*In the*

# Court of Appeal

*of the*

# State of California

**THIRD APPELLATE DISTRICT**

**C078440**

DANIEL RAMIREZ,

*Petitioner,*

v.

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

*Respondents.*

FROM A DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD
HON. GREGORY CLEVELAND · NO. ADJ6821103

## APPLICATION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF OF AMICUS CURIAE CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY INC. IN SUPPORT OF PETITIONER DANIEL RAMIREZ

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# Court of Appeal

*of the*

# State of California

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: C078440

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

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

☐ Interested entities or parties are listed below:

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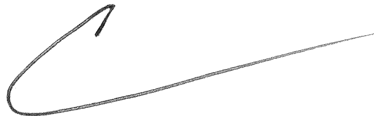

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## APPLICATION FOR LEAVE OF COURT
## TO FILE BRIEF AS AMICUS CURIAE

**TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD JUDICIAL DISTRICT:**

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Society of Industrial Medicine and Surgery, Inc. [hereinafter "CSIMS"], hereby requests leave to file a brief as amicus curiae in support of Petitioner DANIEL RAMIREZ in the above-captioned case. In support of this application, CSIMS states as follows:

1. CSIMS is a professional organization whose members are physicians and other medical providers whose purpose is to improve the workers'' compensation system in California; to increase the public's awareness of the role of medicine in the workers'' compensation system; to promote health and safety; to provide continuing education in the field of industrial medicine; and to set standards of professional conduct for those in the system.

CSIMS, through its representatives, has appeared as *amicus curiae* before other Courts of Appeal and Supreme Court in the matters of: Valdez v. WCAB (2013) 57 Cal. 4th 1231; [164 Cal. Rptr. 3d 184; 78 Cal. Comp. Cases 1209]*Milpitas Unified School District v. W.C.A.B.* (Guzman) (2010)

187 Cal. App. 4th 808; [115 Cal. Rptr. 3d 112; 75 Cal. Comp. Cases 837.];*State Comp. Insurance Fund v. W.C.A.B.* (Almaraz),(2011) Cal. App. 5th Dist. 2011; [2011 Cal. Wrk. Comp. LEXIS 88, 76 Cal. Comp. Cases 687, review denied.]; *State Compensation Insurance Fund v. W.C.A.B. (Sandhagen),* (2008) 44 Cal. 4th 230; [79 Cal. Rptr. 3d 171, 73 Cal. Comp. Cases 981], *Facundo-Guerrero v, W.C.A.B.* (2008) 163 Cal. App. 4th 640; [77 Cal. Rptr. 3d 731, 73 Cal. Comp. Cases 785], *Palm Medical Group, Inc. v. State Compensation Insurance Fund* (2008) 161 Cal. App. 4th 206 [74 Cal. Rptr. 3d 266; 73 Cal. Comp. Cases 352]*Sierra Pacific Industries v. W.C.A.B.* (Chatman)(2006) 140 Cal. App. 4th 1498, [45 Cal. Rptr. 3d 550, 71 Cal. Comp. Cases 714]; *Wal-Mart Stores, Inc. v. W.C.A.B.* (Garcia) (2003) 112 Cal. App. 4th 1435, [5 Cal. Rptr. 3d 822, 68 Cal. Comp. Case 1575]; *Lockheed Martin v. W.C.A.B.* (McCullough) (2002) 96 Cal. App. 4th 1237, [117 Cal. Rptr. 2d 865, 67 Cal. Comp. Cases 245]; *Vacanti v. S.C.I.F.*, (2001) 24 Cal.4th 800 [102 Cal. Rptr. 2d 562, 65 Cal. Comp. Cases 1402]; *Boehm & Associates v. W.C.A.B.* (Lopez) (1999) 76 Cal. App. 4th 513 [90 Cal. Rptr. 486, 64 Cal. Comp. Cases 1350]; *Christian v. W.C.A.B.,* (1997) 15 Cal.4th 505, [63 Cal.Rptr.2d 336, 62 Cal. Comp. Cases 576]; *American Psychometric Consultants, Inc. v. W.C.A.B.,* (1995) 36 Cal.App.4th 1626, [43 Cal.Rptr.2d 254; 60 Cal. Comp. Cases 559]; *Beverly Hills Multispecialty Group, Inc. v. W.C.A.B.,* (1994) 26 Cal.App.4th 789, [32 Cal.Rptr.2d 293, 59 Cal.Comp.Cases 461].

2. The Court's ruling and decision in this case will determine the ability of California's injured workers' to effectively access necessary medical treatment for their work-related injuries and, as such, will directly affect CSIMS members and all parties and stakeholders in the Workers'' Compensation system state-wide.

3. CSIMS is familiar with the issues before this court and the scope of their presentation and believes that further briefing is necessary to address matters not fully addressed by the briefs filed by the parties to this case and those filed by amicus curiae. For one, recently the Court of Appeals issued *Gerawan Farming Inc. v ALRB* 236 Cal. App. 4th 1024 (2015) on May 14th after briefing in RAMIREZ and which severely criticizes *Hess Collection Winery v ALRB* 140 Cal. App. 4th 1584 (2006) which is relied on by the Respondent. See Respondent's APR on pages 35, 36, 49, 51, and 52. Also, the issue of the anonymity of the independent medical reviewer (IMR) set forth in Labor Code §4610.6 (f) requires further analysis in relation to the First Amendment guarantee of public access to judicial proceedings, and comparison of it to the use of anonymous juries in *U.S. v Ross* 33 F. 3d 1507 (1994) and *Erickson v Superior Court* 55 Cal. App. 4th 755 (1997) among other authorities is necessary.

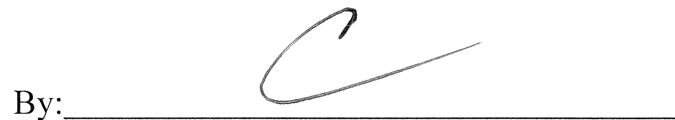
4. CSIMS therefore requests leave to file the following proposed amicus curiae brief.

Wherefore, CSIMS respectfully requests permission to file the proposed *amicus curiae* brief in support of Respondent, Workers'' Compensation Appeals Board and DANIEL RAMIREZ.

Dated: July 15, 2015

Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK



By:____________________________________

Charles E. Clark
Counsel for Amicus Curiae
California Society of Industrial
Medicine and Surgery, Inc.

## ISSUES PRESENTED TO THE COURT

In connection with whether Labor Code §4610.6 is an unconstitutional delegation of authority to an anonymous private party, the following are the issues presented:

1. Is anonymity of the private party, the independent medical reviewer (IMR), in violation of the First Amendment guarantee of open judicial proceedings?

2. Is delegation to an anonymous private party, the IMR, a violation of Article XIV §4 of the California Constitution?

3. Is the delegation to an anonymous private party, the IMR, of fundamental policy matters without procedural safeguards such as adequate standards for the eligibility and qualification of the IMR, the fundamental right of cross-examination, the right to meaningful judicial review, and the right to fair notice and procedure as to the definition and scope of essential terms, unconstitutional?

## ARGUMENT

## I. LABOR CODE §4610.6 IS AN UNCONSTITUTIONAL DELEGATION OF AUTHORITY TO AN ANONYMOUS PRIVATE PARTY

### a. INTRODUCTION

§4610.6 together with its companion statute §4610.5 (which are part of the California workers'' compensation scheme for regulating utilization review and independent medical review that begins with Labor Code §4610) is a swirl in a mess of flaws. It is an unconstitutional delegation of the Legislature's power in matters of fundamental public policy to an anonymous private party without proper safeguards and in violation of the First Amendment guarantee of public access to judicial proceedings. As a practice matter, anonymity of the IMR [§4610.6 (f)] makes it impossible to find out evidence to appeal on the grounds of fraud [§4610.6 (h) (2)], conflict of interest [§4610.6 (h) (3)], and bias [§4610.6 (h) (4)]. How do you know if there is fraud, conflict of interest, or bias if you don't know who the IMR is?

### b. RECENT CASE SCUTTLES CASE RELIED ON BY RESPONDENT

To start with, in *Gerawan Farming Inc. v ALRB* 236 Cal App 4th 1024 (2015), released after briefing in RAMIREZ, the Court of Appeals held there was an unconstitutional delegation to the private party in issue

and repudiated[1] _Hess Collection Winery v ALRB_ 140 Cal App 4th 1584 (2006) which has been heavily relied on by Respondent; see APR on pages 35, 36, 48, 50, and 51.

At 1072-1073, the Court in _Gerawan_ explained the rule and policy behind it:

> "An unconstitutional delegation of authority occurs when a legislative body '(1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.' (_Carson Mobilehome Park Owners' Assn. v. City of Carson_ (1983) 35 Cal.3d 184, 190, 197 Cal.Rptr. 284, 672 P.2d 1297.) 'This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions.' [Citation.] The doctrine prohibiting delegations of legislative power does not invalidate reasonable grants of power to an administrative agency, when suitable safeguards are established to guide the power's use and to protect against misuse. [Citations.] The Legislature must make the fundamental policy determinations, but after declaring the legislative goals and establishing a yardstick guiding the administrator, it may authorize the administrator to adopt rules and regulations to promote the purposes of the legislation and to carry it into effect. [Citations.] Moreover, standards for administrative application of a statute need not be expressly set forth; they may be implied by the statutory purpose. [Citations.]' (_People v. Wright_ (1982) 30 Cal.3d 705, 712–713, 180 Cal.Rptr. 196, 639 P.2d 267.)"

[1] Citing references in Westlaw indicate it was disagreed with and criticized although it was not overruled.

The California Supreme Court in Kugler v Yocum[2] 69 Cal. 2d 371 (1968) emphasized that safeguards are more important than standards at 380-381:

> "Furthermore, we find here, as we said in Wilke & Holzheiser, Inc. v. Department of Alcoholic Bev. Control[3], supra, 65 Cal.2d 349, 369, 55 Cal.Rptr. 23, 36, 420 P.2d 735, 748, that the 'grant of authority (is) * * * accompanied by safeguards adequate to prevent its abuse.' As Professor Davis has stated, 'The need is usually not for standards but for safeguards. * * * (T)he most perceptive courts are motivated much more by the degree of protection against arbitrariness than by the doctrine about standards * * *.' (1 Davis, Administrative Law Treatise, supra, s 2.15.) The requirement for 'standards' is but one method for the effective implementation of the legislative policy decision; the requirement possesses no sacrosanct quality in itself so long as its purpose may otherwise be assured."

Applying Gerawan supra to §4610.6, the delegation by the Legislature is an unconstitutional delegation granted to an anonymous private party whose anonymity is set forth in §4610.6 (f)[4] and who makes the determination of fundamental public policy without adequate safeguards.

---

[2] The fact that the delegation is to a private party does not render it a per se unconstitutional delegation so long as the Gerawan supra rules are complied with.

[3] There are negative citing references but on other grounds as more particularly stated therein: declined to follow, Rice v Alcoholic Beverage Appeals Board 21 Cal. 3d 431 (1978); disagreement recognized in People v Anderson 1 Cal. App. 4th 1084 (1991); and distinguished in Peterson v Superior Court 31 Cal. 3d 147 (1982).

[4] §4610.6 (f): "The independent medical review organization shall keep the names of the reviewers confidential in all communications with entities or individuals outside the independent medical review organization."

Anonymity contained in §4610.6 (f) is drastic and does not comply with *U.S. v Ross* 33 F. 3d 1507 (1994) and *Erickson v Superior Court* 55 Cal. App. $4^{th}$ 755 (1997), as explained in Section 1 (c) hereafter.

There are other problems with anonymity which are worsened by the fact that the IMR did not in fact evaluate the injured worker face-to-face and is not the treating doctor. It also prevents accountability of the IMR who does not have the same direct knowledge of the patient as a treating doctor or face-to-face evaluator would have. Without this, the IMR cannot make a meaningful credibility evaluation which meeting with the injured worker, taking a history, and judging words and behavior provide.

The IMR is part of the independent medical review organization which is a profit making and profit seeking business. It has been hired to determine medical necessity with the stated goal of the statute to reduce costs. It is in the self-interest of this profit making business to employ IMRs and direct them in meeting such goals. Unlike workers'' compensation judges (WCJ) or the commissioners of the WCAB who are subject to the Code of Judicial Ethics (see *Fremont Indemnity Co. v WCAB* 153 Cal. App. 3d 965 (1984)) and civil service rules, they are not acting for the public good but for their own selfish reasons. With the concealment of the identity of the IMR, there is no way for the public to audit them or hold them accountable, as that is done with judges or commissioners by the Code of Judicial Ethics, or arbitrators employed pursuant to Labor Code §5270.5

and §5271, and attorneys governed by the Rules of Professional Conduct, to stop corruption or determinations motivated by political or business concerns aside from the public good. In reality, such an investigation of fraud, conflict of interest, and bias is foreclosed and an appeal made on those grounds rendered impossible. (see §4610.6 (h) (2)), conflict of interest (see §4610.6 (h) (3)), or bias (see §4610.6 (h) (4)).

In addition, §4610.6 fails to provide satisfactory criteria for the eligibility and qualifications of the IMR in the role the IMR has been employed in. Labor Code §139.5 (d) (4) (D) bars the IMR from serving as a qualified medical evaluator and such an evaluator must be trained pursuant to Labor Code §139.2 in medical-legal matters in Workers' Compensation. Thus the IMR is designed to be ignorant of these essential matters destroying a necessary safeguard that sufficient education and training provide.

Furthermore, the IMR is asserted to be acting in a "quasi-judicial capacity" by Respondent (see pages 4, 5, 6, and 47 in Respondent's APR), but the IMR is not subject to the Code of Judicial Ethics for judges and commissioners, to Labor Code §5270.5 which applies to arbitrators, or the Rules of Professional Conduct in relation to attorneys, or the requirement that the IMR must be licensed by the state of California; the IMR may "hold a nonrestricted license in any state of the United States" pursuant to Labor Code §139.5 (d) (4) (B), thus eliminating licensing oversight and

disciplinary jurisdiction by the California Medical Board. §4610.6 has significant flaws in due process procedure; the subsection is missing the definition and scope of essential terms, and the parties are deprived of the fundamental right of cross examination.

### c. **ANNONYMITY OF THE IMR VIOLATES THE FIRST AMENDMENT GUARANTEE OF OPEN JUDICIAL PROCEEDINGS**

Under §4610.6 (f), the IMR is anonymous. Hidden from public scrutiny as such, the IMR makes the determination of medical necessity at issue in this case in a "quasi-judicial capacity." On page 47 of Respondent's APR, Respondent states: "The IMR reviewer acts in a quasi-judicial capacity." See also pages 4, 5, and 6 in Respondent's APR. Respondent claims the prior system is "too litigious." See pages 47 and 48 of Respondent's APR. No adequate rationale for anonymity is provided by Respondent. See pages 19, 47, and 48 of Respondent's APR.

Anonymity of the IMR violates the First Amendment guarantee of public access to judicial proceedings. See *Bellas v Superior Court* 85 Cal. App. 4th 636 (2000). This is a long held part of the common law as well.

In 1685, Sir John Hawles commented that open proceedings were necessary so "that truth may be discovered in civil as well as criminal matters." See Remarks upon Mr. Cornish's Trial, 11 How.St.Tr. 455, 460.

Only under exigent circumstances is a trier of fact permitted to be either anonymous or innominate[5], and the factors establishing such circumstances are set forth in U.S. v Ross 33 F. 3d 1507 (1994).

In Ross at 1519, the Court stated that "(u)nquestionably, the empanelment of an anonymous jury is a drastic measure, one which should be undertaken only in limited and carefully delineated circumstances," and provided the factors to justify such an appointment at 1519:

"Sufficient reason for empaneling an anonymous jury has been found to exist upon a showing of some combination of several factors, including: (1) the defendant's involvement in organized crime, (2) the defendant's participation in a group with the capacity to harm jurors, (3) the defendant's past attempts to interfere with the judicial process, (4) the potential that, if convicted, the defendant will suffer a lengthy incarceration and substantial monetary penalties, and (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation or harassment."

The rule of anonymity in California does not apply to civil cases. In Erickson v Superior Court 55 Cal. App. 4th 755 (1997), the Court of Appeals invalidated a local rule which permitted the identity of jurors to be sealed in civil cases prior to the return of the jury verdict, holding that anonymity was not proper.

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[5] See footnote 1 in U.S. v Bowman 302 F 3d 1228 (11th Cir. 2002)

Anonymity furthermore arbitrarily prevents a successful appeal to the WCAB upon some of the grounds stated in §4610.6 (h). Without knowing who the IMR is it is impossible to prove fraud (see §4610.6 (h) (2)), conflict of interest (see §4610.6 (h) (3)), or bias (see §4610.6 (h) (4)) or even investigate any of these grounds.

Respondent may contend that the IMR should be anonymous despite the limitations set forth in *Ross* supra and *Erickson* supra. This argument is maintained upon the assertions that the IMR is not a trier of fact because the Workers' Compensation Appeals Board (WCAB) is deemed to be in *Garza v WCAB* 3 Cal. 312 (1970); doesn't conduct a trial; and doesn't apply to administrative agency decisions and the like, all of which is intended to reduce costs. The determination of the IMR is binding on the parties under Labor Code §4610.6 (g) and if Respondent argues, to further support anonymity, that the administrative director who has such binding authority is the alter ego of the WCAB, then in effect the IMR is the trier of fact acting for the administrative director as the alter ego of the WCAB. The anonymity of the IMR becomes the anonymity of the decision of the WCAB.

Also, arguing that there is no trial to justify it is equivalent to using its flaws which unreasonably make it impossible to appeal on the grounds of fraud ((§4610.6 (h) (2)), conflict of interest ((§4610.6 (h) (3), and bias ((§4610.6 (h) (4), to defend it.

All of the policy reasons behind the _Ross_ supra and _Erickson_ supra cases apply to IMR. The public's right to know, to audit and hold the IMR accountable, and to prevent decisions swayed by unacceptable reasons are compelling, and there is no evidence that the disclosure of the identity of the IMR will make the process more "litigious" or increase costs.

These are not good and sufficient reasons to adopt such a "drastic" measure. Anonymity doesn't apply to civil cases in California and there is no adequate showing of the _Ross_ supra factors.

### d. DELEGATION TO AN ANONYMOUS PRIVATE PARTY VIOLATES ARTICLE XIV §4 OF THE CALIFORNIA CONSTITUTION

By reference to the Legislature's having "plenary power" in matters of Workers'' Compensation contained in Article XIV §4, Respondent argues that this power is unlimited and consistent with the Constitution. See pages 30-41 of Respondent's APR.

_Gerawan_ supra recognizes what has been in existence from the beginning of our three branches of government: that there are limitations on legislative action. Of course plenary power is limited as _Gerawan_ supra held. Otherwise, it could be used, together with any justification however unreasonable, to remove anything in Workers'' Compensation matters even to get rid of trials because they are "too litigious" and costly. We live in a world of limits and not absolutes.

Such a limitation has been the situation from the beginning of our constitutional government. In Wilkerson v Leland 27 U. S. 627 (1829), which involved a contention that is similar to Respondent's, that the Legislature's power is "plenary" and unlimited, at 644:

> "It is contended that the powers of the legislature of Rhode Island are unlimited and unrestrained, that they transcend all the powers of the other branches of the government."
>
> Daniel Webster's argued against such unqualified authority:
>
> "Though there may be no prohibition in the Constitution, the legislature is restrained from committing flagrant acts, from acts subverting the great principles of republican liberty, and of the social compact; such as giving the property of A. to B. Cited 2 Johns. 248; 3 Dall. 386; 12 Wheaton, 303; 7 Johns. 93; 8 Johns. 511."
>
> Agreeing, Mr. Justice Story held at 656:
>
> "In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island, as an exercise of transcendental sovereignity (sic) before the Revolution, it can scarcely be imagined that the great event could have left the people of that state subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of the legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them-a

> power so repugnant to the common principles of justice and civil liberty-lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

In its deepest sense, the delegation to the anonymous private party violates the limitations set forth in California Constitution Article XIV §4.

As a starting point, this is based on the doctrine of separation of powers which is contained in the California Constitution Article 3 §3 and states:

> "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

In *Howard Jarvis Taxpayers' Assn. v Fresno Metropolitan Projects Authority* 40 Cal. App. 1359 (1995) at 1374, the Court of Appeals affirmed this basic principle by stating "(u)nlike the Federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature," invalidating an improper delegation. In its essential form, the Court reasoned that there was a material conflict between the delegation and the Constitution violating the limitations in the Constitution. It was incidental that the Constitutional provision in question prohibited a grant to a private party. The conflict with the limitations in the Constitution was what was improper.

There is such a conflict between §4610.6 and the limitations contained in Article XIV §4 of the California Constitution.

In the second sentence of this section, the Constitution provides:

> "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 terms "plenary powers" are modified and limited by the adjectival phrases "*by arbitration, or by an industrial accident commission, by the courts*, or by either, any, or all of these agencies…." If the terms "plenary powers" meant to be the unlimited power to control all aspects of Workers'' Compensation, then in this provision there would have been inserted a period after "legislation" and it would have excluded the terms "*by arbitration, or by an industrial accident commission, by the courts*, or by either, any, or all of these agencies…."

Indisputably, an anonymous private party is not included as an adjectival phrase or in any part of this section. This section has a specific reference to agency meaning governmental agency and not any entity or any private party. In using the terms "these agencies," there is no implication that the Legislature has the power to delegate fundamental

public policy decisions to an anonymous private party and to one unskilled in workers' compensation matters (see Labor Code §139.5 (d) (4) (D) which bars the IMR from serving as a qualified medical evaluator who must be trained pursuant to Labor Code §139.2 in medical legal matters in Workers'' Compensation) and unskilled in adjudication and not subject to the Code of Judicial Ethics, to Labor Code §5270.5, or to the Rules of Professional Conduct.

Respondent may claim that there is oversight because the medical director of the review organization must be licensed by the state of California pursuant to Labor Code §139.5 (c) (1) but in truth IMR may hold a license in any state in the country in Labor Code §139.5 (d) (4) (B)[6]. The independent medical review organization must give "*preference*" to the appointment of a physician licensed in California under §139.5 (d) (4) (B). At best, only the medical direct must have the local license which has indirect, attenuated and worthless oversight effect without any disciplinary jurisdiction by the California Medical Board and is not the same as the use of the Code of Judicial Ethics and Labor Code §5270 which the WCAB can employ directly to police judges and arbitrators and constitutes true and effective oversight.

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[6] The coordinating conjunction notwithstanding in §139.5 (d) (4) (B) gets rid of the requirement to have a California license as is expressed by the definition of physician in §139.5 (d) (4) with reference to Labor Code §3209.3.

Further adding to the conflict are the terms “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 ….” Fix and control” again do not imply the proper grant of unlimited authority to an anonymous private party or the elimination of cross examination or provide definitions of essential terms missing from §4610.6; in fact §4610.6 (b) fails to define “pertinent medical records” and “relevant information.”

To the contrary, “fix and control” in relation to “rules of evidence and the manner of review of decisions” with the words “rendered by the tribunal or tribunals designated by it” can only reasonably mean the three specified in this provision: “arbitration,” the “industrial accident commission,” and the “courts,” and do not allow, expressly or impliedly, an anonymous private party who is not subject to the Code of Judicial Ethics, Labor Code §5270.5, or Rules of Professional Conduct or skilled in adjudication as a judge or lawyer and who is by §139.5 prevented from adequate training in medical legal matters in Workers’’ Compensation, to “fix and control” evidence or the manner of review, as the radical and drastic changes in §4610.6 have done.

e. **<u>DELEGATION TO AN ANONYMOUS PRIVATE PARTY OF FUNDAMENTAL POLICY MATTERS WITHOUT PROCEDURAL SAFEGUARDS IS UNCONSTITUTIONAL</u>**

Lastly, §4610.6 also is an improper delegation to the anonymous private party in matters of fundamental public policy without proper procedural safeguards in violation of *<u>Gerawan</u>* supra, *<u>Fremont Indemnity Co. v WCAB</u>* 153 Cal App 3d 965 (1984), and *<u>Beverly Hills Multispecialty Group Inc. v WCAB</u>* 26 Cal. App. 4$^{th}$ 789 (1994).

In *<u>Gerawan</u>* supra at 1075, the Court held:

> "Finally, the delegation of powers under the MMC statute also lacks the necessary procedural safeguards or mechanisms to assure a fair and evenhanded implementation of the legislative mandate to impose a CBA. *<u>Birkenfeld v City of Berkeley 17 Cal. 3d 129 (1976)</u>* held that even if there is 'legislative guidance by way of policy and primary standards,' it is not enough if the Legislature fails to establish safeguards or mechanisms to protect against unfairness or favoritism. (Birkenfeld, supra, 17 Cal.3d at p. 169, 130 Cal.Rptr. 465, 550 P.2d 1001.) Here, in addition to the lack of standards, we do not see how the highly deferential and limited review the Board undertakes of a mediator's report under the MMC statute could be deemed a realistic safeguard against unfairness or favoritism. For the most part, the Board *must* approve the mediator's report as the final order of the Board unless a challenged CBA provision is either (i) 'unrelated to wages, hours or other conditions of employment,' (ii) 'based on clearly erroneous findings of material fact,' or (iii) 'arbitrary and capricious' in light of the mediator's findings of fact. (§ 1164.3, subd. (a).) In practical effect, this means the Board must give virtually a rubber-stamp approval to the mediator's reported CBA as long as the terms thereof have at least a small kernel of plausible support, are not wholly arbitrary, and the mediator has considered the factors listed in section 1164, subdivision (e). Except in perhaps the most egregious instances of overreaching, the

> Board's hands would be tied and the report would have to be approved. In light of the mediator's considerable range of power to determine all aspects of a compelled CBA, which would include a broad array of important economic terms and relationships, such a highly deferential and narrow review mechanism would not be able to meaningfully protect the parties against favoritism or unfairness in regard to the determination of the CBA's terms."

The WCAB's "hands (are) tied" unconstitutionally by §4610.6 in much the same way as in _Gerawan_ supra. The determination of the IMR is "presumed correct" (§4610.6 (h)); "clear and convincing evidence" is required to support an appeal ((§4610.6 (h)); anonymity in §4610.6 (f) makes it impossible to prove three of the grounds for appeal: fraud ((§4610.6 (h) (2)), conflict of interest ((§4610.6 (h) (3); and bias ((§4610.6 (h) (4). In the _County of Sonoma v Superior Court_ 173 Cal. App. 322 (2009), the Court of Appeals invalidated for generally the same reasons the delegation to an arbitration panel which was a private party of the obligation of the Board of Supervisors to set compensation of firefighters impermissibly reducing it to a mere veto power.

These bramble bushes to appeal are not made easier even if the determination of the IMR is based on the Medical Treatment Utilization Schedule (MTUS) and can be rebutted. (See Labor Code §4610.6 (c) and §4610.5 (c) which contains in subsection (c) (2) (A) the requirement that medical necessity must be in accordance with §5307.27 and the Medical Treatment Utilization Schedule (MTUS), and which can be rebutted) What

little there is though is vastly empty and too minimal as the many significant omissions demonstrate.

There are other flaws which further improperly impair safeguards. There are omissions of the definition and scope of the essential terms in §4610.6 (b) including the terms "pertinent medical records" and "relevant information" for the determination of the IMR to make and who and how this is decided, which deprive the parties of due process notice and fair procedure as required in *Mullane v Central Hanover Bank and Trust Co.* 339 U.S. 306 (1950).

With the failure to define essential terms in §4610.6 (b), it is a guessing game for all parties as to their meaning; there are no conceivable limits to these terms or how to deal with them; and this violates due process. This violates proper procedure which requires the right of the parties to seek judicial intervention by getting rulings from the WCJ as to disputes over evidence, as "pertinent medical records" and "relevant information" clearly are.

In *Allison v WCAB* 72 Cal. App. 4th 654 (1999), Justice Croskey held that: "(1) under physician-patient privilege and litigation exception to that privilege, scope of permissible discovery regarding claimant's general medical history was limited, and (2) workers'' compensation judge had authority to hear discovery disputes and make appropriate discovery orders." The IMR has no such authority and, to begin with, doesn't know

what "pertinent medical records" and "relevant information" are or if they even exist.

To safeguard against arbitrariness, cross examination is necessary and there is precedent for this right in the provision for cross examination of the disability rater. In fact, Amicus Curiae CWCI points to Labor Code §139.5 on pages 12, 13, and 14 of its brief to state that the IMR is employed as a "consultant" pursuant to Labor Code §139.5. The rater is also a consultant appointed by the administrative director by Labor Code §123 which states: "The administrative director may employ necessary … disability evaluation raters…." Under 8 CCR §10166, the Disability Evaluation Unit by the disability evaluation rater prepares a "consultative" rating determination. In _Mihesuah v WCAB_ 55 Cal. App. 3d 720 (1976), the Court described this relationship as the Board consulting with the rater as a specialist at 728 although the Court affirmed the role of the rater as a consultant only and not the trier of fact which was the WCAB.

Unlike the situation involving the IMR, the parties have the fundamental due process right to cross examine the rater in accordance with _Caesar's Restaurant v IAC_ 175 Cal App 2d 850, 24 Cal. Comp. Cases 297 (1959), as the parties should have of the IMR who is a consultant no less than the rater who is subject to cross examination.

Previous to SB 863, cross examination was permitted of Agreed Medical Examiners who were neutral doctors selected by the parties and of

"Regular Physicians" appointed by the Board under Labor Code §5701 who determined medical necessity and other medical issues; in the past, this physician was called an Independent Medical Examiner (IME). Certainly, the Regular Physician as an arm of the WCAB is acting in a so called quasi-judicial capacity, and cross examination is nevertheless allowed. A Regular Physician is much like a consultant and is appointed by the WCAB under the authority of Labor Code §5701.

Indisputably, the Regular Physician and IME are performing the same function as the IMR. In conformance with due process however, the Regular Physician, the disability evaluation rater, and in the past the IME are not anonymous.

These numerous and significant flaws make a deadly strike on due process and fundamental rights. In *Fremont Indemnity Co. v WCAB* 153 Cal App 3d 965 (1984), the Court held that due process and the right to cross examination are fundamental rights applicable to Workers'' Compensation proceedings.

*Fremont* supra was followed by the WCAB in the en banc decision of *Costa v Hardy Diagnostic* 71 Cal Comp Cases 1797 (2006) at 1805 in which the WCAB held that "(p)resenting the deposition transcript of Dr. Reville from another unrelated case to which SCIF was not a party deprives SCIF of its **fundamental right** of cross-examination, and thus, of due process of law." See also, *Fidelity & Cas. Co. of New York v WCAB*

*(Harris)* 103 Cal. App. 3d 1001 (1980) at 1015: "Due process requires that " '(a)ll parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.' (Massachusetts etc. Ins. Co. v. Ind. Acc. Com., supra, 74 Cal.App.2d 911 (1946) at 914, quoting from Interstate Commerce Com. v. Louisville & N.R. Co. (1913) 227 U.S. 88; and see Redner v. Workmen's Comp. Appeals Bd., supra, 5 Cal.3d 83, 93, 95 Cal.Rptr. 447, 485 P.2d 799; Allied Corp. v. Ind. Acc. Com. (1961) 57 Cal.2d 115, 121, 17 Cal.Rptr. 817, 367 P.2d 409; Fireman's Fund Indem. Co. v. Ind. Acc. Com. (1963) 223 Cal.App.2d 350, 351-353, 35 Cal.Rptr. 729.)"

Due process is the cornerstone of American jurisprudence since its genesis in Article 39 of the Magna Carta of 1215 which was written in Latin and also known as Magna Carta Libertatum, The Great Charter of the Liberties of England. Article 39 states "(n)o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

In 1608, Sir Edward Coke added to the phrase "law of the land" or "lex terrae," as it was originally written, "that is, by the common law, statute law, or custom of England.... (that is, to speak it once and for all) by

the due course, and process of law…."–See 2 *Institutes of the Law of England* 46 (1608). To emphasize the paramount importance of this phrase, Lord Coke said that "the King hath no prerogative, but that which the law of the land allows him." See Proclamations, 77 Eng. Rep. 1352 (K.B.), 1354, 12 Co. Rep. 74, 75 (1610).

The phrase "law of the land" was later declared by the U.S. Supreme Court in *Murray's Lessee v Hoboken Land & Improvement Co.* 59 U.S. 272 (1856) at 276 that "(t)he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Carta."

Due process is part of Article 1 § 7 of the California Constitution as a starting point although it is contained in other provisions of this Constitution.

Due process and the right to cross examination in Workers' Compensation case law have a long history. The due process guarantee to a right to a fair hearing in workers' compensation proceedings was expressly affirmed in *Beverly Hills Multispecialty Group Inc. v WCAB* 26 Cal. App. 4th 789 (1994) at 806: "A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. ( *Redner v. Workmen's Comp. Appeals Bd.* (1971) 5 Cal.3d 83, 93 [95 Cal.Rptr. 447, 485 P.2d 799].) However, if the denial of due

process prevents a party from having a fair hearing, the denial of due process is reversible per se. (See Dvorin v. Appellate Dept. (1975) 15 Cal.3d 648, 651 [125 Cal.Rptr. 771, 542 P.2d 1363] [summary judgment ordered without motion]; Spector v. Superior Court (1961) 55 Cal.2d 839, 843-844 [13 Cal.Rptr. 189, 361 P.2d 909] [judge refused to allow party to present any evidence or argument]; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 364, p. 366.) Because BHMG was denied due process by the failure to serve the defense medical reports, BHMG was denied a fair trial. The issue of whether denial of a fair trial to a lien claimant should be reversible per se or evaluated under the prejudicial error standard appears to be a matter of first impression**. Although the California Constitution states that a goal of workers' compensation proceedings is to 'accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character ...' (**Cal. Const., art. XIV, § 4)**, the right to due process is paramount to the goal of conducting workers' compensation proceedings expeditiously. We therefore conclude that denial of a fair trial to a lien claimant is reversible per se." (emphasis added)**

Among these significant and essential rights identified by the Court in Beverly Hills Multispecialty supra at 805 is the right of cross-examination: "(i)t is fundamental that undue infringement on the right of cross-examination is a denial of due process."

Respondent justifies the due process flaws by citation to *Matthews v Eldridge* 424 U.S. 319 (1976) (see pages 31 and 43 of Respondent's APR) in which the U.S. Supreme Court held that a Social Security recipient does not have a due process right to an evidentiary pre-termination hearing if his or her benefits are cut off.

There are many reasons why this case doesn't apply. First, it was a pre-termination circumstance and the recipient still had the right to seek reconsideration which carries with it the right to an evidentiary hearing. Petitioner DANIEL RAMIREZ had no such right. Second, *Beverly Hills Multispecialty* supra and *Fremont Indemnity* supra have specifically held that Workers'' Compensation matters must be governed by procedural due process and each was decided after *Matthews* supra. In *American Federation of Labor v Employment Dev. Dept.* 88 Cal. App. 3d 811 (1979), in considering *Matthews* supra, the Court nevertheless held at 818 that "(w)e find that the EDD's practice of affording posttermination (sic) hearings for continuing claim recipients does not meet with the requirements of due process under Article I, section 7 of the California Constitution" since the claimants were not provided with the right to cross examination and fair notice.

Also missing from the safeguards, §4610.6 does not base the determination of medical necessity on the legal standard of substantial evidence and therefore violates Labor Code §5952 and in particular §5952 (d).

Labor Code §5952 mandates that "(d) The order, decision, or award (must be) supported by substantial evidence."

In Escobedo v Marshalls 70 Cal. Comp. Cases 604 (2006), the WCAB set forth the requirements of substantial evidence at 620-621 in this en banc decision:

> "This is because it is well established that ***any decision of the WCAB*** must be supported by substantial evidence. (Lab. Code, § 5952(d); Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660]; Travelers Ins. Co. v. Industrial Acc. Com. (Odello) (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp.Cases 54]; Rosas v. Workers'' Comp. Appeals Bd. (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; Place v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; Zemke v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at p. (sic) 798.) Further, a medical report is not substantial evidence unless it sets forth the

> reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers" Comp. Appeals Bd*. (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, supra, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based)."

The determination of the IMR may still be properly maintained, Respondent may argue, even if it is not based on substantial evidence as defined in these authorities. Respondent will argue that the determination of the IMR meets with substantial evidence requirements and is based on the reading of the face-to-face evaluation of the treating doctor's reports. However, if the IMR rejects the treatment plan of this doctor, the IMR is in effect rejecting the face-to-face evaluation for an indirect one. If the rejection is based on some error in applying the proper guidelines, nothing replaces the face-to-face evaluation to gather a complete history, take a physical examination, and evaluate the activities of daily living in relation to the recommended treatment plan. If the injured worker had a finding by the WCAB that he or she was 100% disabled, there is nothing which compels the IMR to consider this

factor and how much weight to give it. The substantial evidence standard would compel such a consideration.

In addition, there are other essential protections missing from the appointment of the IMR. Despite the assertion by the Respondent that the IMR is acting in a quasi-judicial capacity, the IMR is not a judge who is bound by the Code of Judicial Ethics as are Workers' Compensation Judges and the Commissioners of the WCAB (see *Fremont Indemnity Co. v WCAB* 153 Cal. App. 3d 965 (1984)) or an arbitrator who is qualified by Labor Code §5270.5 and must be an attorney or eligible to be selected by the parties as an attorney under Labor Code §5271(a) or a lawyer subject to the Rules of Professional Conduct (RPC)[7], and has no specific training or expertise in adjudication or the handling of objections to the evidence or any such handling in Workers' Compensation matters.

Leaving aside the ambiguity over mandatory licensing and preference in §139.5 (d) (4), Labor Code 3209.3, and Labor Code §139.5 (d) (4) (B), §4610.6 omits entirely any criteria for the eligibility and qualifications of the IMR, and Labor Code §139.5[8] provides the barest of standards which are inadequate for the job.

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[7] Lawyers as members of the State Bar are bound by the State Bar Act by Business and Professions Code §6000.The RPC, as part of the State Bar Act, have been adopted by the Supreme Court pursuant to Business and Professions Code §§6076 and 6077. None of these rules cover or bind the IMR.

[8] See pages 12 and 14 of Amicus CWCI's brief.

The only so called qualification for the IMR is in Labor Code §139.5 (d) (4) (A) which provides:

> "The physician shall be a clinician knowledgeable in the treatment of the employee's medical condition, knowledgeable about the proposed treatment, and familiar with guidelines and protocols in the area of treatment under review."

It is noteworthy by its absence that there is no requirement that the medical doctor must be familiar with medical-legal determinations in California Workers' Compensation matters, and the terms "guidelines and protocols in the area of treatment under review" are impossibly vague and ambiguous. They fail to make reference to and require familiarity with the AMA *Guides to the Evaluation of Permanent Impairment, Fifth Edition* and the MTUS. There are no years of experience required or that the IMR must have passed a Workers'' Compensation proficiency examination, as did the Workers'' Compensation Judges and Commissioners when they applied for their judicial appointments or lawyers who are licensed by the State Bar and are Workers'' Compensation Specialists certified by the State Bar to act as arbitrators in Workers'' Compensation matters. In fact, Labor Code §139.5 (d) (4) (D) specifically mandates such ignorance by prohibiting the IMR from being a qualified medical evaluator pursuant to Labor Code §139.2 (b) (1) in which mandatory training is required: "(p)rior to his or her appointment as a qualified medical evaluator, passes an examination written and administered by the administrative director for the

purpose of demonstrating competence in evaluating medical-legal issues in the workers'' compensation system."

If an IMR were dismissed by the administrative director for failing to comply with the "guidelines and protocols in the area of treatment under review," the IMR would no doubt successfully defend on the basis of vagueness.

In contrast, the standards contained in the Code of Judicial Ethics, Labor Code §5270.5, and the Rules of Professional Conduct maintain the highest standards of conduct and not just empty ones, or vague and inadequately minimal ones. In comparison to these highest of standards, minimal standards offer little if any protection for the public and anonymity makes the violation any of the standards impossible to investigate.

Unlike judges and the commissioners of the WCAB, the IMR is a profit making person who is not governed by civil service rules and is not a neutral judge, commissioner, or arbitrator acting in the public good.

These failures are all the more reason that the delegation violates the Constitution Article XIV §4 which only permits delegation "*by arbitration, or by an industrial accident commission, by the courts."* If a delegation as broad as argued by Respondent were contemplated or implied by §4610.6, then and in keeping with its "quasi-judicial capacity" the IMR would have been expressly subject to the Code of Judicial Ethics, Labor Code §5270.5, or the Code of Professional Responsibility. Certainly, they are not a

substitute for these Codes' applying to judges, commissioners, and arbitrators as one part of proper and sufficient safeguards.

The claim that the IMR is acting in a quasi-judicial capacity involves a complex and complicated interplay between legislative delegation as is supposed in *Hess* supra and *Gerawan* supra and the delegation of WCAB's judicial function which cannot be superficially resolved by such an oversimplified characterization. In *Gouanillou v IAC* 184 Cal 418 (1920) at 420-421, the California Supreme Court long ago declared that "the Industrial Accident Commission is a judicial body exercising judicial functions, its decisions and awards are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals."

Delegation of the judicial function such as this is described as an exception with limitations set forth by the Constitution by virtue of the doctrine of separation of powers at 7 Witkin, Summary $10^{th}$ (2005) Const. Law, §138 p. 250 which provides "(5) *Authorization by California Constitution.* In rare instances, the California Constitution has expressly authorized a delegation that might otherwise be subject to challenge. (See *In re Phyle* (1947) 30 C.2d 838, 850, 186 P.2d 134 [former delegation of quasi-judicial power to prison warden to make final determination of sanity of convicted prisoner].)"

In re Phyle supra at 850, the Court explained the basis of this exception as one which is permitted if authorized by express provisions in the Constitution: "Even if the warden's power in this regard is judicial, there is no violation of section 1 of Article 3 of the California Constitution, for section 7 of Article 10 specifically provides that 'Notwithstanding anything contained elsewhere in this Constitution, the Legislature may provide for the establishment, government, charge and *superintendence* of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and *superintendence* of such institutions to any public governmental agency or agencies, *officers*, or board or boards, whether now existing or hereafter created by it. Any of such agencies, *officers*, or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe.' (Italics added.)" The warden is a state officer charged with superintendence and this delegation was thus expressly allowed by the Constitution.

However, the specific words in the second paragraph of Article XIV §4 demonstrate what delegations are allowed in Workers'' Compensation law and §4610.6 is not one of them. In this section, there are three such delegations. In the first one, the Legislature has the plenary power to settle disputes but only "by arbitration, or an industrial accident commission, by the courts, or by either, any, or all of these agencies…." In In re Phyle

supra, the delegation was upheld because there was specific delegation in the Constitution which expressly provided for delegation of "superintendence" and to an "officer" which of course included the warden who was a governmental official. But Article XIV §4 by omission in either the first paragraph or second paragraph or otherwise does not permit delegation to a private profiting making company with an anonymous medical doctor performing a judicial function by a non-judge. In *In re Phyle* supra in contrast, the warden was a state employee and officer and not an outside vendor. Nor does it permit delegation to an "officer" who is not identified in any part of Article XIV §4 as one to whom delegation is proper and which term includes the administrative director whose function is passive and is only to adopt the findings of the private profiting making company. "Arbitration," "industrial accident commission," and the "courts," the other words in this section, are conducted by either retired judges or lawyers or commissioners who are judges or lawyers, and it is implausible to claim that they imply authority to delegate to such non-judges as the private profitmaking company or the administrative director are.

It is insufficient to resolve this by claiming that the administrative director employing the IMR as a consultant is the alter ego of the WCAB. All of the truly judicial functions are stripped away. Neither the IMR nor the administrative director can make credibility determinations because

each is deprived of a face-to-face evaluation and thus the determination of the IMR without an evaluation of credibility encroaches on the judicial function of the WCAB to determine credibility as required by the Supreme Court in *Garza v WCAB* 3 Cal. 312 (1970). They do not issue findings of fact based on credibility either. Such findings of fact are required by Labor Code §5903 and by §5313. Their determination is not based on substantial evidence in violation of §5952 and §5952 (d).

It is also extremely difficult to punish an errant IMR. Labor Code §139.5 (b) (2) grants immunity from "monetary liability" and "causes of action" for any communication made by the IMR further improperly "(tying) the hands" of the WCAB in performing the required *Gerawan* supra oversight.

Respondents may further contend that the safeguards should be narrowly construed and that in *Gerawan* supra the Court only sought to guard against arbitrariness and ex parte communications and they are sufficiently safeguarded by anonymity and an alleged appeal to the WCAB. For Respondent's claims about "meaningful" appeal, see pages 12-13, 17, and 32-36, 47, and 51 of Respondent's APR and for allegations about sufficient procedural due process, see pages 41-48 of Respondent's APR.

The word arbitrary is defined in Black's Law Dictionary as "**1.** Depending on individual discretion; of, relating to, or involving a determination made without consideration of or regard for facts,

circumstances, fixed rules, or procedures. **2.** (Of a judicial decision) founded on prejudice or preference rather than on reason or fact. • This type of decision is often termed *arbitrary and capricious.* Cf. capricious"

It cannot be plausibly doubted that anonymity makes it impossible to gather evidence of fraud, conflict of interest, or bias and thus is arbitrary as defined in Black's Law Dictionary. This is made worst by the presumption of correctness and that an appeal must be maintained by clear and convincing evidence in §4610.6 (h).

§4610.6 does not provide a reason for the necessity of anonymity contained in subsection (f) which is arbitrary and capricious. There is no evidence of any sort to maintain that the *Ross* supra factors are present. Besides, *Erickson* holds that anonymity should not be extended to civil proceedings. The determination made in §4610.6 may ultimately be adopted as a decision of the WCAB if there is an appeal and is a civil judicial proceeding.

The Respondents may also contend that anonymity prevents ex parte communications. Nevertheless, anonymity makes it impossible to find out if there was an impermissible back door ex parte communication. The IMR may defend against the charge of an ex parte communication that the rules don't proscribe against ex parte communications, the decision is still reasonable, and it was harmless anyway. But ex parte communications are specifically prohibited by Canon 3 (7) of the Code of Judicial Ethics and by

Rule 5-300 (B) (5) of the Rules of Professional Conduct for attorneys. If the IMR were a WCJ, then ex parte communications would be prohibited under Government Code §11340 but this only applies to WCJs and not quasi-judges. Thus, §4610.6 fails to prevent one of the main evils identified in *Gerawan* supra.

In practical terms, the WCAB has no oversight capabilities because of the impenetrable barrier built up over the determination of the IMR and in many respects is worse than the faulty one in *Gerawan*.

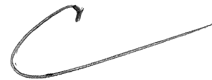
None of this overcomes the flaws caused by anonymity or the elimination of cross examination and other procedural due process safeguards.

**CONCLUSION**

§4610.6 is an unconstitutional delegation of legislative authority.

Dated: July 15, 2015 Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK



By:________________________________

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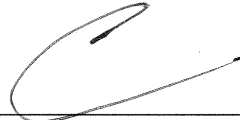
**CERTIFICATE OF COMPLIANCE**

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Application for Leave of Court to File Brief as Amicus Curiae and Proposed Brief of Amicus Curiae is produced using 13-point or greater Roman type, including footnotes, and contains 9,292 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: July 15, 2015

Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK



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