Civil No: C078440

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DANIEL RAMIREZ

Petitioner,

vs.

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

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ6821103

Application Of

CALIFORNIA WORKERS' COMPENSATION INSTITUTE

for Leave To File Amicus Curiae Brief In Support Of Respondents

WORKERS' COMPENSATION APPEALS BOARDOF THE STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, adjusted by STATE COMPENSATION INSURANCE FUND

[Submitted Concurrently With Amicus Curiae Brief]

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT:

The California Workers' Compensation Institute (hereafter CWCI or Institute) hereby applies to this Court for an order granting leave to file an *amicus curiae* brief (concurrently transmtted electronically) in support of Respondents Workers' Compensation Appeals Board of the State of California, California Department of Health Care Services, adjusted by State Compensation Insurance Fund and Administrative Director Division of Workers' Compensation.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 70% of California's workers' compensation premium, and self-insured employers with $42B of annual payroll (24% of the state's total annual self-insured payroll). Its research, which is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the Constitution of the State of California.

The Institute further serves as a liaison with employer, labor, medical,

and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal [including the cases of *Christian v. WCAB* (1997), *SCIF v. WCAB (Stuart)* (1998), *Avalon Bay Foods v. WCAB* (1998), *Rosales v. Depuy Ace Medical Company* (2000), *Lockheed Martin v. WCAB (McCullough)* (2002), *Wal-Mart v. WCAB (Garcia) (2003), Honeywell v. WCAB (Wagner)(2005), Green v. WCAB (2005), Rio Linda School District v. WCAB (Schefiner) (2005), Nabors v. WCAB (2006), Yeager Construction v. WCAB (Gatten) (2006), Chang v. WCAB (2007), Vaira v. WCAB (2007), Brodie, et al. v. WCAB (2007), Babbitt v. Ow Jing (2007); Pendergrass v. Duggan Plumbing) (2007) , Tanimura & Antle v.. WCAB (Lopez) (2007), Palm Medical Group v. State Compensation Insurance Fund (2007), Smith & Amar v. WCAB (2007), and Facundo-Guerrero v. WCAB (2008), Smith & Amar v. WCAB) (2009) , Benson v. WCAB (2009), Boughner v. WCAB (2009), Aguilar v. WCAB (2009), El Aguila Food Products v. WCAB (Cervantes) (2010), Almaraz & Guzman v. WCAB (2011), Baker v. WCAB & X.S. (2011), Ogilvie v. WCAB (2011), Valdez v. WCAB (2012); Pacific Compensation vs. WCAB (Nilsen) (2013); Southern California Edison v. WCAB (Martinez) (2013) Stevens v. Outspoken Enterprises (2014), California Insurance Guaranty Association v. WCAB (Elite Surgery Centers) (2014), South Coast Framing v. WCAB (Clark) (2014)]. Angelotti Chiropractic v. Baker (Administrative Director of Division of Workers' Compensation (2014 – 9th Cir.), Stevens v. WCAB (2015)*

As appears more fully from the attached brief, CWCI and its counsel are familiar with the parties, the law, and the issues raised in this matter, and have

reviewed all of the parties' briefs submitted to this Court. CWCI respectfully seeks an order granting status as *amicus curiae* and ordering the filing of the concurrently submitted brief in support of Respondents Workers' Compensation Appeals Board of the State of California, California Department of Health Care Services (adjusted by State Compensation Insurance Fund), and Administrative Director Division of Workers' Compensation. .

In the view of CWCI and its membership, the Petition for Writ of Review challenging the constitutionality of Independent Medical Review and the provisions of Labor Code Section 4610.5 and 4610.6 should be rejected because, as demonstrated by the accompanying brief, those statutes are clearly within the legislature's prerogative under the "plenary power" authority of the California Constitution Article XIV, Sec 4, consistent with the plain language of the separation of powers provisions of the California Constitution Article III, Sec. 3, and provide adequate safeguards under California's Due Process clause .

To more fully appreciate the context in which these issues arise, and therefore the importance of these statutes to the system of administration of workers' compensation, the *amicus* brief herein also outlines the decades of failed historical legislative efforts to improve the system to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance," as well as the legislative history and intent behind the most recent SB863 reforms utilizing independent studies by the RAND Corporation and Commission on Health & Safety and Workers' Compensation specifically addressing the problems leading up to SB863 and necessity for adoption of IMR with limited appellate jurisdiction as specifically recommended in those

studies.

Briefly, SB 863 was the product of a negotiation between representatives of Labor and employers, which (a) produced improved quality of medical treatment decision-making using nationally recognized quality medical decision-making metrics to produce better treatment outcomes that benefit both employees and employers and enforced through Independent Medical Review; (b) created multiple systemic cost-saving reforms for employers to reduce wasteful frictional costs that historically prolonged workplace absence and adversely impacted employee wage losses; and (c) turned those cost savings into a massive $740 million dollar increase in permanent disability for employees funded by savings from those systemic reforms.[1]

What Petitioner seeks herein is to "have their cake and eat it too" … i.e., to retain the bargained for exchange of a $740 million benefit increase for

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[1] As reflected in the legislative history [Assembly Committee on Insurance, August 31, 2012 Hearing] "Purpose: This bill reflects a negotiated compromise between employers and employees to adopt a substantial increase in permanent disability benefits ($740 million), to ameliorate unexpected reductions that flowed from the 2004 reforms, balanced by substantial changes in the benefit delivery system to eliminate waste, inefficiency, and other loopholes that result in unnecessary employer costs that go to recipients other than injured workers. …

Over the years, the principles of relatively certain defined benefits and relatively timely delivery have been seriously eroded. Inconsistency in parties' ability to ascertain exactly what benefits an injured worker is entitled to has forced the system to develop a complex, cumbersome, and slow litigation-based dispute resolution system. At a fundamental level, the proposal contained in this bill is an effort by the direct parties to the workers' compensation agreement (employees and employers) to return to the principles of relatively certain defined benefits, and relatively timely delivery of those benefits."

employees, restore the historically wasteful and excessive litigiousness of the system that SB863 sought to curtail, and disavow the agreed upon significant employer cost savings anticipated through procedural reforms (including Independent Medical Review challenged herein).

Fundamentally, SB863 sought to reduce frictional costs and improve the quality of medical treatment decision-making for injured workers through Independent Medical Review by qualified physicians instead of lawyers and Judges making medical decisions. It is because of the importance of quality medical decision-making to both employers and employees, and the threat of unraveling the legislative bargain, that we ask this Court to grant this application and order that the attached *amicus curiae* brief be filed so that a fuller examination and broader historical perspective can inform the Court's analysis.

Dated: June 6, 2015. LAW OFFICES OF ALLWEISS & McMURTRY
A Professional Corporation

By: /s/ Michael A. Marks, Esq.
Michael A. Marks, Esq.

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DANIEL RAMIREZ ***Petitioner*** VS. WORKERS' COMPENSATION APPEALS BOARDOF THE STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, adjusted by STATE COMPENSATION INSURANCE FUND ***Respondent(s)***	Civil No: C078440 WCAB Case No. ADJ6821103 **Declaration of Service by Mail**

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Allweiss & McMurtry, 18321 Ventura Blvd, Suite 500, Tarzana, CA 91356

On June 6, 2015, I served a true copy of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief* via USPS by enclosing the document in a sealed envelope addressed as shown below, and depositing the sealed envelope with the USPS, postage fully prepaid, in Essex Junction, Vermont

Mark Lawrence Beatty State Compensation Ins. Fund 2275 Gateway Oaks, Suite 200 Sacramento, CA 95833-3255	William LeRoy Anderson State Compensation Ins Fund 2275 Gateway Oaks, Suite 200 Sacramento, CA 95833-3255	Eric Ledger Mastegni, Holstedt A.P.C. 1912 I Street Sacramento, CA 95811
Workers' Compensation Appeals Bd. Attn: Writs P.O. Box 429459 San Francisco, CA 94142-9459 Contact Name: Neil P. Sullivan		

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 6, 2015, in Essex Junction, Vermont.

/s/ Michael A. Marks
Michael A. Marks, Esq.

Civil No: C078440

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DANIEL RAMIREZ

Petitioner,

vs.

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

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ68211 03

AMICUS CURIAE BRIEF BY CALIFORNIA WORKERS' COMPENSATION INSTITUTE

In Support Of Respondents

WORKERS' COMPENSATION APPEALS BOARDOF THE STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, adjusted by STATE COMPENSATION INSURANCE FUND

[Submitted Concurrently With Application for Leave to File]

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Tel: (818) 343-7509

Attorneys for Amicus
California Workers' Compensation Institute

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): Michael Marks, Esq. SBN 071817 Law Office of Saul Allweiss 18321 Ventura Blvd., Suite 500 Tarzana, CA 91356 TELEPHONE NO.: 818-343-7509 FAX NO. (Optional): E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Amicus California Workers Compensation Institute	Superior Court Case Number: ADJ68211 03
APPELLANT/PETITIONER: DANIEL RAMIREZ RESPONDENT/REAL PARTY IN INTEREST: WCAB, Calif Dept. Healthcare Svcs	FOR COURT USE ONLY

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*): Amicus California Workers Compensation Institute

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: June 6, 2015

Michael A. Marks, Esq. ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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VERIFICATION & WORD COUNT

I, Michael A. Marks, swear that I have read the within *Amicus Curiae* brief and know the contents thereof; that the within Argument & Authorities contains 5,333words, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Workers' Compensation are absent from the County where my office is located and are unable to verify the petition, and because as their attorney I am more familiar with such facts and law than are the officers.

Sworn and executed this 6th day of June, 2015, at Essex,Vermont.

By: /s/ Michael A. Marks
Michael A. Marks

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DANIEL RAMIREZ ***Petitioner*** VS. WORKERS' COMPENSATION APPEALS BOARDOF THE STATE OF CALIFORNIA, and CALIFORNIA DEPARTMENT OF HEALTH CARE SERVICES, adjusted by STATE COMPENSATION INSURANCE FUND ***Respondent(s)***	Civil No: C078440 WCAB Case No. ADJ6821103 **Declaration of Service by Mail**

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On June 6, 2015, I served a true copy of the Amicus Curiae Brief of California Workers' Compensation via USPS by enclosing the document in a sealed envelope addressed as shown below, and depositing the sealed envelope with the USPS, postage fully prepaid, in Essex Junction, Vermont

Mark Lawrence Beatty State Compensation Ins. Fund 2275 Gateway Oaks, Suite 200 Sacramento, CA 95833-3255	William LeRoy Anderson State Compensation Ins Fund 2275 Gateway Oaks, Suite 200 Sacramento, CA 95833-3255	Eric Ledger Mastegni, Holstedt A.P.C. 1912 I Street Sacramento, CA 95811
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I declare, under penalty of perjury, that the foregoing is true and correct. Executed on June 6, 2015, in Essex Junction, Vermont.

/s/ Michael A. Marks
Michael A. Marks, Esq.

I.

ADOPTION OF INDEPENDENT MEDICAL REVIEW IS THE PRODUCT OF DECADES OF STUDIES AND REFORMS INTENDED TO PROVIDE FASTER, LESS EXPENSIVE AND MORE SCIENTIFICALLY SOUND MEDICAL TREATMENT DECISIONS THAT IMPROVE TREATMENT OUTCOMES

The original workers' compensation statutes gave employers control over the selection of medical providers for the life of the claim.[1] In 1975 the employee was given control over provider selection.[2]. Under that so-called employee "free choice" model, disputes were adjudicated at the Workers' Compensation Appeals Board (WCAB) using adversarial experts (referred to as "dueling docs"), with no statutory definition of what constitutes "reasonable and necessary medical treatment." In response to numerous studies (*infra*) showing a system plagued with high administrative costs, low worker benefits, long delays, poor outcomes and endless litigation with inconsistent judicial decisions on seemingly identical facts, the legislature has since repeatedly revised the procedures to improve delivery of quality medical treatment and expeditious dispute resolution.

In 1993, the legislature enacted a presumption that the findings of the treating physician were correct.[3] The likely premise was that the patient's treating doctor knows what's best. But in a system fraught with perverse misplaced incentives, that premise failed to recognize (a) the fee-for-service financial

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[1] stats 1913, Chapter 175, Sec. 15(a)

[2] Stats 1975, Chapter 1529, Section 1, amending Labor Code Section 4600(c); *and see, State Comp. Ins. Fund v. WCAB* (*Silva*) (1977) 71 Cal.App.3d 133 [42 Cal.Comp.Cases 493]

[3] CA Labor Code Section 4062.9 [Stats. 1993 ch. 121] (subsequently repealed)

incentives to the treating doctors to provide excessive, unnecessary, unproven, ineffective and sometimes harmful forms of care that prolonged work loss time and produced increased permanent disabilities, (b) the employee's and their attorney's financial incentive to select treating physicians to describe poorer medical outcomes that increased disability awards and inflated settlements and attorney contingent fees, (c) the contentious adversarial system which resulted in poorer return-to-work outcomes for employees and increased economic hardship due to job losses, and (d) a system with disproportionately high administrative costs, poorer medical outcomes, low worker benefit rates, and lengthy delays of benefit determinations with negative impact on medical outcomes.

With the employee selected treating doctor in control of all medical decision-making and no standard definition of what constituted "reasonable and necessary medical treatment", the system predictably experienced an unprecedented 267% surge in medical benefit costs between 1996 and 2002. Studies revealed a clear association between those cost increases and the treating physician presumption. [4],[5] A 1999 follow-up study by the Commission on Health and Safety and Workers' Compensation (hereafter CHSWC) concluded the

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[4] Gardner, L., Swedlow, A. The Effect of 1993 – 1996 Legislative Reform Activity on Medical Cost, Litigation and Claim Duration in the California Workers' Compensation System. *Research Note*. CWCI. May 2002.

[5] Neuhauser, F. Doctors and Courts: Do Legal Decisions Affect Medical Treatment Practice? An Evaluation of Treating Physician Presumption in the California Workers' Compensation System. A Report for the California Commission on Health and Safety and Workers' Compensation. November 2002.

treating-physician presumption was an abysmal failure and recommended it be curtailed.[6] In response, the Legislature first limited the treating physician presumption of correctness and then repealed it altogether, replacing it with a clear definition of what constitutes "reasonable and necessary medical treatment", adopting an objective Medical Treatment Utilization Schedule (MTUS) comprised of evidence-based, peer reviewed and nationally recognized standards against

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[6] CHSWC - Report on the Quality of the Treating Physician Reports and the Cost-Benefit of Presumption in Favor of the Treating Physician (August 1999). That report states, in its executive summary,

> Numerous parties have challenged the value of the change in the treating physician role and particularly the presumption given to the reports. These complaints generally involve 1) a perception of the low quality of the treating physicians' reports and 2) the problem of poor quality reports being given special authority. Many observers feel that presumption has led to problems with "doctor shopping" by the party with medical control and increased litigation.
>
> However, quality is only one consideration. The legislation in part meant to reduce the frequency of medical reports by reducing the incentive of any party to request a report from a second (or third) forensic physician. Since the original report by the treating physician is presumed correct, it is less likely that a second report will prevail in a dispute and hence less likely that one will be requested.
>
> The Commission on Health and Safety and Workers' Compensation undertook an effort to evaluate the quality of treating physician reports and the cost-benefit of the PTP presumption under 4062.9 ...
>
> In short, changes to the status of the PTP made during the 1993 reforms have resulted in medical-legal decisions based on poorer quality reports without any apparent cost savings. In addition, there is consensus within the WCQB (sic) that presumption has increased litigation and curtailed the discretion of Workers' Compensation Judges to craft reasonable decisions within the range of evidence.
>
> In view of these findings the preliminary recommendation is to curtail the presumption given to the findings of the primary treating physician.

which all treating doctor recommendations must be evaluated to determine if it was medically appropriate.[7] CHSWC emphasized the role of mandatory use of evidence-based treatment guidelines for medical decision-making, stating:

> The effect of the recommended structure of the guidelines in UR should be to encourage efficient processing of requests for authorization, allowing reviewers to reject treatments that are inconsistent with a clear guideline and putting the burden on the treating physician to document and justify deviations from the guideline. .... If the opinion of the treating physician is not backed by citations to scientific evidence, it may be outweighed by the opinion of a UR physician based on his or her expertise plus references to

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[7] Assembly Bill 749 (2003) and Senate Bill 899 (2004).; CHSWC summarized the benefits of evidence-based medical decision-making as follows [Evaluating Medical Treatment Guideline Sets for Injured Workers in California (2005) *prepared by RAND Institute for Civil Justice, at the request of CHSWC*, Pg. 10,11)

> "... physicians and other health care professionals are relying more and more upon evidence from clinical research studies to support their diagnostic and therapeutic choices. Within health care, this represents "a significant cultural shift, a move away from unexamined reliance on professional judgment toward more structured support and accountability for such judgment" (Field and Lohr, 1990).
>
> Use of the best available evidence to support medical professionals' decision-making is often referred to as evidence-based medicine (Sackett et al., 1996), the objective of which has been defined as "to minimize the effects of bias in determining an optimal course of care" (Cohen, Stavri, and Hersh, 2004). Bias, meaning lack of objectivity and other factors that may distort conclusions, can exist at any stage in the medical decisionmaking process, from research through guideline development and clinical care.
>
> There are many sources of bias in evaluating tests and therapies. Preconceived notions on the part of sponsors, researchers, and participants can influence the apparent efficacy of a therapy. Baseline patient characteristics, the natural course of illness, and chance may suggest an effect when there is none, or the absence of an effect when one exists. These problems can be alleviated by careful study design, particularly by the gold-standard design: the randomized controlled trial. In randomized controlled trials, participants are randomly assigned to receive either the therapy under study or a comparison therapy, which can be an accepted therapy or a placebo. While weaker designs can also mitigate bias, they often do so incompletely (Campbell and Stanley, 2005)

> controlling principles of medicine. Where higher-quality evidence is available, the highest-quality evidence that is applicable to an individual case should determine the treatment.[8]

Despite these changes, medical treatment disputes continued to be adjudicated through the unsatisfactory "dueling docs" process, in which many felt that expert witnesses and the decisions of judges often failed to adequately consider and apply the new statutory guidelines, and consequently that the "gold standard" for quality care based on "evidence-based medicine" was thwarted. Though the existence of two opposing camps within the medical community regarding the value of evidence-based medicine was foreseeable,[9] unexpected judicial reluctance to enforcement of evidence-based treatment guidelines further undermined the legislative purposes behind its adoption. These undoubtedly encouraged even more litigiousness and cast doubt on whether non-medical adjudicators such as judges, and treating doctors who reject the principles of evidence-based medicine, were the optimal choice for quality medical dispute resolution.[10] Due to this enforcement shortfall, additional CHSWC studies

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[8] See, CHSWC recommendation: CHSWC recommendations to DWC on Workers' Compensation medical treatment guidelines (Nov. 2004), Pg. 5,6

[9] See, the Division of Workers' Compensation regulatory file, and public comments opposing adoption of evidence-based medical standards, available at http://www.dir.ca.gov/dwc/DWCPropRegs/MedicalTreatmentUtilizationSchedule/MTUS_regulations.htm

[10] The adoption of IMR is not the first time the legislature has made a policy decision to take sides between competing medical camps. Like the presumption of correctness of evidence-based medicine in the MTUS and enforced through IMR, the statutory presumption of police offer heart trouble was plagued with inconsistent and unpredictable outcomes due to just such a philosophical medical

recommended use of independent medical review (hereafter IMR) to resolve treatment disputes, noting that,

> ...external review of medical-necessity issues could reduce the complexity of California's dispute-resolution process, increase the timeliness and appropriateness of medical necessity appeal determinations, and reduce medical cost-containment expenses. There are various models that use external review organizations in deciding medical-necessity disputes. **Timely and impartial independent medical review (IMR) decisions would improve the quality of medical-necessity decisions because such issues would be decided by medical experts instead of judges** in an administrative process.[11]

In late 2012 another round of reforms began to take shape in the form of Senate Bill 863, wherein the rationale for creating IMR is stated follows:

> (d) 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.
> (e) 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 care** and that the provision of the act establishing independent medical review are necessary to implement that policy.

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divide. In response, the legislature amended Labor Code Section 3212.5 "In order to eliminate the repeated and unilluminating battle of experts ... and to provide consistency in treatment to similarly situated injured workers...." *City and County of San Francisco v. WCAB (Wiebe)* (1978) 43 Cal. Comp. Cases 984 , 989; 1978 Cal. Wrk. Comp. LEXIS 3334 , 339; 583 P.2d 151. The adoption of IMR is a similar legislative response to the medical community's philosophical divide over the use of "evidence based medicine."

[11] Medical Care Provided Under California's Workers' Compensation Program: Effects of the Reforms and Additional Opportunities to Improve the Quality and Efficiency of Care, CHSWC 2011 Report, Summary at Pgs. xviii-xxvix,(emphasis added)

(f) … that **independent medical review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code that will be more expeditious, more economical, and more scientifically sound than the existing function** of medical necessity determinations performed by qualified medical evaluators appointed pursuant to Section 139.2 of the Labor Code. **The existing process** of appointing qualified medical evaluators to examine patients and resolve treatment disputes **is costly and time-consuming, and it prolongs disputes and causes delays in medical treatment for injured workers.** Additionally, the process of selection of qualified medical evaluators can bias the outcomes. Timely and **medically sound determinations of disputes over appropriate medical treatment require the independent and unbiased medical expertise** of specialists that are not available through the civil service system.
(g) 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. (SB863, Stats 2012, Ch. 363, section 1 , emphasis added)

In its annual report for 2012, CHSWC described the impact of the new IMR component of SB863, noting that the old system typically took 9-12 months and 8 separate steps (plus supplemental reports, depositions, etc.) even before a hearing took place, whereas in most cases the IMR process takes 40 or fewer days.

As confirmed in the legislative history[12], the intent behind adoption of IMR with limited appellate review was as follows:

SB 863 proposes to change the way medical disputes are resolved. Currently, when there is a disagreement about medical treatment issues, each side attempts to obtain medical opinions favorable to its position, and then counsel for each side tries to convince a workers' compensation judge based on this evidence what the proper treatment is. This system of **"dueling doctors"** with lawyers/judges making medical decisions has resulted in an extremely **slow**, **inefficient** process that many argue **does not provide quality results**.

[12] Assembly Committee on Insurance, August 31, 2012 Hearing

> Long delays in obtaining treatment result in **poorer outcomes**, reduced return to work potential, and **excessive costs** in the system, none of which are good for injured workers. SB 863 would instead adopt an independent medical review system patterned after the long-standing and widely applauded IMR process used to resolve medical disputes in the health insurance system. Thus, a conflict- free medical expert would be evaluating medical issues and making sound medical decisions, based on a hierarchy of evidence-based medicine standards drawn from the health insurance IMR process, with workers' compensation-specific modifications. The bill contains findings that this system would result in faster and better medical dispute resolution than existing law.
>
> The IMR system is designed to ensure that medical expertise is used to resolve medical disagreements. Thus, the decision from the IMR is final and binding on the parties. Nonetheless, in the exercise of the Legislature's plenary authority to establish a workers' compensation system that includes a review of decisions, there is a process to appeal the IMR result, but this review process does not allow the second-guessing of medical expertise. Rather, the appeal is limited to circumstances where there was fraud, conflict of interest, discrimination based on protected classes, or clear mistakes of facts that do not involve medical expertise.

The adoption of IMR to resolve medical treatment disputes as embodied within SB863 thus reflects the legislature's studied response to a bloated dispute resolution process that was too slow, too expensive, too unpredictable and inconsistent, and produced poor outcomes ... instead returning the medical decision-making to physicians with the expertise to identify, sift through and apply state-of-the-art scientific data regarding highest quality medical care. Such a process is wholly consistent with the plenary power of the legislature, as well as the mandate to accomplish substantial justice expeditiously, inexpensively and without encumbrance. In addition, it is consistent with the exercise of the police power to promote the overall purposes of the workers' compensation scheme.[13]

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[13] *See, Atlantic Richfield Co . v. WCAB* (1982) 644 P.2d 1257

II.
THE PLENARY POWER TO ENACT WORKERS COMPENSATION STATUTES VESTED IN THE LEGISLATURE BY ART. XIV, SEC. 4 IS NOT LIMITED BY THE SEPARATION OF POWERS CLAUSE OF ART III, SEC. 3

As relevant herein, Article XIV, Section 4 of the California Constitution relating to workers' compensation expressly grants the legislature uniquely broad authority found nowhere else in the Constitution, to wit: "*plenary power, unlimited by any provision of this Constitution*" including "full provision for vesting power, authority and jurisdiction in an administrative body ... *to determine any dispute* or matter arising under such legislation" as well as "*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". Those powers are expressly "unlimited by any provision of this Constitution", thus compelling the conclusion that the plenary power to enact workers compensation statutes, including establishing the manner of review of decisions, is not limited by the Separation of Powers Clause.

The Court need not rely solely upon the language of Article XIV, section 4 to reach this conclusion, as the express language of the separation of powers

provision of Article III, section 3 envisions just such a constitutionally permissible exception. Article III section 3 contains an express provision that "Persons charged with the exercise of one power may not exercise either of the others *except as permitted by this Constitution.*" Thus, the very language of Article III, section 3, when read with the "plenary power" clause of Article XIV section 4, also compels the conclusion that there is no violation of Separation of Powers.

That conclusion is further bolstered by the well established basic tenets of constitutional construction as excerpted below[14]:

> In interpreting a constitution's provision, our paramount task is to ascertain the intent of those who enacted it. [Citation.] To determine that intent, we "look first to the language of the constitutional text, giving the words their ordinary meaning." [Citation.] If the language is clear, there is no need for construction. [Citation.] If the language is ambiguous, however, we consider extrinsic evidence of the enacting body's intent.' "
>
> Moreover, "[r]udimentary principles of construction dictate that when 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. [Citations.]"
>
> Statutes are presumed to be valid and a court will not strike down a legislative enactment unless its invalidity is clearly established. Mere doubt as to a law's validity will not support invalidating it.

And finally, there is precedent for the Constitutional supremacy of Article XIV section 4, as it was specifically recognized by the California Supreme Court in *Hustedt v. WCAB* (1981) 30 Cal. 3d 329, 342, wherein the Court stated,

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[14] excerpted from *Greene v. Marin County Flood Control & Water Conservation Dist.* (2010) 49 Cal. 4th 277, 290, and from *Costa v. WCAB* (1998) 65 Cal. App. 4th 1177 (internal citations omitted)

> It is well-established that the adoption of article XIV, section 4 "effected a repeal pro tanto" of any state constitutional provisions which conflicted with that amendment. (Subsequent Etc. Fund v. Ind. Acc. Com. (1952) 39 Cal. 2d 83, 88 [17 Cal. Comp. Cases 142, 244 P.2d 889] Western Indemnity Co. v. Pillsbury (1915) 170 Cal. 686., 695 [151 Pac. 398].) A pro tanto repeal of conflicting state constitutional provisions removes "insofar as necessary" any restrictions which would prohibit the realization of the objectives of the new article. (Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal. 3d 685, 691–692 [97 Cal. Rptr. 1, 488 P.2d 161] cf. City and County of San Francisco v. Workers' Comp. Appeals Bd. (1978) 22 Cal. 3d 103, 115–117 [43 Cal. Comp. Cases 984, 148 Cal. Rptr. 626, 583 P.2d 151].)

For all of the reasons set forth above, this Court should conclude that the plenary power vested in the Legislature by Article XIV, section 4 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"* is not limited by the Separation of Powers Clause of Article III, section 3.

III.
THE LEGISLATLURE'S ENACTMENT OF IMR AND RELATED PROCEDURES PURSUANT TO ITS PLENARY POWER DOES NOT VIOLATE THE DUE PROCESS CLAUSE

In furtherance of its Constitutional grant of "plenary power, unlimited by any provision of this Constitution", the legislature enacted a system of IMR with limited appellate review, relying upon the recommendation of CHSWC.[15] The adoption of IMR was part and parcel of a legislative policy determination to increase worker benefits, improve the quality of medical decision-making and

[15] The details of these studies, history of failed legislative efforts and policy analysis behind the proposed solutions of Independent Medical Review are exhaustively discussed *infra*. The abject failures of the existing system, and imperative in enacting IMR, are outlined in both the Legislative Counsel's digest and in Section 1 of the chaptered version of Stats 2012 ch. 363, SB863.

decrease frictional costs, with projected cost savings used to fund a $740 million benefit increase. As reflected in the legislative history[16],

> 1) Purpose. This bill reflects a negotiated compromise between employers and employees to adopt a substantial increase in permanent disability benefits ($740 million), to ameliorate unexpected reductions that flowed from the 2004 reforms, balanced by substantial changes in the benefit delivery system to eliminate waste, inefficiency, and other loopholes that result in unnecessary employer costs that go to recipients other than injured workers.
> ...
>
> Over the years, the principles of relatively certain defined benefits and relatively timely delivery have been seriously eroded. Inconsistency in parties' ability to ascertain exactly what benefits an injured worker is entitled to has forced the system to develop a complex, cumbersome, and slow litigation-based dispute resolution system. At a fundamental level, the proposal contained in this bill is an effort by the direct parties to the workers' compensation agreement (employees and employers) to return to the principles of relatively certain defined benefits, and relatively timely delivery of those benefits.

The resulting structure underlying IMR is found in Labor Code Section 139.5, which expressly classifies the IMR physician reviewers as consultants to the Administrative Director (Labor Code Section 139.5(b)), and sets out the standards applicable to such consultants insofar as licensing, conflict of interest, expertise/qualifications, etc. The process for IMR after an employer's Utilization Review decision to delay/deny/modify a treatment recommendation is *de novo review* as detailed in Labor Code Section 4610.5 and 4610.6, which together with 139.5, flesh out the requisites for an employee's appeal to IMR, the unlimited documentary record that can be created by the parties for the IMR reviewer,[17] the

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[16] Assembly Committee on Insurance, August 31, 2012 Hearing

[17] Labor Code Section 4610.5(f)(3), (l) and (m), 4610.6(b)

injured worker's right to representation and assistance in presenting evidence to IMR,[18] the strict scientific standards to be applied in weighing competing medical opinions and studies submitted for consideration,[19] and the extensive detailed written analysis required of the reviewer[20] to support the Administrative Director's IMR determination on the limited issue of medical necessity[21] of the disputed treatment.

The IMR physician consultant's detailed report becomes the decision of the Administrative Director (hereafter AD),[22] which is then subject to no fewer than three levels of judicial review: (1) by a workers' compensation judge,[23] (2) whose decision is then subject to another appeal via Petition for Reconsideration to the Workers' Compensation Appeals Board (hereafter WCAB),[24] and (3) whose decision is in turn subject to appeal by petition to the appellate courts.[25]

As relevant to the Due Process considerations herein, **the employee's first challenge to the AD's IMR decision is via judicial review by a workers' compensation judge** for a trial on whether (1) the AD acted in excess of his/her authority [see Labor Code Section 4610.6(h)(1)]; (2) the AD decision was

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[18] Labor Code Section 4610.5(j)

[19] Labor Code Section 4610.5(c)(2) and 4610.6(c)

[20] Labor Code Section 4610.6(e), 4610.6(c), 4610.5(c)(2)

[21] Labor Code Section 4610.6(c)

[22] Labor Code Section 4610.6(g)

[23] per Labor Code Section 4610.6(h)

[24] Labor Code Section 5900, et seq.

[25] Labor Code Section 5950, et seq.

procured by fraud [see Labor Code Section 4610.6(h)(2)]; (3) reviewer conflict of interest [Labor Code Section 4610.6(h)(3)] [which would be determined by review of the affiliation and conflict disclosures required under Labor Code Section 139.5 and, where appropriate, could be accessed by the WCAB via electronic means per 8 CCR 10957.1(i)] .[26] (4) for bias on basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability [see Labor Code Section 4610.5(h)(4)] [reliance upon unlawfully biased studies would be determined from review of the evidence-based medicine studies referenced in the documentary record created by the parties and the extensive reasoning within the AD's written decision]; (6) for plainly erroneous express or implied factual error apparent from the record [see Labor Code Section 4610.6(h)(5)] [which would be determined by from review of the record as created by the parties].

If the IMR decision is upheld by a WCAB Judge the **employee's second appeal is via Petition for Reconsideration to the Appeals Board** under Labor Code Section 5903, on one or more of the statutory grounds set forth therein.[27] If

[26] In addition, the AD has audit oversight of the IMR contractor, and has a unique reviewer ID number that could be used by the AD to audit and verify the compliance as appropriate when presented with a *bona fide* issue.

[27] Grounds for appeal under Labor Code Section 5903 are (a) That by the order, decision, or award made and filed by the appeals board or the 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; (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 at the hearing; (e) That the findings of fact do not support the order, decision, or award.

still dissatisfied with the result, **the employee's third appeal is via Writ of Review** to the Court of Appeal on one or more of the statutory grounds set forth in Labor Code Section 5953.[28]

From the standpoint of "due process", the IMR determination is made based on an evidentiary record created by the parties, the WCAB Judge's decision follows a full trial, the Appeals Board's decision follows review of the record below as does the Court of Appeal's decision. Therefore, though reversal of the IMR decision results in a new IMR determination by a different reviewer, there are no fewer than three appellate opportunities to challenge an IMR determination. Moreover, the an employee may resubmit a request for the same medical treatment by the same physician at any time, even after IMR rejection, on a showing of a documented change in the facts material to the basis of the original utilization review decision.[29]

In assessing the Constitutional sufficiency of these multiple appellate opportunities as against the plenary authority of Article XIV section 4 and the ills the legislature sought to remedy, the Court's analysis should take into consideration the general precepts that

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[28] The grounds for appeal under Labor Code Section 5953 are (a) The appeals board acted without or in excess of its powers; (b) The order, decision, or award was procured by fraud; (c) The order, decision, or award was unreasonable; (d) The order, decision, or award was not supported by substantial evidence; (e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

[29] Labor Code Section 4610(g)(6)

> The procedural requirements necessary to satisfy due process vary according to the competing interests of the government and the citizen. (*Menefee & Son v. Department of Food & Agriculture* (1988) 199 Cal.App.3d 774, 781 [245 Cal. Rptr. 166].)
>
> Due process does not guarantee an opportunity to present oral testimony, but is satisfied where a party is entitled to submit written materials; (*see, State of Pennsylvania v. Riley (3d Cir. 1996) 84 F.3d 125, 13 , and see, Mathews v. Eldridge (1976) 424 U.S. 319, 334)*
>
> Courts may not second-guess the wisdom of the policy choices made by the legislature to resolve the problems. [*Rio Linda Union School Dist. v. WCAB* (2005) 131 Cal.App.4th 517, 532]
>
> The court must balance the private interest affected by the official action against the risk of an erroneous deprivation of that interest through the procedures used, along with the government's interest, including administrative burdens which would be incurred by additional safeguards. (*Peretto v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 449, 460; *Mackey v. Montrym* (1979) 443 U.S. 1, 10 [61 L.Ed.2d 321, 329].)

Considering the Legislature's balancing of the Constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" alongside of the Constitutional grant of "plenary power, unlimited by any provision of this Constitution" to do so, this Court should defer to the Legislature's judgment. Furthermore, in light of the ills sought to be cured, the $740 million benefit increase to injured workers which was the legislative trade-off for the cost-saving procedural reforms of which IMR was the largest portion[30], the historically unconscionable administrative burden and historically poor medical outcomes that the Legislature sought to remedy in order to improve the quality of workers' medical treatment and outcomes, and the safeguard that any IMR determination adverse to the employee is subject to three

[30] See, Assembly Committee on Insurance, August 31, 2012 Hearing;

separate appeals and may be reopened at any time upon a showing of "a documented change in the facts material to the basis of the utilization review decision",[31] it is respectfully submitted that the procedural safeguards and appellate opportunities provided by the IMR statutes do not violate the Due Process clause of California's Constitution.

Finally, to the extent that this case represents a constitutional challenge based on facial invalidity, and as noted in *Professional Engineers v. Department of Transportation*, 15 Cal. 4th 543, 549-550

> in determining whether legislation is facially invalid, it is settled that "[a] facial challenge to the constitutional validity of a statute . . . considers only the text of the measure itself, not its application to . . . particular circumstances. . . ." (*Tobe v. City of Santa Ana*, *supra*, 9 Cal. 4th at p. 1084.) In order to prevail in a facial attack on a legislative enactment, the challenge must establish that under no circumstance can the legislation be applied without violating the Constitution. "[P]etitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute. . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions."

It is respectfully submitted that Petitioner herein has not met that standard for facial invalidity, and for that reason the appeal herein must fail.

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[31] Labor Code Section 4610(g)(6); *Nota Bene* that under Labor Code Section 4610, the *employer* has no right to appeal a utilization review decision favorable to the employee.

CONCLUSION

Against this historical backdrop, and the alarming unwillingness of both the workers' compensation medical community and judiciary to endorse and enforce evidence-based medicine as the gold standard for reasonable and necessary medical treatment, the Legislature sought to remedy the problem by curtailing both the adversarial doctor system and the WCAB's jurisdiction over medical treatment disputes and replacing them with independent physician experts in evidence-based medicine.[32] As persuasively demonstrated by the arguments herein and in the briefs submitted by State Compensation Insurance Fund, the procedures enacted are within the plenary power granted to the legislature within Cal. Const., art. XIV, § 4, do not violate the Separation of Powers clause of Article III, § 3, and contain adequate procedural safeguards and appellate review sufficient to meet the requirements of Due Process.[33]

Dated: June 6, 2015.

ALLWEISS & McMURTRY
A Professional Corporation

/s/ Michael A. Marks

[32] Labor Code Section 4610.5, 4610.6,, as enacted by Stats 2012 ch. 363, SB863.

[33] In the unlikely event this Court finds any portion of Labor Code Section 4610.6 unconstitutional, the statute should not be entirely stricken as 4610(n) contains an express severability clause.