

# CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION



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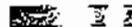
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December 21, 2005

California Workers Compensation Reporter  
P.O. Box 975  
Berkeley, CA 94701

Attention: Mel Witt

Re: Robin Metoyer vs. Wilshire West Dental (No. LBO 368875):

Dear Mel:

Enclosed is an important panel decision regarding MPN notices on the right of injured workers to select their own treating doctor if the carrier or employer fails to give appropriate notice under §3550.

We believe this is an important case that deserves publication in your excellent treatise.

If we can be of any further assistance, please contact me.

Sincerely,

William A. Herreras  
Co-chair of CAAA Amicus Committee

WAH:eo

Enclosure

Cc: Michael Ozurovich, Esq.

Dictated but not read.

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**WORKERS' COMPENSATION APPEALS BOARD**

STATE OF CALIFORNIA

Case No. LBO 368875

ROBIN METOYER,

*Applicant,*

vs.

WILSHIRE WEST DENTAL,  
ZENITH INSURANCE CO.,  
*Defendants.***OPINION AND ORDER  
DENYING PETITION  
FOR RECONSIDERATION**

Defendant, Wilshire West Dental, by and through its insurer, Zenith Insurance Company, seeks reconsideration of the Findings and Award and Order, issued September 13, 2005, in which a workers' compensation administrative law judge (WCJ) found applicant is entitled to temporary disability indemnity through August 15, 2005, and further medical treatment, based upon the opinion of her primary treating physician, whose opinion was obtained outside the defendant's medical provider network (MPN). The WCJ concluded that applicant was entitled to treat outside the MPN because of the lack of a posted notice as required by Labor Code section 3550.

Defendant asserts that applicant's treatment, and the finding of temporary disability status based upon the opinion of a doctor outside of Zenith's MPN, is not justified. More specifically, the defendant sets forth the issues as follows:

"1) Is a workers' compensation carrier with a medical provider network in place bound by Labor Code §3550(e)?

"2) Does any code or rule grant a 'covered employee' as defined by Title 8 California code of Regulations 9767.1(2) the ability to 'opt out' of the Medical Provider Network for any reason absent availing themselves of the second and third opinion process?

"3) Can a physician improperly selected outside of a medical provider network issue a finding of temporary total disability which is binding on Zenith?"

1 Background

2 Applicant sustained admitted industrial injury to her head, cervical spine, and right shoulder  
3 on April 7, 2005, when she was struck by a falling light fixture while sitting at her desk. The  
4 applicant was initially referred to Dr. Shahin, who was a member of Zenith's MPN. However, the  
5 applicant retained counsel and was referred to Advanced Care Medical Clinic, where she was  
6 evaluated by Dr. Ronald Schilling, who was not a member of Zenith's MPN. Defendant notified  
7 applicant's attorney that applicant's doctor, Dr. Schilling, was not in Zenith's MPN, and that she  
8 was required to select a physician from within the MPN. Applicant gave notice to defendant under  
9 Labor Code section 4061/4062 that she was objecting to the findings of the primary treating  
10 physician, suggesting recourse to an AME.

11 At trial, applicant testified that she has no recollection of the posting of a notice regarding  
12 workers' compensation in any of the rooms in her employer's office. She testified that she was not  
13 aware of any formal procedures for reporting a work injury. At the time of her injury, the office  
14 was being remodeled, which started in December of 2004. Prior to the remodeling, she did not  
15 observe a workers' compensation notice posted on the wall.

16 When she reported her injury, she was sent to Dr. Shahin for treatment. She was not  
17 advised that Dr. Shahin was a member of a MPN, nor was she provided with a list of alternative  
18 physicians within the MPN. Before her second visit with Dr. Shahin, she was not advised that she  
19 had a choice of physicians with Zenith's MPN.

20 Applicant's employer, Dr. Norton, testified that prior to the remodeling, an old workers'  
21 compensation form was posted in the laboratory area. The poster was removed during the  
22 remodeling process. Dr. Norton was not aware of Zenith's MPN policies and he testified that  
23 perhaps Zenith provided the required notices to applicant.

24 Discussion

25 Defendant argues that once the existence of a carrier's MPN is established, applicant cannot  
26 opt out, notwithstanding any pre-existing notice requirements. Defendant asserts that applicant may  
27 only seek to select a physician of her choice, through the procedures provided by Administrative

1 Director's Rule 9767, including through the second and third opinion options for selecting a  
2 physician outside of the MPN.

3 Labor Code section 3550 sets forth specific requirements for the posting of a notice  
4 concerning every employee's right to workers' compensation benefits, including medical  
5 treatment, in the event of an industrial injury.

6 Labor Code section 3550(e) reads as follows:

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

11 Absent proof that defendant complied with this notice requirement, it would appear that the  
12 applicant would be entitled to be treated by his/her personal physician with respect to an injury  
13 occurring during the time that there was a failure to post the required notice. We see no ambiguity  
14 in the application of this provision. There is no indication that in authorizing the creation of  
15 medical provider networks, the Legislature intended to invalidate the application of Section  
16 3550(e) for those employee's whose employer has agreed to participate in an MPN.<sup>1</sup>

17 Additionally, we note that AD Rule 9767.12 provides for required notices to be given prior  
18 to an injury, specifically written notice of a medical provider network under Labor Code section  
19 4616.3 prior to the implementation of an approved MPN, at the time of hire, or when an existing  
20 employee transfers into the MPN. While specific consequences for a failure to provide the required  
21 notice are not described in AD Rule 9767.12, when coupled with the aforementioned Labor Code  
22 section, the consequences herein may be justified.

23 Accordingly, we shall affirm the WCJ's determination to rely upon the substantial evidence  
24 provided by applicant pertaining to her need for further medical treatment and her temporary  
25 disability status, and will deny defendant's petition for reconsideration.

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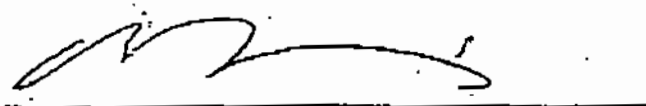
27 <sup>1</sup> Defendant's Exhibit J is a notice that applicant is covered by Zenith's MPN. In the absence of evidence which would cast reasonable doubt on the validity of this notice, we believe this notice adequately establishes the existence of a valid MPN.

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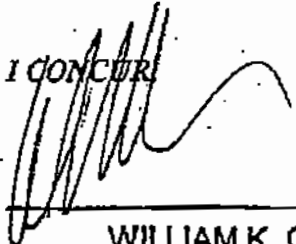
For the foregoing reasons.

IT IS ORDERED that the Petition for Reconsideration, filed October 5, 2005, is DENIED.

WORKERS' COMPENSATION APPEALS BOARD



MERLE C. RABINE

I CONCUR  


WILLIAM K. O'BRIEN



JAMES C. CUNEO

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

DEC 05 2005

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

SV

