



**ELAYNE VALDEZ V. WAREHOUSE DEMO SERVICES**, (2009) (Petition for Recon Granted - en banc) 76 Cal. Comp.Cases \_\_\_\_\_

*Provided by Edward L. Hummer of the Santa Rosa Office*

Applicant filed a claim for industrial injury occurring on October 7, 2009 to her back, right hip, neck, right ankle, right foot, right lower extremity, lumbar spine and bilateral knees while employed as a demonstrator for defendant.

Defendant accepted the claim and the applicant was properly notified of the employer's MPN. She initially treated with a physician from the MPN from October 9, 2009 to October 31, 2009. Thereafter she began treating with a non-MPN physician to whom she was referred by her attorney.

The matter went to trial on July 22, 2010 on the issues of temporary disability and attorney's fees. Applicant relied on reports from the non-MPN physician in support of her claim for temporary disability and defendant objected to the reports. The Workers Compensation Judge overruled the objection, admitted the reports and in reliance on the physician's findings, awarded applicant temporary disability benefits for the period November 2, 2009 through February 10, 2010.

The defendant petitioned for reconsideration, contending that the reports of the non-MPN physician were inadmissible and that the defendant was not liable for the cost of the non-MPN treatment and reports. (Significantly, the applicant did not file an answer to the Petition for Reconsideration.)

In its *en banc* decision, the WCAB discussed the Labor Code sections which allow the establishment of MPN's and the notice requirements which a defendant must meet. When the defendant complies with all of the requirements, if an applicant seeks treatment outside the MPN, the non-MPN physician cannot be the primary treating physician and the reports from that physician are inadmissible. Further, citing LC § 4605 ("[n]othing contained in this chapter shall limit the right of the employee to provide, *at his own expense*, a consulting or any attending physicians whom he desires [emphasis supplied]"), the board found that the defendant is not responsible for payment for either the treatment obtained outside the MPN or the reports of the non-MPN physician.

The original en banc decision issued April 20, 2011. The Applicant filed a petition for reconsideration which was granted on July 14, 2011 to allow sufficient opportunity for the Board to study the factual and legal issues in the case.