on January 9, 2009; that he is in need of further medical treatment; that
17 he is entitled to reimbursement of self-procured medical treatment; that he was permitted to change
18 treating doctors pursuant to Rule 9780.1 (c)(d); and awarding attorney fees. In his Opinion on
19 Decision, the WCJ stated that he based the Award on the reports of Drs. Sobol and Lipper, which
20 he admitted into evidence.

21 Defendant filed a Petition for Reconsideration, contending that only a pre-designated
22 physician can refer an injured employee to another physician outside an MPN for treatment and
23 that the WCJ's finding of apportionment is not supported by substantial evidence. We have not
24 received an answer from applicant.

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27 ³ We assume that the parties intended to raise the issue of permanent disability. The WCJ awarded permanent disability indemnity.

1 Section 4600(c) provides: "Unless the employer or the employer's insurer has established a
2 medical provider network as provided for in Section 4616, after 30 days from the date the injury is
3 reported, the employee may be treated by a physician of his or her own choice or at a facility of his
4 or her own choice within a reasonable geographic area" (emphasis added).

5 Section 4600(d)(6) provides in relevant part: "An employee shall be entitled to all medical
6 appropriate referrals by the personal physician to other physicians or medical providers within the
7 nonoccupational health care plan"

8 Rule 9780.1(c) provides: "Where an employer or an employer's insurer has a Medical
9 Provider Network pursuant to section 4616 of the Labor Code, an employee's predesignation
10 pursuant to this section which has been made in accordance with this section shall be valid and the
11 employee shall not be subject to the Medical Provider Network."

12 Rule 9780.1(d) provides: "Where an employee has made a valid predesignation pursuant to
13 this section, and where the employer or the employer's insurer has a Medical Provider Network,
14 any referral to another physician for other treatment need not be within the Medical Provider
15 Network" (emphasis added).

16 In this case, it is undisputed that the employer has an MPN, that applicant pre-designated
17 Dr. Feldman as his treating physician prior to his injury, and that Dr. Feldman did not refer him to
18 Dr. Sobol or Dr. Lipper. Thus, the issues before us are whether Drs. Sobol and Lipper can be
19 found to be treating physicians and whether their reports are admissible into evidence. We answer
20 both questions in the negative.

21 As noted above, section 4600(c) provides that an employee may be treated by a physician of
22 his or her choice 30 days after the date the injury is reported only where the employer does not
23 have an MPN. Here, the employer does have an MPN. For this reason, applicant had no right to
24 change his treatment to physicians outside the MPN 30 days after he reported his injury. However,
25 he was entitled to medically appropriate referrals outside the MPN by his pre-designated physician.
26 In fact, this occurred when Dr. Feldman referred him to Dr. Jackson. But he was not entitled to
27

1 referral to other physicians by anyone other than Dr. Feldman. The referral to Dr. Sobol was made
2 by applicant's attorney. Therefore, it was not valid under section 4600(d)(6).

3 As also noted above, Rule 9780.1(d) can be read to allow any referral to another physician
4 outside the MPN, including a referral by applicant's attorney. However, this reading would
5 contravene the statutory language of section 4600(d)(6). To the extent that the rule contradicts the
6 statute under which it is promulgated, it is invalid. "[A]dministrative regulations may not
7 contravene the terms of statutes under which they are adopted" (*Boehm & Associates v. Workers'*
8 *Comp. Appeals Bd. (Lopez)* (1999) 76 Cal.App.4th 513, 519 [64 Cal.Comp.Cases 1350]; see also
9 *Mendoza v. Huntington Hospital* (2010) 75 Cal.Comp.Cases 634 (Appeals Board en banc)).

10 Thus, Drs. Sobol and Lipper can not be treating physicians pursuant to sections 4061, 4062
11 and 4062.2. For this reason, their reports are not admissible into evidence. Therefore, we amend
12 the Findings and Award to defer issues that were decided on the basis of the reports of Dr. Sobol
13 and Dr. Lipper, and we return the case to the trial level for determination of outstanding issues on
14 the basis of a record excluding Applicant's Exhibits 1 and 2.

15 For the foregoing reasons,

16 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
17 Appeals Board, that the Findings and Award dated October 27, 2010, is **AFFIRMED**, except as
18 **AMENDED** below:

19 **FINDINGS OF FACT**

20 4. The issues of permanent and stationary date, permanent disability and apportionment are
21 deferred.

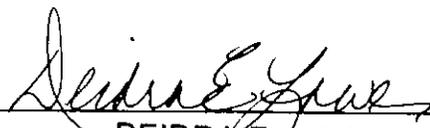
22 6. Applicant is entitled to reimbursement for self-procured medical treatment and
23 medical/legal expenses in an amount to be adjusted by the parties, with jurisdiction reserved if the
24 parties are unable to do so.

25 7. The medical reports of Philip Sobol, M.D., and Arthur Lipper, M.D. (Applicant's
26 Exhibits 1 and 2) are not admitted into evidence.

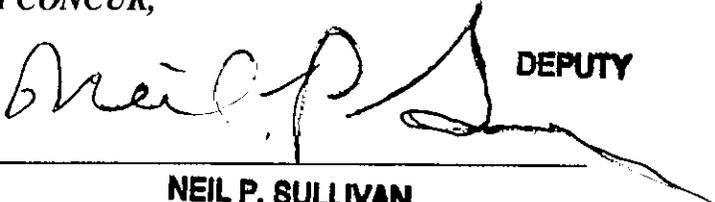
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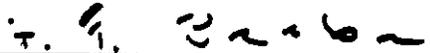
1 **IT IS FURTHER ORDERED** that this matter is **RETURNED** to the trial level for such
2 further proceedings and decisions by the WCJ as may required, consistent with this opinion
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4 **WORKERS' COMPENSATION APPEALS BOARD**

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7 _____
8 DEIDRA E. LOWE

9 **I CONCUR,**

10 
11 _____
12 NEIL P. SULLIVAN
13 DEPUTY

14 
15 _____
16 FRANK M. BRASS



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

18 **MAR 10 2011**

19 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
20 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

21 *Floyd, Skeren & Kelly*
22 *Glauber & Berenson*
23 *Terry Scudder*

24
25 **MR/ara** 

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27 **SCUDDER, Terry**