

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS
FROM: JOE TRUCE
DATE: February 25, 2004
RE: WHIPDOC (WHO IS THE PRIMARY TREATING DOCTOR?)

I am enclosing the Opinion and Order Granting our Petition for Reconsideration and Decision After Reconsideration in the case of Veronica Alonzo v. Robinsons May Corporation handled by Mr. D'Arcy Swartz of our San Diego office.

At Trial, the Workers' Compensation Judge (WCJ) found that the applicant's designated physician, Dr. McClure, was the primary treating physician and therefore entitled to the presumption of correctness. D'Arcy then filed a Petition for Reconsideration arguing that Dr. Dillin (the employer's choice) remained the applicant's primary treating physician, as Dr. Dillin continued functioning as the applicant's primary treating physician, even after the applicant's attorney's designation of Dr. McClure as the PTP.

In the enclosed Order Granting Reconsideration dated November 26, 2003 and Decision After Reconsideration, the Board reversed the Trial Judge and found that Dr. Dillin remained the applicant's PTP. More importantly, the Board noted that the defendant (D'Arcy) had not stipulated to Dr. McClure as the applicant's primary treating physician on the Pretrial Conference Statement.

I am enclosing page 2 of the Pretrial Conference Statement which is the **stipulation page** and please note that the stipulation page provides a place where the parties can stipulate as to the identity of the primary treating physician.

Before stipulating that the applicant's treating doctor is also the primary treating physician, we should always ascertain whether or not the applicant's treating physician comes within the definition of a PTP as defined in Administrative Rule 9785. For example, if the applicant's treating physician happens to be Dr. Steven Nagelberg, we should make sure that Dr. Nagelberg has complied with all of the requirements of Administrative Rule 9785 before designating or stipulating to Dr. Nagelberg as the PTP. Our analysis of this issue should include whether or not Dr. Nagelberg has complied with the mandates of Administrative Rule 9785 by incorporating the reports of all secondary physicians, setting forth a clear treatment program, and reporting to the claims administrator every 45 days.

MEMO TO ALL ATTORNEYS/CLIENTS

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Unless the treating doctor complies with all requirements of Administrative Rule 9785, I think we can take the position that although the applicant's doctor may be a treating doctor, he does not deserve the exalted title of primary treating physician pursuant to Administrative Rule 9785.

In this case, D'Arcy not only did not stipulate that Dr. McClure was the primary treating physician, but managed to persuade the applicant's attorney to stipulate that Dr. Dillin was the PTP. Because of ambiguities elsewhere in the Pretrial Conference Statement, the Board did not hold the applicant's attorney to his stipulation but this should be a lesson to us all not to routinely stipulate that someone is a primary treating physician unless that physician has complied with the reporting mandates of Administrative Rule 9785.

WJT:ab
Attach -

Alonzo Order Granting Recon
Page 2 of PTC Statement

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **VERONICA ALONZO,**

Case No. AHM 0091066

5 *Applicant,*

6 *vs.*

7
8 **ROBINSONS MAY CORPORATION;
9 PERMISSIBLY SELF-INSURED,**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION AND
DECISION AFTER
RECONSIDERATION**

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11 *Defendant(s).*

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13 Defendant, the May Department Store Company, seeks reconsideration
14 of the Findings and Order of September 9, 2003, wherein it was found that
15 applicant, born July 9, 1951, while employed on July 25, 2000 as a sales
16 associate, sustained industrial injury to her back, right side of the body and
17 right knee; that at the Mandatory Settlement Conference (MSC) of September 9,
18 2002, the parties completed documents identifying their stipulations and
19 issues which simultaneously represented that Dr. William Dillin was the
20 primary treating physician and also claimed that there was an objection and a
21 non-acknowledgement of his being the primary treating physician; that the
22 qualified medical examiner (QME) report of Dr. Sanjay Deshmukh is
23 admissible; that defendant's Exhibit 6, the May 19, 2002 report by Dr. Edward
24 Komberg, D.C., is inadmissible because it was served the morning of trial; that
25 Dr. Robert McClure made the referral to an orthopedist which led the applicant
26 to be examined by Dr. Dillin; and there is no evidence that Dr. McClure ever
27 reviewed the opinion of Dr. Dillin. Defendant's request that Dr. Dillin be the

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2/8/03

1 designated primary treating physician was denied. The matter was ordered off
2 calendar until admissible evidence was submitted on the issue of permanent
3 disability.

4 Defendant contends that: (1) this is a final decision because it
5 determines the substantive rights of the parties insofar as it determines
6 whether Dr. Dillin is the primary treating physician and whether his opinion is
7 entitled to the presumption of correctness under Labor Code section 4062.9; (2)
8 this is a final decision because the WCJ's order is dispositive of the applicant's
9 right to self-procured medical treatment and to select a new primary treating
10 physician under Labor Code section 4600; (3) in the alternative, it is filing the
11 petition as one for removal insofar as there is potential irreparable prejudice to
12 defendant if applicant is allowed to select a new treating physician and self-
13 procure medical care, without first resolving the issue of a need for continuing
14 medical care as required by California Code of Regulations, title 8, § 9785; (4)
15 substantial evidence justifies finding Dr. Dillin as a primary treating physician
16 because he took over management of the care of applicant beginning October
17 27, 2000, identified himself in a report to the claims administrator as the
18 primary treating physician, and saw applicant on numerous occasions
19 prescribing medical care; and (5) the parties are bound by stipulation that Dr.
20 Dillin is a primary treating physician (*County of Sacramento v. Workers' Comp.*
21 *Appeals Bd. (Weatherall)* (2000) 65 Cal.Comp.Cases 1).

22 Based on our review of the record and for the reasons stated herein, we
23 will grant reconsideration, rescind the WCJ's decision and return the case to
24 the trial level for further proceedings and decision.

25 At the hearing of June 18, 2003, applicant testified that she was injured
26 on July 25, 2000 in the break room while she was taking a cup from the
27 microwave and stepped on some fruit and fell. The applicant's sister picked

1 her up and took her to see Dr. McClure the day of the accident. This physician
2 was chosen by the Human Resources secretary for the employer. Applicant
3 testified that she was treating with Dr. McClure and saw him three times a
4 week. On her last visit, he informed her that she needed an orthopedic
5 appointment because she had been receiving physical therapy for a long time
6 and still had pain. Applicant specifically testified that Dr. McClure's secretary
7 sent her to Dr. Dillon and provided her with the date and time for the
8 appointment.

9 Thus, on the issue of who was the primary treating physician, the record
10 reflects that the employer sent applicant to Dr. McClure. Dr. McClure
11 produced minimal reports, but did treat applicant. He referred her for physical
12 therapy. Dr. McClure then referred applicant to an orthopedist, but never
13 reviewed his reports. Regarding the referral, we note the physical therapy
14 records set forth in applicant's exhibit "4" also indicate that on August 20,
15 2000, applicant was referred to an orthopedist. In addition, we note that
16 applicant proceeded to be treated by Dr. Dillin, an orthopedist, from October
17 25, 2000 to at least June of 2001. Further, Dr. Dillin issued a October 30,
18 2001 PR-3 report even after applicant had obtained an attorney in September
19 of 2001.¹

20 At the outset, we are persuaded that the workers' compensation
21 administrative law judge (WCJ) correctly found that the MSC stipulation to Dr.
22 Dillin as the treating physician was not binding, insofar as there are obvious
23 ambiguities in the MSC statement. On page 2, it is stipulated that the primary
24 treating physician is Dr. Dillin. On page 3 of the MSC statement, under
25 "Issues," defendant relies on the presumption of correctness of the treating

26 ¹ Thereafter, on February 18, 2003, applicant designated a new treating physician, Dr.
27 Komberg. (See, applicant's exhibit "5.")

1 physician, Dr. Dillin, applicant objects to Dr. Dillin's reports, and the matter of
2 "determination of primary treating physician" is requested by applicant.

3 California Code of Regulations, title 8, section 9785 (a)(1) provides that
4 the primary treating physician is the doctor who is primarily responsible for
5 managing the care of the applicant and who has examined and treated the
6 employee at least once and monitored the effect of the treatment thereafter.
7 The primary treating physician is the physician selected by the employer.
8 Here, the employer sent her to Dr. McClure and initially he treated applicant
9 and was the primary treating physician. However, again, Dr. McClure stopped
10 treating applicant in October 2000, and at that point, Dr. Dillin issued his first
11 report identifying himself as the primary treating physician.

12 Further, we are persuaded that Dr. Dillin is not a "secondary physician"
13 under California Code of Regulations, title 8, section 9785² insofar as he was
14 primarily responsible for her treatment by the very facts herein, given that Dr.
15 McClure never saw applicant again.

16 Moreover, we note that on October 29, 2001, defendant sent applicant a
17 "notice of denial of permanent disability benefits" based on Dr. Dillin's
18 September 19, 2001 opinion as the primary treating physician that there was
19 no permanent disability. In the October 2001 notice, defendant also informed
20 that no permanent disability benefits were payable, explained applicant's
21 rights, and sent a copy of the letter to applicant's attorney.

22 In addition, the record reflects that applicant never objected to the
23 October 29, 2001 letter and waited until February 18, 2003 to send a notice
24 that she had a new primary treating physician, Dr. Komberg.

25 Therefore, we disagree with the WCJ's finding that Dr. McClure is still

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27 ² Section 9785 (a)(2) defines a secondary physician as any physician other than the primary
treating physician who examines or provides treatment to the applicant, but is not responsible
for continued management of the care.

1 the primary treating physician when none of Dr. Dillin's reports have been
2 incorporated into a supplemental report by Dr. McClure. Further, the WCJ
3 only found that there was no stipulation to Dr. Dillon as the primary treating
4 physician and we are persuaded that the remainder of the record supports a
5 finding that Dr. Dillin was the primary treating physician.

6 On this basis, we rescind the WCJ's decision and return the matter to
7 the trial level for further proceedings and decision.

8 In passing, we are granting defendant's request to file its supplemental
9 petition for reconsideration, pursuant to California Code of Regulations, title 8,
10 section 10842, and we have considered the arguments made in that petition in
11 reaching this decision.

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For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration/Removal filed September 30, 2003, be, and the same hereby is GRANTED.

IT IS FURTHER ORDERED that the Findings and Order of September 9, 2003, be and the same hereby is RESCINDED and the case RETURNED to the trial level for further proceedings and decision.

WORKERS' COMPENSATION APPEALS BOARD

James C. Cuneo

JAMES C. CUNEO

I CONCUR,

A. John Shimon

A. JOHN SHIMMON

CONCURRING, BUT NOT SIGNING

Veronica Alonzo



DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

NOV 26 2003

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL ADDRESS RECORD.

Alonzo

STIPULATIONS

THE FOLLOWING FACTS ARE ADMITTED:

1. _____, BORN ___/___/___

WHILE EMPLOYED ALLEGEDLY EMPLOYED

ON _____

DURING THE PERIOD(S) _____

AS A(N) _____, OCCUPATIONAL GROUP NUMBER _____

AT _____, CALIFORNIA,

BY _____

SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO _____

CLAIMS TO HAVE SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO _____

2. AT THE TIME OF INJURY THE EMPLOYER'S WORKERS' COMPENSATION CARRIER WAS

THE EMPLOYER WAS PERMISSIBLY SELF-INSURED UNINSURED LEGALLY UNINSURED

3. AT THE TIME OF INJURY, THE EMPLOYEE'S EARNINGS WERE \$ _____ PER WEEK, WARRANTING INDEMNITY RATES OF \$ _____ FOR TEMPORARY DISABILITY AND \$ _____ FOR PERMANENT DISABILITY.

4. THE CARRIER/EMPLOYER HAS PAID COMPENSATION AS FOLLOWS: (TD/PD/VRMA)

<u>TYPE</u>	<u>WEEKLY RATE</u>	<u>PERIOD</u>	<u>TYPE</u>	<u>WEEKLY RATE</u>	<u>PERIOD</u>
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

THE EMPLOYEE HAS BEEN ADEQUATELY COMPENSATED FOR ALL PERIODS OF T/D CLAIMED THROUGH _____

5. THE EMPLOYER HAS FURNISHED ALL SOME NO MEDICAL TREATMENT.

THE PRIMARY TREATING PHYSICIAN IS _____

6. NO ATTORNEY FEES HAVE BEEN PAID AND NO ATTORNEY FEE ARRANGEMENTS HAVE BEEN MADE.

7. OTHER STIPULATIONS _____

APPLICANT

DEFENDANT

LIEN CLAIMANT/OTHER