Civil No: A141435

IN THE
COURT OF APPEAL
OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

FRANCES STEVENS

Petitioner,

vs.

OUTSPOKEN ENTERPRISES
AND STATE COMPENSATION INSURANCE FUND
AND THE WORKERS' COMPENSATION APPEALS BOARD,
AND THE ACTING ADMINISTRATIVE DIRECTOR, DIVISION OF
WORKERS' COMPENSATION, ET AL.,

Respondents.

WCAB No. ADJ 1526353

Workers' Compensation Appeals Board

Answer to Petition for Writ of Review and Mandate

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(Government Code §6103)

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STATE OF CALIFORNIA

COURT OF APPEAL

FIRST APPELLATE DISTRICT

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Stevens v. Outspoken Enterprises/State Compensation Insurance Fund

Please check the applicable box:

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

☐ Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Dated April 28, 2014

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To the Honorable Presiding Justice, and to the Honorable Associate Justices of the California Court of Appeal, First Appellate District, Division One from Respondents, the Acting Administrative Director and the Division of Workers' Compensation:

INTRODUCTION

In 2012, California's Legislature passed Senate Bill 863[1] to increase benefits to injured workers and to address the rampant abuses, vast delays, and excessive medical costs impacting the quality and effectiveness of medical care in the workers' compensation system. It established Independent Medical Review (IMR) to allow doctors, instead of judges, to make medical decisions to ensure injured workers receive prompt and effective medical care. (See Cal. Labor Code section 4610.5, 4610.6.[2]) Petitioner raises constitutional challenges to IMR, including the claim it violates the guarantee of due process.

The Legislature made sweeping changes in workers' compensation law geared towards improving the system for the key stakeholders, injured workers and employers. The Legislature introduced measures shifting the focus to benefiting injured workers through the provision of quality medical treatment using objective, evidence-based standards and reducing abuses, frictional costs, and inefficiencies. The reform was, in part, intended to eliminate incentives to provide excessive and unnecessary treatment and instead, encourage medical management and quality of care. The Legislature properly exercised its plenary power to correct a dysfunctional system by stemming runaway medical costs and delays, while embedding judicial review protections into the statute to provide means to challenge decisions.

In this case, Petitioner availed herself of the statutory appeal process, asserting two of the numerous grounds for appeal in the proceedings below.

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[1] Senate Bill 863 (Chapter 363, stats. of 2012, effective January 1, 2013) ("SB 863"). See http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-900/sb_863_bill_20120919_chaptered.html

[2] All further statutory references are to the California Labor Code unless otherwise noted.

While her challenges are pending before the Workers' Compensation Appeals Board (WCAB), Petitioner comes to this court seeking extraordinary relief via a petition for writ of review and writ of mandate. Her request for writ relief is premature and improper.

By way of answer to the petition for writ of review and writ of mandate, the Division of Workers' Compensation (DWC) and Destie Overpeck, the Acting Administrative Director (AD), (hereafter collectively referred to as "Respondents") assert that procedurally, the petition should be dismissed as premature and defective since Petitioner has failed to exhaust her administrative remedies or otherwise meet the requirements for writ relief. Further, this petition should be dismissed on the merits as the Legislature acted well within its plenary powers and created a constitutionally-sound IMR system. The court should not disturb the Legislature's solution to the problems plaguing the workers' compensation medical dispute system.

LEGISLATIVE INTENT BEHIND ENACTMENT OF IMR

The Legislature enacted significant workers' compensation reform with the passage of SB 863. It improved the medical treatment delivery system by stemming excessive treatment through use of evidence-based medical treatment guidelines, removing incentives for abuse, and reducing delays. The introduction of IMR is intended to resolve disputes regarding the reasonableness and necessity of medical treatment proposed by the injured worker's treating physician, in an efficient and effective manner.

The Legislature added IMR as a safeguard to offer an avenue to seek fair consideration of medical disputes arising out of utilization review (UR). Labor Code section 4610 requires that every employer implement a UR process to review and approve, modify, or deny physicians' treatment

requests. It requires that licensed physicians in the appropriate specialty determine questions regarding the medical necessity of a requested treatment. They review the relevant medical records, apply the medical treatment utilization schedule (MTUS), and make a determination regarding medical necessity. When a treating physician's treatment request is either modified or denied on the basis of medical necessity, the injured worker may object to the determination and request a review of the UR decision through the IMR process, as well as pursue any avenues of informal internal appeals that may be offered by the employer or its utilization review organization.

Prior to SB 863, medical treatment disputes arising out of UR were addressed by the parties submitting the matter to either an agreed medical evaluator (AME) or panel qualified medical evaluator (QME) who would examine the injured worker and issue a report addressing the treatment dispute. (Lab. Code, §§ 4610, 4062, 4062.1 and 4062.2.) In instances where there was a perceived deficiency, error or weakness in the evaluator's report, the parties could request supplemental reports and conduct depositions.

Each step in this process resulted in costs and delays associated with the time spent by parties to agree upon or select an evaluator from a panel; the time to obtain an appointment with the evaluator which could be set several months out or longer; the time for the evaluator to issue the report after examination; and the time to conduct further discovery to resolve any deficiencies or issues with the evaluator's reported opinion.

Additionally, if a party disagreed with the findings of the evaluator, the matter could be returned to the WCAB for a hearing and determination by a workers' compensation administrative law judge ("WCJ"), which was subject to judicial review. Where an injured worker alleged a procedural defect with the UR determination itself, the party could proceed directly to

the WCAB and request that the WCJ issue a decision with respect to medical necessity.

These various methods of resolving medical treatment disputes were fraught with delays, costs, and inconsistent results. Ultimately the system did not protect the best interests of injured workers and put them at risk of enduring long delays in the final adjudication of medical issues and relying on judges who have no medical training to decide medical disputes. Further, this led to the potential likelihood that similarly situated injured workers would receive differing determinations of medical necessity for the same injuries and treatment modalities.

In an effort to mitigate those risks and reduce delays and costs, SB 863 introduced a process that requires medical treatment disputes arising out of UR be resolved by submission to independent medical review physicians who serve as arbiters of the issue of medical necessity. These independent physicians conduct a de novo review of the treatment request in conjunction with the medical records, utilization review decision, and any other documentation submitted by the parties relevant to the issue of medical necessity.

The physician reviewers use their medical expertise, insight, and judgment about the medical evidence submitted to them and rigorously apply the best available scientific medical evidence to determine the medical necessity of the requested treatment in accordance with Labor Code sections 4600(b), 4604.5, and 5307.27 and applicable regulations.[3] The

[3] Specifically, Labor Code section 5307.27 directed the AD to adopt a medical treatment utilization schedule (MTUS) that is evidence-based. Labor Code section 4604.5 provides that the guidelines adopted are presumptively correct on the issue and scope of medical treatment. The presumption is rebuttable and may be controverted by a preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury. The medical treatment guidelines are

physician reviewers do not question the diagnosis made by a treating physician; nor do they recommend an alternative course of treatment. Their role is solely to determine the medical necessity of the requested treatment by applying the MTUS.

The IMR determination is deemed to be the determination of the AD and it is binding on all the parties. (Lab. Code, § 4610.6, subd. (g).) However, the decision is subject to judicial review as set forth in Labor Code section 4610.6, subdivision (h). The five grounds for review are as follows: the AD acted without or in excess of her powers; the determination was procured by fraud; the reviewer was subject to a conflict of interest; the determination was the result of bias; and the determination was the result of a mistake of fact. (Lab. Code, § 4610.6, subd. (h).) A party may request a hearing on the appeal on either a regular or expedited basis. If the WCJ determines that the appeal is meritorious, the determination of the IMR physician reviewer is overturned, and the matter remanded for a de novo review by a different physician reviewer in either the same IMR organization or a different one. (Lab. Code, § 4610.6, subd. (i).) Affirming the Legislature's intent to keep medical decisions in the hands of medical professionals, the statute provides that in no event shall a WCJ, the WCAB, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization. (Lab. Code, § 4610.6, subd. (i).) Rather, medical necessity in the IMR system is

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contained in the MTUS regulations which can be found in the California Code of Regulations, title 8, section 9792.20 et seq. The MTUS sets forth treatments scientifically proven to cure or relieve work-related injuries and illnesses. It also deals with frequency, intensity, and duration of treatment. It contains clinical topics (for example, neck and upper back complaints, shoulder complaints, elbow complaints, etc.), special topics (acupuncture medical treatment guidelines, chronic pain medical treatment guidelines, and postsurgical treatment guidelines), and a strength of evidence rating methodology.

intended to remain in the exclusive purview of physician reviewers with medical expertise.

The Legislature made clear its assessment of the previously existing process for resolving treatment disputes as well as its intent and the compelling state interests in instituting the IMR system:

> The Legislature finds and declares all of the following: . . .
>
> (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 provisions of the act establishing independent medical review are necessary to implement that policy.
>
> (f) . . . [T]hat independent medical review is a new state function . . . that will be more expeditious, more economical, and more scientifically sound than the existing function of medical necessity determinations performed by qualified medical evaluators . . . . 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 examiners 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 of limited appeal of decisions resulting from independent medical review are a necessary exercise of the Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of this state and to control the manner of review of such decisions.

Stats. 2012, ch 363 (SB 863) §1.

The court should honor the Legislature's exercise of its plenary power.

STATEMENT OF FACTS

Petitioner Frances Stevens sustained a work-related injury while employed as a magazine editor on October 28, 1997. State Compensation Insurance Fund ("State Fund"), the insurer in the case, provided indemnity and medical benefits to Petitioner. (Petitioner's Ex. 2, p. 2.)

The Petitioner's case went to trial and a finding of permanent disability was made, entitling her to reasonable and necessary future medical care. (Petitioner's Ex. 3.) Subsequently, Petitioner's treating physician made requests for authorization for medical treatment which State Fund submitted to UR and denied as not medically necessary. (Petition for Writ, p. 12.)

In response to those denials, Petitioner filed an application for IMR with Maximus Federal Services, Inc. (Maximus), the Independent Medical Review Organization (IMRO) designated by the AD to perform IMR. On February 20, 2014, Maximus found that the requested treatment was not medically necessary as defined by the applicable medical treatment guidelines. (Petitioner's Ex. 4.)

In response, Petitioner filed an appeal of the decision with the WCAB claiming that the IMR decision involved an erroneous finding of

fact and that the AD had exceeded her powers. Additionally, Petitioner raised a constitutional challenge to IMR. (Respondents' Ex. A.) On or about March 18, 2014, Petitioner filed a Declaration of Readiness requesting a hearing on her appeal and the matter has been set for hearing on May 19, 2014. (Respondents' Exs. B & C.) On April 3, 2014, prior to any action taking place on the initial level of appeal at the WCAB, Petitioner filed this petition for writ of review and mandate.

ARGUMENT

I. THE PETITION FOR WRIT OF REVIEW AND MANDATE SHOULD BE DISMISSED AS PROCEDURALLY DEFECTIVE

Petitioner seeks relief from this court without having satisfied the proper procedural requirements. The procedural defects are dispositive on the issue of whether the petitioner is entitled to the extraordinary relief. This matter is not properly before the court.

A. THE PETITION FOR WRIT OF REVIEW IS PREMATURE BECAUSE PETITIONER'S ADMINISTRATIVE APPEAL IS STILL PENDING BELOW

The necessary prerequisite for relief via a writ of review is the filing of a petition for reconsideration and its granting or denial. (Lab. Code, § 5901; *Llewellyn Iron Works v. IAC* (*Crider*) (1933) 129 Cal.App. 449, 452; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1040.) Labor Code section 4610.6, subdivision (h) sets forth the five grounds for appealing an IMR determination, including abuse of the AD's authority and erroneous finding of fact.[4]

[4] Labor Code §4610.6 (h) states:

The Petitioner filed an initial level appeal at the WCAB challenging the IMR determination in this case on the statutory grounds that the decision was the result of an erroneous finding of fact and that the AD acted without or in excess of her powers in issuing the decision. The appeal further contends the IMR process is unconstitutional. Petitioner requested a hearing to address her appeal petition, which is scheduled to take place on May 19, 2014.

Assuming she is aggrieved by the WCJ's decision ruling on her appeal petition, Petitioner still has a second avenue of administrative appeal for review of the decision, through a petition for reconsideration. Until the WCAB issues a decision on a petition for reconsideration, there is no final order in this case that is subject to review by this court via writ of review. (*Greener, supra,* at p. 1040.)

(h) A determination of the administrative director pursuant to this section may be reviewed only by a verified appeal from the medical review determination of the administrative director, filed with the appeals board for hearing pursuant to Chapter 3 (commencing with Section 5500) of Part 4 and served on all interested parties within 30 days of the date of mailing of the determination to the aggrieved employee or the aggrieved employer. The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal:

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

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

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

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

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

Since Petitioner's appeal of the IMR decision still remains to be addressed at the initial administrative level of review, it is evident that this petition for writ of review is premature and the matter is not ripe for judicial review. "[T]he challenge must come following exhaustion of the remedies available in the workers' compensation system, and must be made by petition for review of the order of the Board." (*Greener, supra* at p. 1040.)

B. THE PETITION FOR WRIT OF MANDATE IS DEFECTIVE BECAUSE THE RELIEF REQUESTED IS IMPROPER, AN ADEQUATE REMEDY IS AVAILABLE, AND PETITIONER WILL NOT SUFFER IRREPARABLE INJURY

Petitioner's request for writ of mandate relief must fail because it is defective in three key respects. First, the requested mandate relief cannot be properly awarded. Second, there is an adequate remedy available to Petitioner. Third, Petitioner cannot establish that she will suffer irreparable injury if the writ is not granted.

To obtain writ relief a petitioner must show: (1) a clear, present and usually ministerial duty on the part of the respondent, and (2) a clear, present and beneficial right in the petitioner to the performance of that duty. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540.) The writ of mandate is an equitable remedy that will not issue if it is contrary to promoting the ends of justice. (*McDaniel v. City of San Francisco* (1968) 259 Cal.App.2d 356, 361.) In addition, a petitioner is required to show there was no adequate remedy at law available to remedy the resulting harm. (See *Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1271-1275.) Therefore, it must appear that petitioner will suffer irreparable injury if the writ is not granted. (*Valley Bank of Nevada v. Super. Ct.* (1975) 15 Cal.3d 652.)

A ministerial duty is one imposed upon a person in public office who, by virtue of that position, is obligated to perform in a legally prescribed manner when a given state of facts exist. (*Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1081.) Generally, ministerial acts do not entail the exercise of judgment or discretion. (*Kavanaugh v. West Sonoma County Union High School District* (2003) 29 Cal.4th 911, 916.)

Here, there is no affirmative ministerial duty that is enforceable through writ of mandate. Petitioner's prayer that she be "afforded an opportunity to present the issue of medical necessity of her treatment to a WCJ with further rights to judicial review" is an improper directive for this court to issue for two reasons. First, judicial review of medical necessity determinations following an appeal of the AD's determination is expressly prohibited by Labor Code section 4610.6, subdivision (i).[5] The remedy sought is precisely what the Legislature intended to avoid in implementing IMR. Second, it is not appropriate for traditional mandate to issue as the effect would not be to direct the WCAB to perform a ministerial function but rather to perform an adjudicatory function which the WCAB is not obligated to perform. (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442.)

Regardless of what relief Petitioner seeks via writ of mandate, jurisdiction is not proper unless there is no adequate remedy available in the

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[5] Labor Code section 4610.6(i) provides: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by different independent medical review organization. In the event that a different independent medical review organization is not available after remand, the administrative director shall submit the dispute to the original medical review organization for review by a different reviewer in the organization. In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization."

ordinary course of law. (*Greener, supra*, at p. 1044.) In this case, Petitioner has already availed herself of a plain, speedy and adequate remedy in the ordinary course of law, by filing a petition with the WCAB appealing the IMR determination on multiple statutory grounds. A hearing is scheduled before a WCJ to address the appeal petition. If Petitioner is aggrieved by the judge's decision, she still has another opportunity for judicial review through the reconsideration process.

In her appeal, Petitioner contends that the AD acted in excess of her powers and that there was an erroneous finding of fact. The appeal could potentially be granted on either ground providing Petitioner with the relief she seeks. Now the WCJ and WCAB, on reconsideration, have an opportunity to review the entire record and determine whether the IMR determination is supported by substantial evidence. If this review compels a decision in Petitioner's favor, the IMR determination will be overturned and the matter will be ordered back to IMR for a de novo review by a different reviewer.

Therefore, judicial review is available at the administrative level that can potentially provide the relief Petitioner seeks. Petitioner has already availed herself of this remedy, and a hearing on her appeal is pending. Consequently, she has failed to show that she will suffer irreparable injury if the writ is not granted.

C. THE PETITION FOR WRIT IS DEFECTIVE BECAUSE PETITIONER FAILED TO EXHAUST HER ADMINISTRATIVE REMEDIES

In California, it has long been the rule that failure to exhaust administrative remedies is a bar to relief. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280.) The general rule is that exhaustion of

administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts. . . . [E]xhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Id.* at p. 301, italics in original.)

In *Abelleira v. District Court of Appeal,* the Supreme Court rejected a similar assertion that an appeal at the administrative level, required by the statutory scheme, would be futile, stating that where administrative procedure provides for a rehearing, the rule of exhaustion of remedies will apply to provide an opportunity to correct any errors it may have made. (*Id.* at pp. 301-302.) This has long been recognized as an important doctrine. "The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." (*Morton v. Superior Court of Fresno County* (1970) 9 Cal.App.3d 977, 982.) "Even where the administrative remedy may not resolve all the issues or provide the precise relief requested by a plaintiff, the exhaustion doctrine is still viewed with favor because it facilitates the development of a complete record that draws on administrative expertise and promotes judicial efficiency. (Cites omitted.) It can serve as a preliminary administrative sifting process, unearthing the relevant evidence and providing a record which the court may review. (Cites omitted.)" (*Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, 501.) The rule will apply even when the administrative procedures arguably limit the remedy the agency may award. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 323.)

Petitioner has not exhausted her administrative remedies. She cannot show that, but for an adjudication that the regulation is unconstitutional, she

will be unable to prevail at the WCAB. The IMR statutes include a dispute resolution process which provides adequate notice to the parties and an opportunity to present evidence, as well as a manner to pursue an appeal at the WCAB. Moreover, upon successful appeal, a de novo review of the issue of medical necessity is awarded. It is likely these processes will resolve the issue of whether the medical treatment is necessary under the applicable guidelines without reaching the constitutional issue. "Unless it appears that there is no reasonable probability the constitutional claim may be avoided in that manner, reaching out to resolve it is inappropriate." (*Public Employment Relations Board v. Superior Court of Sacramento County* (1993) 13 Cal.App.4th 1816, 1832.)

The exhaustion of the administrative remedy is required even though the law sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds. (*United States v. Superior Court of Los Angeles County* (1941) 19 Cal.2d 189, 195.) In *Public Employment Relations Board v. Superior Court of Sacramento County, supra,* 13 Cal.App.4th 1816, the court emphasized that a lawsuit raising primarily legal claims does not remove the necessity for following the prescribed administrative remedy. "When pursuing the administrative remedy will cause irreparable injury and the lack of agency jurisdiction clearly appears from considerations that are not within the agency's specialized understanding, exhaustion should not be required. But when the administrative proceeding involves no unusual expense and when the agency's specialized understanding may contribute to a proper determination, a requirement may be desirable." (*Id.*, at p. 1829.) "[C]ourts ordinarily eschew the resolution of constitutional questions unless compelled to reach them." (*Id.*, at p. 1830.)

Petitioner asserted challenges to the IMR determination in her administrative appeal on the statutory grounds of abuse of authority and mistake of fact. (Respondents' Ex. A, p.2, l. 2-8.) Despite having a full opportunity to frame and address the issues in her appeal, it appears that Petitioner raises new arguments in her writ petition including one that the IMR reviewer's finding regarding home health care was contrary to law, which if meritorious would likely result in the IMR determination being overturned. This, as well as any other basis Petitioner had for appealing the decision, should have been raised in her appeal. She cannot manufacture jurisdiction in this court by failing to raise arguments available to her at the administrative level. Petitioner cannot neglect or refuse to raise an issue at the administrative level that could resolve the dispute and then turn to this court and assert that she does not have an adequate remedy available to her. "[T]he fact that such a legal remedy has been lost by reason of neglect does not require the granting of the writ, in the absence of a sufficient showing of excuse for failure to pursue the legal remedy." (*Wadey v. Justice Court, Upland Judicial Dist.* (1959) 176 Cal.App.2d 426, 428-429.)

Petitioner has administrative remedies available to her, the pursuit of which will not cause irreparable injury; therefore, it is improper to seek to bypass the administrative process and reach out to this court to raise a constitutional challenge. Petitioner must exhaust her administrative remedies first.

II. THE LEGISLATURE PROPERLY EXERCISED ITS AUTHORITY IN DEVELOPING A PROCESS THAT USES INDEPENDENT MEDICAL REVIEWERS FOR THE DETERMINATION OF MEDICAL NECESSITY

Article XIV, section 4 of the California Constitution vests in the Legislature "plenary power to create, and enforce a complete system of workers' compensation." It includes an administrative body with all the

requisite governmental functions to determine any dispute or matter arising under such legislation in order to accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character. The section also states that 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, and, or all of these agencies, either separately of 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."

This language clearly grants the Legislature broad authority regarding the manner in which workers' compensation disputes will be resolved. Although the use of an independent medical reviewer to serve as the arbiter of medical treatment disputes is not specifically mentioned in Article XIV, section 4, this does not render the IMR process invalid. The Legislature is authorized to exercise broad powers concerning workers' compensation. (*City and County of San Francisco v. Workers' Comp. Appeals Bd.* (*Wiebe*) (1978) 22 Cal.3d 103, 113; *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177, 1185.) The purpose of Article XIV, section 4 was to remove any doubt about the constitutionality of the workers' compensation legislation, not to limit the Legislature's authority to enact additional appropriate legislation to protect employees. (*Wiebe, supra*, at p. 114.)

The IMR process outlined in Section 4610.5 and 4610.6 protects injured workers through the provision of treatment that adheres to the highest standards of evidence-based medicine. It ensures consistency in application of the MTUS to the treatment of industrial injuries, thereby serving the best interest of injured workers. An added benefit of IMR is that it serves to educate the industry. With appropriate redactions to protect

the injured worker's identity, IMR decisions are made available to the public. The decisions can be analyzed to increase industry awareness of the propriety of treatment protocols which would ultimately result in fewer treatment disputes and delays in providing treatment.

In order to ensure that the medical treatment decisions are made by medical professionals with the appropriate expertise, the Legislature delegated this function to the IMR physician reviewers. The wisdom of allowing medical treatment assessments and determinations to be made by medical professionals is accepted in the workers' compensation realm. It can be seen in the utilization review statutes which prohibit anyone other than a licensed physician who is competent to evaluate the specific clinical issues involved in the medical treatment services, and where the services are within the scope of the physician's practice, to modify, delay or deny requests for authorization of medical treatment for reasons of medical necessity. (Lab. Code, § 4610, subd. (e).) Historically, disputes over medical treatment required submission to agreed or qualified medical examiners. (Lab. Code, §§ 4610, 4062, 4062.1 and 4062.2.) Such requirements implicitly reflect an acknowledgement of the importance and value of having medical determinations made by professionals with medical training and expertise. This principle has been legislatively extended in the IMR process to ensure that, in addition to providing expert opinion, medical professionals are also used to resolve disputes concerning treatment.

In California, it has frequently been held that the proper or usual practice and treatment by a physician or surgeon in the examination and treatment of a wound or injury, is a question for experts. (*William Simpson Constr. Co. v. Industrial Acci. Com.*, (1925) 74 Cal.App. 239, 243 citing *Perkins v. Trueblood*, 180 Cal. 437, 433; *Houghton v. Dickson*, (1916) 29 Cal.App. 321, 324; *Dameron v. Ansbro*, (1918) 39 Cal.App. 289, 300; and *Pearson v. Crabtree*, (1924) 70 Cal.App. 52.) "[W]henever the subject

under consideration is one within the knowledge of experts only, and is not within the common knowledge of laymen, the expert evidence is conclusive upon the question in issue. It follows that in such cases, neither the court nor the jury can disregard such evidence of experts . . . they are bound by such evidence, even if it is contradicted by nonexpert witnesses." (*William Simpson Constr. Co.*, at p. 243.) In light of the specialized knowledge required to apply the statutory treatment guidelines and perform an assessment of medical necessity, and given the substantial state interest in ensuring that such assessments are performed correctly and consistently, the Legislature properly exercised its power to limit these determinations to the exclusive purview of the IMR physician arbiters.

Petitioner repeatedly references throughout the petition the fact that the IMR physician reviewer is a "non-treating, non-examining medical reviewer." It is assumed this repeated reference is made to suggest that the IMR reviewer is not in the best position to determine the issue of medical necessity because he or she did not treat or examine the injured worker. This suggestion is at odds with the Petitioner's request that the writ of mandate issue and the matter be submitted to a WCJ for resolution, given that the WCJ is a non-treating, non-examining legal professional who lacks any medical training or expertise. Respondents contend that the determination of medical necessity is better suited for a medical professional than someone who lacks specialized medical knowledge. This position is consistent with the Legislative intent underlying the IMR process.

III. LABOR CODE SECTION 4610.6 DOES NOT VIOLATE PETITIONER'S RIGHT TO DUE PROCESS

A. THE IMR STATUTES SATISFY DUE PROCESS

1. Parties Are Fully Apprised of Evidence and Have an Opportunity to Inspect Documents and Offer Rebuttal Evidence

Citing *Fidelity v WCAB* (1980) 103 Cal.App.3d 1001, the Petitioner argues that Labor Code section 4610.5 et seq. deprives the injured worker of due process. However, applying the individual elements of due process to the provisions of the statute in question demonstrates that there is no denial of due process.

Due process requires that all parties must be fully apprised of the evidence submitted or to be considered. (*Fidelity, supra*, at p. 1015.) Labor Code section 4610.5, subdivisions (l) & (m) and California Code of Regulations, title 8, section 9792.10.5 set forth the broad range of documentation that the employer must and the employee may provide to the IMR for consideration in conducting the review. In addition to the exhaustive list of documents the employer must provide to the IMR reviewer, the injured worker is entitled to submit any material that he or she believes is relevant to the issue of medical necessity. There is also a continuing obligation requiring that the parties provide information as it is developed or discovered. Parties are required to advise each other of the documentation being submitted for consideration. Additionally, the scientific medical evidence that will be applied by the physician reviewer, as well as the directives regarding the manner in which they are to be applied, are clearly set forth in the applicable sections of the Labor Code and Regulations.

Due process requires that all parties be given the opportunity to inspect documents and to offer evidence in explanation or rebuttal. (*Fidelity, supra*, at p. 1015.) A close examination of the IMR review process yields the conclusion that by the time the medical dispute reaches

an IMR review, the parties have been given sufficient notice and an opportunity to inspect all relevant documentation, and submit documents or evidence in explanation or rebuttal, including materials developed or discovered after the issuance of the UR decision. This allows the parties a chance to correct and substantiate any deficiencies identified during the UR process. Therefore, in this instance, due process is satisfied.

2. The Statute Does Not Infringe Upon the Right to Cross-Examine Witnesses

Due process requires all parties must be given the opportunity to cross-examine witnesses. (*Fidelity, supra*, at p. 1015.) Contrary to her contention, Petitioner's due process right to cross-examine witnesses is not infringed upon by Labor Code section 4610.6. Petitioner cites the en banc decision in *Stingley v. INA* (1969) 34 Cal.Comp.Cases 462 as supporting her contention that the Petitioner has a right to cross-examine the IMR physician reviewer. In *Stingley*, the Referee, presiding over a petition to terminate benefits, submitted a request to the Permanent Disability Rating Bureau for a recommended permanent disability rating. (*Id.* at p. 462.) The defendants were denied a hearing to cross-examine the rating specialist and to present rebuttal evidence. (*Id.* at p. 463.) The WCAB found that the Referee's failure to allow cross-examination of the rater resulted in a denial of due process. (*Id.*) The WCAB concluded that "an attempt to restrict such cross-examination or rebuttal evidence prior to the proceeding itself is against all concepts of fair play and accordingly is violative of a party's fundamental right to conduct cross-examination and present rebuttal evidence." (*Id.* at p. 464.)

Petitioner's application of the *Stingley* decision to the case at hand is an improper expansion of the holding, and for the reasons stated below, *Stingley* is distinguishable. There is a critical distinction to keep in mind when considering Petitioner's alleged right to cross-examine the IMR physician reviewer.

The IMR physician reviewer is not acting as a witness or expert witness on behalf of a party but rather, the reviewer sits as the arbiter of the dispute. The physician reviewer is not issuing an opinion or recommendation for the court's consideration; the physician reviewer is performing an adjudicatory function. The physician reviewer is utilizing his or her medical training, experience related to his or her scope of practice, and clinical competence to make a uniquely medical decision as to the necessity of the treatment. Their role as arbiters of medical facts does not lend itself to cross-examination, and therefore their identities need not be revealed.

Indeed, "[n]o person presiding in any judicial or quasi-judicial proceeding, and no arbitrator or mediator, shall be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in conjunction with the prior proceeding, except as to a statement or conduct that could (a) give rise to civil or criminal contempt, (b) constitute a crime, (c) be the subject of investigation by the State Bar or Commission on Judicial Performance, or (d) give rise to disqualification proceedings . . . ." (Evid. Code, § 703.5.)

In the California Supreme Court case *City of Fairfield vs. Superior Court* (1975) 14 Cal.3d 768, 777-778, the court discusses "the Morgan rule." Under the "Morgan rule," which precludes one from probing into the thought processes of the decision-maker of a quasi-judicial administrative

agency decision, the IMR reviewer's testimony in this matter would be absolutely precluded. As the court stated at page 779, a quasi-judicial decision stands or falls on its findings, and the decision-maker may not be called on to clarify or supplement those findings:

> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan, supra*, 313 U.S. 409, 422 [85 L.Ed. 1429, 1435] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators. (See *Camp v. Pitts* (1973) 411 U.S. 138, 142-143 [36 L.Ed.2d 106, 111-112, 93 S.Ct. 1241].) If it does not state findings, the remedy, depending on the case, is to annul the administrative action or to remand the matter to the board for findings, not to take the depositions of the administrators as a substitute for findings. (See *Hadley v. City of Ontario, supra,* 43 Cal.App.3d 121, 128-129.)

Based upon the foregoing, Respondents contend that due process rights are not violated by virtue of maintaining the anonymity of the IMR reviewers' identity.

3. The Statute Allows for Meaningful Judicial Review

Petitioner's argument alleging the denial of due process hinges on the fundamentally false premise that the process embodied in Labor Code section 4610.5 is not subject to judicial review. The review afforded by the WCAB satisfies the constitutional requirement of the right of judicial review for errors of fact or law. (*Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 653.) Due process does not require a process that assures perfect, error-free determinations; rather it requires procedures that afford fair consideration of a party's claims. (*California Consumer Health Care Council, Inc. v. Department of Managed*

Health Care (2008) 161 Cal.App.4th 684, 691-692.) The IMR system established by the Legislature provides for fair consideration of a party's claims and meaningful judicial review of the IMR reviewer's decision. First, the system allows for judicial review of the IMR decision to determine if the AD acted without or in excess of her powers or if the decision is based on a mistake of fact. Second, the system allows for challenges to the decision on the ground of bias, conflict of interest, and fraud. Finally, should it be determined that the decision was defective in one of these respects, the statute provides for a de novo review of the issue of medical necessity by a different medical reviewer. These safeguards ensure that the parties have a full opportunity to evaluate the decision of the reviewer.

Contrary to Petitioner's assertion, the IMR process is not a secretive one. The parties have the opportunity to provide to the IMR physician reviewer documentation relevant to the issue of medical necessity and are entitled to full disclosure of all documents submitted and reviewed. There is no secrecy as to the process the IMR physician reviewer will follow in conducting the review or the scientific medical evidence that will be applied and considered. Indeed, the discretion of the physician reviewer is limited to application of the MTUS for medical treatment in a pre-designated and controlling order. The IMR reviewer is bound by the finding of the medical condition and the application of the MTUS. It is not his or her role to second-guess the diagnosis, assess the credibility of the doctor or injured worker, or make recommendations of alternative treatment plans.

The reviewer quite simply examines all the evidence, identifies the diagnosed condition, applies the MTUS to the injured worker's condition, and compares the requested treatment against it. If the requested treatment

falls within the recommendation supported by the MTUS, the treatment is awarded; if it does not, the utilization review organization's denial or modification of treatment is upheld.

The determination that is issued by the IMR physician reviewer describes the medical condition as set forth in the medical evidence; identifies the materials reviewed and relied upon; references the source of the treatment recommendation applied; and explains the rationale for and import of their application.

Given the requirement that the physician reviewers apply statutorily defined scientific medical evidence and that they be applied in a particular order, the physician reviewers' discretion is limited. Any deviance from that application would be evident on the face of the determination, and would need to be supported by the medical evidence and explained in the decision. As a result, the IMR determination itself, in conjunction with the materials submitted for consideration and the scientific medical evidence applied, should provide the information necessary to raise any challenge to the decision whether on the grounds of abuse of discretion, mistake of fact or law, bias, conflict of interest, or fraud. If the decision reflects that the medical condition was accurately described, the medical records were reviewed, and the scientific medical evidence was appropriately applied, then the decision is supported by substantial evidence and should not be disturbed absent evidence of something else which would be reflected on the four corners of the document. Furthermore, this process is consistent with the legislative mandate that the determinations concerning medical treatment are based on the MTUS pursuant to subdivision (b) of Labor Code section 4600.

The IMR determinations themselves are instructive as to the existence of any potential basis for challenging the decision and the identity of the reviewer is not critical to make this determination. Any potential basis for overturning a determination and having a de novo review conducted will be shown by the facts and conduct of the reviewer as reflected within the four corners of the determination. There is therefore no need to conduct discovery regarding the identity of the IMR reviewer.

If there is a contention that the AD acted in excess of her powers, that there was an erroneous finding of fact, or that the IMR reviewer issued a determination procured by fraud, this will be evident from the documentary record. The AD and the independent contractors selected to provide the IMR service instituted internal procedures to avoid financial conflicts of interest and the determinations contain statements by the reviewers indicating that they are free from conflicts of interest. Bias would need to be shown by the reviewer's conduct as reflected upon the face of the determination itself.

Finally, if an injured worker appeals the IMR determination on any of the enumerated grounds and the WCJ finds in his or her favor, the injured worker is entitled to a new IMR with a different reviewer. Therefore, there is no violation of due process based upon the system of meaningful judicial review encompassed in the statute.

B. THE DISPUTE OVER MEDICAL NECESSITY IS NOT A LEGALLY COGNIZABLE DISPUTE WITHIN THE MEANING OF ARTICLE XIV, SECTION 4 OF THE CALIFORNIA CONSTITUTION

It is erroneous to assume that the process of review of a UR decision embodied in Labor Code section 4610.5 gives rise to a legally cognizable dispute within the meaning of the second paragraph of California Constitution, Article XIV, § 4.

The provisions of Labor Code section 4610.5 et seq. are simply a permissible exercise of the plenary power of the Legislature to formulate a medical benefit delivery system that places the ultimate decision with respect to medical necessity in the hands of medical professionals. The statutory scheme also embodies a limited judicial review with respect to all elements necessary to satisfy procedural due process.

Distilled to its bare essence, the system embodied in Labor Code section 4610.5 provides a method to review a dispute between two medical professionals. The process is only invoked when a UR evaluator has disagreed with the treatment recommendations of an injured worker's treating physician. The IMR evaluator reviews the medical records related to the denied treatment request, and makes a determination as to medical necessity applying the procedures embodied in Labor Code section 4016.5(c)(2)[6]. This process encompasses a determination of medical

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[6] Labor Code §4016.5(c) (2) states:
"Medically necessary" and "medical necessity" mean medical treatment that is reasonably required to cure or relieve the injured employee of the effects of his or her injury and based on the following standards, which shall be applied in the order listed, allowing reliance on a lower ranked standard only if every higher ranked standard is inapplicable to the employee's medical condition:
(A) The guidelines adopted by the administrative director pursuant to Section 5307.27.
(B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service.
(C) Nationally recognized professional standards.
(D) Expert opinion.
(E) Generally accepted standards of medical practice.

necessity made by a licensed physician applying statutorily determined guidelines. Of paramount importance to the review of the constitutionality of the statute is the fact that the employer can stop the entire process at any time by providing written authorization for the disputed medical treatment. (Lab. Code, § 4610.5, subd. (g).)

This court has ruled on the constitutionality of a Labor Code section that similarly embodied the plenary powers of the Legislature in limiting the provision of medical benefits.

In *Facundo-Guerrero v. Workers' Compensation Appeals Board, supra,* 163 Cal.App.4th 640, this court reviewed the constitutionality of Labor Code section 4604.5, subd. (d) (i.e., 24 chiropractic visit limit). This court concluded that a disagreement with an employer's refusal to approve excess treatments did not give rise to a legally cognizable dispute within the meaning of the second paragraph of Cal. Const., art. XIV, § 4, because the employer has the sole discretion as to whether to approve payment for more than 24 chiropractic visits. In other words, the decision to allow or refuse additional visits does not turn on the employee's need for the treatment. As the *Facundo-Guerrero* court stated, the Legislature has the legal authority to limit the injured worker's right to receive medical treatment. Here, the IMR reviewer's decision allowing or limiting medical treatment is based on applying the MTUS' chronic pain guideline for the medical condition. Because the IMR reviewer is not making a decision about a factual or legal dispute, applying the guidelines for medical necessity embodied in Labor

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

Code §4016.5(c)(2) does not give rise to a legally cognizable dispute within the meaning of the second paragraph of Cal. Const., art. XIV, § 4.

Respondents submit that the determination of medical necessity made by the IMR evaluator does not give rise to a legal or factual dispute that should be decided by a judicial officer. The application of the medical evidence enunciated in Labor Code section 4610.5(c)(2) to a specific set of facts embodied in the medical records constitutes a medical determination that should be made by a medical professional. Although the medical decision may not be overturned by a WCJ, an appeal may be granted for the reasons set forth in Labor Code section 4610.6(h) and the IMR will be assigned to a new physician reviewer.

IV. PETITIONER FAILS TO SHOW THAT THE NEW PROCESS FOR RESOLVING MEDICAL TREATMENT DISPUTES DENIES SUBSTANTIAL JUSTICE IN ALL CASES EXPEDITIOUSLY AND WITHOUT ENCUMBRANCE

Petitioner asserts that Labor Code section 4610.6 violates article XIV, section 4 of the California Constitution because it creates an encumbrance to the workers' compensation system. Petitioner's constitutional challenge must fail because the IMR process continues to require an employer to provide medical treatment that is "reasonably required to cure or relieve the injured worker from the effects of his or her injury. . . ." (Lab. Code, § 4600.) Labor Code section 4610.6 is simply a procedural change for disputing medical treatment issues, a proper exercise of the Legislature's broad plenary powers established under the Constitution.

Article XIV, section 4 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...

It is well established that California Constitution, Article XIV, § 4 provides the Legislature with broad power to establish a complete system of workers' compensation. As stated in *Bautista v. State of California* (2011) 201 Cal.App.4th 716, 729:

> "We read article XIV, section 4 as defining the necessary provisions for a complete workers' compensation system, and leaving it up to the Legislature to enact laws to give effect to each provision, including "securing safety in ... employment." (See *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 651 [77 Cal.Rptr.3d 731] [Legislature may limit employees' chiropractic treatments]; *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd., supra*, 131 Cal.App.4th at p. 526 [Legislature may limit employees' statutory right to benefits]; see also *Six Flags, Inc. v. Workers' Comp. Appeals Bd.* (2006) 145 Cal.App.4th 91, 95–96 [51 Cal.Rptr.3d 377] [Legislature may not expand its constitutional authority to provide death benefits to deceased worker's estate].) The Legislature must act to fulfill its constitutional mandate to create the workers' compensation system, and the judicially enforceable rights are the laws it enacts."

As this court aptly noted in *Facundo-Guerrero v. Workers' Comp. Appeals Bd.*, 163 Cal.App.4th 640, 651, the court "will not second-guess the wisdom of the Legislature in meeting the workers' compensation crisis in this state."

Prior to the enactment of SB 863, parties utilized qualified medical evaluators (QMEs) or agreed medical evaluators (AMEs) to resolve contested medical treatment issues. The process often involved a waiting period before a list of QMEs would issue; several months' wait thereafter to obtain the appointment and evaluation with the QME; and additional time for the QME to issue the report with the evaluation findings. If the report did not fully address the parties' concerns or if the parties wished to cross-

examine the reviewer, they could conduct further discovery including requesting supplemental reports or deposing the doctor. Once the issues had been addressed, if either party still disputed the findings of the QME, it was entitled to a hearing by a WCJ. A decision rendered thereafter was subject to review by the WCAB which in turn was subject to appellate review by the courts of this State.

The Legislature recognized that the system, as it existed for resolving medical disputes, was costly, time consuming, and did not uniformly result in the provision of treatment that adhered to standards of evidence-based medicine. As a result, the IMR system was implemented. The IMR process ensures an expeditious, economical, and scientifically- based method in making medical necessity determinations. Pursuant to Labor Code section 4610.6, subdivision (d), upon receipt of a completed application and relevant medical records, the determination of the disputed medical treatment modality is made within 30 days. In this case there was a delay in issuing a determination within this timeframe due to issues surrounding obtaining copies of relevant documents and making an eligibility determination. Regardless, the determination was still issued more expeditiously here than it would have been under the prior dispute resolution process.

The Constitution authorizes the Legislature to "fix the manner of review" of decisions, allowing the Legislature to change the process of review. The Court of Appeal in *Facundo-Guerrero* confirmed that there are no constitutional entitlements to a particular benefit or process. (*Facundo-Guerrero v. WCAB* (2008) 163 Cal.App.4th 640.) "The California Constitution does not make a worker's right to benefits absolute." (*Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005)131 Cal.App.4th 517, 532.) Nonetheless, similar to the prior process, the IMR decisions continue to be subject to judicial and appellate review.

The change in law does not fail to accomplish substantial justice when the new process still requires that the employer provide all necessary medical treatment and provides a system that allows for review of medical treatment decisions using the best available medical evidence. The Labor Code sets forth what the IMR reviewer will be applying to make a determination of medical necessity. The Labor Code provides that the MTUS is correct, and the MTUS is set forth in regulations. (California Code of Regulations, title 8, sections 9792.20 et seq.) The UR reviewers apply the best available medical evidence; so either treatment requests can be made in accordance with the MTUS or the physician can explain why an alternative recommendation found in another guideline or original scientific study is more appropriate under the circumstances. It is anticipated that this will result in fewer treatment disputes and a reduction in delays in the provision of treatment.

It is the duty of the treating doctor to explain the basis for the necessity of the treatment. This opportunity to substantiate the medical necessity of the requested treatment is available to the provider prior to the submission of the request to the claims administrator, and again in any informal appeal process that a utilization review organization may employ, and finally, again when the matter is sent to IMR for review. At that time, the parties may submit any documents that are relevant to determining the issue of medical necessity which could include substantiation from the treating physician as to the medical necessity.

In the situation where the treatment is not deemed medically necessary, that decision remains effective for 12 months but only applies to the request made by that particular physician and even then, it is not absolute. Labor Code section 4610, subdivision (g)(6) allows for the same physician to make a subsequent request for the treatment as long as the

request is supported by a documented change in facts material to the issue of medical necessity.

Considering the totality of the IMR system, it is clear that it satisfies the mandate that the workers' compensation system provide substantial justice in all cases expeditiously and without encumbrance.

CONCLUSION

The Legislature properly exercised its plenary power to implement the IMR process as a solution to a crisis in the workers' compensation system. Petitioner, dissatisfied with the IMR outcome in her case, filed an appeal at the administrative level and has come to this court seeking extraordinary writ relief, raising constitutional challenges to the IMR system itself. Her petition for writ of review and mandate suffers from fatal procedural defects and her specious constitutional challenges do not stand up under close examination of the law and the due process and procedural safeguards embedded in the IMR system.

For these reasons, Respondents respectfully submit that the petition for writ of review and mandate should be denied.

Dated: April 28, 2014

Yvonne M. Hauscarriague
Attorney for Respondents
Division of Workers' Compensation and
Destie Lee Overpeck,
Acting Administrative Director

CERTIFICATION OF BRIEF LENGTH

Pursuant to Rule 8.204(c)(1) and (3), the undersigned counsel for the Acting Administrative Director, Division of Workers' Compensation, hereby certifies that the foregoing Answer to Petition for Writ of Review and Mandate (not including the Table of Contents, Table of Authorities, and this Certification of Brief Length) contains 8,749 words. Said word count is made in reliance on the computer program used to prepare this answer and memorandum.

DATED: April 28, 2014

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STATE OF CALIFORNIA

COURT OF APPEAL

FIRST APPELLATE DISTRICT

APPLICATION TO THE PRESIDING JUSTICE TO ALLOW ADDITIONAL PAGES OF ATTACHMENTS FOR GOOD CAUSE

Stevens v. Outspoken Enterprises/State Compensation Insurance Fund

Respondents herein have attached approximately 18 pages as exhibits to the Answer to Petition for Writ of Review and Mandate herein. Respondents believe that these attachments are not voluminous enough to warrant a separate Appendix. However, the documents attached hereto are relevant and essential to the determination of the issues raised by the Petition and Answer to the Petition.

For the foregoing reasons, Respondents respectfully request that the Presiding Justice permit these exhibits in excess of 10 pages for good cause.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Application was executed on April 28, 2014 at Oakland, California.

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Exhibit A

Petition for Appeal from IMR (WCAB)

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Attorneys for Applicant

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANCES STEVENS, Applicant, vs. **OUTSPOKEN ENTERPRISES INC. and SCIF,** Defendants.	**Case No.: ADJ1526353 (SFO 0441691)** **APPEAL FROM MEDICAL REVIEW DETERMINATION PURSUANT TO LABOR CODE SECTION 4610.6**

COMES NOW applicant herein by and through her attorney record and files this appeal from the Independent Medical Review Final Determination Letter of February 20, 2014 (Exhibit 1).

Applicant requests the WCAB to incorporate by reference the Findings & Award issued in this matter on August 16, 2013, the Minutes of Hearing and Summary of Evidence of May 20, 2013, applicant's trial brief of May 14, 2013, and all exhibits admitted into the trial record as reflected in the Minutes of Hearing and Summary of Evidence of May 20, 2013.

Additionally, applicant submits recent reports of Dr. Jamasbi (applicant's treating doctor) as Exhibit 2, all received after the Findings and Award in this matter.

Applicant requests this appeal on the following grounds:

1. The statutory scheme outlined in Labor Code § 4610.6, including 4610.6 (f) requiring the reviewing organization to keep medical reviewers anonymous from the applicant and her counsel and immune from cross-examination, is in violation of Article XIV, Section 4 of the California Constitution and applicant's right to due process.
2. The IMR decision of February 20, 2014 is contrary to Labor Code § 4610.6 (h) (5).
3. The IMR determination of February 20, 2014 is contrary to Labor Code § 4610.6 (h) (1).
4. The procedures followed by the IMR reviewer organization violated the mandate of Labor Code § 4610.6 (d).
5. The IMR determination of February 20, 2014 violates the mandate of Labor Code § 4610.6 (c).

I.

BACKGROUND

After extensive pretrial litigation, the case of Francis Stevens (applicant is now 16 years post injury) finally proceeded to trial on May 20, 2013.

Numerous medical exhibits were accepted into the trial record as reflected in the Minutes of Hearing and Summary of Evidence prepared by the WCJ.

Testimony was taken from the applicant and on August 16, 2013, WCJ Lehmer issued her Findings of Fact and Award, finding applicant to be 100% permanently and totally disabled.

WCJ Lehmer discussed extensively the medical evidence in this case in her Opinion on Decision, which had also been reviewed extensively in applicant's counsel's trial brief of May 14, 2013.

Unfortunately, as result of applicant's industrial injury, she has become wheelchair-bound, lives in chronic pain, and suffers from a severe depression.

She is unable to do most things for herself and the medication regimen offered by her treating physician is the only meaningful treatment at this stage available to applicant, given the chronic nature of her condition.

II.

THE STATUTORY SCHEME OUTLINED IN LABOR CODE § 4610.6 VIOLATES ARTICLE XIV, SECTION 4 OF THE CALIFORNIA CONSTITUTION AND DENIES APPLICANT HER DUE PROCESS RIGHTS.

Article XIV, Section 4 of the California Constitution provides, in part,

> "The Legislature is hereby expressly vested with plenary power unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation..."

This includes a

> "... full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government."

The IMR determination of February 20, 2014 issued in Ms. Stevens' case, denying various medications that applicant has been prescribed by her treating physician for an extended period of time (essentially cutting off applicant "cold turkey"), as well as denying home health care,does not comply with the constitutional mandate that workers' compensation laws must provide benefits, including medical care, for severely injured workers expeditiously and without encumbrance.

The original Utilization Review denials in this case were issued in a series of denials in October 2013, yet Maximus, in its IMR decision of February 20, 2014, did not even comply with the time frames outlined in Labor Code § 4610.6 (d). Even the reviewing organization

acknowledges applicant's severe pain and loss of major bodily function, yet complied with neither the 30-day requirement of Labor Code § 4610.6 (d), nor the three-day requirement.

Moreover, the Supreme Court of California, as stated by Justice Tobriner in *Quinn v. State of California* (1975) 15 Cal 3rd 162, Labor Code § 3202 requires the Courts to view the Workers' Compensation Act from the standpoint of the injured worker, with the objective of securing for him/her the maximum benefits to which he/she is entitled.

Labor Code § 4610.6 (f) requiring that the reviewing physician be kept anonymous and protected from any cross-examination, denies applicant her rights to due process. In 1969, the WCAB issued an *en banc* decision in the case of *Stingly v. INA* 34 CCC 4062. In *Stingly*, the Court held:

> "Even though appropriate restrictions may be imposed in the interest of orderly proceedings during the actual course of proceedings, an attempt to restrict cross-examination or rebuttal evidence prior to the proceeding itself is against all concepts of fair play, and accordingly is violative of a party's fundamental right to conduct cross-examination and present rebuttal evidence."

In *Stingly, supra*, the WCAB also states:

> "We are mindful of the heavy demands made upon this Board and its referees with our ever increasing case load, and are fully cognizant of the fact that it is administratively desirable to simplify procedures whenever possible in discharging out duty of 'expeditiously adjudicating cases before the Board.' (see California Constitution, Article XX, section 21). However, where judicial procedures, no matter how desirable they may be, clash with the requirements of due process of law, the former must yield to the latter."

In *Fidelity v. WCAB* (1980), 45 CCC 381, 103 Cal. App 3d. 1001:

> "The WCAB 'acts as a Court and it must observe the mandate of the Constitution of the United States that this cannot be done except after due process of law...'
>
> > "Due process requires that all parties must be fully apprised of the evidence submitted or to be considered, 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 makes its defense."
>
> "Unfortunately, in this case the Board's rush to judgement has led it far afield of the essentials of due process. If this case is a measure, the Board has despite its sheath of rules of practice and procedure (California Administrative Code and Labor Code), operates in an essentially structureless environment where the vigilance of the petitioning and responding parties provides the only insurance against the arbitrary and capricious denial of due process."

Applicant, Francis Stevens, is a severely injured worker with chronic pain, severe depression, and inability to conduct most activities of daily living without assistance, and who requires the assistance of home health aides and the provision of chronic medication as well as a wheelchair to maintain any quality of life whatsoever.

Her treating physician, Dr. Jamasbi, states in his report of December 5, 2013 (Exhibit 2): "She requires use of a home health aide 5 days a week, 8 hours a day in order to help with dressing, feeding, helping her with bath and shower."

In his report of December 11, 2013 (Exhibit 2), Dr. Jamasbi reports that her medications have been refilled and her August 1, 2013 urine screen is consistent with the medication use (indicating chronic use and compliance with the medication regimen).

In the medical report of January 10, 2014 (Exhibit 2), Dr. Jamasbi reports

> "As you will recall, she could not complete the Northern California functional restoration program secondary to a severe flareup of pain. She continues to utilize a motorized for ambulation. We did receive denial for home health aide to assist with dressing, feeding, driving, back and showers..."
>
> "Patient would like to stay conservative with her treatment. Patient is currently utilizing Norco 6 tablets per day. We will try weaning her down to 5 tablets per day this next month. She does report some memory issues and poor concentration. We will monitor her progress and determine if this improves with weaning down on the Norco."

In a report of February 6, 2014 Dr. Jamasbi reports "patient does not wish to have any invasive procedures and would like stay conservative with her treatment. Ultimately, she would like to try to wean off all medications ordered to reduce her dependency on medications."

The IMR determination of February 20, 2014 must be construed in this context; the IMR reviewer would cut off all of applicant's medication regimen "cold turkey" in spite of her physician's best efforts to wean her to a more manageable level, while at the same time denying applicant the needed home health aide to assist her with functions of daily activities, such as bathing, dressing, cleaning and cooking.

It does not take an expert determination to determine that such a denial defies common sense contrary even to the flawed mandate of Labor Code § 4610.6

The statutory scheme of Labor Code § 4610.6, which allows an anonymous physician to issue a decision terminating her medications and restricting her home health assistance, some four months after the initial Utilization Review denials, without affording applicant the basic right of cross-examination of the reviewing physician, particularly when that reviewing physician is obviously not either an examining or treating physician, has created a substantial encumbrance to applicant receiving her necessary medical care and cannot be construed in any rational manner as being expeditious.

A medical determination of such importance to applicant based on a physician who is not only anonymous, but neither a treating or examining physician, violates applicant's fundamental right to receive reasonable and necessary medical care for her industrial injury and further violates her rights to due process.

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III.

THE DECISION OF FEBRUARY 20, 2014, DENYING APPLICANT'S MEDICATIONAND HOME HEALTH ASSISTANCE, IS CONTRARY TO THE MANDATE OF LABOR CODE § 4610.6 (H) (5).

WCJ Lehmer made extensive findings and and explained those findings of fact, in her Opinion on Decision of August 16, 2013.

At its essence, those findings are that applicant is wheelchair-bound, suffering from chronic intractable pain, and suffers from severe depression.

The denial of medications that applicant has been taking consistently at the request of her treating physicians for her chronic pain is a plainly erroneous decision, not requiring medical expertise; a "common sense" interpretation of the facts and findings made by WCJ Lehmer would lead any reviewer, lay or medical, to determine that it is contrary to the consideration of applicant's particular needs as required by Labor Code § 4610 (c) to allow termination by the defendant carrier of all of applicant's pain medications and to deny her home health assistance as requested by her treating physician.

IV.

CONCLUSION

The determination of the IMR reviewing organization denying applicant's medications and home health assistance of February 20, 2014, must be overturned and applicant should be afforded the opportunity to know the name and qualifications of the reviewing physician, and applicant must be afforded the opportunity to cross-examine that physician. Applicant must be provided her medical care in a manner consistent with the California State Constitution requiring the expeditious delivery of benefits, including medical care, expeditiously, without encumbrance and in compliance with due process.

To allow an anonymous physician who has neither treated nor examined the applicant to terminate her medications without the provisions of alternative treatments essentially denies

applicant her right to receive reasonable and necessary medical care consistent with the mandate of Labor Code §§ 4600, 3202, the California State Constitution, and fundamental rights of due process.

Dated: March 17, 2014

Respectfully submitted,

Law Office of Joseph C. Waxman

By: _____
Joseph C. Waxman
Attorney for Applicant

VERIFICATION

I DECLARE THAT:

I am the attorney representing Applicant, Frances Stevens, in the above-entitled action and have read the contents of the foregoing document and that the matters so stated are believed to be true and correct, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

I, Joseph C. Waxman, certify under penalty of perjury that the foregoing is true and correct.

Dated this 17th day of March 2014, at San Francisco, California.

Joseph C. Waxman

Exhibit B

Declaration of Readiness to Proceed (WCAB)

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD
DECLARATION OF READINESS TO PROCEED

NOTICE: Any objection to the proceedings requested by a Declaration of Readiness to proceed shall be filed and served within ten (10) days after service of the Declaration.

ADJ1526353
Case No.

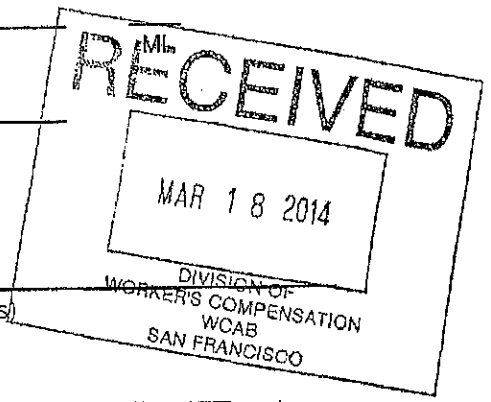
Applicant

FRANCES
First Name

MI

STEVENS
Last Name

VS



Employer Information

OUTSPOKEN ENTERPRISES
Employer Name (Please leave blank spaces between numbers, names or words)

P. O. BOX 10525
Employer Street Address/PO Box (Please leave blank spaces between numbers, names or words)

OAKLAND — City
CA — State
94610 — Zip Code

Declarants: Please designate your role (Please Select Only One)

☐ Employee ☒ Applicant ☐ Defendant ☐ Lien Claimant

Declarant requests: (Please Select Only One)

☒ Mandatory Settlement Conference ☐ Status Conference ☐ Rating MSC* ☐ Priority Conference
☐ Lien Conference

At the present time the principal issues are: (Check all that apply)

☐ Compensation Rate ☐ Rehabilitation/SJDB ☐ Temporary Disability ☒ Self-Procured Medical Treatment
☐ Permanent Disability ☒ Future Medical Treatment ☐ AOE/COE ☐ Discovery
☐ Employment ☒ Other 4610.6 APPEAL

Declarant relies on the report(s) of:

Doctors (s) _____ date _____ MM/DD/YYYY

*For a Rating MSC, all ratable medical reports, including treating physician, QME and AME reports, must be filed with this Declaration of Readiness, unless they have been previously filed. A Rating MSC will be set only where the issues are limited to permanent disability and the need for future medical treatment.

Declarant states under penalty perjury that he or she is presently ready to proceed to hearing on the issues below and has made the following specific, genuine, good faith efforts to resolve the dispute(s) listed below:

APPEAL PURSUANT TO LABOR CODE SECTION 4610.6

Unless a status or priority conference is requested, I have completed discovery on the issues listed above, and that all medical reports in my possession or control have been filed and served as required by the rules promulgated by the Court Administrator.

Copies of this Declaration have been served this date as shown on the attached proof of service.

Declarant's Signature Joseph C. Waxman

JOSEPH WAXMAN SAN FRANCISCO
Name of declarant or name of the law firm of the declarant (Print or Type)

220 MONTGOMERY STREET SUITE 905 SAN FRANCISCO CA 94104
Address (Please leave blank spaces between numbers, names or words)

415-956-5505
Phone Number

Date 03/17/2014
MM/DD/YYYY

PROOF OF SERVICE BY MAIL

I, the undersigned, am employed in the County of San Francisco; I am over 18 years of age, and I am not a party to the within action; my business address is: Law Office of Joseph Waxman, 220 Montgomery Street Suite 905, San Francisco, CA. On March 17, 2014 I served the within:

Declaration of Readiness to Proceed

on the parties listed below in said action by placing a true and correct copy thereof in a sealed envelope with the required postage therein, fully prepaid, for collection and mailing on the date and at the place shown below following ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that this correspondence was placed for collection and mailing, it was deposited in the ordinary course of business in a sealed envelope with postage fully prepaid and deposited in the United States mail at San Francisco, CA, addressed as follows:

Workers' Compensation Appeals Board
455 Golden Gate Avenue 2nd floor (AND VIA HAND DELIVERY 3-18-14)
San Francisco, CA 94142-9003

Frances Stevens
133 Caperton Avenue
Oakland, CA 94611

State Compensation Insurance Fund
P.O. Box 65005
Fresno, CA 93650

Heather Nicoll
State Compensation Ins Fund - Legal Dept
P.O. Box 3171
Suisun City, CA 94585-6171

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

Executed on March 17, 2014 at San Francisco, CA.

Janelle McCormack

Exhibit C

Pretrial Conference Statement [Notice of Trial Setting] (WCAB)

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD

CASE NO. ADJ 1526353

FRANCES STEVENS,

APPLICANT

OUTSPOKEN ENTERPRISES; STATE COMPENSATION INS. FUND,

DEFENDANT(S).

PRE-TRIAL CONFERENCE STATEMENT §5502 (d) (3)

☒ NOTICE OF HEARING

LOCATION: San Francisco DATE: 3/27/2014 TIME: 830

SETTLEMENT CONFERENCE JUDGE: DAVID HETTICK

APPEARANCES:

☐ INJURED WORKER:

☑ INJURED WORKER'S ATTORNEY JOSEPH WAGMAN ☐ATTY ☐HRG REP

(FIRM NAME AND PERSON APPEARING)

☑ DEFENDANT'S ATTORNEY HEATHER NICOLE STATE FUND ☑ATTY ☐HRG REP

☐ATTY ☐HRG REP

☐ATTY ☐HRG REP

☐ATTY ☐HRG REP

(FIRM NAME AND PERSON APPEARING) (DEFENDANT)

☐ OTHERS APPEARING:

(L.C., INTERPRETERS, ETC.)

☐ ADDRESS RECORD CHANGES:

Box below to be completed only by workers' compensation judge

DISPOSITION: SET FOR REGULAR HEARING: ☐ WCAB NOTICE ☐ NOTICE WAIVED

☐ 1 HOUR ☐ 2 HOURS ☒ ½ DAY ☐ ALL DAY

☐ BEFORE ANY WCJ

☒ BEFORE WCJ Lehmer ☐ BEFORE ANY WCJ OTHER THAN

☐ CASE(S) SET ON 5/19/14 (DATE) 8:30 (TIME) WCJ LEHMER IN SFO (LOCATION)

☐ OTHER DISPOSITION AND ORDERS:

EXHIBITS ARE TO BE TABBED AND INDEXED (APPLICANT'S WITH NUMBER, DEFENDANT'S WITH LETTERS) AND FILED AND SERVED TWENTY (20) DAYS BEFORE TRIAL

DAVID HETTICK
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

SERVICE AS ORDERED ON PAGE 4

PRE-TRIAL CONFERENCE STATEMENT CASE NO. ADJ 1526353

All in Ex A of 8/16/13 STIPULATIONS

THE FOLLOWING FACTS ARE ADMITTED:

1. _____, BORN __/__/__

WHILE ☐ EMPLOYED ☐ ALLEGEDLY EMPLOYED

☐ ON _____

☐ DURING THE PERIOD(S)_____

_____

AS A (N)_____, OCCUPATIONAL GROUP NUMBER_____

AT_____, CALIFORNIA,

BY_____

☐ SUSTAINED INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT TO_____

_____

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

_____

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

_____

☐ THE EMPLOYER WAS ☐ PERMISSIBLY SELF-INSURED ☐ UNINSURED ☐ LEGALLY UNINSURED

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

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

TYPE	WEEKLY RATE	PERIOD	TYPE	WEEKLY RATE	PERIOD

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

5. THE EMPLOYER HAS FURNISHED ☐ ALL ☑ SOME ☐ NO MEDICAL TREATMENT.
THE PRIMARY TREATING PHYSICIAN IS Jamadar

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

7. ☑ OTHER STIPULATIONS dtd 8/16/13 as to retro home health care through 7/24/13 is incorporated by reference

_____ _____ _____

APPLICANT DEFENDANT LIEN CLAIMANT/OTHER

PRE-TRIAL CONFERENCE STATEMENT CASE NO. ADJ1526353

ISSUES

☐ EMPLOYMENT

☐ INSURANCE COVERAGE

☐ INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

☐ PARTS OF BODY INJURED:

☐ EARNINGS: EMPLOYEE CLAIMS _____ PER WEEK, BASED ON

EMPLOYER/CARRIER CLAIMS _____ PER WEEK, BASED ON

☐ TEMPORARY DISABILITY, EMPLOYEE CLAIMING THE FOLLOWING PERIOD(S):

☐ PERMANENT AND STATIONARY DATE:

EMPLOYEE CLAIMS ____/____/____, BASED ON

EMPLOYER/CARRIER CLAIMS ____/____/____, BASED ON

☐ PERMANENT DISABILITY ☐ APPORTIONMENT

☐ OCCUPATION AND GROUP NUMBER CLAIMED: BY EMPLOYEE

BY EMPLOYER/CARRIER

☑ NEED FOR FURTHER MEDICAL TREATMENT Rx meds + HHC per ~~2/25/14~~ 2/20/14 IMR Determination

☐ LIABILITY FOR SELF-PROCURED MEDICAL TREATMENT

☐ LIENS:

LIEN CLAIMANT	TYPE OF LIEN	AMOUNT AND PERIODS PAID

☑ ATTORNEY FEES

☑ OTHER ISSUES: IMR appeal upholding UR denials on due process grounds

Defendant State Fund objects to the preparation of the pre-trial conference statement, in advance of a proposed expedited hearing re IMR Appeal that is the subject of a DOR different than the DOR that is the subject matter of the 3/27/14 proceedings. The IMR Appeal DOR was received by Def. on 3/21/14; therefore, any hearing regarding the IMR Appeal cannot be set less than 10 days therefrom.

Heather N Heidl

APPLICANT DEFENDANT LIEN CLAIMANT/OTHER

CASE ID [illegible]
[illegible]

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. ______________________________

THIS PAGE FOR JUDGE'S USE ONLY

JUDGE'S CONFERENCE NOTES: ______________________________

____

____

____

____

____

____

ORDERS

☐ IT IS ORDERED PURSUANT TO WCAB RULE 10500, THAT ☐ DEFENDANT ☐ APPLICANT ☐ LIEN CLAIMANT SERVE FORTHWITH THIS ☐ PRE-TRIAL CONFERENCE STATEMENT ☐ NOTICE OF HEARING ON ALL PARTIES OR THEIR REPRESENTATIVE SHOWN ON THE OFFICIAL ADDRESS RECORD AND ANY ADDITIONAL LIEN CLAIMANTS WHOSES LIENS ARE SHOWN UNDER ISSUES (PAGE 3).

☐ IT IS FURTHER ORDERED THAT ☐ DEFENDANT ☐ APPLICANT ☐ LIEN CLAIMANT SERVE TIMELY NOTICE OF THE TIME AND PLACE OF ALL REGULAR HEARING SESSIONS ON ALL LIEN CLAIMANTS WHOSE LIENS ARE SHOWN UNDER ISSUES, TOGETHER WITH THE FOLLOWING NOTICE: YOUR LIEN IS AT ISSUE AND WILL BE ADJUDICATED AT REGULAR HEARING.

☐ IT IS FURTHER ORDERED THAT THE PROOF OF SERVICE ORDERED ABOVE BE FILED WITH THE WCAB ONLY ON REQUEST OF THE ASSIGNED WORKERS' COMPENSATION JUDGE.

OTHER DISPOSITION AND ORDERS

☐ RECORDS WHICH HAVE BEEN LISTED HEREIN WITHOUT SPECIFICITY SHALL BE DESIGNATED, EXCERPTED, LISTED AND SERVED (BUT NOT FILED) NO LATER THAN __________ DAYS BEFORE TRIAL (RULE§10626) MED LEGAL REPORTS SHALL BE LISTED WITH SPECIFICITY AT MSC.

☐ EARNING DOCUMENTATION SHALL BE SERVED (BUT NOT FILED) NO LATER THAN __________ DAYS BEFORE TRIAL

☐ A BILL OF OF PARTICULARS FOR SELF-PROCURED MEDICAL CLAIMS SHALL BE SERVED (BUT NOT FILED) NO LATER .... DAYS BEFORE TRIAL.

☐ PARTIES WITH WITNESSES WHO REQUIRE AN INTERPRETER SHALL PROVIDE A CERTIFIED INTERPRETER.

☐ PENALTY ISSUES ARE DEFERRED IF A PENALTY PETITION HAS BEEN FILED AND SERVED NO LATER THAN .... DAYS FROM TODAY DATE.

☐ RE: ANY LISTED WITNESS (ES) WHOSE TESTIMONY WILL BE OFFERED AS AN EXPERT WITNESS (E.G. LE BOEUF TYPE, ECONOMIST, ETC.), THE PARTY OR PARTIES LISTING SUCH WITNESS SHALL HEREIN PROVIDE WRITTEN REPRESENTATIONS AND STATEMENTS CONSISTENT WITH THE REQUIREMENTS OF CCP§§2034.210 ET SEQ.

☐ DISCOVERY IS CLOSED

SERVICE OF THIS DOCUMENT WAS MADE PERSONALLY UPON atty's BY WCJ

[signature]

DAVID HETTICK

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE

DATE 3/27/14

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

PRE-TRIAL CONFERENCE STATEMENT CASE NO. ADJ1526353

EXHIBITS

- ☑ APPLICANT
- ☐ DEFENDANT
- ☐ LIEN CLAIMANT
- ☐ APPEALS BOARD

DESCRIPTION	DATE
Jamali report (treater)	
AME's already in evidence (Schaffer mx)	
Kehal West Report	
UR + IMR denials + appeals	

WITNESSES

Applicant	
Applicant's spouse	

ABOVE LISTINGS OF EXHIBITS AND WITNESSES REVIEWED BY ALL PARTIES.

APPLICANT DEFENDANT LIEN CLAIMANT/OTHER

STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

PRE-TRIAL CONFERENCE STATEMENT

CASE NO. ADJ1526353

EXHIBITS

- ☐ APPLICANT
- ☒ DEFENDANT
- ☐ LIEN CLAIMANT
- ☐ APPEALS BOARD

DESCRIPTION	DATE
UR denial 7/25/13±	
IMR Determination 2/20/14	
~~Documents~~	
Itemization/cover letter re docs submitted to UR +/or IMR	various
Judicial notice is requested of MTUS ODG and other evidence based guidelines relied upon by UR +/or IMR reviewers	

WITNESSES

State Fund UR witness(es)

ABOVE LISTINGS OF EXHIBITS AND WITNESSES REVIEWED BY ALL PARTIES.

APPLICANT | DEFENDANT | LIEN CLAIMANT/OTHER

PROOF OF SERVICE BY MAIL
(C.C.P. 1013A, 2015.5)

I am employed in the City and County of Alameda, I am over the age of eighteen years and not a party to the within entitled action; my business address is 1515 Clay Street, 18th Floor, Oakland, California 94612.

On **April 28, 2014,** I served the within:

ANSWER TO PETITION FOR WRIT OF REVIEW AND MANDATE

Re: *Frances Stevens v. Outspokern Enterprises/State Compensation Insurance Fund*
Court of Appeal Case No. A141435
Trial Court Case: ADJ1526353

on all parties in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Oakland, California, addressed as followed:

State of California (***Original + Three copies via hand delivery; One Electronic Copy***)
Court of Appeal, First Appellate District
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Supreme Court of California (***Via Electronic Copy to 1st District; Misc. Order 13-1)***
350 McAllister Street
San Francisco, CA 94102-4797

Workers' Compensation Appeals Board
Attn: Writ Section
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102-9459

The Honorable Francie Lehmer
Workers' Compensation Appeals Board
455 Golden Gate Avenue, 2nd Floor
San Francisco, CA 94102

Joseph Waxman, Esq. (Two Copies)
Law Office of Joseph Waxman
220 Montgomery Street, Suite 905
San Francisco, CA 94104

State Compensation Insurance Fund
Attn: David M. Goi
Complex Legal Unit
5880 Owens Drive, Bldg B
Second Floor
Pleasanton, CA 94588

State Compensation Insurance Fund - Claims
PO Box 65005
Fresno, CA 93650

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Oakland, California on **April 28, 2014.**

WYNN NORONA
Declarant