INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS\CLIENTS

FROM: JOE TRUCE

DATE: June 17, 2003

RE: **WCAB DETERMINES THAT DEFENDANTS ARE ENTITLED TO AN EXPEDITED HEARING PURSUANT TO LABOR CODE §5502(B) ON THE ISSUE OF DEFENDANT'S RIGHT TO MEDICAL CONTROL THROUGH A HEALTH CARE ORGANIZATION (HCO)**

For some years an employer or insurer has been legally entitled to contract with an HCO to provide for medical services to an injured employee (Labor Code §4603.3).

Injured employees can then elect to enroll in the HCO and be bound by the terms of the HCO plan or they can opt out of the HCO plan by designating their own personal physician as their treater in the event of an industrial injury.

HCO programs are, of course, favored by insurers and employers, as HCO programs lengthen the time that the employer and/or insurer can control medical treatment. Although there have been numerous controversies over HCOs in the past, the Board unfortunately has issued few decisions on this issue.

Fortunately the Board has just issued a favorable decision on the employer's right to control medical treatment through an HCO in the panel decision of **Noe Vega v. Taco Bell; California Indemnity Insurance Company**. [1]

In the **Noe Vega** case, the employer contracted with an HCO to provide for medical services to injured employees. In this case the applicant sustained an admitted industrial injury on July 15, 2002 and the applicant apparently refused to cooperate with the physician provided by the HCO selected by the employer "by failing to attend medical treatment appointments with HCO plan providers..."

On page 2 of their decision, the Board noted as follows:

---

[1]The full text of the Noe Vega case is attached.

> **"Instead, applicant identified treating physicians selected by his attorney, who informed defendant on September 21, 2002 that applicant "had been instructed not to attend any defense medical appointment in violation of Labor Code §4061 and §4062."**

The defendant in this case immediately filed for an Expedited Hearing on the question of defendant's "entitlement to an Expedited Hearing on the question of its right to medical control..."

The Board initially denied defendant's petition. However, when it was brought to the Board's attention that there were contrary panel decisions, the Board vacated its order and, after further study, held as follows:

> **"Accordingly, we hold the defendant may obtain an Expedited Hearing to resolve disputes over an applicant's entitlement to medical treatment and a defendant's right to control that medical treatment for injured workers enrolled in an HCO plan..."**

Therefore in cases that we have with an employer and/or insurer that has contracted with a health care organization, we are now entitled to an expedited hearing on the issue of our right to control medical if the applicant refuses to cooperate with the medical services being delivered by the health care organization.

WJT:dab
Enclosure - **Noe Vega**

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NOE VEGA, *Applicant,* vs. TACO BELL; CALIFORNIA INDEMNITY INSURANCE COMPANY, *Defendants.*	Case No. VNO 458318 **ORDER VACATING ORDER GRANTING RECONSIDERATION, OPINION AND ORDER GRANTING REMOVAL AND DECISION AFTER REMOVAL**

This case presents the issue of whether a defendant is entitled to an expedited hearing under Labor Code § 5502(b)(1) on the issue of an applicant's entitlement to medical treatment when it is asserted that the applicant has refused to accept treatment from an employer selected physician under a Health Care Organization (HCO) agreement pursuant to Labor Code section 4600.3[1]. We hold that an expedited hearing shall be set on a defendant's Declaration of Readiness to Proceed to Expedited Hearing under Section 5502(b) where the issue of a defendant's right to medical control within the scope of Section 4600.3, and concomitantly, an applicant's entitlement to medical treatment, is presented for decision.

On January 2, 2003, defendant, Taco Bell, by and through its insurer, California Indemnity Insurance Company, filed a petition for removal, or alternatively, for reconsideration, for review of the Appeals Board's December 13, 2002, order denying a prior petition for removal. In the latter decision, the WCJ's denial of defendant's request for an expedited hearing was affirmed. Defendant contends that it is entitled to an expedited hearing where applicant failed to adhere to his obligation to cooperate with defendant's right to control his medical treatment for his industrial injury under Section 4600.3. Defendant now seeks the consolidated review of two additional cases to

[1] All further statutory references are the Labor Code.

demonstrate the disparate treatment of this issue at different district offices.

On March 3, 2003, we granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the petition for reconsideration. Having completed our review, and for the reasons set forth below, we shall vacate our Order Granting Reconsideration, grant defendant's Petition for Removal, and as our Decision After Removal, return this matter to the trial level for an expedited hearing on defendant's Petition for Order to Restore Medical Control.

Statement of Facts

Applicant, Noe Vega, filed an Application for Adjudication of Claim on October 1, 2002, alleging that he sustained an industrial injury to his back and right knee on July 15, 2002, while employed as a store manager by Taco Bell/TacoBiz, Inc.

On October 15, 2002, defendant filed a Request for Expedited Hearing and Decision, seeking a prompt hearing on applicant's entitlement to medical treatment. Concurrently, defendant filed a Petition for Order to Restore Medical Control. By this petition, defendant asserted that applicant was denying the employer's right of medical control by refusing to cooperate with the physicians provided by the HCO selected by the employer by failing to attend medical treatment appointments with HCO plan providers. Instead applicant identified treating physicians selected by his attorney, who informed defendant on September 21, 2002 that applicant "has been instructed not to attend any Defense Medical Appointment in violation of Labor Code section 4061 and 4062."

In response to defendant's request for an expedited hearing, the Van Nuys district office set the matter for pre-trial hearing on December 2, 2002. This prompted defendant's initial petition for removal on November 18, 2002, in which defendant first raised the issue of its entitlement to an expedited hearing on the question of its right to medical control.

We denied defendant's November 18, 2002 petition, adopting the Presiding Workers' Compensation Administrative Law Judge's (PWCJ) Report and Recommendation on Petition for Removal, wherein she expressed the view that defendant is not entitled to an expedited hearing

since the issue of medical control is not an enumerated issue under Section 5502(b), and defendant has an adequate remedy by way of seeking recovery of the lost days of medical control.

The defendant then filed the instant petition for removal, for the first time pointing out the lack of consistency between district offices on this issue. Defendant cited two additional cases venued in the Los Angeles and Santa Monica district offices, wherein it did obtain expedited hearings on the issue of its right to medical control under Section 4600.3.

We shall now grant defendant's petition for removal and vacate our order granting reconsideration issued March 3, 2003. As the issue raised by defendant's petition for removal concerns the pre-trial procedure to be followed at the trial level, and no final decision has yet been rendered, reconsideration is not a proper method for obtaining review. However, the Appeals Board may exercise the power of removal, pursuant to Section 5310, to remove a case to itself where a party demonstrates that it will suffer irreparable harm or significant prejudice without review before a final order. Because we believe reconsideration will not provide defendant with an adequate remedy under the circumstances of this case, we shall exercise our authority under Section 5310 to grant removal and hold, as our decision after removal, that a defendant may obtain an expedited hearing to require an applicant subject to an HCO plan, to accept the HCO plan's choice of medical provider for the period of its medical control.

Discussion

An employer or insurer may contract with an HCO to provide for medical services for injured employees. (Labor Code § 4600.3.) Employees may elect to enroll in the HCO, and be bound by the terms of the HCO plan, or they may choose to opt out of the HCO plan by designating their personal physician as their treater in the event of a work injury.

Section 4600.3 provides, in part,

> (a)(1) Notwithstanding Section 4600, when a self-insured employer, group of self-insured employers, or the insurer of an employer contracts with a health care organization certified pursuant to Section 4600.5 for health care services required by this article to be provided to injured employees, *those employees who are subject to the contract shall receive medical services in the manner prescribed in*

> *the contract*, providing that the employee may choose to be treated by a personal physician, personal chiropractor, or personal acupuncturist that he or she has designated prior to the injury, in which case the employee shall not be treated by the health care organization. (Emphasis added.)

When applicant allegedly refused to cooperate with defendant's right to control medical treatment, thus implicating applicant's concurrent entitlement to medical treatment, defendant sought to resolve the dispute using the most efficacious procedural means available, an expedited hearing.

Under Section 5502(b), expedited hearings may be set to determine the rights of the parties on specified issues, including entitlement to medical treatment and temporary disability indemnity. This section provides, in part:

> (b) The court administrator shall establish a priority calendar for issues requiring an expedited hearing and decision. A hearing shall be held and a determination as to the rights of the parties shall be made and filed within 30 days after the declaration of readiness to proceed is filed if the issues in dispute are any of the following:
>
> (1) The employee's entitlement to medical treatment pursuant to Section 4600.
>
> (2) The employee's entitlement to, or the amount of, temporary disability indemnity payments. . . .

The PWCJ held that defendant was not entitled to an expedited hearing, finding that the defendant's right to medical control under Section 4600.3 is not implicated in the issue of an applicant's entitlement to medical treatment. The PWCJ concluded that Section 5502 was not intended to address the issue of right to medical control as a defendant has other remedies available to it, which is not the case with an injured worker who has been denied medical treatment. On further consideration, we believe the PWCJ has defined the scope of the enumerated issue of entitlement to medical treatment too narrowly.

Here, defendant's Petition for Order to Restore Medical Control alleges that applicant refused to comply with his obligation under the provisions of the HCO plan by refusing to accept medical treatment from the HCO designated physician. If an injured worker who has not opted out

of an employer's HCO plan refuses to abide by the requirements of the plan, an employer has no other readily available options to enforce compliance within the period of employer control. This implicates the applicant's right to medical treatment as the defendant is not required to provide medical treatment outside the scope of its control. This also implicates an applicant's right to temporary disability indemnity, as such benefits are tied to a treating physician's medical reporting. If no admissible medical evidence is presented to establish the fact and period of temporary disability, the insurer is not mandated to provide benefits. Therefore, an expedited hearing is the appropriate forum for obtaining a prompt resolution of a dispute over the defendant's right of control of medical treatment, and concurrently, an applicant's entitlement to medical treatment as well as temporary disability benefits.

Accordingly, we hold that a defendant may obtain an expedited hearing to resolve disputes over an applicant's entitlement to medical treatment and a defendant's right to control that medical treatment for injured workers enrolled in an HCO plan. We shall grant defendant's petition for removal and, as our decision after removal, order that this matter be returned to the trial level for an expedited hearing on the issues raised in defendant's Petition for Order to Restore Medical Control.

///

///

///

///

///

///

///

///

///

///

///

For the foregoing reasons,

IT IS ORDERED that the March 3, 2003 Order Granting Reconsideration is **VACATED**.

IT IS FURTHER ORDERED that Defendant's Petition for Removal, be and hereby is, **GRANTED**, and as our Decision After Removal, this matter be **RETURNED** to the trial level for an expedited hearing and decision on the issues raised in defendant's Petition for Order to Restore Medical Control.

WORKERS' COMPENSATION APPEALS BOARD

_____

I CONCUR,

_____

_____

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

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

dd