Civil C078440

In The

Court of Appeal

of the

State of California

Third Appellate District

DANIEL RAMIREZ,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD;
and
CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES,
by and through its adjusting agent,
STATE COMPENSATION INSURANCE FUND,
Respondents.

Civil C078440; WCAB Case No. ADJ6821103
Hon. Gregory Cleveland, Sacramento Office, WCAB

Answer to Petition for Writ of Review

STATE COMPENSATION INSURANCE FUND
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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C078440
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* William L. Anderson 118844 2275 Gateway Oaks Drive, Suite 200 Sacramento, CA 95833 TELEPHONE NO.: (916) 924-5007 FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* wlanderson@scif.com ATTORNEY FOR *(Name):* Cal. Dept. of Health Care Services	Superior Court Case Number: ADJ6821103 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: DANIEL RAMIEREZ RESPONDENT/REAL PARTY IN INTEREST: DEPT OF HEALTH CARE SERVICES	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): California Department of Health Care Services

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: April 1, 2015

William L. Anderson
(TYPE OR PRINT NAME)

▶ William L Anderson
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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Hon. Gregory Cleveland,
Sacramento Office, WCAB

Answer to Petition for Writ of Review

To the Honorable Presiding and Associate Justices of the California Court of Appeal, Third Appellate District, from Respondent, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, by and through its adjusting agent, STATE COMPENSATION INSURANCE FUND ("STATE FUND"):

INTRODUCTION

Over the last twelve years, the Legislature has enacted three workers' compensation bills intended to contain the rapidly rising cost of medical care provided to injured workers: Senate Bill 228, [1] Senate Bill 899 [2] and Senate Bill 863 [3] The Legislature's efforts have culminated in Independent Medical Review.

Division of Workers' Compensation (DWC) and Workers' Compensation Appeals Board (Board)

This matter involves both the Division of Workers' Compensation (DWC) and the Workers' Compensation Appeals Board (Board). Petitioner has failed to name DWC as a party in his petition. Both entities have a role in implementing the workers' compensation system, which the Legislature created pursuant the California Constitution. [4]

Labor Code section 50. **Department of Industrial Relations**

> There is in the Labor and Workforce Development Agency the Department of Industrial Relations.

Labor Code section 56. **Departmental divisions**

> The work of the department shall be divided into at least five divisions known as the Division of Workers' Compensation, the Division of Occupational Safety and Health, the Division of Labor Standards Enforcement, the Division of Apprenticeship Standards, and the State Compensation Insurance Fund.

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[1] Senate Bill 228 (Stats. 2003, ch. 639 § 27)

[2] Senate Bill 899 (Stats. 2004, ch. 34 § 25)

[3] Senate Bill 863 (Stats. 2012, ch. 363 § 41)

[4] California Constitution, Article XIV, section 4

Labor Code section 60. **Administration and enforcement of code**

> Except as otherwise provided, the provisions of Divisions 4 and 4.5 of this code **shall be** administered and **enforced by** the **D**ivision of **W**orkers' **C**ompensation. (Emphasis added.)

Labor Code section 111. **Powers of appeals Board and administrative director**

> The **Workers' Compensation Appeals Board**, consisting of seven members, **shall exercise all judicial powers vested in it under this code**. In all other respects, the Division of Workers' Compensation is under the control of the administrative director and, except as to those duties, powers, jurisdiction, responsibilities, and purposes as are specifically vested in the appeals Board, the administrative director shall exercise the powers of the head of a department within the meaning of Article 1 (commencing with Section 11150) of Chapter 2 of Part 1 of Division 3 of Title 2 of the Government Code with respect to the Division of Workers' Compensation which shall include supervision of, and responsibility for, personnel, and the coordination of the work of the division, except personnel of the appeals Board. (Emphasis added.)

Labor Code section 133. **Division of Workers' Compensation—Power and jurisdiction**

> The **Division of Workers' Compensation**, including the administrative director and the appeals Board, **shall have power and jurisdiction to do all things necessary or convenient** in the exercise of any power or jurisdiction conferred upon it under this code. (Emphasis added.)

California workers' compensation has five types of benefits, to wit:

1. temporary disability (TD)
2. permanent disability (PD)

3. "medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury" [5]
4. vocational rehabilitation (VR for injuries prior 1-1-2004) and supplemental job displacement benefit voucher (SJDB for injuries on and after 1-1-2004)
5. death

There is historical precedent for the Administrative Director (AD) of the Division of Workers' Compensation (DWC) to function in a quasi-judicial role in administering workers' compensation benefits. In 1965, the Legislature adopted Labor Code section 139.5 to "to provide for vocational rehabilitation programs in order to restore injured workers to suitable gainful employment for maximum self-support after their industrial injury." *Medrano v. Workers' Comp. Appeals Bd*. (2008) 73 Cal.Comp.Cases 1407, 1412; *Beverly Hilton Hotel, Hilton Hotels Corp. v. Workers' Comp. Appeals Bd*. (*Boganim*) (2009) 74 Cal.Comp.Cases 927, 930. [6] The adjudication of VR claims was performed by the Administrative Director (AD) of the Division of Workers' Compensation (DWC). Labor Code sections 4635 through 4647. The AD employed non-lawyers (typically former claims adjusters) in this quasi-judicial role. The forum was called the Rehabilitation Unit. An injured worker could appeal a decision of the

[5] California Constitution, Article XIV, section 4

[6] They have no precedential value, but Board panel decisions and denials of petitions for writ of review reported in the California Compensation Cases and in the California Workers' Compensation Reporter, along with occasional Board denials of petitions for reconsideration, also reported periodically in the latter publication, are properly citable authority, but only to the extent that they point out the contemporaneous interpretation and application of the workers' compensation laws by the Board. *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 446; *Smith v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 530, 537, fn. 2; *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010-3DCA) 181 Cal.App.4th 752, 769-770 fn. 6 (citing *Baur v. Workers' Comp. Appeals Bd.* (2009) 176 Cal.App.4th 1260, 1265, fn 3).

AD (Rehabilitation Unit) to a Workers' Compensation Judge (WCJ). After a VR appeal to a WCJ, an aggrieved party had the legal right to file a petition for reconsideration with the Board,[7] and thereafter, a party could file a petition for writ of review with a court of appeal. [8]

In 2003, "the Legislature changed the landscape for vocational rehabilitation." *Weiner v. Ralphs Co.* (2009) 75 Cal.Comp.Cases 736, 742 (Board en banc). The Legislature repealed both former Labor Code 139.5 and the article of the Labor Code entitled "Vocational Rehabilitation", which had contained Labor Code sections 4635 through 4647. As a replacement, the Legislature enacted a new Labor Code 139.5, and Labor Code sections 4658.5 and 4658.6, which created a more limited supplemental job displacement benefit (SJDB). This benefit is given to employee for injuries sustained on or after January 1, 2004. Issues concerning SJDB are adjudicated by the Board. [9]

Prior to SB 863, utilization review (UR) disputes were adjudicated before a WCJ. After SB 863, UR disputes are adjudicated before the AD. The AD employs doctors in this quasi-judicial role, and the process is known as independent medical review (IMR). [10] An injured worker can appeal a decision of the AD (IMR) to a Workers' Compensation Judge (WCJ). After an IMR appeal to a WCJ, an aggrieved party has the legal right to file a petition for reconsideration with the Board,[11] and thereafter, a party may file a petition for writ of review with a court of appeal. [12]

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[7] Labor Code section 5900

[8] Labor Code section 5950

[9] Sullivan on Comp, chapter 11.2, Vocational Rehabilitation–Repealed

[10] Labor Code section 139.5

[11] Labor Code section 5900

[12] Labor Code section 5950

The quasi-judicial functions of the AD in the Rehabilitation Unit are similar to the quasi-judicial function of the AD in independent medical review (IMR). The processes of appealing a VR determination to a WCJ, the Board and a court of appeal are similar to the processes of appealing an IMR determination to a WCJ, the Board, and a court of appeal. [Note, the standards (bases) for appealing a VR determination differ from the standards (bases) for appealing an IMR determination, but the processes of appealing to the WCJ, Board, and a court of appeal are similar.]

Request for Authorization (RFA) for Medical Treatment

Requests for medical treatment are initiated by a physician completing a "Request for Authorization," DWC Form RFA. The physician *must* attach to the RFA documentation substantiating the need for the requested treatment. 8 Cal. Code of Reg. § 9792.6.1, subdivision (t).

The time frames set forth in the UR statutes compel the conclusion the Legislature did not contemplate UR review of the complete medical file. For ordinary prospective UR, a decision to approve, modify, delay, or deny a request for authorization (RFA) must be made within five working days from receipt of information reasonably necessary to make a determination, but in no event more than 14 days from the date of the RFA. [13] In order for the process to be completed in a timely manner, most UR programs require the RFA to be sent directly to the UR provider without going through the claims administrator. [14] Again, it is the injured worker's physician's obligation to provide a complete RFA and to attach documentation

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[13] Labor Code section 4610, subdivision (g)(1). The applicable time frames are even shorter where the condition includes an imminent and serious threat to health.

[14] This procedure is specifically authorized by Cal. Code Regs., tit. 8 section 9792.6.1, subdivision (t)(3).

substantiating the need for the requested treatment. [15]

Medical Treatment Utilization Schedule (MTUS) and Utilization Review (UR)

Senate Bill 228 (Chapter 639, Stats. of 2003, effective January 1, 2004) adopted several provisions designated to control workers' compensation costs: Labor Code section 5307.27, requiring the Administrative Director to adopt a medical treatment utilization schedule (MTUS) on or before December 1, 2004; Labor Code section 4604.5, providing that the medical treatment utilization schedule pursuant to Labor Code section 5307.27 is presumptively correct on the issue of extent and scope of medical treatment, and that until such schedule is adopted the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (ACOEM Practice Guidelines), is presumptively correct on the issue of extent and scope of medical treatment; and Labor Code section 4610, requiring employers to establish and maintain a utilization review process. [16]

Labor Code section 4610 requires employers to establish and maintain a utilization review process, effective January 1, 2004, consistent with the utilization schedule developed by the Administrative Director pursuant to section 5307.27, and prior to the adoption of that schedule, consistent with the ACOEM Practice Guidelines.

From 2004 to 2007, the MTUS was ACOEM per statute. In 2007, via regulations promulgated by the AD, the MTUS was ACOEM and the Colorado acupuncture guidelines. In 2009, via regulations promulgated by the AD, the MTUS added post-surgical guidelines. Also in 2009, via regulations promulgated by the AD, the MTUS added chronic pain

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[15] Cal. Code Regs., tit. 8 section 9792.6.1, subdivision (t)(2).

[16] Initial Statement of Reasons of UR regulations (January 2005)

guidelines from ODG (Official Disability Guidelines: Treatment in Workers' Comp., by Work-Loss Institute).

Senate Bill 899 (Stats. 2004, ch. 34 § 25) affirmed UR with some minor changes to Labor Code section 4604.5. [17] Labor Code section 4604.5 provides that the recommended guidelines set forth in the medical treatment utilization schedule (MTUS) pursuant to Labor Code section 5307.27 are presumptively correct on the issue of extent and scope of medical treatment. Labor Code section 4604.5 also provides that the presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines is reasonably required to cure or relieve the injured worker from the effects of his or her injury. The presumption created is one affecting the burden of proof. The injured worker has the burden of proof. [18]

If a doctor's treatment request is not addressed by the MTUS, then the treatment request may be accepted or denied by UR pursuant to other EBM (evidence-based medical) treatment guidelines which are recognized by the national medical community and scientifically based. [19] Per the 2004

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[17] Initial Statement of Reasons of UR regulations (July 2006): href=http://www.dir.ca.gov/dwc/DWCPropRegs/MedicalTreatmentUtilizationSchedule/MTUS_regulations.htm

[18] *State Comp. Ins. Fund. v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 242: "The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34, § 9.) Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5)."

[19] Labor Code section 4604.5 and 8 Cal. Code of Reg. § 9792.20

CHSWC recommendations and the 2005 RAND report, such other EBM treatment guidelines include, but are not limited to, ACOEM, McKesson, AAOS, IntraCorp, and ODG. [20] Other EBM guidelines include the medical treatment guidelines used by other states (e.g., HMOs and workers' compensation), and the federal government (e.g., MediCare).

If a UR decision denies a RFA, the injured worker, his/her physician, or his/her attorney may invoke the internal UR appeal process, [21] which will cause the RFA to be re-reviewed by a different UR physician. A UR decision to modify, delay or deny a RFA remains effective only for 12 months (from the date of the UR decision), or until there is a documented change of condition, or until there is a change of treating physician, whichever is shorter. [22]

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[20] *CHSWC Recommendations to DWC on Workers' Compensation Medical Treatment Guidelines*, Commission on Health and Safety and Workers' Compensation (November 15, 2004); and *Evaluating Medical Treatment Guideline Sets for Injured Workers in California, RAND Institute for Civil Justice and RAND Health*, Nuckols, Wynn, et al., 2005. [ACOEM (American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines; McKesson (McKesson/ InterQual Care Management Criteria and Clinical Evidence Summaries); AAOS (Clinical Guidelines by the American Academy of Orthopedic Surgeons); IntraCorp (Optimal Treatment Guidelines, part of IntraCorp Clinical Guidelines Tool; and ODG (Official Disability Guidelines; Treatment in Workers' Comp., by Work-Loss Data Institute).]

[21] Cal. Code Regs., tit. 8 section 9792.9.1(e)(5)(J) allows a URO to provide an internal appeal of the initial UR decision; however, "the internal appeals process is a voluntary process that neither triggers nor bars use of the dispute resolution procedures of Labor Code section 4610.5 and 4610.6, but may be pursued on an optional basis." EK Health is the URO retained by State Fund to perform UR on the RFA at issue, and EK Health has an internal UR appeal process, which was described in the 7-16-14 letter to petitioner. [Petitioner's Exhibit 1, p. 9.].

[22] Labor Code section 4610, subdivision (g)(6).

Independent Medical Review (IMR)

IMR is the process to resolve disputes about UR decisions. Pursuant to Labor Code section 139.5, the Administrative Director (AD) of the Division of Workers' Compensation (DWC) has contracted with Maximus (which also conducts IMR on HMOs in California and other states). The determinations that are prepared by Maximus are deemed to be those of the AD and are binding on all parties.[23]

If a RFA is denied, modified, or delayed via UR, the injured worker—and his/her attorney if represented—are notified. With the notification is an Application for IMR, [24] and an envelope addressed to the AD to mail the completed Application for IMR. [25] The *injured worker* is also notified that s/he *may provide information or documentation*, either directly or through his/her physician, *to the IMR*. [26] If the injured worker is unrepresented, s/he may designate another person as an agent. The physician whose RFA was denied or modified may join with or assist the injured employee in seeking IMR.

Under IMR, *after* the injured worker has requested IMR review (up to 30 days) and *after* the DWC AD has approved the request for IMR eligibility (length of time defined only as "expeditious"), the claims examiner is then permitted *10 days* (or *twice* the length of the entire UR process time) in which to submit the necessary documents and records. [27]

Furthermore, there is no guessing what the claims examiner will send to IMR. The documents and records the claims examiner must send for IMR

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[23] Labor Code section 4610.6, subdivision (g).

[24] Cal. Code Regs., tit. 8 section 9792.9.1, subdivision (e)(5)(G).

[25] Cal. Code Regs., tit. 8 section 9792.9.1, subdivision (e)(5)(G).

[26] Labor Code section 4610.5, subdivision (f)(3)

[27] Labor Code section 4610.5, subdivisions (h)(1), (k), and (*l*)

review are specifically identified by statute: [28]

1. The medical records relevant to the current medical condition, treatment, and RFA
2. The adverse UR determination and supporting documentation
3. Information from the examiner to the injured worker regarding the UR decision
4. Materials supplied by the injured worker or primary treating physician (PTP) in support of the RFA
5. Other relevant documents used by the claims examiner and/or statement from the examiner explaining the reason for the decision to deny, modify, or delay the RFA

As evidenced by this statutory listing, the documentation required for IMR is far more expansive than the documentation statutorily required for UR, i.e., the RFA and relevant documentation. [29]

The MTUS is rebuttable. If the treating physician, applicant, or applicant's attorney provides rebuttal evidence, i.e., scientific studies, [30] the MTUS can be rebutted via UR and IMR. [31] SB 863 added Labor Code section 4610, subdivision c(2) which creates a hierarchy of evidence for IMR, to wit:

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[28] Labor Code section 4610.5, subdivision (*l*)

[29] Labor Code section 4610, subdivision (d). Any perceived inadequacy of the records submitted for UR can be addressed by submission of supplemental relevant documentation. See, e.g., Labor Code section 4610, subdivisions (d), (g)(1), and (g)(5).

[30] The MTUS is presumptively correct, but it may be rebutted by a preponderance of scientific medical evidence. (Lab. Code § 4604.5, subd. (a).) Cal. Code Regs., tit. 8 section 9792.20 provides the definitions of "scientifically based" and "MEDLINE". MTUS rebuttal entails searching MEDLINE, identifying the literature evaluated, and applying it as the basis for an alternate treatment guideline.

[31] Some opine the MTUS is only rebuttable via UR, and the Legislature removed MTUS rebuttal from IMR by adopting the hierarchy review standard in Labor Code section 4610, subdivision (c).

(c) For purposes of this section and Section 4610.6, the following definitions apply:

(1) "Disputed medical treatment" means medical treatment that has been modified, delayed, or denied by a utilization review decision.

(2) "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. [i.e., MTUS]

(B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.

(C) Nationally recognized professional standards.

(D) Expert opinion.

(E) Generally accepted standards of medical practice.

(F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious.

(Emphasis added.)

Appealing an Independent Medical Review (IMR) Determination

An IMR determination may be appealed to a workers' compensation judge (WCJ) per Labor Code section 4610, subdivision (h). [On an IMR appeal, a WCJ may annul an IMR determination and remand it to the DWC AD for another IMR determination by a different IMR physician per Lab. Code § 4610.6, subd. (i).] The order of a WCJ may be appealed to the Board via a petition for reconsideration per Labor Code sections 5900 et seq. A decision of the Board may be appealed via petition for writ of

review to a Court of Appeal per Labor Code section 5950.

STATEMENT OF THE CASE

The petitioner, Daniel Ramirez, is an office assistant employed by the California Department of Health Care Services, who sustained an injury to his left ankle and lower left leg. [32] [33]

The date of injury was 11-30-06. [34]

As of July 2014, the petitioner was still working on modified duty per reports from the petitioner's treating physician, Dr. Natalya Shtutman. [35]

Medical treatment included, *inter alia*: A gym/swim membership was authorized on April 17, 2013, and the gym/swim membership authorization was continued on December 3, 2013. Six (6) sessions of acupuncture were authorized on December 11, 2013. Four (4) additional sessions of acupuncture were authorized on January 24, 2014. Two (2) additional sessions of acupuncture were authorized on April 17, 2014. And one (1) additional session of acupuncture was denied on May 29, 2014. [36]

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[32] Petitioner failed to include the June 14, 2011 Stipulations with Request for Award as part of the appellate record. But WCJ Cleveland's November 12, 2014 Report and Recommendation states it included an award for future medical treatment for an injury to petitioner's left leg. [Petitioner's Exhibit 8, p. 1, lines 17-23].

[33] July 16, 2014 report from EK Health [Petitioner's Exhibit 1, pp 2-3.].

[34] July 16, 2014 report from EK Health [Petitioner's Exhibit 1, pp 1-2.]; and September 10, 2014 report of Dr. Manchester (MAXIMUS) [Petitioner's Exhibit 2, p 1.]

[35] July 16, 2014 report from EK Health [Petitioner's Exhibit 1, pp 3-4.].

[36] July 16, 2014 report from EK Health [Petitioner's Exhibit 1, pp 2-5.].

Petitioner's treating physician, Dr. Shtutman, reported on Mr. Ramirez's condition on December 3, 2013, January 14, 2014, February 25, 2014, April 8, 2014, May 20, 2014, and July 3, 2014. [37]

Dr. Shtutman prescribed (in July 2014) twelve (12) additional sessions of acupuncture, and noted Mr. Ramirez' work status remained modified duty; he does mostly sedentary work and he can do that and self modifies duties as needed. [38]

Dr. Shutman's RFA for twelve (12) additional acupuncture sessions was submitted by State Fund to one of its utilization review organizations (UROs), to wit: EK Health. [39]

The July 16, 2014 UR denial by EK Health was timely. [40]

Per the September 10, 2014 IMR determination, the July 16, 2014 UR denial by EK Health was based "on the MTUS Acupuncture Medical Treatment Guidelines and on the Non-MTUS Official Disability Guidelines (ODG)." [41] [Petitioner asserts at page 9 of his petition for writ of review that State Fund failed to comply with utilization review because it did not follow the MTUS.]

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[37] Petitioner failed to include any of the reports of Dr. Shtutman as part of the appellate record. But these reports are summarized in the July 16, 2014 report from EK Health [Petitioner's Exhibit 1, pp 2-4.].

[38] Petitioner failed to include the RFA (request for authorization) from Dr. Shtutman as part of the appellate record. But it is summarized in the July 16, 2014 report from EK Health [Petitioner's Exhibit 1, p. 4] and summarized in the September 10, 2014 IMR determination [Petitioner's Exhibit 2, p. 1].

[39] Petitioner failed to include the referral to UR or the records sent to the URO (EK Health) as part of the appellate record.

[40] At the October 23, 2014 hearing before WCJ Cleveland, petitioner's "counsel, admitted there was no timeliness issue with the IMR or the earlier Utilization Review (UR)." WCJ Cleveland's November 12, 2014 Report and Recommendation [Petitioner's Exhibit 8, p. 1, lines 27-28].

[41] September 10, 2014 IMR determination [Petitioner's Exhibit 2, p. 3].

Petitioner had the option of an internal UR appeal, [42] but petitioner did not request an internal [second] UR review by a different UR physician to resolve the UR dispute.

Petitioner disputed the UR denial of the twelve (12) additional acupuncture sessions, and petitioner filed an Application for IMR. [43]

The DWC IMR sustained the UR denial of twelve (12) additional acupuncture sessions. [44]

On October 1, 2014, Petition filed (a) Appeal of IMR Determination; (b) Petition for Award of Medical Treatment per *Dubon* I; and (c) Petition for Order to Disclose Identity of IMR Doctor. [45]

On October 6, 2014, the Workers' Compensation Appeal Board issued *Dubon v. World Restoration* (2014) 79 Cal.Comp.Cases 1298 (en banc) (*Dubon* II), which superseded *Dubon* I.

On October 21, 2014, Petitioner filed a First Amended (a) Petition Appealing AD IMR Determination; (b) Petition for Award of Medical Treatment; and (c) Petition for Order to Disclose Identity of IMR Doctor. [46]

At the October 23, 2014 hearing, three issues were pending: (1) petitioner's IMR Appeal; (2) petitioner's assertion the WCJ should apply *Dubon* I notwithstanding the Board en banc decision in *Dubon* II; and (3)

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[42] The right to an internal UR appeal is described in the 7-16-14 letter from EK Health to petitioner. [Petitioner's Exhibit 1, p. 9.]

[43] Petitioner failed to include the Application for IMR, and petitioner failed to include the medical records submitted to IMR as part of the appellate record. Petitioner's appellate exhibits are inadequate. There is no authentication of petitioner's exhibits (CEB, Cal. Civil Writ Practice (2014) § 18.57). There is no consecutive pagination of petitioner's exhibits as required by Cal. Rules of Court, rule 8.486(c)(1)(A).

[44] September 10, 2014 IMR determination [Petitioner's Exhibit 2].

[45] Petitioner's Exhibit 3.

[46] Petitioner's Exhibit 4.

petitioner's request for an order to disclose the identity of the IMR doctor. **No decision or order was rendered on these three issues**. [47] [48]

At the October 23, 2014 hearing, petitioner requested the matter be OTOC (ordered taken off calendar) so that petitioner could "**raise constitutional issues only**". Respondent opposed this request. (Emphasis added.) [49]

On November 3, 2014, petitioner filed a Petition for Reconsideration or Removal with the Workers' Compensation Appeals Board (Board). [50]

On November 13, 2014, respondent filed an Answer to Petition for Reconsideration or Removal. [51]

On November 12, 2014, WCJ Cleveland filed his Report and Recommendation on Petition for Reconsideration or Removal. [52]

On January 2, 2015, the Board issued its Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal wherein the Board found no proper legal basis for a Petition for Reconsideration and no proper legal basis for a Petition for Removal, but held: "we note that **the Petition for Removal raises only constitutional issues** that the Appeals Board has no authority to resolve. [Citation.] Therefore, in order for petitioner to have a final order for purposes of appellate review, we will grant removal on our own motion [citation] and **amend the OTOC to include a final order that applicant's**

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[47] October 23, 2014 Minutes of Hearing [Petitioner's Exhibit 5].

[48] WCJ Cleveland's November 12, 2014 Report and Recommendation [Petitioner's Exhibit 8].

[49] October 23, 2014 Minutes of Hearing [Petitioner's Exhibit 5].

[50] Petitioner's Exhibit 6.

[51] Petitioner's Exhibit 7.

[52] Petitioner's Exhibit 8.

appeal of the Independent Medical Review determination is denied."
(Emphasis added.) [53]

Questions Presented

(1) Has Petitioner failed to name an indispensable party?

(2) Has Petitioner waived all issues except constitutional challenges to IMR?

(3) Should the Board's en banc decision in *Dubon* II be overruled?

(4) Was the RFA for acupuncture denied by UR based upon the MTUS?

(5) Does the Legislature have broad plenary power over workers' compensation?

(6) May the Legislature fix the manner of review of IMR determinations?

(7) Are IMR determinations subject to meaningful appellate review?

(8) Do the IMR statutes violate the separation of powers clause of the California Constitution?

(9) Do the IMR statutes provide the requisite due process?

ARGUMENT

I.

THE PETITION FOR WRIT OF REVIEW FAILS TO INCLUDE AN INDISPENSABLE PARTY

The Administrative Director (AD) of the Division of Workers' Compensation (DWC) administers the independent medical review (IMR) process, which petitioner asserts is unconstitutional. Thus, the AD of the

[53] Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal. [Petitioner's Exhibit 9.]

DWC should be a party. Petitioner's counsel knows the DWC is a party in another appellate matter concerning similar issues. [54]

The California Code of Civil Procedure section 389(a) states:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party."

In *Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, the Supreme Court, citing *Hartman Ranch Co. v. Associated Oil Co.* (1937) 10 Cal.2d 232, stated that a person is an indispensable party when the judgment to be rendered necessarily will affect his rights. In *Olszewski*, the State of California was not found to be indispensable party because the relief sought would not invalidate Welfare and Institutions Code section 14124.791. In the instant case, the DWC is an indispensable party because it is responsible for enforcing the statutes and regulations related to IMR.[55] If petitioner is successful in his argument, then it will require this Court to find the statute constitutionally invalid and either strike the entire IMR process, or strike

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[54] The AD of the DWC is a party in the First District Court of Appeal (A143043) *Stevens v. Board, DWC, and SCIF*. Petitioner's counsel cites *Stevens* on page 4 of his petition, and prepared an amicus brief in *Stevens*.

[55] Labor Code section139.5

the portion concerning the anonymity of the IMR physicians. This makes the administrative director (AD) of the DWC an indispensable party to this action.

II.

PETITIONER HAS WAIVED ALL ISSUES EXCEPT CONSTITUTIONAL CHALLENGES TO IMR

At the October 23, 2014 hearing, three issues were pending: (1) petitioner's IMR Appeal; (2) petitioner's assertion the WCJ should apply *Dubon* I notwithstanding the Board en banc decision in *Dubon* II; and (3) petitioner's request for an order to disclose the identity of the IMR doctor. **No decision or order was rendered on these three issues**.[56] [57]

At the October 23, 2014 hearing, petitioner requested, and respondent opposed, the matter be OTOC (ordered taken off calendar) so that petitioner could "**raise constitutional issues only**". (Emphasis added.) [58]

On January 2, 2015, the Board issued its Opinion and/orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal wherein the Board found no proper legal basis for a Petition for Reconsideration and no proper legal basis for a Petition for Removal, but held: "we note that **the Petition for Removal raises only constitutional issues** that the Appeals Board has no authority to resolve. [Citation.] Therefore, in order for petitioner to have a final order for purposes of appellate review, we will grant removal on our own motion (Lab. Code, § 5310) and **amend the OTOC to include a final order that**

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[56] October 23, 2014 Minutes of Hearing [Petitioner's Exhibit 5].

[57] WCJ Cleveland's November 12, 2014 Report and Recommendation [Petitioner's Exhibit 8].

[58] October 23, 2014 Minutes of Hearing [Petitioner's Exhibit 5].

applicant's appeal of the Independent Medical Review determination is denied." (Emphasis added.) [59]

The only issue "addressed" by the Board decision was Petitioner's constitutional challenge to IMR. Neither WCJ Cleveland nor the Board ruled on Petitioner's *Dubon* I versus *Dubon* II argument. Neither WCJ Cleveland nor the Board ruled on Petitioner's request for an order to disclose the identity of the IMR doctor. Therefore, the scope of Petitioner's petition for writ of review is limited to only constitutional challenges to IMR.

Labor Code section 5904. **Waiver or irregularities** states:

> The petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration.

The California Supreme Court in *U.S. Auto Stores* v. *Workmen's Comp. App. Bd.* (1971) 4 Ca1.3d 469, 477, explained the purpose of Labor Code section 5904, to wit:

> "The policy motivating that section is to give the Board an opportunity to rectify its referee's errors." [Citation omitted, and underline added.]

The scope of a petition for writ of review is limited to those issues decided by the Board's decision. *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657 [18 Cal.Comp.Cases 246], construed Labor Code section 5904 to be a limitation only on the matters a petitioner may raise in a

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[59] Petitioner's Exhibit 9.

petition for a writ of review. As stated at page 663: "While section 5904 of the Labor Code provides that the petition for a rehearing 'shall be deemed to have finally waived' all the points not 'set forth in the petition for reconsideration' that simply means that the petitioner cannot raise points on petition for a writ of review not raised before the commission."

III.

THE WORKERS' COMPENSATION APPEALS BOARD'S ASSERTED JURISDICTION OVER POST-UR DISPUTES IN *DUBON* II IS TOO BROAD—NOT TOO LIMITED

If petitioner's argument concerning *Dubon* II is not barred by waiver (see Argument II, *supra*), then it is necessary to address petitioner's argument that *Dubon* II is too limited.

SB 863 did not change the procedural requirements for UR decisions, but it amended the procedures for resolving post-UR disputes over the "medical necessity" of treatment requests, i.e., it enacted the IMR process to resolve post-UR disputes. [60] SB 863 indicated the Workers' Compensation Appeals Board (Board) no longer had authority over post-UR disputes over medical necessity. [61] The question arose: When did the Board have jurisdiction (if ever) to decide post UR-disputes without going through the IMR process?

Dubon v. World Restoration (2014) 79 Cal.Comp.Cases 313 (en banc) (*Dubon* I) held the Board had jurisdiction (and IMR was inapplicable) when:

1. no UR was performed;
2. UR was untimely performed; or
3. UR was procedurally flawed.

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[60] *Dubon* II (2014) 79 Cal.Comp.Cases 1298, 1305 (en banc).

[61] Labor Code section 4610, subdivision (i), Labor Code section 4610.5, subdivisions (a) (b) (e) and (k), and Labor Code section 4610.6, subdivision (i).

Dubon v. World Restoration (2014) 79 Cal.Comp.Cases 1298 (en banc) (*Dubon* II) [62] held the Board had jurisdiction (and IMR was inapplicable) when:

1. no UR was performed; or
2. UR was untimely performed.

Dubon II supersedes *Dubon* I. An en banc decision is binding precedent on all Workers' Compensation Judges (WCJs) and all Board panel decisions. [63]

Petitioner asserts *Dubon* I was legally correct, and *Dubon* II is legally incorrect. **Respondent asserts** both *Dubon* I and *Dubon* II are legally incorrect, and the **Board only has jurisdiction** (and IMR inapplicable) **when no UR was performed**.

The Legislature intended for IMR to address **any dispute** concerning utilization review decisions. This includes issues of timeliness and/or compliance with statutes and regulations regarding the utilization review decision. The Legislature's intent can be found in the plain meaning of Labor Code section 4610.5, subdivisions (a) and (b), which provide:

> (a) This section applies to the following disputes:
>
> (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.
>
> (b) A dispute described in subdivision (a) **shall be** resolved only in accordance with this section.

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[62] Petition for Writ of Review was denied February 5, 2015 (G051017). *Dubon v. Workers' Comp. Appeals Bd.* (2014) 80 Cal.Comp.Cases 192. Petition for review filed February 17, 2015.

[63] Cal. Code Regs., tit. 8 section 10341.

(Emphasis added.)

Based upon the clear and unambiguous meaning of Labor Code section 4610.5, subdivisions (a) and (b), the Legislature intended that "any dispute" over utilization review decisions "shall be" resolved under Labor Code section 4610.5. According to Labor Code section 15, "Shall" is mandatory and "may" is permissive. Thus, it is mandatory that "any dispute", including issues of timeliness and/or compliance with statues and regulations regarding utilization review decisions, be resolved through the IMR process. Courts have consistently held that when the language is clear, and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms. *DuBois v Worker's Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388.

The Legislature expressly stated it intended for the Administrative Director of DWC to address issues of timeliness and other UR requirements. Labor Code section 4610, subdivision (i) provides in relevant part:

> If the administrative director determines that the employer, insurer, or other entity subject to this section has failed to meet any of the **timeframes** in this section, **or** has failed to meet **any other requirement** of this section, the administrative director may assess, by order, administrative penalties for each failure. A proceeding for the issuance of an order assessing administrative penalties shall be subject to appropriate notice to, and an opportunity for a hearing with regard to, the person affected. The administrative penalties shall not be deemed to be an exclusive remedy for the administrative director.
>
> (Emphasis added.)

The Administrative Director (AD) has authority to not only impose administrative penalties for untimely or procedurally defective UR decision, but the AD may pursue other remedies as well. This authority is specifically granted to the AD. Significantly absent is any mention of the Workers' Compensation Appeals Board (Board). If the Legislature had intended for issues of timeliness and/or compliance with statutes and regulations governing UR to be within the jurisdiction of the Board, the Legislature would have said so. See *California Compensation & Fire Co. v. Industrial Acci. Com.* (1961) 193 Cal.App.2d 6, 10 where the Court of Appeal stated in regard to a different statutory interpretation by the Industrial Accident Commission that, "Had the Legislature meant what the commission says it meant there seems little doubt but that it could have said so clearly."

Instead the Legislature enacted Labor Code section 4604 which states controversies between employer and employee shall be determined by the Board except as otherwise provided by section 4610.5. And section 4610.5, subdivisions (a) and (b) specify that IMR is to address "any dispute" over UR decisions. Moreover, the Legislature specifically stated a UR decision may be reviewed only by IMR and an employer shall have no liability unless the UR decision is overturned by IMR. Labor Code section 4610.5, subdivision (e) provides:

> A utilization review decision may be reviewed or appealed **only by** independent medical review pursuant to this section. Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section.

(Emphasis added.)

The plain meaning of Labor Code section 4610.5, subdivision (e) demonstrates the Legislature did not intend for the Board to "review" issues of UR timelines and/or compliance with statutes and regulations. Such issues are to be reviewed only by the AD via IMR process. When read together, it is without question these statutes demonstrate the Legislature intended for the Board to have no authority over issues of UR timeliness and/or compliance with statutes and regulations.

The rules governing statutory construction are well established. The Appeals Board's objective should be to ascertain and effectuate the Legislature's intent. (*City of Huntington Beach* v. *Board of Administration* (1992) 4 Cal.4th 462, 468; *Mejia* v. *Reed* (2003) 31 Cal.4th 657, 663). In determining legislative intent, the Court should look to the statutory language itself. (*Mejia* v. *Reed, supra,* 31 Cal.4th at p. 663). If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735). But the plain meaning rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Ca1.3d 1379, 1387). Thus, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect. (*Moore v. Panish* (1982) 32 Cal.3d 535, 541; see also *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *City of Huntington Beach* v. *Board Administration, supra,* 4 Cal.4th at p. 468). Where several codes are to be construed, they must be

regarded as blending into each other and forming a single statute. Accordingly, they must be read together and so construed as to give effect, when possible, to all the provisions thereof. (*Tripp v. Swoap* (1976) 17 Ca1.3d 671, 679, *Mejia* v. *Reed, supra*, 31 Cal.4th at p. 663.)

When an examination of statutory language in its proper context fails to resolve an ambiguity, Courts also may turn to the legislative history of an enactment as an aid to its interpretation. (See, e.g., *Mejia v. Reed, supra,* 31 Cal.4th at p. 663; *Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1239; "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment* & *Housing Com., supra,* 43 Ca1.3d at p. 1387.) If ambiguity still remains courts cautiously take the third and final step in statutory construction and "apply reason, practicality, and common sense to the language at hand." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc., supra,* 6 Cal.App.4th at p. 1239; see also, e.g., *Mejia v. Reed, supra,* 31 Ca1.4th at p. 663.) Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. (*Dyna-Med, Inc.* v. *Fair Employment* & *Housing Com., supra,* 43 Ca1.3d at p. 1387). In this case, the interpretation that best follows the plain meaning of the aforementioned Labor Code sections and also ensures that all are harmonized and have effect is that the Board has no authority over issues of timeliness or compliance with statutes and/or regulations governing utilization review.

Moreover, Labor Code section 4610.5, subdivision (k) provides in relevant part that if there appears to be any medical necessity issue, the dispute "shall" be resolved pursuant to an independent medical review. And Labor Code section 4610.6, subdivision (i) provides that in no event shall a workers' compensation administrative law judge, the Board, or any

higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.

These statutes leave no doubt the Legislature did not intend for the Board to review the issue of medical necessity if it found the utilization review decision untimely or invalid. To the contrary, the Legislature made it clear that IMR is to be the exclusive method for resolving disputes over medical necessity. A Court must apply the plain language of the statute if it is unambiguous on its face. (*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1245).

To reinforce the point, the Legislature included in SB 863 uncodified section 1(d) which declares the Legislature's recognition of problems with the Board resolving disputes over medical necessity:

> That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.
>
> (Stats. 2012, ch. 363, § 1(d) [uncodified].) [64]

SB 863 uncodified section 1(e) is evidence of the Legislature's intent to have IMR replace the Board as the arbiter of medical necessity disputes. Section 1(e) states:

> That 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

[64] Respondent's Request for Judicial Notice, Exhibit 2, page 1.

> care and that the provision of the act establishing independent medical review are necessary to implement that policy.
>
> (Stats. 2012, ch. 363, § 1(e) [uncodified]. Emphasis added.) [65]

Moreover, the Legislature's intent to replace the Board with IMR as arbiter of medical necessity issues is expressly stated in the Legislative history. See the Senate Committee on Labor and Industrial Relations report dated August 31, 2012. [66]

As noted above, "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Ca1.3d at p. 1387).

If the Legislature had intended for the Board to decide medical necessity issues after a finding the utilization review decision is untimely or invalid, then it would have expressly said so. (*California Compensation & Fire Co. v. Industrial Acci. Com.*, *supra*, 193 Cal.App.2d at p. 10). Instead the Legislative history states the intent of SB 863 is to change the way medical disputes are resolved and the uncodified portions of SB 863 contain findings that IMR would result in faster and better medical dispute resolution than existing law. The Board making determinations of medical necessity is the law the Legislature intended to replace. The Board's assertion of jurisdiction over untimely UR in *Dubon* II is exactly what the Legislature wanted to avoid.

IV.

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[65] Respondent's Request for Judicial Notice, Exhibit 2, page 1.

[66] Respondent's Request for Judicial Notice, Exhibit 1, pages 6-7.

UR DENIED THE RFA FOR ACUPUNCTURE PER THE MTUS AND PER NON-MTUS TREATMENT GUIDELINES

If petitioner's argument re *Dubon* II is not barred by waiver (see Argument II, *supra*), *and if* the Court of Appeal opines *Dubon* II should be overturned with *Dubon* I (as asserted by petitioner), then it is necessary to address petitioner's argument that UR was procedurally flawed because the RFA for additional acupuncture sessions was denied contrary to the MTUS.

Per the September 10, 2014 IMR determination, the July 16, 2014 UR denial by EK Health was based "on the MTUS Acupuncture Medical Treatment Guidelines and on the Non-MTUS Official Disability Guidelines (ODG)." [67] [Petitioner asserts at page 9 of his petition for writ of review that State Fund failed to comply with utilization review because it did not follow the MTUS.] If this is considered a factual argument, then it inappropriate for the Court of Appeal to reweigh the evidence. If this is considered a legal argument, then Respondent offers the following:

8 Cal. Code of Reg. section 9792.24.1, subdivision (c) [68] provides:

> (c) Frequency and duration of acupuncture or acupuncture with electrical stimulation may be performed as follows:
>
> (1) Time to produce functional improvement: 3 to 6 treatments.
>
> (2) Frequency: 1 to 3 times per week
>
> (3) Optimal duration: 1 to 2 months

Functional improvement is defined in 8 Cal. Code of Reg. section 9792.20, subdivision (e), to wit:

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[67] September 10, 2014 IMR determination [Petitioner's Exhibit 2, p. 3].

[68] https://www.dir.ca.gov/t8/9792_24_1.html

> (e) “Functional improvement” means either a clinically significant improvement in activities of daily living or a reduction in work restrictions as measured during the history and physical exam, performed and documented as part of the evaluation and management visit billed under the Official Medical Fee Schedule (OMFS) pursuant to Sections 9789.10-9789.111; and a reduction in the dependency on continued medical treatment.

Applicant had received acupuncture for over year, and the reports from Dr. Shtutman did not show "functional improvement" warranting further acupuncture per the UR and IMR physicians. Furthermore, the frequency and duration of the requested acupuncture exceeded the MTUS parameters. The UR denial of the RFA for an additional twelve (12) sessions of acupuncture was based, in part, on the MTUS.

V.

THE LEGISLATURE HAS BROAD PLENARY POWER

Article XIV, section 4 of the California Constitution provides, in pertinent part:

> The Legislature is hereby expressly vested with **plenary power, unlimited by any provision of this Constitution**, to create, and enforce a complete system of workers' compensation, . . .
>
> 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, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of**

> **decisions rendered by the tribunal or tribunals designated by it**; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.
>
> . . . (Emphasis added.)

Per the California Constitution, the Legislature has plenary power to decide who decides issues, what evidence may be used, and how such decisions may be reviewed. Article XIV, section 4 of the California Constitution specifically provides the Legislature may fix the manner of review.

The Supreme Court in *Mathews v. Workmen's Comp. Appeals Bd* (1972) 6 Cal.3d 719 (*Mathews*), clarified that rather than imposing a mandate on the Legislature to create and enforce an unlimited system of workers' compensation benefits, the California Constitution re workers' compensation was intended to safeguard the full, unfettered authority of the Legislature to legislate in this area, as it saw fit. That intent was not to impose a lawmaking mandate upon the Legislature, but to endow that body expressly with exclusive and "plenary" authority to determine the contours and content of our state's workers' compensation system, including the power to limit benefits.

SB 863 uncodified section 1(g) declares the Legislature's plenary power to create the independent medical review process under the Administrative Director:

> That the establishment of independent medical review and provision for limited appeal of decisions resulting from independent medical review are a necessary exercise of the Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of

this state and to control the manner of review of such decisions.

(Stats. 2012, ch. 363, § 1(g) [uncodified].) [69]

VI.

THE LEGISLATURE MAY FIX THE MANNER OF REVIEW FOR APPEALS OF IMR DETERMINATIONS

Labor Code section 5952 describes the grounds upon which a Board decision may be subject to a petition for writ of review to a Court of Appeal. Labor Code section 5903 describes the grounds upon which a decision by a WCJ may be "appealed" to the Board. Labor Code section 4610.6, subdivision (h) describes the grounds upon which an IMR determination may be appealed to a WCJ and the Board. While there are similarities among these three statutes, there is no legal requirement that the bases for each "appeal" be the same. Article XIV, section 4 of the California Constitution specifically authorizes the Legislature plenary power to fix and control *the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions*.

VII.

IMR DETERMINATIONS ARE SUBJECT TO MEANINGFUL APPELLATE REVIEW

Per Labor Code 4610.6, subdivision (h), either party may appeal an adverse IMR decision on one or more of the following grounds:

(1) The administrative director *acted without or in excess of the administrative director's powers.*

(2) The determination of the administrative director was procured by fraud.

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[69] Respondent's Request for Judicial Notice, Exhibit 2, page 1.

(3) The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.

(4) The determination was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.

(5) The determination was the result of a *plainly erroneous express or implied finding of fact*, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

(Italic added.) [70]

The aggrieved party in an IMR appeal has the legal right to file a petition for reconsideration with the Board,[71] and a party aggrieved by the Board may file a petition for writ of review with a court of appeal. [72]

In *Stone v. Achieve Kid* (ADJ376655) 2014 Cal. Wrk. Comp. P.D. LEXIS 663, [73] and the 2-18-15 Findings & Order in *Benson v Dept. of Corrections and Rehabilitation* (ADJ3553915) [74] by WCJ Farmer, the IMR determination was annulled and the UR dispute remanded back to the AD for new IMR determinations per Labor Code 4610.6, subdivision (h)(1). In *Stone*, Commissioners Lowe and Brass, and Chairwoman Caplane opined:

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[70] The bases for an Independent Medical Review appeal [Lab. Code § 4610.6, sub. (h)] are identical to the bases for an Independent Bill Review appeal [Lab. Code § 4603.6, subd. (f)]. A ruling by this Court of Appeal that the IMR statutes are unconstitutional would suggest the IBR statutes are also unconstitutional.

[71] Labor Code section 5900

[72] Labor Code section 5950

[73] Respondent's Request for Judicial Notice, Exhibit 3.

[74] Respondent's Request for Judicial Notice, Exhibit 4.

> [T]he IMR statute does not authorize the Administrative Director to arbitrarily approve surgeries that are not medically supported, and it does not allow surgeries that are medically supported to be arbitrarily denied by the Administrative Director. To do either would be "in excess of the administrative director's powers" as described in section 4610.6(h)(l).

If an IMR reviewer makes a mistake of law, and the AD adopts that IMR determination, the AD will act in excess of the AD's powers. Thus, the decision in *Stone* and *Benson* are correct, and petitioner's suggestion that WCJs and the Board are precluded from addressing legal errors by IMR is errant.

Similarly, the Board applied Labor Code 4610.6, subdivision (h)(5) in *Hayworth v. KCI Holdings USA* (ADJ8115084) 2014 Cal. Wrk. Comp. P.D. LEXIS 234 [75] and annulled an IMR determination for a plainly erroneous finding of fact, and remanded the UR dispute back to the AD for another IMR determination.

The statutory bases for a petition for reconsideration (appeal of WCJ decision to Board and petitions for writ of review (appeal of Board decision to Court of Appeal) are similar to the statutory bases for an IMR Appeal. If a party desires to appeal a decision of a WCJ to the Board, the statutory bases of Labor Code section 5903 are:

> (a) That by the order, decision, or award made and filed by the appeals Board or a workers' compensation judge, the appeals Board *acted without or in excess of its powers.*
>
> (b) That the order, decision, or award was procured by fraud.

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[75] Respondent's Request for Judicial Notice, Exhibit 5.

(c) That the evidence does not justify the findings of fact.

(d) That the petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced a the hearing.

(e) That the findings of fact do not support the order, decision, or award.

(Italics added.)

When a party appeals the decision of a WCJ for a mistake of law, it is per Labor Code section 5903, subdivision (a). If a party subsequently appeals a Board decision to the Court of Appeal, one basis is Labor Code section 5952, subdivision (a), which provides for appeal when "The appeals Board *acted without or in excess of its powers*." These statutes are similar to Labor Code 4610.6, subdivision (h)(1), which provides several bases for an IMR appeal.[76] Thus, Labor Code 4610.6, subdivision (h)(1) legally enables a WCJ or the Board to annul an IMR determination for a mistake of law and to order another IMR.

The Board is required to set aside any IMR determination that is based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or action in excess of the AD's powers. This is similar to the statutory scheme of the Agricultural Relations Board which the Third District Court of Appeal held was constitutional. In *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal.App.4th 1584, 1601, the Court stated:

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[76] Joseph Waxman, California Applicants' Attorneys Association, 2015 Winter Convention, p. 287: "4610.6(h)(1) (pertaining to the administrative Director acting without or in excess of her powers) is potentially broad and leaves room for an appeal to the WCAB."

> The statutory scheme requires that the mediator set forth the basis for his determinations and that the record support those determinations. (§ 1164, subd. (d).) The Board is required to set aside any portion of the mediator's decision that is based upon clearly erroneous findings of fact or that is arbitrary and capricious in light of the findings. (§ 1164.3, subds. (a), (b).) A party has the right to judicial review of the Board's decision, which includes whether the Board acted without or in excess of jurisdiction and whether the Board's order was an abuse of discretion. (§ 1164.5, subd. (b).) Excess of jurisdiction and abuse of discretion necessarily include limited factual review, that is, whether the decision is wholly lacking in evidentiary support. That is all the judicial review to which a party challenging a quasi-legislative determination is entitled. Thus, the statutory scheme gives Hess the scope of judicial review that is constitutionally required.

Similar to *Hess*, the Legislature correctly provided for limited factual review of IMR determinations as one of the grounds for appeal in Labor Code section 4610.6, subdivision (h)(5).

VIII.

THE SEPARATION OF POWERS CLAUSE OF THE CALIFORNIA CONSTITUTION DOES NOT LIMIT THE LEGISLATURE'S CONSTITUTIONAL, PLENARY POWER TO ENACT WORKERS' COMPENSATION STATUTES

A. Rules of Constitutional Construction Presume a Statute is Constitutional

In considering a facial constitutional challenge to a statute, it will be upheld unless its unconstitutionality appears plainly and unmistakably; and all presumptions favor its validity. *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-11; *Voters for Responsible Retirement v. Board of*

Supervisors (1994) 8 Cal.4th 765, 780; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253-255; *Fox v. Federated Department Stores, Inc*. (1979) 94 Cal.App.3d 867; *L. B. Foster Co. v. County of Los Angeles* (1968) 265 Cal.App.2d 24. Any doubt as to the Legislature's authority to act in a given area must be resolved in favor of the legislative action and the enactment must not be construed to embrace matters not covered by the language of such enactment. *City and County of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103. Legislative enactments must be construed in a manner that seeks to harmonize the statute and the Constitution. *Welton v City of Los Angeles* (1976) 18 Cal.3d 497.

B. The Board is Not Part of the Judicial Branch, and the Legislature's Changes of the Workers' Compensation System Do Not Violate the California Separation of Powers

Petitioner asserts the Legislature's enactment of IMR is an unconstitutional impairment upon the powers of the Board. That is a non sequitur. The Legislature created the workers compensation system per the Article XIV, section 4 of the California Constitution. The Board is not part of the Judicial branch per the California Constitution. [77]

The Legislature created the roles of the Board. If the Legislature chooses, it could assign all the Board's functions to the DWC, another agency, and/or the Courts. This is within its plenary authority of the Legislature pursuant Article XIV, section 4 of the California Constitution.

> 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**, and may fix and control the

> method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.
>
> (Cal. Const., art. XIV, § 4, emphasis added.)

C. Article XIV, Section 4 of the California Constitution Concerning Workers' Compensation Expressly States it is Unlimited by Any Other Provision of the California Constitution

Article XIV, section 4 of the California Constitution vests the Legislature with "plenary power, *unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation . . . ." (Cal. Const., art. XIV, § 4, italics added.) Article III, section 3 provides that "[t]he 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*." (Cal. Const., art. III, § 3, italics added.)

Thus, the Legislature's plenary power to enact workers' compensation statutes avoids any tension with Article III, section 3's separation of powers regime. The powers guaranteed by article XIV, section 4 expressly trump all purported limitations imposed elsewhere in the California Constitution, and the limitations imposed by article III, section 3 expressly exempt powers guaranteed elsewhere in the Constitution.

The Supreme Court has recognized that article III, section 3 "do[es] not limit the power of those agencies whose authority is derived from the

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[77] Article 6, section 1 defines the Judicial branch as the Supreme Court, courts of appeal, and superior courts.

Constitution itself." (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 404.) The phrase *except as permitted by this Constitution* in article III, section 3 "forms the basis for the exercise of judicial powers by so-called 'constitutional agencies'; insofar as specific constitutional provisions relating to the individual agencies in question directly vest judicial power in them, the agencies so favored can perform judicial functions to the extent of the grant without offending the doctrine of separation of powers." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35-36.)

It is beyond dispute that the Workers' Compensation Appeals Board (Board) is an agency empowered to perform judicial functions whose authority derives from California's Constitution. (Cal. Const., art. XIV, § 4; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355 [Board's authority is derived from Constitution].) And, as explained, *infra*, the Legislature acted within its constitutional authority when it enacted legislation to provide for independent medical review of the medical necessity of treatment requested within the workers' compensation system. Therefore, petitioner's separation of powers claim cannot succeed. (See *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1037 ["The jurisdictional provisions of article VI of the California Constitution [outlining judicial powers] are, therefore, inapplicable to the extent that the Legislature has exercised the powers granted it under section 4 of article XIV"].)

D. No Core Powers of the Judiciary Are Materially Impaired

The California Constitution concentrates power in the legislature and is not designed to "balance" power among the branches of government. (*Marine Forests Soc'y v. Cal. Coastal Comm'n* (2005) 36 Cal.4th 1; 113 P.3d 1075, 1076.) The California Legislature possesses plenary lawmaking

power except as specifically limited by the California Constitution. (*Id.* at pages 1073-1074.)

The courts "recognize[] that the three branches of government are interdependent" and are not wholly independent entities. (*Carmel Valley Fire Prot. Dist. v. State of California* (2001) 25 Cal.4th 287; 20 P.3d 533, 538.) "[T]he separation of powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent function of another branch." (*In re Rosenkrantz* (2002) 29 Cal.4th 616; 59 P.3d 174, 208. See also Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2010) 45 Univ. of San Francisco Law Review 654, 669.)

The Supreme Court has confirmed that legislation enacted pursuant to article XIV, section 4 would not violate article III, section 3. In *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, the Court assessed whether article III, section 3 prohibited the Legislature from granting the Board the power to discipline attorneys by prohibiting them from practicing before the Board. Under the Court's analysis, if "the Legislature's action is authorized by some other section of the Constitution" (*id.* at pp. 341-342) such as "the special power granted the Legislature pursuant to article XIV, section 4," there would be no violation of the separation of powers requirement in article III, section 3 (*id.* at p. 338). On the unique facts of *Hustedt*, the Court found a separation of powers violation because the legislation at issue was not enacted pursuant to the Legislature's powers under article XIV, section 4, and because the Legislature "overreached its traditionally recognized authority, under the police power, to regulate the practice of law." (*Id.* at pp. 341, 346.) In short, the Court did not view the power to remove attorneys from practice as "necessary to effect the resolution of workers' compensation claims 'expeditiously, and without

encumbrance,' " especially because even the superior courts and courts of appeal did not possess that power themselves. (*Id.* at p. 344.)

Here, by contrast, determining the medical necessity of requested treatment is necessary to effect the resolution of workers' compensation claims, and the independent medical review system enacted by the Legislature provides for resolution expeditiously and without encumbrance. SB 863 therefore falls within the Legislature's plenary power to enact workers' compensation statutes. (See Cal. Const., art. XIV, § 4 [workers' compensation provides for treatment "as is requisite" to alleviate injuries]; As a result, article III, section 3 is inapplicable.

IX.

THE LEGISLATURE'S CONSTITUTIONAL, PLENARY POWER TO ENACT WORKERS' COMPENSATION STATUTES, DOES NOT DENY PETITIONER DUE PROCESS

A. Legislation Enacted Pursuant Article XIV, Section 4 of the California Constitution Concerning Workers' Compensation May Not be Invalidated Under California's Due Process Clause

Article I, section 7, California's due process clause, provides "[a] person may not be deprived of life, liberty, or property without due process of law . . . ." (Cal. Const., art. I, § 7.) Because the Legislature's plenary power to create and enforce a complete system of workers' compensation is "unlimited by *any* provision of this Constitution" (Cal. Const., art. XIV, § 4, emphasis added), it follows that the Legislature's plenary power must not be limited by article I, section 7.

" '[W]hen constitutional provisions can reasonably be construed so as to avoid conflict, such a construction should be adopted. [Citations.] As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision.' "

(*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 45 (*Bowens*).) Article XIV, section 4's guarantee of plenary power to enact workers' compensation statutes is both more recent[78] and more specific than article I, section 7's broad statement regarding due process. Therefore, article XIV, section 4 must take priority should this Court perceive a conflict.

Courts consistently apply these principles of construction to hold legislation enacted pursuant to article XIV, section 4's authority is immune from challenge under other provisions of the California Constitution.

> "[T]he adoption of the constitutional provision concerning workmen's compensation **effected a repeal *pro tanto* of the state constitutional provisions in conflict** therewith."
>
> *Subsequent Injuries Fund v. Ind. Acc. Com.* (1952) 39 Cal.2d 83, 88. (Emphasis added.)

See also *Loustalot v. Superior Court* (1947) 30 Cal.2d 905; *Strauss v. Horton* (2009) 46 Cal.4th 364, 408; and *Bowens*, *supra*, 1 Cal.4th at p. 45.

B. Petitioner Has Not Demonstrated a Protected Property Right Subject to Procedural Due Process

The petitioner does not have a property right to payment for medical treatment not yet adjudicated to be reasonably required for her injuries. (See *Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 214 [" 'The first inquiry in every due process

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[78] Article XIV, section 4 was adopted in 1976. (West's Ann. Cal. Const., art XIV, § 4.) It is substantially similar to its predecessor, article XX, section 21, which was adopted in 1911 and last amended in 1918. (*Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 719, 730, 734.) The relevant part of article I, section 7 was adopted in 1974. (West's Ann. Cal. Const., art 1, § 7.) The due process clause was originally part of article I, section 8 of California's original constitution of 1849. (See *Crawford v. Board of Education* (1980) 113 Cal.App.3d 633, 635; *Clarke v. Ray* (1856) 6 Cal. 600, 601.)

challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty' "].)

In *American Mfrs. Mut. Ins. Co. v. Sullivan* (1999) 526 U.S. 40 [119 S.Ct. 977, 143 L.Ed.2d 130], the United States Supreme Court held that because Pennsylvania workers' compensation law entitled an employee only to " 'reasonable' and 'necessary' medical treatment," and because the employee had not yet established that the particular medical treatment at issue was reasonable and necessary, the employee did not show a property interest in receiving payment for the treatment under the federal Due Process clause. (*Id.* at pp. 60-61.) In accord is *Lujan et al. v. G & G Fire Sprinklers, Inc.* (2001) 532 U.S. 189 [121 S.Ct. 1446, 149 L.Ed.2d 391] where a state labor agency was permitted to withhold disputed payments to a public works subcontractor. California law likewise limits treatment to what is medically necessary. (See Lab. Code, § 4610.6, subd. (c).) Thus, petitioner has not established the property interest required for her due process claim because her requested treatments have not been adjudicated to be medically necessary. (See *Ruiz v. Industrial Acc. Com.* (1955) 45 Cal.2d 409, 414 [claim to workers' compensation death benefits could not support due process claim]; *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002 [claim to workers' compensation benefits is wholly statutory, and therefore not a vested property right until reduced to final judgment].)

C. Procedural Due Process Afforded by the U.S. Constitution is Satisfied by Notice and Opportunity to be Heard

Significant abridgment of life, liberty, or property warrant due process per the U.S. Constitution. In the pending case, the claimed property right is the disputed request for acupuncture treatment. As discussed *supra* (IX, B), this may not even rise to the level of a property right. Even if it is a

property right, it is not a significant right. A UR denial of a request for authorization (RFA) is not permanent. A UR decision to modify, delay or deny a RFA remains effective only for 12 months (from the date of the UR decision), or until there is a documented change of condition, or until there is a change of treating physician, whichever is shorter. [79] Because of the minimal property right, if any, the required due process is minimal.

Procedural "due process" is not simply a list of basic rights as described in *Goldberg*; rather the Supreme Court has now [80] formulated a balancing test to determine the rigor with which the requirement of procedural due process should be applied to a particular deprivation, for the obvious reason that *mandating such requirement in the most expansive way for even the most minor deprivations would bring the machinery of government to a halt*. The United States Supreme Court set out the test as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
>
> *Mathews v. Eldridge* (1976) 424 U.S. 319, 335.

What the Constitution requires inevitably is dependent on the situation. What process is "due" is a question to which there cannot be a single

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[79] Labor Code section 4610, subdivision (g)(6).

[80] Because of the outpouring of cases after *Goldberg*, the Supreme Court adopted a more discriminating approach.

answer. *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, 390-391. As explained by Peter Strauss, *Due Process*, Legal Information Institute, March 8, 2013: [81]

> A successor case to Goldberg, *Mathews v. Eldridge*, tried instead to define a method by which due process questions could be successfully presented by lawyers and answered by courts. The approach it defined has remained the Court's preferred method for resolving questions over what process is due (although not one that the Court always refers to; sometimes it simply invokes tradition or some other basis for understanding). Mathews arose in a context much like Goldberg; Mr. Eldridge had been receiving disability benefits under a federally supported scheme. Responsible officials came to believe, on the basis of information he had provided and physicians' reports, that he was no longer disabled. They then notified him that they intended to terminate his benefits. Only written procedures were available before the termination was made provisionally effective. Eldridge was entitled to a full oral hearing at a later date, and would have received full benefits for the interim period if he prevailed. His argument, like Kelly's in Goldberg v. Kelly, was that even suspending payments to him pending the full hearing was a deprivation of a property interest that could not be effected without the use of the procedures specified in Goldberg.
>
> Where Goldberg had listed procedures that had to be followed, Mathews attempted to define how judges should ask about constitutionally required procedures. The Court said three factors had to be analyzed:
>
> > First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute

> procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Using these factors, the Court first found the private interest here less significant than in Goldberg. A person, who is arguably disabled but provisionally denied disability benefits, it said, is more likely to be able to find other "potential sources of temporary income" than a person who is arguably impoverished but provisionally denied welfare assistance. Respecting the second, it found the risk of error in using written procedures for the initial judgment to be low, and unlikely to be significantly reduced by adding oral or confrontational procedures of the Goldberg variety. It reasoned that disputes over eligibility for disability insurance typically concern one's medical condition, which could be decided, at least provisionally, on the basis of documentary submissions; it was impressed that Eldridge had full access to the agency's files, and the opportunity to submit in writing any further material he wished. Finally**, the Court now attached more importance** than the Goldberg Court had **to the government's claims for efficiency**. In particular, the Court assumed (as the Goldberg Court had not) that "**resources available for any particular program of social welfare are not unlimited**." Thus additional administrative costs for suspension hearings and payments while those hearings were awaiting resolution to persons ultimately found undeserving of benefits would subtract from the amounts available to pay benefits for those undoubtedly eligible to participate in the program. The Court also gave some weight to the "good-faith

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[81] http://www.law.cornell.edu/wex/due_process

judgments" of the plan administrators what appropriate consideration of the claims of applicants would entail.

Matthews v. Eldridge thus reorients the inquiry in a number of important respects. First, it emphasizes the variability of procedural requirements. **Rather than create a standard list of procedures** that, en gross, constitute the procedure that is "due," the opinion emphasizes that **each setting or program invites its own assessment**. About the only general statement that can be made is that persons holding interests protected by the due process clause are entitled to "some kind of hearing." Just what the elements of that hearing might be, however, depends on the concrete circumstances of the particular program at issue. Second, that assessment is to be made both concretely, and in a holistic manner. It is not a matter of approving this or that particular element of a procedural matrix in isolation, but of assessing the suitability of the ensemble in context.

(Emphasis added.)

IMR is performed entirely with paper submissions and without oral testimony. The IMR reviewer acts in a quasi-judicial capacity. The IMR determination is subject to a meaningful appeal process. And any adverse IMR determination is temporary.

Analysis per *Mathews v. Eldridge* (1976) 424 U.S. 319:

- The petitioner's private interest: identity of the IMR reviewer; and ability to cross-examine the IMR reviewer.
- The risk of error in using written procedure is low, just like in *Mathews*, and the risk is unlikely to be significantly reduced by adding confrontational procedures. Again, the same as in *Mathews*. Furthermore, the Petitioner's request to identify and cross-examine the IMR reviewer is more litigious and contrary to the Legislature's intent for a faster and cheaper resolution system. The DWC's IMR

system was overwhelmed with IMR applications in 2013. [82] The DWC's IMR organization would be adversely affected by such additional procedural requirements, and it would likely delay other IMRs.

- The government interest is less litigation, less cost, speedier dispute resolution system, i.e. more efficient, and to promote better health by facilitating more treatment reviews per the MTUS or other EBM treatment guidelines.

The facts in the pending case favor the government interest (as much or more) than the facts in *Mathews v. Eldridge* (1976) 424 U.S. 319. Thus, it is respectfully submitted, it is not a violation of Petitioner's due process rights for the IMR reviewer to be anonymous and not subject to cross-examination.

D. Petitioner's Reliance on *Bayscene* is Misplaced

Petitioner's reliance on *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 (*Bayscene*) is misplaced. As explained in *Hess Collection Winery v. Agricultural Labor Relations Board* (2006) 140 Cal.App.4th 1584, 1601 - 1602:

> Hess's reliance on *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 [18 Cal.Rptr.2d 626] (*Bayscene*), is misplaced. That case involved a city's ordinance providing for compulsory arbitration of disputes over proposed rent increases. The ordinance did not provide for review of the arbitrator's decision by anyone, either the city council or the courts. The Court of Appeal assumed that general Code of Civil Procedure provisions applicable to private, voluntary arbitration would apply. Those provisions generally limit

[82] 2014 Independent Medical Review (IMR) Report: Analysis of 2013 Data: http://www.dir.ca.gov/dwc/imr/reports/2014_IMR_Annual_Report.pdf

> review of an arbitration award to issues of fraud, corruption, or other misconduct. (*Id*. at p. 134.) Unless the parties have agreed otherwise, a private, voluntary arbitration decision will not be reviewed for errors of fact or law, and will not be reversed even for error on the face of the award that causes substantial injustice. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 28 [10 Cal.Rptr.2d 183, 832 P.2d 899].)
>
> It ought to be clear, as the *Bayscene* court concluded (*Bayscene, supra,* 15 Cal.App.4th 119), 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. But the Legislature did not do so with respect to agricultural employers. The statutory scheme at issue preserves the right to judicial review with adequate factual review for quasi-legislative purposes. The *Bayscene* decision is inapposite.

As explained in *Facundo-Guerrero v Workers' Compensation Appeals Board* (2008) 163 Cal.App.4th 640, 653:

> Nor are petitioner's citations to *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 [18 Cal.Rptr.2d 626] (*Bayscene*) and *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177 [77 Cal.Rptr.2d 289] (*Costa*), of assistance. 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." (*Bayscene, supra*, 15 Cal.App.4th at p. 134.) The case is inapposite, involving a local ordinance compelling private parties to submit their rent control disputes to binding

> arbitration without any right of judicial review for errors of fact or law.

In *Bayscene*, *supra*, 15 Cal.App.4th 119 the city ordinance did not provide for review of factual errors; thus, it was constitutionally flawed. In the present case, the Board is required to set aside any IMR determination that is based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or action in excess of the AD's powers. (Lab. Code § 4610.6, subd. (h).) When an IMR determination is reversed by the WCJ/Board, it is referred back to the AD for another IMR (by a different evaluator). This is similar to the statutory scheme of the Agricultural Relations Board addressed in *Hess*, *supra,* 140 Cal.App.4th 1584, which utilized an interim remedy of referral back to the arbitrator. In *Costa*, *supra*, 65 Cal.App.4th 1177, the Court held workers' compensation could be supplanted by mandatory arbitration (ADR). Thus, it is respectfully submitted the IMR statutes in this case are similar to *Hess* and *Costa*, and are therefore facially valid.

Conclusion

This case reminds me of a baker, whose cake did not rise in the oven. Rather, than check the cake mix for the absence of baking powder, [83] the baker blames the oven and attempts to throw out the oven.

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[83] When making a cake you use baking powder or bicarbonate of soda, (or use self-raising flour, which already contains baking powder). Bicarbonate of soda contains carbon dioxide, which can be released as a gas by reacting it with acid or by heating. As the carbon dioxide is much bigger as a gas than it was in the bicarbonate of soda, it expands, makes bubbles in the cake mix and so makes the cake rise.
http://www.thenakedscientists.com/HTML/questions/question/1552/

The physician requested treatment which was outside the treatment guidelines in the MTUS. At the UR level, the MTUS can be rebutted. However, the physician sent no scientific evidence to rebut the MTUS.

Petitioner did not request a second (internal) UR review of the denied RFA.

Petitioner filed an Application for IMR, but petitioner provided no scientific evidence to rebut the MTUS.

Petitioner did not submit his legal assertions to the WCJ for decision. Instead, petitioner indicated he only wanted to challenge the constitutionality of the UR and IMR processes.

Respondent submits there is nothing wrong with the oven; rather the cake mix needs more baking powder. Respondent submits the UR and IMR statutes are constitutional, but treating physicians and parties need to better understand the MTUS and the UR and IMR processes.

The IMR statutes at issue are constitutional because:

- The Legislature has broad plenary power;
- Article XIV, section 4 authorizes the Legislature to establish the appropriate manner for resolving disputes, and it may fix the manner of review.
- IMR determinations are subject to a meaningful judicial review.
- The IMR process is a non-intrusive process that simply puts medical determinations in the hands of qualified medical people, instead of judges.
- The IMR process is similar to *Hess* and *Costa*, where statutes were found constitutional.
- The IMR statutes are entitled to a presumption of constitutionality, with all doubts resolved in favor of the statutes' validity.

- The IMR process is nondiscriminatory on its face, with a right of review of any IMR determination that is based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or any action in excess of the AD's powers.
- The IMR process is designed to provide substantial justice, expeditiously, and without encumbrance.
- IMR determinations are common in other regulated contexts, like group health plans.
- The IMR process does not violate the California Constitution's separation of powers clause.
- The IMR process does not violate Petitioner's due process rights.

Therefore, CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, by and through its adjusting agent, STATE COMPENSATION INSURANCE FUND, respectfully requests this Court hold Labor Code Sections 4610.5 and 4610.6 are a constitutional exercise of the Legislature's broad plenary power.

Dated: April 1, 2015

Sacramento, California

Respectfully submitted,

STATE COMPENSATION INSURANCE FUND
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INSURANCE FUND

Verification

Under penalty of perjury, I declare the truth of the following:

- The contents of the foregoing document are true and correct to my own knowledge, except as to matters stated therein on information and belief;

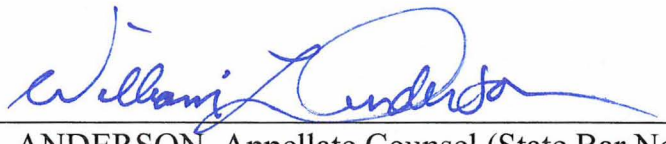
- The matters so stated are believed by me to be true and correct; and

- I make this verification because the facts set forth in said document are within my knowledge and because, as attorney for Respondent State Compensation Insurance Fund, I am more familiar with such facts than are the officers of State Fund.

Dated: April 1, 2015

Sacramento, California

Respectfully submitted,



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Word Count Certification

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that the attached brief contains less than 14,000 words including footnotes, according to the word count of the computer program used to prepare the brief. According to that word count program, this brief contains 13,895 words.

Dated: April 1, 2015

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PROOF OF SERVICE BY MAIL
(Code Civ. Proc., §§ 1013a, 2015.5)

I declare that I am a citizen of the United States, employed in the City of Sacramento in the County of Sacramento, CA. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2275 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833. On April 1, 2015, I served the attached **ANSWER TO PETITION FOR WRIT OF REVIEW** on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid for deposit with the United States Postal Service at Sacramento, CA addressed as follows:

Eric Ledger
Mastagni, Holstedt A.P.C.
1912 I Street
Sacramento, CA 95811

Workers' Compensation Appeals Board (2 copies)
Attention: Writs
P.O. Box 429459
San Francisco, CA. 94142-9459

Mark Lawrence Beatty
State Compensation Insurance Fund
P.O. Box 3171
Suisun City, CA 94585

Department of Health Care Services
P.O. Box 997411
Sacramento, CA 95899

Following ordinary business practices, the envelopes were sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 1, 2015, at Sacramento, CA.

Michelle I. Florentine