In the

Court of Appeal

of the

State of California

THIRD APPELLATE DISTRICT

C078440

DANIEL RAMIREZ,

Petitioner,

v.

THE WORKERS' COMPENSATION APPEALS BOARD,
DEPARTMENT OF HEALTH CARE SERVICES and
STATE COMPENSATION INSURANCE FUND,

Respondents.

FROM A DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD
HON. GREGORY CLEVELAND · NO. ADJ6821103
SERVICE ON ATTORNEY GENERAL REQUIRED PURSUANT TO C.R.C. RULE 8.29(C)

PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER DANIEL RAMIREZ

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Court of Appeal Case No.: C078440

Case Name: Ramirez v. The Workers' Compensation Appeals Board et al.

☑ There are no interested entities or parties to list in this Certificate per California Rules of Court, 8.208

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person **Nature of Interest**

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ISSUES PRESENTED

May the Legislature create a system for resolving workers' compensation medical treatment disputes which expressly prohibits judicial review of the final determination of those disputes in spite of Article XIV, Section 4, of the California Constitution which mandates that all decisions by a workers' compensation tribunal "shall be subject to review by the appellate courts of this State"?

May the Legislature vest physician-reviewers employed by a private, for-profit enterprise with judicial or quasi-judicial powers to decide medical treatment disputes in spite of Article III, Section 3, and Article VI, Section 1, of the California Constitution?

May the Legislature create a system for resolving workers' compensation medical treatment disputes which denies injured workers minimum due process of law as guaranteed by Article I, Section 3 (b)(4), of the California Constitution and the Fourteenth Amendment of the United State Constitution?

Did the Legislature properly delegate quasi-legislative power to physician-reviewers to define their own standards for determining workers' compensation medical treatment disputes?

Did the Workers' Compensation Appeals Board correctly decide that all *legal* compliance issues arising from the utilization review *process*, other than the timeliness of the resulting utilization review *decision*, must be resolved through the IMR process even though the WCAB's construction of the relevant Labor Code provisions:

(A) is contrary their "plain meaning";

(B) impermissibly alters their express statutory language to accomplish a purpose which the Legislature did not intend;

(C) produces absurd results;

(D) creates an unworkable IMR process; and

(E) fails to harmonize these provisions.

Did the Workers' Compensation Appeals Board correctly decide that a utilization review decision which is timely but suffers from other material legal deficiencies is nonetheless valid and that the only remedy for these deficiencies is monetary penalties?

SUMMARY OF ARGUMENT

In 2012, the Legislature undertook yet another sweeping reform of the California workers' compensation system in the form of SB 863. The centerpiece of this legislation was the creation of an Independent Medical Review ("IMR") process for resolving medical treatment disputes. The adoption of the IMR process is, without a doubt, the most radical and controversial change which the Legislature has made to the workers' compensation system since the system was initially created in 1913, more than a century ago.

The petition for review in this case presents two separate challenges to the IMR process. In the first instance, Petitioner challenges the constitutionality of the IMR implementing statutes[1] *as*

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[1] Labor Code Sections 4610.5 and 4610.6.

adopted by the Legislature. In addition, Petitioner challenges these statutes *as interpreted* by the WCAB in its *en banc Dubon II* decision[2]

These issues have been brought before the Court of Appeal in two separate, prior cases. The constitutionality of the IMR statutes was considered by the First Appellate District in *Stevens v. Workers' Comp. Appeals Board* (2015) 241 Cal. App. 4th 1074, in which the Court recently issued a published opinion holding that the IMR statutes do not violate any provision of the state or federal Constitutions. (*Id.* at 1081). As further discussed *infra,* CAAA respectfully submits that the *Stevens* case was wrongly decided. On the other hand, the Fourth Appellate District declined to grant review the WCAB's interpretation of the IMR statutes in *Dubon II* on the grounds that the issues had become moot[3]. As such, those issues have not been the subject of any substantive appellate review. Respondent STATE COMPENSATION INSURANCE FUND ("SCIF") is the defendant/respondent in both *Stevens* and *Dubon II.*

To be properly evaluated, IMR must be viewed within the context of a larger evolution of the process for resolving medical treatment disputes in workers' compensation cases. That evolution began in 2003 with the enactment of SB 228, which added two key components to the medical treatment dispute resolution process: 1) the adoption of a mandatory utilization review ("UR") process for all

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2 (2014) 79 Cal. Comp. Cas. 1298 (*en banc*).

3 *Dubon v. Workers' Comp. Appeals Bd.* (2015) 80 Cal. Comp. Cas. 192 (writ denied).

medical treatment authorization requests[4]; and 2) the adoption of a medical treatment utilization schedule ("MTUS") consisting of treatment guidelines which are presumptively correct as to the extent and scope of medically necessary treatment[5]. These changes enabled employers to dispute medical treatment recommendations in a more cost-effective manner by permitting UR physicians to perform a "paper review" of those recommendations without actually examining the injured workers themselves and to rely upon treatment guidelines which, as previously stated, are presumptively correct.

The gains which accrued to employers through SB 228 were further solidified within months of its January 1, 2004 effective date when the Legislative enacted SB 899, a further broad workers' compensation reform bill. SB 899 repealed Labor Code Section 4602.9, which provided a presumption of correctness to the opinions of the treating physician[6], and amended Labor Code Section 4600 to expressly limit the scope of treatment which is an employer is required to provide to that which is medically necessary pursuant to the MTUS[7].

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4 *See* Labor Code Section 4610; *see also, State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal. 4th 230, 240 ("Sandhagen").

5 *See*, Labor Code Sections 4604.5; 5307.27; *see also, Sandhagen, supra.*

6 Stats. 2004, ch. 34, § 23.

7 Stats. 2004, ch. 34, § 25.

IMR represents an even further step along this evolutionary path. Post-SB 863, if an injured worker wishes to challenge an adverse UR determination of the medical necessity, his or her sole recourse is to file an application for IMR[8]. The IMR physician-reviewer, like the UR physician who preceded them, performs a "paper review" only and renders a medical necessity determination which, like the MTUS guidelines upon which the determination is to be based, is presumptively correct[9].

Therefore, post-SB 863 medical treatment recommendations are subject to a two-stage, "paper review" only dispute resolution process: first, at the UR stage if *the employer disputes* the treating physician's determination of medical necessity; and second, at the IMR stage *if the employee disputes* an adverse medical necessity determination by UR. What is fundamentally different about the post-SB 863 dispute resolution process is that the medical necessity determination by IMR is final and is not subject to review by the WCAB or any court of this State.

<u>The Constitutional Issues</u>

CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION ("CAAA") submits that the IMR process as established by SB 863 violates the state and federal Constitutions on the following grounds:

(I) That the absolute prohibition of judicial review of IMR determinations of medical necessity violates Article XIV,

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8 Labor Code § 4610.5 (e).

9 Labor Code § 4610.6 (b), (g), (h).

Section 4, of the California Constitution which requires that all decisions by a duly-constituted workers' compensation tribunal "shall be subject to review by the appellate courts of this State";

(ii) That conferring judicial or quasi-judicial powers upon IMR reviewers employed by a private, for-profit enterprise violates Article III, Section 3, and Article VI, Section 1, of the California Constitution;

(iii) That the IMR process denies injured workers minium due process of law as guaranteed by the state and federal Constitutions; and

(iv) That the authority to render medical necessity determinations was improperly delegated to IMR reviewers without adequate standards and safeguards to prevent arbitrary and capricious decision-making.

The Statutory Interpretation Issues

In the preamble to SB 863, the Legislature stated clearly and unequivocally its intent in establishing the IMR process:

> The Legislature finds and declares all of the following:
>
> . . .
>
> (e) [t]hat having medical professionals ultimately determine **the necessity of requested treatment** furthers the social policy of this state in reference to using evidence-based medicine **to provide injured workers with the highest quality of medical care** and that the provision of the act establishing independent medical review are necessary to implement that policy[10]. [Sic]

10 Emphasis added.

Section 4610.5 specifies the subject matter to which the IMR process applies and defines certain key terms central to that process, most importantly, "medical necessity".

Section 4160.5, subdivision (a), provides that the IMR process is applicable to:

> (1) Any dispute over **a utilization review decision** regarding treatment for an injury occurring on or after January 1, 2013.
>
> (2) Any dispute over **a utilization review decision** if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.[11]

Section 4610.5, subdivision (c)(3), defines a "utilization review decision" as:

> **a decision pursuant to Section 4610 to modify, delay, or deny, based in whole or in part on medical necessity to cure or relieve, a treatment recommendation or recommendations by a physician** prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600 or subdivision (c) of Section 5402.[12]

Section 4610.5, subdivision (c)(2), defines "medical necessity" as follows:

> **"Medically necessary" and "medical necessity" mean medical treatment that is reasonably required to cure or relieve the injured employee of the effects of his or her injury** and based on the following standards, which shall be applied in the order listed, allowing reliance on a lower ranked standard only if every higher ranked

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11 Emphasis added.

12 Emphasis added.

> standard is inapplicable to the employee's medical condition:
>
> > (A) The guidelines adopted by the administrative director pursuant to Section 5307.27 ....[13]

What is unmistakably clear from the language of Section 4610.5 is that the IMR process applies only to certain specified utilization review *decisions* and only to the issue of *medical necessity*. In other words, as its name implies and in accordance with the expressly-stated legislative intent, IMR is a process for reviewing *medical treatment recommendations* in reference to *specific hierarchy of medical treatment guidelines or other expert medical evidence.*

Section 4610.6, in turn, sets forth the procedures by which the IMR process is conducted. Section 4610.6, subdivision (a) states in no uncertain terms:

> Upon receipt of a case pursuant to Section 4610.5, an independent medical review organization shall conduct the review in accordance with this article and any regulations or orders of the administrative director. **The organization's review shall be limited to an examination of the medical necessity of the disputed medical treatment.**[14]

Furthermore, Section 4610.6, subdivision (c), describes the outcome of the IMR process:

> Following its review, the reviewer or reviewers **shall determine whether the disputed health care service was medically necessary based on the specific medical needs of the employee and the standards of medical**

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13 Emphasis added.

14 Emphasis added.

> **necessity as defined in subdivision (c) of Section 4610.5.**[15]

Section 4610.6, subdivision (e), specifies what the reviewer's written determination of medical necessity shall include:

> The medical professionals' analyses and determinations shall state whether the disputed health care service is medically necessary. **Each analysis shall cite the employee's medical condition, the relevant documents in the record, and the relevant findings associated with the provisions of subdivision (c) to support the determination.**[16]

What is conspicuously absent from Section 4610.6 is any reference to any rules or regulations that must be considered or cited in an IMR determination other than the applicable "standards of medical necessity".

In addition to adopting Sections 4610.5 and 4610.6, as part of SB 863 the Legislature also amended Labor Code Section 4604 to read: "Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, *except as otherwise provided by Section 4610.5.*"[17]

DUBON I

On February 27, 2014, Respondent WORKERS' COMPENSATION APPEALS BOARD ("WCAB") rendered its first

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15 Emphasis added.

16 Emphasis added.

17 Labor Code § 4604 (italics added).

en banc decision in *Jose Dubon v. World Restoration, Inc.* ("*Dubon I*")[18]. Its specific holdings were:

1. IMR solely resolves disputes over the medical necessity of treatment requests. Issues of timeliness and compliance with statutes and regulations governing UR are legal disputes within the jurisdiction of the WCAB.

2. A UR decision is invalid if it is untimely or suffers from material procedural defects that undermine the integrity of the UR decision. Minor technical or immaterial defects are insufficient to invalidate a defendant's UR determination.

3. If a defendant's UR is found invalid, the issue of medical necessity is not subject to IMR but is to be determined by the WCAB based upon substantial medical evidence, with the employee having the burden of proving the treatment is reasonably required.

4. If there is a timely and valid UR, the issue of medical necessity shall be resolved through the IMR process if requested by the employee.[19]

With regard to the specific medical treatment at issue, the WCAB remanded the case for further determination by the trial judge, holding: "[W]e conclude that the defendant's UR process suffers from **material procedural defects that undermine the integrity of the UR decision** because the UR physicians were not provided with adequate medical records."[20]

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18 (2014) 79 Cal. Comp. Cas. 313 (*en banc*).

19 *Id.* at 315.

20 *Ibid* (emphasis added).

In reaching its decision in *Dubon I*, the WCAB specifically invoked the statement of legislative intent in SB 863 cited *ante*:

> Our conclusion that IMR physicians cannot determine whether a UR decision is untimely or procedurally deficient is consistent with the Legislature's declaration regarding IMR in uncodified section 1(e) of SB 863 ... **This declaration reflects a legislative intent that IMR physicians are to address medical necessity issues using evidence-based medicine standards. Section 1(e) in no way indicates a legislative intent that IMR physicians may address legal issues such as the timeliness or procedural sufficiency of UR.** Indeed, nothing in section 1(e) or in sections 4610.5 and 4610.6 suggests that IMR physicians will have the knowledge or expertise to decide whether a UR decision was untimely or procedurally deficient.[21]

Citing the Supreme Court's *Sandhagen* decision, the WCAB held that compliance with all statutory and regulatory provisions applicable to the UR process is mandatory, stating: "[J]ust as an untimely UR is invalid, a UR that fails to comply with the procedural requirements of section 4610 and the AD's Rules may also be invalid." (79 Cal. Comp. Cas. at p. 321.)

The WCAB's reliance on *Sandhagen* in *Dubon I* and, indeed, in *Dubon II* as well, represents a truly ironic twist of fate. In its own initial *en banc* decision in *Sandhagen*, the WCAB not only concluded that the time frames for completion of the UR process set forth in Labor Code Section 4610 were mandatory (as did the Supreme Court), but the WCAB also specifically *rejected* the argument which the *WCAB itself* would later make in *Dubon II*, namely, that administrative or judicially-imposed penalties were the only

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21 79 Cal. Comp. Cas. at p. 320 (emphasis added).

remedies available for UR procedural violations other than the timeliness of the UR decision. (*See, Sandhagen v. Cox & Cox Construction* (2004) 69 Cal. Comp. Cas. 1452, 1459-1460.)

Furthermore, the WCAB emphasized the importance of "judicial oversight" of the UR process for the benefit of the entire workers' compensation system:

> Judicial scrutiny of the procedural validity of a UR decision is of particular importance since SB 863 amended the Labor Code to bar an injured worker from renewing a treatment request for 12 months absent a documented material change in circumstances . . . Furthermore, requiring strict compliance with mandatory time limits and other regulations governing UR will ensure the integrity of the UR process and the decisions rendered. **This result will be beneficial to the workers' compensation system as a whole.**[22]

Perhaps most importantly for the purposes of these current proceedings, in *Dubon I* the WCAB recognized: 1) that the utilization review process and the utilization review determination which is the end result of that process are separate and legally distinct; and 2) in the absence of a procedurally compliant utilization process, there is no valid utilization review determination which may be submitted to the IMR process.

Having considered the Legislature's stated intent in establishing the IMR process and the consequences of improper administration of the underlying UR process, in *Dubon I* the WCAB succinctly concluded: "[T]he purpose of IMR is to review a 'utilization review decision.' [citations omitted] Accordingly, if there

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22 *Id.* (emphasis added).

is no legally valid UR decision, either because the UR decision is untimely or suffers from material procedural defects, there is no basis for IMR."[23]

It is worth noting that the WCAB's decision in *Dubon I* was entirely unanimous.

DUBON II

On October 6, 2014, the WCAB issued its second *en banc* decision ("*Dubon II*")[24]. Its specific holdings were:

1. A utilization review (UR) decision is invalid and not subject to independent medical review (IMR) **only if it is untimely.**

2. **Legal issues regarding the timeliness of a UR decision must be resolved by the Workers' Compensation Appeals Board (WCAB), not IMR.**

3. **All other disputes regarding a UR decision must be resolved by IMR.**

4. If a UR decision is untimely, the determination of medical necessity may be made by the WCAB based on substantial medical evidence consistent with Labor Code section 4604.5.[25]

In so doing, the WCAB majority *expressly rescinded* its own prior *Dubon I* decision and with reference to the specific medical treatment request at issue in this case held: "[T]he medical necessity

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23 79 Cal. Comp. Cas. at p. 324.

24 *Dubon II* was decided by a majority of the Commissioners, with one Commissioner filing a concurring opinion and another Commissioner filing a dissenting opinion.

25 79 Cal. Comp. Cas. at pp. 1299-1300 (emphasis added).

of applicant's requested back surgery must be determined by IMR, *notwithstanding any procedural defects in defendant's timely UR decision*."[26] **By deciding in *Dubon II* that its jurisdiction is limited to reviewing the timeliness of the resulting *UR decision* and that all other procedural compliance issues with respect to the underlying *UR process* must be submitted to IMR, the WCAB reached a conclusion which is diametrically opposite to its conclusion in *Dubon I.*** Paradoxically, the WCAB majority cited the very same statement of legislative intent to support its decision in *Dubon II* as it had done previously to support the opposite result in *Dubon I.*

In *Dubon II*, the WCAB majority was forced to conflate a UR determination with the UR process which leads to that determination and to create a completely contrived definition of "medical necessity" which is totally inconsistent with how the Legislature expressly defined that term in Labor Code Section 4610.5, subdivision (c)(2):

> In addition to timeliness, a UR decision must be "in compliance with" other elements of section 4610. [citations omitted] **With the exception of timeliness, all other requirements go to the validity of the medical decision *or* decision-making process** ... With the exception of timeliness, all defects in the UR process can be remedied when appealed to IMR.[27]

To further bolster its contrived distinction between timeliness and all other procedural deficiencies in the UR process, the WCAB

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26 79 Cal. Comp. Cas. at p. 1300 (italics added).

27 79 Cal. Comp. Cas. at p. 1309 (emphasis added).

majority emphasized that IMR reviewers are "medical professionals" who lack the legal acumen and resources to render timeliness determinations, stating: "[S]ection 4610.5 nowhere indicates that IMR physicians are to be provided with documents relating to the timeliness of the defendant's UR decision or with the legal authority relating to the timeliness of UR."[28]

The WCAB majority even went so far as implying that disputes concerning *the legal sufficiency* of the UR process other the timeliness of the UR decision are actually *medical determinations*:

> The legislature has made it abundantly clear that medical decisions are to be made by medical professionals. To allow a WCJ to invalidate a UR decision based on any factor other than timeliness and substitute his or her own decision on a treatment request violates the intent of SB 863.[29]

Finally, the WCAB majority opined that the appropriate remedy for all other UR deficiencies is the imposition of penalties pursuant to Labor Code Sections 4610, subdivision (i), and 5814.[30]

Commissioner Lowe filed a concurring opinion arguing that the issues before the WCAB at the time of *Dubon I* had become moot when the case came before the WCAB once again at the time of *Dubon II* because most of the medical treatment at issue had been approved and provided by SCIF.[31] However, the WCAB majority gave short shrift to the mootness issue, observing that the

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28 79 Cal. Comp. Cas. at 1308.

29 79 Cal. Comp. Cas. at p. 1310.

30 79 Cal. Comp. Cas. at p. 1311.

31 79 Cal. Comp. Cas. at p. 1314-1316.

documents relied upon by Commissioner Lowe were *dehors* the record on appeal and, more importantly, that a tribunal has "inherent discretion" to address issues of "broad public interest" raised in a particular case even if the case itself has become moot.[32]

Commissioner Sweeney, on the other hand, authored a lengthy and impassioned dissenting opinion concurring only in the WCAB's majority's determination that an untimely UR decision is invalid.[33] Commissioner Sweeney invoked the Supreme Court's reasoning in *Sandhagen* and insisted that *all* of the procedural requirements pertaining to the UR process, not simply those pertaining to the timeliness of the resulting UR decision, are mandatory.[34]

Commissioner Sweeney likewise noted that, by isolating timeliness issues from the other UR procedural requirements, the WCAB majority was a "minority of one": "[E]very court that has interpreted section 4610 has described the utilization review process as having multiple requirements, and no court has construed the timeliness requirement to be more important than any other requirement."[35]

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32 79 Cal. Comp. Cas. at p. 1314 (citing *Edelstein v. City and County of San Francisco* (2012) 29 Cal. 4th 164.)

33 79 Cal. Comp. Cas. at p. 1316-1322.

34 79 Cal. Comp. Cas. at p. 1317-1318.

35 79 Cal. Comp. Cas. at p. 1318.

Similarly, Commissioner Sweeney turned to the "plain meaning" of Labor Code Section 4610 and, in very convincing fashion, decontsructed the WCAB majority's commingling of the UR process and the resulting UR decision:

> By defining a utilization review decision as "a decision pursuant to Section 4610" the Legislature clearly and unambiguously mandated that the substantive and procedural requirements of the section 4610 utilization review process must be followed in order to proceed to independent medical review. **Because a utilization review decision is "a decision pursuant to Section 4610," a treatment determination produced by a process that does not comply with section 4610 is not a utilization review decision and cannot be reviewed as if it were a utilization review decision.**[36]

Commissioner Sweeney then argued that, when it enacted SB 863, the Legislature is presumed to have been aware of the *Sandhagen* decision holding that Section 4610 establishes "compulsory procedural and substantive requirements" which govern the UR process. Therefore, since SB 863 did not alter the language of Section 4610, Labor Cod Sections 4610 and 4610.5 are "adjunctive" and must be harmonized.[37]

Once again relying upon the express statutory language, Commissioner Sweeney concluded:

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36 *Id.* (emphasis added).

37 79 Cal. Comp. Cas. at pp. 1318-1319.

> Section 4610.5(a) and (b) require a "dispute over a utilization review decision" to "be resolved in accordance with" section 4610.5, which provides for independent medical review. Section 4610.5(c)(3) defines "utilization review decision" as "a decision pursuant to Section 4610." Section 4610 sets forth the procedural and substantive requirements for the utilization review process. **A treatment determination that does not comply with section 4610 is not a "decision pursuant to Section 4610," and thus by definition is not a "utilization review decision." A utilization review decision is a necessary prerequisite for independent medical review, and by the terms of sections 4610 and 4610.5, only a dispute after a utilization review decision, i.e., a treatment determination that complies with section 4610, is resolved through independent medical review. Therefore, a dispute over a treatment determination without compliance with section 4610 is not a dispute over a utilization review decision pursuant to section 4610.5(a), and such a dispute is not subject to section 4610.5 independent medical review.**[38]

Commissioner Sweeney next assailed the limitation imposed by the WCAB majority upon the scope of Labor Code Section 4604, as well as the majority's argument that, by rendering decisions on UR procedural deficiencies other than timeliness, the WCAB would be impermissibly infringing upon the IMR process and making medical decisions:

> Under [section] 4604, the WCAB has jurisdiction both to hear controversies over whether particular treatment determinations are utilization review decisions and controversies over treatment determinations that are not subject to independent medical review under section 4610.5. **Consideration of whether a treatment**

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[38] 79 Cal. Comp. Cas. at p. 1319 (emphasis added).

> **determination meets the procedural and substantive requirements of section 4610 involves proper application of the law to questions of fact, and is not an issue of medical necessity. In determining whether a utilization review decision exists, the WCAB does not exercise medical judgment. Instead, the issue is whether a determination complied with section 4610, and that issue must be decided by the WCAB pursuant to section 4604. This means that a dispute must fall squarely within section 4610.5 or it is to be determined by the WCAB.**[39]

Commissioner Sweeney then exposed the most fundamental flaw in the WCAB's majority's opinion, namely, that in many cases it would render the entire UR process a meaningless farce:

> The majority extends independent medical review to treatment determinations that do not meet the statutory definition of a "utilization review decision" contrary to the clear statutory language. Consequently, under the majority decision, a treatment determination that is based on an evaluation by a nurse or other medical professional other than a licensed physician is still treated as a "utilization review decision" even though it does not meet the definition in section 4610.5(c)(3). In fact, even a treatment determination that is based on the medical records of the wrong employee, the wrong body part or no medical records at all, and even one that does not comply with section 4610 in any way except by being timely, is still treated as a "utilization review decision" by the majority. **In short, the majority allows any treatment determination to proceed to the second step of the process so long as it is not untimely, which effectively makes the section 4610 utilization review process optional.**[40]

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39 *Id.* (emphasis added).

40 79 Cal. Comp. Cas. at pp. 1320-1321 (emphasis added).

Commissioner Sweeney also swiftly dismissed the notion that administratively or judicially imposed penalties are adequate remedies for UR procedural deficiencies:

> In lieu of judicial review, the majority relies on the Administrative Director's authority under section 4610(I) to impose administrative penalties for violations of the utilization review process and the WCAB's authority under section 4610.1 to impose section 5814 penalties when the utilization review process results in an unreasonable delay in the provision of medical treatment. **As important as those sections are, they do not address a request for medical treatment in an individual case. The penalties authorized by section 4610.1 are tied to the responsibility of the Administrative Director to oversee the entire utilization review process and do not provide any individual remedy. Similarly, the penalties allowed by section 5814 only apply after the utilization review process fails and causes unreasonable delay in the provision of necessary medical treatment.**[41]

Finally, Commissioner Sweeney addressed the concern raised by the WCAB majority that its prior decision in *Dubon I* would run afoul of the Legislature's expressed intent in SB 863 that medical necessity determinations should be made by medical professionals. Commissioner Sweeney pointed out that, under long-standing precedent, the WCAB may only decide a medical treatment dispute if it is provided with *substantial medical evidence* upon which to base a decision. Therefore, contrary to the WCAB majority's assertion, if a workers' compensation judge decides such a dispute, he or she is not "substituting" their judgment for that of qualified medical

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[41] 79 Cal. Comp. Cas. at p. 1321 (emphasis added).

professionals. Rather, the judge's decision is based upon the opinions of the medical professionals.[42]

Commissioner Sweeney concluded her observations on this point by noting that, if the WCAB determines that a UR decision is procedurally defective but that the medical evidence is insufficient, the WCAB cannot render any determination concerning the necessity of the disputed medical treatment. The WCAB must, instead, order further development of the medical record which may result in the dispute being resubmitted to the UR process.[43]

Commissioner Sweeney expressed her ultimate conclusion as follows:

> The Legislature created a two-step process for determining the necessity of a medical treatment request by an employee's treating physician. Section 4610 established a utilization review process with mandatory requirements. Section 4610.5 established a process of independent medical review of a utilization review decisions. Treatment determinations that do not comply with section 4610 are not utilization review decisions and are not subject to independent medical review. Controversies as to those determinations must be resolved by the WCAB pursuant to section 4604.[44]

Simply, either the WCAB was wrong when it decided *Dubon I*, or it was wrong when it decided *Dubon II*. There is no alternative; there is no "middle ground". Quite astoundingly, the WCAB majority did not offer any explanation whatsoever in *Dubon II* as to how it could reach a decision which is directly opposite to its

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42 79 Cal. Comp. Cas. at pp. 1321-1322.

43 79 Cal. Comp. Cas. at p. 1322.

44 *Id.*

decision in *Dubon*. As discussed *infra*, for these reasons the WCAB majority's interpretation of the relevant Labor Code provisions in *Dubon II* should not be granted the customary deference by this Court.

As will demonstrated *infra*, the WCAB majority's decision in *Dubon II* violates cardinal rules of statutory construction, renders the UR process nothing more than a pro forma exercise and would have the absurd result of allowing medical professionals to make legal determinations which would be accorded a legal presumption of correctness and would be subject to meaningless appellate review. Accordingly, CAAA respectfully submits that this Court must reverse the WCAB's decision in *Dubon II*.

ARGUMENT

I.

STANDARD OF REVIEW

A. Constitutional Issues

CAAA concedes that duly-enacted legislation is entitled to a presumption of constitutionality and that, when a facial challenge is made to a statute, all doubts must be resolved in favor of the statute's validity. (*The Hess Collection Winery v California Agricultural Labor Relations Bd.* (2006) 140 Cal. App. 4th 1584, 1595-1596.) Such a challenge will only succeed if a statute's unconstitutionality "plainly and unmistakably appears", or, put another way: "if the statute inevitably poses a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.*) CAAA also acknowledges that the California Constitution, unlike its federal counterpart, acts not as a grant of power to the Legislature, but

rather as a limitation upon its authority to act. (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal. 3d 685, 691.)

CAAA further acknowledges the plenary power of the Legislature to "create, and enforce, a complete system of workers' compensation, by appropriate legislation" and that the adoption of Article XIV, section 4, effected a *pro tanto* repeal of any other conflicting provision of the California Constitution. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal. 3d 329, 343.)

Nevertheless, the Legislature's power to make laws for the administration of the California workers' compensation system is not limitless and absolute. The Legislature's plenary power pursuant to Article XIV, section 4, does not include the power to make laws which violate the California Constitution. (*See, Independent Energy Producers Assn. v. McPherson* (2006) 38 Cal. 4th 1020, 1036.) Where, as here, it is claimed that the Legislature's exercise of plenary power pursuant to one constitutional provision conflicts with the operation of another constitutional provision, the Court must strive to avoid a repeal by implication and attempt to harmonize the two provisions. (*Id.* at p. 1034.) In that regard, the *pro tanto* repeal of conflicting constitutional provisions exists *only to the extent necessary* for the achievement of the primary provision's objectives, and the court must determine whether the Legislature's actions *must* be upheld for those objectives to be achieved. (*Hustedt, supra.*)

Moreover, since the fundamental due process rights to a fair hearing and to cross-examination are guaranteed in workers' compensation proceedings *(Ogden Entertainment Services v. Workers'*

Comp. Appeals Bd. (2014) 233 Cal. App. 4th 970, 982), Labor Code Sections 4610.5 and 4610.6 cannot be upheld if they infringe upon those fundamental rights.

Similarly, the Legislature cannot delegate quasi-legislative powers to an agency or entity without imposing sufficient safeguards to prevent arbitrary and capricious decision-making. *(See Carson Mobilehome Park Owners' Assn. v. City of Carson* (1983), 35 Cal. 3d 184.*)*

B. <u>Statutory Construction Matters</u>

Matters of statutory construction such as those presented in this case involve questions of law which are subject to *de novo* review. *(Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal. 4th 272, 277.) Ordinarily, the WCAB's construction of Labor Code provisions is accorded great weight. *(Id.)* However, this deference does not amount to judicial abdication. Statutory construction ultimately remains within the exclusive province of the courts. *(Cf. Sarah M. v. Superior Court* (2005) 36 Cal. 4th 998, 1014.) Moreover, judicial deference does not extend to clearly erroneous interpretations by an administrative agency *(Cannon v. Industrial Acci. Com.,* (1959) 53 Cal. 2d 17, 22), in particular, interpretations which are arbitrary, capricious or are lacking in a reasonable or rational basis. *(Jacobs, Malcom & Burtt v. Voss* (1995) 13 Cal. App. 4th 1399, 1404.) Similarly, an administrative agency's interpretation of a statute cannot prevail in the face of clearly contrary legislative intent. *(Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal. 3d 101, 117.)

CAAA submits that the WCAB majority's unexplained and inexplicable abandonment in *Dubon II* of its previous interpretations of the Labor Code provisions at issue in *Dubon I* is clearly arbitrary and capricious and lacks any rational basis. Furthermore, as will be demonstrated *infra,* the WCAB majority's construction of these provisions flies in the face of the Legislature's clearly expressed intent when SB 863 was enacted. Accordingly, with reluctance, CAAA submits that the WCAB majority's decision in *Dubon II* should be accorded no weight whatsoever by this Court.

II.

THE PROHIBITION OF JUDICIAL REVIEW OF IMR DETERMINATIONS IS IRRECONCILABLY INCONSISTENT WITH ARTICLE XIV, SECTION 4, WHICH MANDATES THAT WORKERS' COMPENSATION DECISIONS "SHALL BE SUBJECT TO REVIEW BY THE APPELLATE COURTS OF THIS STATE"

It would be difficult to conceive of a situation where a statute's constitutionality would be more in question than where its provisions directly contravene the express language of the state Constitution. It is self-evident that where there is a clear conflict between a constitutional provision and a statute, the former must prevail. (*Noce v. Department of Finance* (1941) 45 Cal. App. 2d 5, 9-10.)

Nevertheless, that is precisely the sort of direct conflict posed by Labor Code Section 4610.6, subdivision (i), which provides: "In no event shall a workers' compensation administrative law judge, the appeals board, **or any higher court** make a determination of

medical necessity contrary to the determination of the independent medical review organization."[45]

Article XIV, Section 4, on the other hand clearly and unequivocally guarantees the right to appellate review of decisions in workers' compensation matters:

> The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination ... **provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.**[46]

In construing a constitutional provision, the court's primary goal is to give effect to the enacting body's intent. (*Davis v. City of Berkeley* (1990) 51 Cal. 3d 227, 234.) To determine that intent, courts must first look to the language of the constitutional text, giving its words their ordinary meaning. (*Ibid.*) If the language of the constitutional provision is clear and unambiguous, there is no need for judicial construction or for resort to secondary indicia of the enacting body's intent. (*Lungren v. Deukmejian* (1998) 45 Cal. 3d 727, 735.) Indeed, these principles are grounded in the language of the California Constitution itself:

> Article I, section 26 of the California Constitution states: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." Under this provision, "all branches of government are required to comply

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[45] Emphasis added.

[46] Emphasis added.

> with constitutional directives ... or prohibitions ... As we observed more than a century ago, "[e]very constitutional provision is self-executing to this extent, that everything done in violation of it is void."[47]

Accordingly, had the People intended for appellate review in workers' compensation matters to be limited, Article XIV, Section 4, would have included words of limitation. It does not.

In *Stevens*, although acknowledging these rules of statutory interpretation, the Court of Appeal side-stepped the express language of Article XIV, Section 4, mandating appellate review:

> Since the establishment of the IMR process, an aggrieved worker who contests a Board decision affirming a medical necessity determination can, as he or she could before, challenge a Board decision by seeking a writ of review from the Court of Appeal ... **But as we mentioned above, although appellate courts are now statutorily precluded from making "a determination of medical necessity contrary to the determination of the IMR organization" ... they never had the authority to make such a determination in the first place ... Instead, the reforms limited appellate review only indirectly, to the extent they limited the *Board's* ability to review IMR determinations. Whereas previously the Court of Appeal could "determine whether the evidence, when viewed in light of the entire record, support[ed] the award of the [Board]" (*ibid.*), such substantial-evidence review is no longer available because the Board is precluded from making its own factual findings. This has a slight practical impact, however, because under the current system, the record for a worker's challenge in the Court of Appeal necessarily includes, as a result of the UR and IMR at least two physicians' conclusions that the requested treatment is unnecessary. Under the**

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47 *Katzberg v. Regents of Univ. of Cali.* (2002) 29 Cal. 4th 300, 306-307 (internal citations omitted).

old system, the conclusions of at least two physicians would have virtually always constituted substantial evidence to uphold an adverse medical-necessity determination. And nothing in the legislative reforms constrains a Court of Appeal's consideration of any other issue.[48]

The *Stevens* court's analysis falls short for one simple, but very important reason: the very essence of appellate review is that it reviews or corrects a lower court's decision. (*Leone v. Medical Board* (2000) 22 Cal. 4th 660, 666. ["[T]he ordinary and widely accepted meaning of the term 'appellate review' is simply the power of a reviewing court to correct error in a trial court proceeding."].) Stated more emphatically, for the words of Article XIV, Section 4, providing that "all decisions of any [workers' compensation] tribunal shall be subject to review by the appellate courts of this State" to be given any meaning, that review must include review of the substantive decision of the tribunal. Therefore, in the context of IMR, the medical necessity determination itself must be subject to meaningful appellate review.

In *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal. App. 4th 1177, the Court of Appeal considered the validity of Labor Code Section 3201.5 which authorizes the creation, through labor-management collective bargaining agreements, of alternative dispute resolution ("ADR") systems to resolve workers' compensation disputes in lieu of the WCAB. In rejecting a challenge to Section 3201.5's constitutionality on the grounds that it failed to

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48 *Stevens, supra,* at p. 1095-106 (internal citations omitted)(emphasis added).

incorporate adequate safeguards to prevent abuse of the ADR programs to the detriment of injured workers, the *Costa* court specifically emphasized that Section 3201.5 provides for review of arbitration decisions by the WCAB and the Court of Appeal. (*Id.* at pp. 1185-1186).[49]

Labor Code Section 4610.6, subdivision (i), further frustrates Article XIV, Section 4, by precluding the WCAB from reviewing IMR determinations of medical necessity in the first instance. As discussed in the above-quoted text from the *Stevens* opinion, the Court of Appeal's authority to review workers' compensation decisions is limited to determining whether those decisions are supported by substantial evidence. Such review requires findings of fact from a trial court, or, in the case of workers' compensation matters, the WCAB. The fact that the Legislature has sought to insulate IMR determinations from effective appellate review by eliminating the WCAB's ability to make factual findings should cause Labor Code Section 4610.6, subdivision (I), to be viewed even more skeptically, rather than being invoked as a basis for upholding it as the First District did in *Stevens*.

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49 (*See also Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal. App. 4th 640, 653 ["[In *Costa*] the court considered the constitutionality of provisions in a collective bargaining agreement that required employees to exhaust contractual grievance and arbitration procedures before exercising their constitutional right of review by the WCAB. **Because (Article XIV, Section 4) specifically authorized the use of arbitration to resolve workers' compensation claims and the arbitration decisions were subject to review by the WCAB and the Courts of Appeal, the court held that the provisions were lawful.**"].) (emphasis added).

SCIF argues that IMR determinations are subject to "meaningful judicial review" since the WCAB retains the authority to invalidate a determination based upon the various grounds for appeal set forth in Labor Code Section 4610.6, subdivision (h), including: (1) a misapplication of the applicable medical necessity standards, which would constitute an action without or in excess of the Administrative Director's powers[50]; and (2) a "plainly erroneous express or implied finding of fact" [51]. (*Answer to Petition for Writ of Review*, dated April 1, 2015 ["*Answer*"], at pp. 32-36.)

SCIF's position is superficially satisfying, but its weakness is quickly exposed when, as in this case, an IMR reviewer goes beyond their proper role of applying the medical necessity standards to the information contained in the treating physician's reports and, as argued by Petitioner, bases their determination upon an "interjected' opinion concerning the credibility of the treating physician's reporting. (*Petition for Review* dated February 11, 2015, pp. 18-19.) In such an instance, the IMR determination would not constitute a misapplication of the medical necessity standards. Similarly, the IMR determination would not be based upon a "plainly erroneous express or implied finding of fact". Rather, the IMR determination would involve *an arbitrary and capricious conclusion* on the part of the IMR reviewer that the treating physician's findings should be invalidated and disregarded. The WCAB would be powerless to remedy this clear injustice through its limited review authority pursuant to Labor Code Section 4610.6, subdivision (h).

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[50] Labor Code § 4610.6 (h)(1).

[51] Labor Code § 4610.6 (h)(5).

The power to correct an erroneous decision is also inherent in Article XIV, Section 4, which confers authority upon the appellate courts to review quasi-judicial decisions involving injured workers. California voters adopted the predecessor to Article XIV, section 4, in 1911, and added the language preserving the authority of the appellate courts in 1918.

In 1917, the Legislature enacted section 67 of the Workmen's Compensation Act of 1917, which clarified that the Supreme Court and the Courts of Appeal had "jurisdiction to review, reverse, *correct,* or annul any order or decision of" the Industrial Accident Commission. (Stats. 1917, p. 875 [italics added]; *see Loustalot v. Super. Ct.* (1947) 30 Ca1. 2d 905, 911.)

The voters' approval of the 1918 amendment must be read in the context of the Legislature's action the prior year. In preserving the authority of the courts to review the decisions of the Industrial Accident Commission, the voters understood that such review included the power to "reverse, or *correct,*" language that continues in effect today. *(See* Labor Code § 5955 [italics added].)[52]

Moreover, nothing in the legislative history of Article XIV, Section 4, suggests that the voters intended to limit the traditional role of the courts in reviewing the quasi-judicial decisions of administrative agencies. In fact, the Legislature placed Article XIV, Section 4, on the ballot for a very different purpose: to remove any doubt about its authority to provide for benefits to injured workers, irrespective of who was at fault

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52 Section 67 of the Workmen's Compensation Act of 1917 was incorporated, without change, into the Labor Code as section 5955 in 1937. *(See Loustalot, supra,* at 911.)

for the injury. (*See* Ballot Pamp., Special Elec. [Oct. 10, 1911] argument in favor of Sen. Const. Amend. 32 ["sole object of the proposed amendment" is to clarify that a "compulsory scheme for compensation" for workplace injuries imposed on all employers is not "a taking of property 'without due process of law.'"]; *see also Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Ca1. 3d 719, 733-734, fn. 11 [Article XIV, Section 4, "was added to the Constitution and then amended for the sole purpose of removing all doubts as to the constitutionality of the then existing workmen's compensation statutes."].) In enacting Article XIV, Section 4, the voters confirmed the Legislature's ability to enact workers' compensation statutes, but they did not strip the judiciary of its role in ensuring the just resolution of disputes.

The injustice of Labor Section 4610.6, subdivision (i), appears even more clearly when the IMR process established by SB 863 is compared with the managed care IMR process upon which it was obviously modeled. Health and Safety Code Section 1374.30, which became effective on January 1, 2001 (twelve years before Labor Code Sections 4610.5 and 4610.6), requires health care service plan providers to establish an IMR process for plan participants to request external review of decisions to deny, modify or delay authorization of a medical treatment service on the grounds of medical necessity. (*Health and Safety Code Section 1374.30(b)*). The scope of IMR in the managed care model is limited to the issue of medical necessity only, as in its workers' compensation counterpart. (*Health and Safety Code Section 1374.31(b)*). Moreover, the IMR process set forth in Labor Code Section 4610.6 mirrors the managed care IMR process set forth in Health and Safety Code Section 1374.33, including providing for anonymity of IMR reviewers.

(*Health and Safety Code Section 1374.33(e)*). However, the crucial distinction between the two IMR processes is that the managed care version is *not* the exclusive remedy available to challenge medical necessity determinations. (*Health and Safety Code Section 1374.31(h)*["The independent medical review process authorized by this article is in addition to any other procedures or remedies that may be available."].) Healthcare service plan participants, unlike injured workers, have access to California courts to challenge adverse medical necessity determinations. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal. App. 4th 471, 501-502.)

From whatever angle the Court chooses the approach the issue, there is simply no basis whatsoever for upholding the constitutionality of Labor Code Section 4610.6, subdivision (i), in the face of the clear and unequivocal language of Article XIV, Section 4.

III.

DELEGATION OF MEDICAL NECESSITY DETERMINATIONS TO AN IMR ORGANIZATION VIOLATES THE SEPARATION OF POWERS DOCTRINE

The Separation of Powers doctrine derives from Article III, Section 3, of the California Constitution which provides: "The powers of state government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Article IV, Section 1, in turn, declares: "The judicial power of this State is vested in the Supreme Court, courts of appeal, and superior courts, all of which are courts of record." All judicial powers conferred by the workers' compensation laws are vested in the WCAB. (*See Labor Code §§111(a); 5300; 5302*). In adjudicating disputes regarding workers' compensation claims, the

WCAB unquestionably exercises judicial powers. *(Fremont Indemnity v. Workers' Comp. Appeals Bd.* (1984) 153 Cal. App. 3d 965.) CAAA submits that deferring medical necessity determinations to IMR physician-reviewers, rather than having those determinations made by Respondent WCAB, constitutes an impermissible delegation of judicial powers which violates the Separation of Powers doctrine.

This is not the first time that the Separation of Powers doctrine has been implicated in an issue involving the exercise of judicial powers in workers' compensation matters. In *Hustedt, supra,* the Supreme Court addressed the question of whether a Labor Code provision, Section 4907, which granted to the WCAB the authority to suspend or bar attorneys from appearing before it constituted an impermissible delegation of judicial power reserved to the courts by Article III, Section 3, and thus violated the Separation of Powers doctrine. (30 Cal. 3d at pp. 335-336.) The *Hustedt* court observed that the Legislature may impose "reasonable restrictions" upon the functions of the courts provided that those restrictions "do not defeat or materially impair the exercise of those functions." (*Id.* at p. 338.) Having concluded that the Legislature had, in fact, intruded too far into the traditional role of the courts in disciplining attorneys, the Supreme Court stated what remained to be determined was whether some other provision of the Constitution authorized enactment of the statute. (*Id.* at pp. 341-342.)

In defense of the statute, the WCAB claimed (as does SCIF and its amici with respect to the IMR statutes) that the Legislature's plenary power pursuant to Article XIV, Section 4, to make laws for the establishment and administration of the workers' compensation system authorized the enactment of Section 4907. To evaluate this claim, the

Hustedt court observed: (1) that the *pro tanto* repeal of conflicting constitutional provisions which arose with the adoption of Article XIV, Section 4, extends only so far as necessary to remove any barriers to the achievement of its objectives; and (2) that the ultimate question was whether having the powers conferred about it by Section 4907 was absolutely necessary for the WCAB to effectively exercise its proper functions. (*Id.* at pp. 342-343). The *Hustedt* court concluded that these powers were not required for the WCAB to carry out its functions and, therefore, that Article XIV, Section 4, did not authorize the enactment of Section 4907. (*Id.* at pp. 345-346.)

The same can be said of Labor Code Section 4610.6. The Legislature chose to confer the authority to make medical necessity determinations, a function which the WCAB would otherwise perform in exercise of its judicial powers over workers' compensation claims, upon IMR reviewers and to completely eliminate the role of the judicial branch in conducting a meaningful review of the IMR decisions. Such an intrusion, on its face, would violate the Separation of Powers doctrine, unless Article XIV, Section 4, could be read to have effected a *pro tanto* repeal of Article III, Section 3. However, under *Hustedt,* a *pro tanto* repeal occurs only when it is necessary to realize the objectives of the constitutional provision. Eliminating the possibility of meaningful judicial review, of course, is not necessary to achieve the goal of "just resolution of disputes" arising under the Workers' Compensation law. In fact, it has just the opposite effect; it obstructs the ability of injured workers to receive adequate treatment for their injuries.

It is true that one of the goals of Article XIV, Section 4, is to "accomplish substantial justice in all cases expeditiously." But here, the voters made clear that they wanted to preserve the traditional role of the courts, thereby furthering the goal of providing substantial justice, rather than the goal of resolving disputes expeditiously. In fact, judicial review arguably frustrates the goal of administrative efficiency because it adds another step to the process of resolving cases. To the extent that there is tension in the text of Article XIV, Section 4, between "accomplishing substantial justice" and resolving disputes "expeditiously", the latter must yield to the former in resolving this controversy, given that the goal of appellate review is to ensure the just resolution of disputes.

SCIF argues that there is no Separation of Powers issue to be considered because the Legislature could, theoretically, pursuant to its plenary power under Article XIV, Section 4, assign all of the WCAB's judicial functions to the Administrative Director or the courts. (*Answer* at pp. 37-38). While this would be possible, to affect such a transfer of authority, the Legislature would need to abrogate or amend Labor Code Section 111 which provides: "The Workers' Compensation Appeals Board, consisting of seven members, shall exercise all judicial powers vested in it under this code." No changes were made to Section 111 as part of SB 863. Accordingly, by the Legislature's own hand, the WCAB continues to retain its judicial powers.

The Court of Appeal in *Stevens* summarily concluded that Article XIV, Section 4, without question "trumps" the Separation of Powers clause (241 Cal. App. 4th 1074, 1092), without engaging in any analysis whatsoever, as required by *Hustedt*, to determine whether the *pro tanto* repeal of Article III, Section 3, extended to providing authority for the

Legislature to enact Labor Code 4610.6. In the absence of such an analysis, it cannot be concluded that the Legislature's plenary power under Article XIV, Section 4, extends to sanctioning the enactment of Labor Code Section 4610.6.

IV.

THE IMR PROCESS DEPRIVES INJURED WORKERS OF MINIMUM PROCEDURAL DUE PROCESS IN VIOLATION OF THE STATE AND FEDERAL CONSTITUTIONS

Article I, Section 7, of our Constitution provides: "A person may not be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment to our federal Constitution provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." As discussed *ante*, due process *does* apply in workers' compensation proceedings. *(See Ogden Entertainment Services, supra.)* Indeed, due process is essential to ensuring expediency in workers' compensation proceedings: "Although the California Constitution states that a goal of workers' compensation proceedings is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character . . .." *(Cal. Const., art. XIV, § 4)*, the right to due process is paramount to the goal of conducting workers' compensation proceedings expeditiously." (*Beverly Hills MultiSpecialty Group v. Workers' Comp. Appeals Bd.* (1994) 26 Cal. App. 4th 789, 806.)

A. Labor Code Section 4610.6 ViolatesState Due Process Guarantees

Labor Code section 4610.6 violates the state Due Process Clause because the grounds for review of an IMR's decision are so limited that the statute deprives workers and employers of their right to a fair hearing. Subsection (h) of section 4610.6 permits review of an IMR's decision only for: fraud, bias, conflict of interest, whether the administrative director acted in excess of his or her powers, or erroneous finding of fact on a matter that is not subject to expert opinion. Given the anonymity of the IMR reviewers *(see Labor Code Section 4610.6, subdivision (f))*, the grounds for appeal largely pertain to matters about which the parties have no information. An employee or employer would have no way of knowing whether a decision was procured by fraud, bias, or conflict of interest, for example, because they would have no way to determine whether the IMR had a financial interest in the outcome of the case, had received a payment to rule in a particular way, or was predisposed to rule against the injured worker as a result of racial bias. Furthermore, given that the determination of the IMR "shall be deemed to be the determination of the administrative director . . . ." *(id., Labor Code Section 4610.6, subdivision (g))*, the parties also lack the necessary information to be able to determine whether the administrative director acted in excess of his or her powers. As such, an injured worker's right to appeal an adverse IMR determination under these grounds is illusory.

The remaining ground available for appeal — erroneous finding of fact — also deprives parties of due process because it precludes parties from challenging determinations based on expert opinion. *(See Hess Collection, supra,* at p. 1602 ["It ought to be clear . . . that a legislative body

cannot compel a private party to submit to final, binding arbitration without any right of judicial review for errors of fact or law"].)

Similarly, Labor Code Section 4610 violates the Due Process Clause by not providing for cross-examination of IMR reviewers. The pivotal role played by cross-examination in ensuring fair hearings has been acknowledged time and again by the Courts of Appeal, such as in *Ogden Entertainment Services* the Court stated: "We address in this case therefore nothing less than one of the fundamental guarantees of a fair trial or, as in this case, a fair hearing, for there is no doubt that the right of cross-examination is guaranteed to the parties in workers' compensation proceedings." (*Ogden Entertainment Services, supra*, p. at 982.)

In *Stevens*, the Court of Appeal dismissed petitioner's assertion that the Due Process Clause required IMR reviewers to be subject to cross-examination based upon two erroneous premises. First, the *Stevens* court characterized IMR reviewers as "statutorily authorized decision makers" who were thus immune from cross-examination. (*Stevens, supra*, at pp. 1279-1280.) However, the Labor Code expressly provides that IMR reviewers are "consultants" (*Labor Code Section 139.5, subdivision (b)(1)*), and it is the determination of the Administrative Director based upon their opinion regarding medical necessity which becomes "binding on all parties." (*Labor Code Section 4610.6 (g)*). Secondly, the *Stevens* court distinguished *Jennings v. Jones* (1985) 165 Cal. App. 3d 1083, which held that welfare recipients were entitled to cross-examine caseworkers vested with the authority to order a termination of benefits at a subsequent evidentiary hearing, stating:

> Unlike a physician reviewer, however, these caseworkers were not reviewing a decision but were instead making the initial decision. Welfare recipients would lack a meaningful

> opportunity to challenge the basis of the caseworkers' decisions without having an opportunity to discover what that basis was. In contrast, injured workers requesting treatment under the workers' compensation system are given detailed explanations of the reasons for a denial or modification of their request, and they are given multiple opportunities to submit evidence and challenge those decisions.[53]

With all due respect to the *Stevens* court, the above assertion completely misses the point. Just as the welfare receipt in *Jennings*, an injured worker (or their employer) wishing to challenge an adverse IMR determination "cannot cross-examine a file." (*Jennings, supra*, at p. 1090.) However, unlike their counterparts in *Jennings*, neither employers nor employees are not entitled to an evidentiary hearing to review an adverse IMR determination.

Finally, Section 4610.6 violates the Due Process Clause because it limits review to matters of ordinary knowledge and excludes consideration of whether an IMR's decision was based on "substantial evidence." Depriving both employers and injured workers of substantial evidence review interferes with a party's right to a fair hearing, as required by the Due Process Clause. *(See Healy v. Onstott* (1987) 192 Cal. App. 3d 612, 615-616 [giving near conclusive weight to an arbitrator's decision "involuntarily deprive[d] an affected party of his constitutional right to trial."].) Thus, Section 4610.6 deprives applicants of the right to a meaningful review, whether by the WCAB or the courts, in violation of the Due Process Clause.

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53 *Stevens, supra*, at p. 1099.

SCIF argues that, given its plenary power pursuant to Article XIV, Section 4, the Legislature has "carte blanche" to adopt any legislation that it wishes without regard to an injured worker's right to procedural due process as guaranteed by the state and federal constitutions. Indeed, SCIF boldly argues that the Legislature's plenary power under Article XIV, Section 4 "must not be limited by article I, section 7." (*Answer* at pp. 41-42).

The Court of Appeal in *Stevens* was equally dismissive of the due process challenge raised by the petitioner in that case, stating: "[Article XIV] Section 4 supercedes the State Constitution's due process clause with respect to legislation passed under the Legislature's plenary powers over the workers' compensation system." (*Stevens, supra,* at p. 1275.) As with its treatment of the Separation of Powers challenge discussed *ante*, the Court of Appeal in *Stevens* failed to engage in any substantive analysis, as required by *Hustedt*, of whether the reach of the *pro tanto* repeal of Article III, Section 3, extended to providing authority for the Legislature to enact Labor Code 4610.6.

It is difficult to conceive of a reason why it would be necessary to eliminate due process protections in order to further the purposes of the workers' compensation laws. As discussed *ante*, the objective of the workers' compensation system is to "accomplish substantial justice in all cases . . . ." (*Cal. Const., art. XIV, § 4; see also Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal. App. 4th 1159, 1164 [same]; *Hustedt, supra,* at pp. 343-344 [objective of article XIV, section 4, is to obtain "the just resolution of disputes arising under such legislation"].)

In this case, repealing due process protections for both employees and employers is not necessary in order to obtain the just resolution of disputes. Eliminating these protections has just the opposite result; it prevents injured workers and employers from obtaining a fair hearing and it deprives the courts of the power to correct errors of fact and law. If an IMR applies the wrong legal standard for medical necessity or misstates facts relating to a matter that is subject to expert opinion, Labor Code section 4610.6 strips the parties of their right to review of those decisions. Indeed, a *pro tanto* repeal of the Due Process clause would make it more difficult to accomplish the goal of substantial justice.

B. **Labor Code Section 4610.6 Violates Federal Due Process Guarantees**

Turning to the question of whether the IMR statutes offend federal due process considerations, both the Court of Appeal in *Stevens* and Respondent SCIF assert that these statutes afford injured workers all the process that is required pursuant to *Mathews v. Eldridge* (1976) 424 U.S. 319. (*See Stevens, supra,* at pp. 1096-1099; *Answer* at pp. 43-48). Indeed, both the *Stevens* court and Respondent SCIF measure the adequacy of the procedural protections provided to injured workers in the IMR process in direct comparison to those at issue in *Mathews*. However, *Mathews* is clearly distinguishable. In *Mathews*, the Supreme Court concluded that a Social Security recipient need not be afforded a hearing *prior* to termination of benefits where they would be entitled to a multi-level appeals process from any adverse determination beginning with a post-termination evidentiary hearing. (*See Mathews, supra,* at p. 349

["[T]he prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.].) By contrast, injured workers are not entitled to any evidentiary hearing at all in the IMR process.

Moreover, the *Stevens* court ironically further supported its decision that the IMR process established by Labor Code Section 4610.5 and 4610.6 satisfies federal due process standards by comparing it to the managed care IMR process. (*See Stevens, supra*, at pp. 1098-1099.) However, as discussed *ante*, the crucial distinction between two processes is that the managed care participants retain the right to judicial review of adverse medical necessity determinations, while injured workers do not.

On the other hand, the *Stevens* court did not address *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal. App. 4th 119. In *Bayscene*, the Court of Appeal held that a municipal ordinance which required compulsory arbitration of mobilehome rent disputes and limited appellate review of arbitration decisions to fraud, corruption or other misconduct by party or the arbitrator violated both the state and federal Due Process Clauses. The grounds for appeal found to be lacking in *Bayscene* are undeniably similar to those set forth in Labor Code Section 4610.6, subdivision (h).

SCIF argues that *Bayscene* has no applicability to this case, citing the Court of Appeal's reasoning in *Facundo-Guerrero*:

> In *Bayscene*, Division One of the Fourth District Court of Appeal struck down on due process grounds a city ordinance which required binding arbitration for mobilehome park rent disputes. **The court stressed that the primary failing of the ordinance was that it did not provide for judicial review of the evidence**; instead, the issues on appeal were "essentially limited to fraud, corruption, or other misconduct of a party or the arbitrator."[54]

However, as the *Stevens* court recognized, the IMR process suffers from this very infirmity, the unavailability of substantive judicial review of the evidence supporting an IMR determination: "Whereas previously the Court of Appeal could 'determine whether the evidence, when viewed in light of the entire record, support[ed] the award of the [Board]' (*ibid.*), such substantial-evidence review is no longer available because the Board is precluded from making its own factual findings." (*Stevens, supra*, at p. 1095.)

Accordingly, CAAA submits that the IMR statutes are utterly inconsistent with minimum due process as guaranteed by the state and federal Constitutions.

V.

LABOR CODE SECTION 4610.6 IMPROPERLY DELEGATES QUASI-LEGISLATIVE AUTHORITY TO IMR REVIEWERS

In *The Hess Collection*, the Court of Appeal laid out the distinction between quasi-judicial and quasi-legislative action:

> An administrative action is quasi-judicial, or quasi-adjudicative, when it consists of applying existing rules to existing facts. *(20th Century Ins. Co. v Garamendi* (1994) 8 Cal.4th 216, 275, 32 Cal. Rptr. 807, 878 P.2d 566.) The creation of new rules for future application, such as is done

54 163 Cal. App. 4th at p. 653 (emphasis added).

> here, is quasi-legislative in character. *(Ibid)*. This is even though the action is, as here, taken in an individual case. (Id at p. 277, 32 Cal. Rptr 2d 807, 878 P.2d 566.) ¶ The distinction has considerable significance because a variety of matters, such as the decision-maker, the right to and nature of hearing, the standards applied, and the scope of judicial review, vary between quasi-judicial and quasi-legislative acts.

(140 Cal. App. 4th at p. 1598).

Although in subdivision (h), Labor Code Section 4610.6 provides that an IMR determination may only be overturned upon a showing of "clear and convincing evidence" that one or more of the enumerated grounds for appeal exists, Section 4610.6 does not define any standard according to which IMR reviewers must determine medical necessity in the first place. Is that standard "clear and convincing evidence" as well? Is it a mere preponderance of evidence? Section 4610.6 provides no answer. Each IMR reviewer is left to decide his or her own standard for decision. The failure on the part of the Legislature to establish a standard for decision is particularly troubling since IMR reviewers (physicians, not lawyers or judges) are required to base their medical necessity determinations on the MTUS guidelines which presumed correct but are rebuttable. How is an IMR reviewer to decide whether an MTUS guideline has been rebutted in a particular case?

The gaps in Labor Code Section 4610.6 go even further, however. Subdivision (b) states that an IMR reviewer shall base his or her determination upon a review of "all pertinent medical records", as well

as "relevant information related to the criteria set forth in subdivision (c)", but nowhere does Section 4610.6 define what either of these phrases mean. Once again, each IMR reviewer is left to his or her own devices to decide what records are "pertinent" and which information is "relevant".

These flaws in Section 4610.6 invite arbitrary and capricious decision-making by IMR reviewers as occurred in this case where the reviewer "looked behind" the treating physician's findings in support of the requested treatment as a basis for denying it.

In *City of Carson, supra,* the Supreme Court held that an unconstitutional delegation of authority occurs when a legislative body: "(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy." (*Id.* at p. 190.) Moreover, in *Kugler v. Yocum* (1968) 69 Cal. 2d 371, cited in *City of Carson*, the Supreme Court observed that where legislative authority is delegated, the imposition of appropriate safeguards is as important (if not more important) than the establishment of standards. (*Id.* at pp. 380-381.)

By eliminating judicial review of IMR medical necessity determinations, the Legislature removed the only effective safeguard against arbitrary and capricious decision-making by IMR reviewers which, again, is invited by the glaring omissions and defects in Labor Code Section 4610.6. This defect alone renders Section 4610.6 unconstitutional. *(Cf. Costa, supra; Facundo-Guerrero, supra*).

VI.

THE WCAB'S INTERPRETATION OF LABOR CODE SECTIONS 4604, 4610.5 AND 4610.6 IN *DUBON II* VIOLATES CARDINAL RULES OF STATUTORY CONSTRUCTION

A. The WCAB's Interpretation of Labor Code Sections 4610.5 and 4610.6 Is Contrary to Their "Plain Meaning"

When called upon to construe legislative enactments, a reviewing court's task is to determine and effectuate legislative intent. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal. 3d 711, 724.) The Court's inquiry must begin with the exact words of the statute as they are generally the most reliable indicator of that intent. (*People v. Trevino* (2001) 26 Cal. 4th 237, 241.) The words of a statute are to be given their "usual and ordinary" meaning. (*Moyer v. Workmen's Comp. App. Bd.* (1973) 10 Cal. 3d 222, 230.) When the statutory language is clear and unambiguous, their "plain meaning" controls, and judicial construction is unnecessary. (*Atlantic Ritchfield Co. v. Workers' Comp. Appeals Bd.*, (1982) 31 Cal. 3d 715, 726.)

As Commissioner Sweeney more than adequately demonstrated in her dissent, the WCAB majority's interpretation of the Labor Code provisions at issue in this case is contrary to their clear and unambiguous statutory language. Therefore, the majority's resort to secondary construction aids is completely unjustified and unwarranted.

Section 4160.5, subdivision (a), provides that IMR applies to:

> (1) Any dispute over **a utilization review decision** regarding treatment for an injury occurring on or after January 1, 2013.

> (2) Any dispute over **a utilization review decision** if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury.[89]

Section 4610.5, subdivision (c)(3), defines a "utilization review decision" as:

> **[A] decision pursuant to Section 4610 to modify, delay, or deny, based in whole or in part on medical necessity to cure or relieve, a treatment recommendation or recommendations by a physician** prior to, retrospectively, or concurrent with the provision of medical treatment services pursuant to Section 4600 or subdivision (c) of Section 5402.[90]

Section 4610.5, subdivision (c)(2), defines "medical necessity" as:

> **"Medically necessary" and "medical necessity" mean medical treatment that is reasonably required to cure or relieve the injured employee of the effects of his or her injury** and based on the following standards, which shall be applied in the order listed, allowing reliance on a lower ranked standard only if every higher ranked standard is inapplicable to the employee's medical condition:
>
> (A) The guidelines adopted by the administrative director pursuant to Section 5307.27 ...91

Section 4610.6, subdivision (a), defines the scope of IMR review as follows:

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89 Emphasis added.

90 Emphasis added.

> Upon receipt of a case pursuant to Section 4610.5, an independent medical review organization shall conduct the review in accordance with this article and any regulations or orders of the administrative director. **The organization's review shall be limited to an examination of the medical necessity of the disputed medical treatment.**[92]

When read together, these statutes make clear that the IMR process applies only to utilization review *decisions* which, in turn, pertain only to the issue of *medical necessity* as defined only by a *specific hierarchy of medical treatment guidelines or other expert medical evidence.*

Contrary to the WCAB majority's opinion in *Dubon II*, none of these statutes state or even suggest: (i) that the IMR process may review any aspect of the UR process *other than* the ultimate UR decision; (ii) that the IMR process may review any issue *other than* medical necessity; or (iii) that in determining medical necessity the IMR process may resort to any standards *other than* the specified hierarchy of medical evidence. Had the Legislature intended a more expansive role for the IMR process than the express language of Section 4610.5 clearly states, it is presumed to have known how to express this intent directly and expressly. In the absence of such clearly expressed intent, this Court may not (as the WCAB majority) infer it. *(See Schifando v. City of Los Angeles*, (2003) 31 Cal. 4th 1074, 1093-1094.)

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92 Emphasis added.

B. <u>The WCAB's Interpretation of Labor Code Sections 4610.5 and 4610.6 Impermissibly Distorts Their Plain Meaning To Accomplish A Purpose Which the Legislature Did Not Intend</u>

Where, as here, the statutory language is clear, the Court should not impose its own construction which adds to or alters that language to accomplish a purpose which the Legislature did not intend. *(California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 698.)

To "work around" the express language of Labor Code Sections 4610.5 and 4610.6, the WCAB majority in *Dubon II invented* its own definition of "medical necessity" which encompasses both review of the *procedural validity* of the UR process as well as of the *substantive validity* of the resulting UR decision: "**With the exception of timeliness, all other requirements go to the validity of the medical decision or decision-making process** ... With the exception of timeliness, all defects in the UR process can be remedied when appealed to IMR."[93] Given that Sections 4610.5 and 4610.6 expressly limit the scope of the IMR process to a review of the UR decision regarding medical necessity, the WCAB majority's distortion of the plain meaning of that statutes is totally impermissible. As has been emphasized *ante*, the WCAB majority made no attempt whatsoever to explain its "change of heart" in *Dubon II* or, more specifically, to explain why it sought to redefine the concept of "medical necessity". Thus, this Court can only infer what the WCAB majority's motivations were.

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[93] 79 Cal. Comp. Cas. at p. 1309 (emphasis added).

If it is allowed to stand, the *Dubon II* decision will to force many thousands of disputes concerning the procedural validity of the UR process into the IMR process. In effect, the WCAB majority's decision in *Dubon II* amounts to a wholesale abdication of authority by the WCAB. However, nothing in SB 863 even remotely suggests that the Legislature intended such a result.

C. The WCAB's Interpretation of the Relevant Statutes Produces Absurd Results

In interpreting a statute, courts are obligated to "adopt a common sense construction over one leading to mischief or absurdity." (*In re Samano* (1995) 31 Cal. App. 4th 984, 989.) In her dissenting opinion in *Dubon II*, Commissioner Sweeney wrote:

> [U]nder the majority decision, a treatment determination that is based on an evaluation by a nurse or other medical professional other than a licensed physician is still treated as a "utilization review decision" even though it does not meet the definition in section 4610.5(c)(3). In fact, even a treatment determination that is based on the medical records of the wrong employee, the wrong body part or no medical records at all, and even one that does not comply with section 4610 in any way except by being timely, is still treated as a "utilization review decision" by the majority. **In short, the majority allows any treatment determination to proceed to the second step of the process so long as it is not untimely, which effectively makes the section 4610 utilization review process optional.**[94]

It is important to recall that in *Sandhagen* SCIF, in fact, unsuccessfully argued that the UR process should be optional:

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94 79 Cal. Comp. Cas. at pp. 1320-1321 (emphasis added).

> **State Fund claims that section 4610 simply requires employers to "establish" a utilization review process, but does not require employers to actually *use* the process. We find this argument unpersuasive.** Having broadly defined utilization review, and requiring every employer to establish such a process at considerable expense and with numerous statutory safeguards (discussed in further detail below), **it is unlikely that the Legislature intended to allow employers to circumvent the process whenever an employer felt it expedient. To the contrary, the statutory language indicates the Legislature intended for employers to use the utilization review process when reviewing and resolving *any and all* requests for medical treatment.**[95]

When selecting between competing interpretations of a statute, a court should consider whether those interpretations promote or frustrate the statute's purpose. (*Frazier Nuts, Inc. v. American Ag Credit* (2006) 141 Cal. App. 4th 1263, 1274.) Similarly, it is presumed that the Legislature is aware of existing judicial interpretations of previously-enacted statutes when it enacts new legislation. (*Nickelsberg v. Workers' Comp. Appeals Bd.* (1981) 54 Cal. 3d 288, 298.) Therefore, it would be irrational to assume that in establishing the current IMR system the Legislature intended the enabling statutes to be interpreted in away which would render the entire UR process meaningless and "optional"contrary to the Supreme Court's express findings in *Sandhagen*.

Similarly, by ignoring the substantiality test, the WCAB majority opinions allows a UR physician to consider evidence which is incomplete (lack of relevant medical reports). The appellate courts have repeatedly

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95 44 Cal. 4th at p. 236 (emphasis added).

held that expert medical opinion does not always meet the required standard of being "substantial evidence" upon which the WCAB may properly base a decision. In particular, the WCAB may not rely on medical opinions which are known to be erroneous, no longer germane, or are based on surmise, speculation, conjecture, or guess, inadequate medical history or examinations." (*See Place vs. WCAB* (1990) 3 Cal. 3d 372, 378.) By ignoring the substantial evidence test, the requirement of adequate medical records, renders the UR opinion insubstantial, a violation of the substantive rule required by Labor Section 4610. As pointed out by Commissioner Sweeney a UR opinion could pass muster if the incorrect medical records are sent to the UR physician. This of course leads to an absurd result, an irrational medical decision that may ultimately lead to a denial of medical treatment by IMR.

D. *Dubon II* Would Require Physicians To Make Legal Determinations Which Are Presumptively Correct and Not Subject to Meaningful Appeal

It is hardly debatable that *all disputes* related to the procedural requirements of the UR process require legal, not medical, determinations. Nevertheless, under the guise of "medical necessity", the WCAB majority would have all procedural issues related to the UR process other than the timeliness of the UR decision will be submitted for determination by IMR reviewers (physicians), whose determinations will be deemed the presumptively correct determinations of the Administrative Director. These determinations, in turn, are not subject to appeal with respect to their underlying merits and, even if an appeal were successful, the procedural disputes would be submitted for a second IMR review. *As such, these disputes which are clearly legal (and not medical) in nature would never be reviewed by anyone with legal knowledge*

or training. Is it even conceivable that the Legislature intended such an absurd result? Logic and common sense dictate otherwise.

E. <u>The WCAB's Interpretation of the Relevant Statutes Creates an Unworkable IMR System</u>

Courts should avoid interpreting statutes in way which would lead to impractical or unworkable results. *(Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal. 4th 175, 194.) Simply put, the WCAB's majority's statutory interpretation which is totally unworkable. Reiterating the point made immediately *supra*, the WCAB would have all procedural issues related to the UR process other than the timeliness of the UR decision submitted for determination by IMR reviewers (physicians). Assuming that this were the case, how could IMR reviewers determine whether the UR process in any given case had been conducted in compliance with the applicable procedural requirements given that Labor Code § 4610.6, subdivision (c), requires them to make "medical necessity" determinations based upon "the standards of medical necessity" set forth above? Similarly, how could IMR reviewers express their findings concerning compliance with Section 4610's procedural requirements since Labor Code Section 4610.6, subdivision (e), requires them to set forth their analysis and findings in relation to those same "standards of medical necessity"? The obvious and inescapable fact is, simply, that they could not.

F. <u>The WCAB's Interpretation of the Relevant Statutes Fails to Properly Harmonize Them</u>

Whenever reasonably possible, a court must seek to harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions. This same rule applies even

though one statute deals generally with a subject while the other relates specifically to particular aspects of the subject. *(Hough v. McCarthy* (1960) 54 Cal. 2d 273, 279.) The WCAB majority failed to adhere to these rules in its construction of Labor Code Sections 4604, 4610.5 and 4610.6.

As has been emphasized repeatedly herein, Sections 4610.5 and 4610.6 solely address and pertain to the specific issue of "medical necessity". On the other hand, Labor Code Section 4604 is a "catch-all" provision reserving WCAB jurisdiction over: "Controversies between employer and employee arising under this chapter ... except as otherwise provided by Section 4610.5." If, as the WCAB majority believes, the Legislature intended that the WCAB would only have the authority to determine medical treatment disputes when there is an untimely UR decision, why would SB 863 have included a general reservation of WCAB jurisdiction? Had the Legislature intended such specific "carve out" of jurisdiction consistent with the WCAB's majority's opinion, it could and would have phrased Section 4604 in such a way that its intent was manifest. The WCAB majority's interpretation renders Section 4604 almost superfluous given its breadth as phrased by the Legislature but yet as constrained it is by the *Dubon II* decision.

VII.

ADMINISTRATIVE OR JUDICIALLY IMPOSED MONETARY PENALTIES ARE NOT AN ADEQUATE REMEDY FOR VIOLATIONS OF THE UR PROCEDURAL REQUIREMENTS

The WCAB majority argues in *Dubon II* that a UR decision is valid as long as it is timely and that, in spite of any procedural defects, the decision may only be reviewed through the IMR process. However,

Commissioner Sweeney more than adequately demonstrated in her dissenting opinion that compliance with all of the statutory and regulatory UR process requirements is mandatory and that a UR decision which suffers any material defect (not just untimeliness) is not, in fact, a valid decision at all (as the WCAB unanimously held in *Dubon I*).

Nevertheless, the WCAB majority in *Dubon II* does not even attempt to explain its abandonment of this previously and fervently held belief that judicial review of the entire UR process is necessary to ensure the integrity of UR decisions. Instead, the WCAB simply argues that the only available (and appropriate) remedies to address UR process violations other than untimeliness are penalties imposed by the Administrative Director pursuant to Labor Code Section 4610, subdivision (i), and/or "unreasonable delay" penalties imposed by the WCAB pursuant to Labor Code § 5814. As Commissioner Sweeney, on the other hand, argued convincingly these remedies are manifestly inadequate since the former are not intended to address noncompliance with the UR process in any particular and the latter offer limited comfort to an injured worker who is denied necessary medical treatment (and will continue to be for at least 12 months).

As has been discussed *ante,* in its initial *en banc* decision in *Sandhagen*, the WCAB rejected the argument then advanced by SCIF that monetary penalties pursuant to the very same Labor Code sections were an appropriate remedy if an employer or insurer fails to complete the UR process within the time frames specified in Section 4610, subdivision (g). Accordingly, this Court should follow suit and similarly reject that same argument now being made by the WCAB in Dubon *II.*

CONCLUSION

For the foregoing reasons, CAAA respectfully submits that this Court should declare Labor Code Sections 4610.5 and 4610.6 unconstitutional, or, in the alternative, that this Court should vacate the WCAB's decision in *Dubon II.*

Dated: December 24, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, Rule 8.204)

I, Charles R. Rondeau, certify that the foregoing brief complies with the paper type, format requirements and the length limitation as set forth in Rules 8.204, subdivisions (b) and (c), of the California Rules of Court ("CRC"). The brief is printed on white, recycled paper of at least 20 pound weight. The text of the brief is proportionately spaced, has a conventional typeface of 13 points or more and, according to WordPerfect X7, the word-processing software used to compose the document, exclusive of the Table of Contents, the Table of Authorities, and this Certificate of Compliance, contains 13,377 words. This number is less than the 14,000 word limit set forth in CRC Rule 8.204, subdivision (c).

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