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Applicants' Attorneys' New Strategy: Push for Treatment Within MPNs

- *By Sherri Okamoto*
- *State: California*

Applicants' attorneys have been fighting for years to get treatment for their clients from doctors outside of the employer's medical provider network, but now a group of practitioners is suggesting a new tactic: demanding treatment from within the network.

Sylvia Joo

Charles Rondeau, a panelist for a discussion on MPNs last month at the California Applicants' Attorneys Winter 2017 convention, on Thursday said he is espousing the idea as a way for participants in the comp system to "recognize reality."

He explained that "market forces" have driven many doctors who would have treated a worker out of business, given the low reimbursement rates for their services and the long collection cycle for their bills. As a result, Rondeau said, the opportunity to get treatment outside an MPN is dwindling, and there isn't much point in breaking out of an MPN when "there's no one to take your client to."

But he said that acquiescing to a worker's participation in the MPN system means applicants' attorneys need to push the networks to "provide the care they are statutorily required to provide" — and this remains problematic.

At the CAAA convention, Sylvia Joo of Rowen, Gurvey & Win presented the results of an informal statistical research project she had undertaken to quantify just how difficult it can be for a worker to find a doctor within an MPN.

Between 2014 and 2016, Joo said firm employees had called 212 doctors who were listed as network providers within five different MPNs, but only 11 expressed a willingness to provide treatment to an injured worker. By contrast, 60 of the doctors said they don't treat workers' compensation patients.

Tom Martin, the moderator for the MPN panel discussion, then asked the audience if any of them had had any wildly different experiences, and not a single hand was raised.

Martin said he took this to be an indication that the comp system was "in a crisis state." He said the panel was issuing "a call for action" for applicants' attorneys to let the Department of Industrial Relations know the MPNs are not doing what they're supposed to do.

He contended that "a passive willingness to provide care" is not enough to satisfy an employer's obligations under the comp system — they need to actually make sure treatment is provided.

Rondeau also expanded on this idea while speaking at the CAAA event, noting that the California Code of Regulations requires that a treating doctor render an opinion on "any and all medical issues necessary to determine the employee's eligibility for compensation."

He said he's heard many MPNs instruct doctors to address only the conditions that have been accepted as compensable, in direct violation of this regulation, and he thought applicants' attorneys need to push for "greater transparency" as to what is actually happening in MPNs.

Born from reforms

MPNs came into existence in 2005 as part of the passage of Senate Bill 899. The legislation allowed employers to set up networks of care providers that workers would be required to use in the event of an on-the-job injury unless they "pre-designated" their preferred treating physician before injury.

Applicants' attorneys almost immediately began looking for ways to keep workers out of the MPN, and they scored an early victory with an en banc decision from the Workers' Compensation Appeals Board in 2006 that held employers had to pay for medical treatment obtained by workers who are not properly notified about the employer’s medical provider network.

Then in 2012, the 2nd District Court of Appeal also put out a published decision saying that reports obtained from a doctor outside of the employer's MPN could be used as evidence to support a worker's claim for benefits.

The California Supreme Court affirmed this ruling from Valdez v. WCAB (Warehouse Demo Services) one year later.

Meanwhile, the Legislature enacted SB 863, which shored up some of the MPN provisions. Among the changes directed by the Legislature was the addition of language to the Labor Code to specify that any report prepared by an out-of-network doctor cannot be used as the sole basis of an award for compensation.

SB 863 also imposed a requirement that MPNs have contracts with the in-network doctors documenting their agreement to treat workers' compensation patients. It further required that MPNs provide a written regional provider listing to covered employees, and that the MPNs offer "medical access assistants" to help workers find a doctor.

Alan Gurvey, an applicants' attorney with Rowen, Gurvey & Win, on Thursday said these requirements from SB 863 have proven to be "largely meaningless," as demonstrated by Joo's research.

He said it's not uncommon for it to take three to four weeks to find a doctor while a worker's condition deteriorates. Then, once the worker gets to a doctor, Gurvey said some of the doctors don't know how to write requests for authorization or reports that would constitute admissible medical evidence.

That puts a worker "behind the eight ball from the start" should the worker become embroiled in a treatment dispute.

Gurvey said he adamantly believed "there should be ramifications for having an MPN full of doctors that have not and will not provide treatment to injured workers," because the way things are now just means "wasted time and wasted money" for the system.

If there were some quality control on the MPNs, he suggested that would allow workers to get needed treatment faster, and perhaps the comp system wouldn't have the problems with lien filings and opioid use.

Regulators' point of view

The administrative director of the DIR has the authority to audit and penalize MPN providers. Department spokesman Peter Melton said the Division of Workers' Compensation is no stranger to complaints about difficulties in accessing care under MPNs.

Melton, however, said that many of these complaints have failed to provide credible evidence of an access violation.

For example, he said, the DWC has received complaints regarding MPN provider lists where many physicians of a particular specialty were not taking workers' compensation patients. He said an MPN is required to have only three available physicians from which an injured worker can choose within set geographic distances from the worker's home or job site. So as long as there were three doctors within the area who could provide timely treatment to the worker, there is no access violation, he said.

If the DWC gets a complaint that provides credible evidence of a violation, Melton said the agency will conduct an investigation and provide the MPNs with an opportunity to remedy a deficiency.

"Thus far, the DWC has not conducted audits or sanctioned any MPN with regard to a violation of MPN access standards, but the DWC has certainly sanctioned MPNs for other violations," Melton said.

Bita Adham, a defense attorney with Tennenhouse & Minassian who spoke at CAAA, on Thursday said she really hasn't run into the problems that her fellow panelists were describing.

While she said she had no doubt there were problems, she said "it really depends on the MPN, who is running it, and if they're staying on top of things."

Adham said she works with an MPN that has a "network relations manager" to resolve issues when treatment isn't authorized, a doctor can't be located or paperwork goes missing. She also suggested that applicants' attorneys call defense counsel if there's a problem with getting treatment to see if they can work out a solution. She also recommended that applicants' attorneys make use of the medical-access assistants the MPNs are required to have.

Melton explained that MPNs are required to provide help to injured workers with finding available MPN physicians of the injured worker’s choice and with scheduling provider appointments. These assistants must be available, at a minimum, from from 7 a.m. to 8 p.m. Pacific Monday through Saturday, and assistance must be available in English and Spanish.

He said the MPN access assistants not only "play an invaluable role in assisting injured workers," they are also "integral in triggering the required MPN Medical Access Standard timeframes (set forth in 8 CCR Section 9767.5(f) and (g)) that will be used when determining if access standards have been met."

What medical access assistants?

At the CAAA convention, there were only about five or six members in the audience who raised their hands to show they had ever called upon medical access assistants.

Adham said she hasn't done it herself, but she has heard from at least one applicants' attorney who told her these access assistants have been very helpful in getting clients to doctors.

Tim Kinsey of Stander Reubens Thomas Kinsey, the defense attorney in Valdez, said he was heartened to hear the CAAA panelists were encouraging applicants' attorneys to treat within an MPN.

He said he expected this would reduce litigation, cut back on lien filings and speed up the resolution of claims.

But, he said, it remains "extremely important to ensure an MPN is up-to-date, with physicians who can provide treatment within the MPN regulatory scheme." Otherwise, the employer runs the risk of the applicant legitimately securing outside treatment.

Rod L. Coppedge, a defense attorney with the Law Offices of Rudy H. Lopez, said he also was happy to hear what the CAAA panelists said.

He said he considered this advice to be "baby steps toward an understanding of how robust the system is for their clients."

Coppedge explained that the MPN system allows workers who are unhappy with their treatment to seek a second opinion, and then a third, and an independent medical review process. If a worker is still unhappy at that point, the worker can get a hearing with the WCAB.

He said this process is available only to a worker who is aggrieved, though. If an employer disagrees with the MPN doctor's treatment recommendation, the employer has to submit the matter to utilization review and then independent medical review by Maximus Federal Services. There is a very limited availability for review by the WCAB after the IMR decision.

Coppedge's firm recently defended a case at the board where a worker argued that a decision by an MPN doctor had to go through the multi-step MPN review process, but the WCAB ruled that the proper course of review for an employer objection is utilization review and then independent medical review.

The 4th DCA denied the worker's petition for review of the board decision last month, although he has now filed a petition for review with the California Supreme Court.

But at the end of the day, Coppedge said, whichever course of review a dispute may go down, the comp system is still creating an opportunity to workers to receive "evidence-based medical care if necessary," if the workers are willing to use the system.