Civil No. A141435

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

FRANCES STEVENS,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA, ADMINISTRATIVE DIRECTOR DIVISION OF WORKERS' COMPENSATION; OUTSPOKEN ENTERPRISES AND STATE COMPENSATION INSURANCE FUND

Respondents.

WORKERS' COMPENSATION APPEALS BOARD

WCAB NOS. ADJ 1526353; SFO 0441691

MOTION TO DISMISS PETITION FOR WRIT OF REVIEW AND MANDATE, AND ANSWER TO PETITION FOR WRIT OF REVIEW AND MANDATE

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Civil No.: A141435

STATE OF CALIFORNIA

COURT OF APPEAL

FIRST APPELLATE DISTRICT

DIVISION ONE

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Stevens v. Workers' Comp. Appeals Board et al.

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 May 13, 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 respondent State Compensation Insurance Fund:

MOTION TO DISMISS PETITION FOR WRIT OF REVIEW AND WRIT OF MANDATE

Respondent State Compensation Insurance Fund ("State Fund") hereby moves to dismiss the petition for writ of review filed herein by Frances Stevens ("Petitioner"). State Fund submits the petition should be dismissed because this court lacks subject matter jurisdiction as the petition is not authorized by Labor Code section 5950.[1] Section 5950 allows petitioners to apply to the Supreme Court or Court of Appeal for a writ of review where petitioners have been affected by an order, decision, or award of the Appeals Board.[2] Here, the Workers' Compensation Appeals Board (appeals board or Board) has not issued an order, decision or award affecting petitioner Stevens. Hence, State Fund respectfully submits petitioner's petition for writ of review is unauthorized, and should be dismissed as premature.

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[1] All statutory references are to the Labor Code unless otherwise noted.

[2] Labor Code section 5950 provides as follows:

> Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration. The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.

Similarly, State Fund hereby moves to dismiss Stevens's petition for writ of mandate on the grounds the petition is not authorized by Labor Code section 5955. Section 5955 permits a petition for writ of mandate in Supreme Court and the Courts of Appeal in "proper cases."[3] State Fund submits the present matter is not a proper case for writ of mandate under section 5955, because petitioner has an adequate remedy at law at the appeals board. (*Greener v Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1047) Hence, State Fund respectfully submits petitioner's petition for writ of mandate is unauthorized, and should be dismissed as improvidently filed.

MEMORANDUM OF POINTS AND AUTHORITIES

I

When Stevens filed her petition for writ of review, the appeals board had not issued an order, decision, or award affecting Stevens. Hence, there was no final order from which Stevens's petition for writ of review could be taken.

> "A petition for a writ of review may only be sought from a final order, decision, or award of the Appeals Board. (See Labor Code §5901.) Thus, a petition for a writ of review will be denied as premature when there is no final order

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[3] Labor Code section 5955 provides as follows:

> No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

> determining any substantive right or liability of either party to the compensation proceeding. (*Shorter v. Workers' Comp. Appeals Bd.* (1988) 53 Cal.Comp.Cases 8 (writ denied); *Calvey v. Workers' Comp. Appeals Bd.* (1987) 52 Cal. Comp. Cases 438 (writ denied))"[4]

(Hanna, Cal. Law of Employee Injuries and Workers' Compensation, Rev. 2d Ed., § 34.10 [2].)

Labor Code section 5900 authorizes the filing of petitions for reconsideration from final orders, decisions, or awards of the appeals board or a workers' compensation judge.[5] Labor Code § 5950 authorizes the

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[4] "The Board has approved the citation of writ-denied summaries published in the California Compensation Cases. (Cal. Workers' Compensation Practice (Cont.Ed.Bar 1985) § 10.24, pp. 367-368.) Accordingly, the courts permit citation of California Compensation Cases and occasionally cite them in published opinions. (For example, see *General Foundry Service v. Workers' Comp. Appeals Bd.* (1986) 42 Cal.3d 331, 336.)" (*Wings West Airlines v. Workers' Comp. Appeals Bd.* (1986) 187 Cal. App. 3d 1047, 1053.)

[5] Labor Code section 5900 provides:

> (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition shall be made only within the time and in the manner specified in this chapter.
>
> (b) At any time within 60 days after the filing of an order, decision, or award made by a workers' compensation judge and the accompanying report, the appeals board may, on its own motion, grant reconsideration.

filing of petitions for writ of review from orders, decisions, or awards of the appeals board following reconsideration. For the convenience of the court the relevant part of Section 5950 is provided below:

> Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration.

While the language of section 5950 would seem to allow appellate review of any order of the Board, only final orders have been held covered by section 5950. (*Safeway v. Workers' Comp. Appeals Bd.* (1980) 104 Cal.App.3^{d} 528, at p 535.) This interpretation was made, in part, by comparing the purpose of section 5950 with the purpose of section 5900, and considering the latter's proviso that petitions for reconsideration may only be made from a final order, decision, or award of the appeals board. (*Safeway, supra,* 104 Cal.App.3d at p 535.) Thus, the courts have viewed sections 5900 and 5950 as establishing similar tests of ripeness. (*Ibid.*)

In the present matter, petitioner's current appeal before Workers' Compensation Appeals Board is from the determination of the independent medical review organization (IMRO). Under Labor Code section 4610.6 (g) the determination of the IMRO is deemed to be the determination of the administrative director. Under Labor Code section 110 (b) "'Administrative' director means the Administrative Director of the Division of Workers' Compensation." Under Labor Code section 111, the administrative director does not have control over the judicial powers of the Board. Hence, the determination of the IMRO/administrative director—from which Stevens has; 1) appealed to the appeals board, and 2) petitioned

for writ of review—is not a final order, decision or award of the appeals board under Labor Code section 5950. Thus, respondents submit Stevens's petition for writ of review in this matter is premature.

California Constitution, Article XIV, Section 4 provides further support for the rule that appellate review should await a final decision. That section provides in relevant part:

> "the administration of . . . [workers' compensation] 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 policy of this State, binding upon all departments of the State government."

Contrary to the foregoing language, an unrestricted right of appeal would be expensive. In a case unrelated to workers' compensation law, California's Supreme Court advised that cost was one of the reasons for the one judgment rule. In the Court's own words:

> "The reason for the one judgment rule is that 'piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and . . . a review of intermediate rulings should await the final disposition of the case.'"

(*Knodel vs. Knodel* (1975), 14 Cal.3d 752, 760 [122 Cal.Rptr. 521; 537 P.2d 353].)

State Fund submits that permitting parties to seek appellate review where, as here, there is no final order, decision, or award of the Board would similarly be oppressive and costly. The opportunity to force repetitive reviews of piecemeal litigation will be costly, and the deviation from the Labor Code's progression of judicial review will cause uncertainty and delay. State Fund submits this concern with cost and delay are more reasons to dismiss the petition for writ of review. Accordingly, the petition for writ of review should be dismissed.

II

When Stevens filed her petition for writ of mandate in the Court of Appeal she had an adequate remedy at law as her appeal was pending at the appeals board.

In *Greener v Workers' Comp.Appeals Bd., supra,* 6 Cal.4th at p. 1040 our Supreme Court explained that Labor Code section 5955 permits a petition for writ of mandate in "proper cases." The Court explained mandamus is permissive under Code of Civil Procedure section 1085 "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ."[6] (*Id.*, at p. 1044.) And, mandamus is mandatory under Code of Civil Procedure 1086 "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law."[7] (*Ibid.*)

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[6] Code of Civil Proc. Section 1085 provides:

> (a) A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.
>
> (b) The appellate division of the superior court may grant a writ of mandate directed to the superior court in a limited civil case or in a misdemeanor or infraction case. Where the appellate division grants a writ of mandate directed to the superior court, the superior court is an inferior tribunal for purposes of this chapter.

[7] Code of Civil Proc. Section 1086 provides:

> The writ must be issued in all cases where there is not a plain,

(footnote continued on next page)

In the present matter, Stevens argues she lacks a speedy and adequate remedy at the WCAB in her appeal from the determination of the IMRO/administrative director.[8] Yet, Stevens also argues that the determination of the IMRO/administrative director is defective and should be set aside because it is based, in part, on the independent medical reviewer's finding that home health care is not considered medical treatment.[9] Indeed, Stevens provides case authority showing housekeeping services and home health care services are reimbursable as medical treatment. Hence, Stevens's argument that she does not have a plain, speedy, and adequate remedy is belied by her argument that the IMRO's determination should be set aside as defective.

Labor Code section 4610.6, subdivision (h) provides the grounds for challenging the determination of the administrative director.[10] The fifth of

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> speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

[8] Petition for Writ of Mandate and Writ of Review, at pp. 2, 19, 20, 27, 31.

[9] Petition for Writ of Mandate and Writ of Review, at pp. 25-26.

[10] Labor Code Section 4610.6 (h) provides:

> (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

(footnote continued on next page)

these grounds presents the situation where the determination is based on an erroneous finding of fact. State Fund submits Stevens's argument to set aside the determination could have been made in her appeal under Labor Code section 4610.6, subdivision (h) (5) (i.e., "The determination was the result of a plainly erroneous express or implied finding of fact.")

Had she made this argument in her appeal from the independent medical review determination, State Fund believes there would have been a

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> 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.

good chance Board would have set aside the determination.[11] Stevens's failure to avail herself of a speedy adequate remedy under the Labor Code by failing to set forth her home health care argument in her appeal, however, is not a principled reason to allow a writ of mandate at this juncture.

When faced with a similar situation in *Phelan v Superior Court of San Francisco* (1950) 35 Cal.2nd 363, our Supreme Court refused to grant mandamus absent an adequate showing of sufficient excuse. Here's what the Court said:

> Although petitioner alleges that he had "no other plain, speedy, or adequate remedy" and that unless a writ of mandate is issued he "will suffer great and irreparable harm and injury," it is obvious that such general allegations, without reference to any facts, are not sufficient to sustain his burden of showing that the remedy of appeal would be inadequate. (*Lincoln v. Superior Court*, 22 Cal.2d 304, 311 [139 P.2d 13].) The precise question which petitioner is raising here, i.e., the validity of the reduction in the amount of recovery, could have been raised on an appeal from the portion of the order modifying the judgment. Petitioner is not in a position to claim that the remedy of immediate review by appeal is less expeditious than that of mandate because he made no attempt to pursue that remedy, but, instead, waited until after the time in which he could take an appeal had expired and then applied for this writ. Nor will the fact that petitioner has lost his remedy by appeal justify resort to mandate in the absence of a sufficient excuse for his failure to take an appeal. (Citation omitted.)

(*Phelan v. Superior Court of San Francisco, supra*, 35 Cal.2d at pp. 370-371.)

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[11] Appeal From Medical Review Determination Pursuant To Labor Code Section 4610.6, [Division of Workers' Comp's] Answer To Petition For Writ of Review and Mandate, Exhibit A.

Stevens has not provided any excuse for her failure to set forth this argument in her appeal. Instead, Stevens characterizes her appeal as a futile gesture that will not afford a plain, speedy, and adequate remedy.[12] Moreover, the Board has not yet issued a decision on petitioner's appeal, which is set for a hearing on May 19, 2014. Hence, petitioner's claim that she does not have a speedy adequate remedy is either premature, or due to her own inaction.

For the foregoing reasons, respondent State Compensation Insurance Fund respectfully request this court grant this motion to dismiss Stevens's petition for writ of mandate and writ of review.

Following this motion is State Fund's Answer to Petition for Writ of Review and Writ of Mandate, which is included for the court's consideration in the event this motion is denied.

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[12] Petition for Writ of Mandate and Writ of Review, at p. 20.

I. Introduction

Senate Bill 863 (SB 863) is the current workers' compensation reform signed into law on September 19, 2012, by Governor Edmund G. Brown, Jr.[13] This reform legislation was enacted, in part, to rectify a perceived problem with the former system for resolving medical treatment disputes. The Legislature perceived the former dispute resolution system was costly, time consuming and not uniform, that it prolonged disputes and delayed medical treatment, which was adversely affecting the health and safety of injured workers.[14] To alleviate these problems SB 863 enacted changes to the independent medical review procedure.

These changes were enacted, inter alia, to further "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."[15]

State Fund believes the "plus sections" from SB 863, provided below, will assist the court's understanding of the nature of the problem, and the public policy behind SB 863's enactment of the current system for resolving medical treatment disputes.[16]

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[13] SB 863 (2011-2012 Reg. Sess.) may be found at: http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_863_bill_20120919_chaptered.html

[14] *Ibid.*, at Section 1, (d) and (f), (*post* at p. 13).

[15] *Ibid.*, at Section 1, (e) (*post* at p. 13).

[16] "A 'plus section' is a provision of a bill that is not intended to be a substantive part of the code section or general law that the bill enacts, but to

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SECTION 1. 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 provision of the act establishing independent medical review are necessary to implement that policy.

(f) That the performance of independent medical review is a service of such a special and unique nature that it must be contracted pursuant to paragraph (3) of subdivision (b) of Section 19130 of the Government Code, and 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

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express the Legislature's view on some aspect of the operation or effect of the bill. Common examples of 'plus sections' include severability clauses, saving clauses, statements of the fiscal consequences of the legislation, provisions giving the legislation immediate effect or a delayed operative date or a limited duration, and provisions declaring an intent to overrule a specific judicial decision or an intent not to change existing law." (*Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517, 526.)

> 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.
>
> [¶] . . . [¶]

(SB 863 (Stats 2012, ch 363, section 1, subdivisions (d) – (g)).)[17]

II. Nature of California's Workers' Compensation System

For an appreciation of the Legislature's authority over workers' compensation matters, State Fund believes a review the statutory nature of California's workers' compensation system is useful. The following description of California's workers' compensation system was provided by the Third District Court of Appeal in *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd. (Scheftner)*, (2005) 131 Cal.App.4th 517. The issue in *Scheftner* concerned the Legislative intent of workers' compensation reform legislation that immediately preceded SB 863.

> The nature of the workers' compensation system was well described in *Graczyk v . Workers ' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 977 [229 Cal.Rptr. 494.] (*Graczyk*). "California workers' compensation law (§ 3200 et seq.) is a statutory system enacted pursuant to constitutional grant of plenary power to the Legislature to establish a complete and

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[17] SB 863, section 1 may be found at: http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_863_bill_20120919_chaptered.html)

> exclusive system of workers' compensation. [Citations.] It is 'an expression of the police power' (§ 3201) and has been upheld as a valid exercise of the police power. [Citations.] [¶] The right to workers' compensation benefits is 'wholly statutory' [citations], and is not derived from common law. [Citations.] [¶] This statutory right is exclusive of all other statutory and common law remedies, and substitutes a new system of rights and obligations for the common law rules governing liability of employers for injuries to their employees. [Citations.] Rights, remedies and obligations rest on the status of the employer-employee relationship, rather than on contract or tort. [Citations.]" (*Graczyk, supra,* at pp. 1002–1003; [citations].) [¶] . . . [¶] However, the repeal of a statutory right or remedy triggers the application of rules distinct from the traditional law regarding the prospective or retroactive application of a statute. "A well-established line of authority holds: ' " 'The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect it cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered. ' " [Citations.]' [Citations.]" [Citations.] "The justification for this rule is that all statutory remedies are pursued with full realization that the [L]egislature may abolish the right to recover at any time." (*Callet v. Alioto* [(1930) 210 Cal. 65] at pp. 67–68.)

(*Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd. (Scheftner), supra*, 131 Cal.App.4th at pp. 527 and 528.)

Given the statutory nature of California's workers' compensation system, and given the Legislature's plenary power to establish a workers' compensation system, State Fund submits great deference must be given to

the enactment of SB 863. SB 863 enacted several statutory changes to the medical treatment dispute resolution procedure. State Fund submits that all sections in SB 863 should be harmonized as they were enacted at the same time. The court must assume that when passing a statute the Legislature is aware of existing related laws and intends to maintain a consistent body of rules. (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.) And, "every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*Stafford v. Realty Bond Service Corp.* (1952) 39 Cal.2d 797, 805.)

By way of answer to the petition for writ of review, State Fund denies the petition for writ of review was taken from a final order as required by Labor Code sections 5900, et seq.

By way of answer to the petition for writ of mandate, State Fund denies the present matter is a proper case for writ of mandate under Labor Code section 5955, because petitioner has a plain, speedy, and adequate remedy at law.

FURTHER QUESTIONS PRESENTED

I) Did the Legislature exceed its constitutional authority in enacting the current system for resolving medical treatment disputes under Labor Code section 4610.6?

II) Does Labor Code section 4610.6, subdivision (i)'s provision—restricting a workers' compensation judge, the appeals board, or any higher court from making a determination of medical necessity contrary to the determination of the independent medical organization—violate California Constitution, Article XIV, Section 4's requirement that all decisions of any such tribunal shall be subject to review by the appellate court of this state?

ADOPTION OF ANSWER

Stevens's petition for writ of mandate and writ of review seeks intervention by the Court of Appeal that State Fund believes is premature. State Fund agrees in all respects with the answer brief of the Acting Administrative Director of the Division of Workers' Compensation—which State Fund adopts by reference pursuant to California Rules of Court, rule 8.200 (a) (5). The Acting Administrative Director's answer brief contains an accurate statement of facts, and addresses all of the contentions in Stevens's petition for writ of mandate and writ of review.

FURTHER ARGUMENTS

I

The Legislature did not exceed its constitutional authority in enacting the current system for resolving medical treatment disputes under Labor Code section 4610.6.

Petitioner argues the Legislature exceeded its authority when it enacted Labor Code section 4610.6 in violation of Article XIV, Section 4 of the California Constitution.[18] In other words, petitioner argues the enactment of section 4610.6 is not authorized by Article XIV, Section 4 of California's Constitution. State Fund disagrees.

In *City and County of San Francisco v Workers' Comp. Appeals Bd. (Wiebe)* (1978) 22 Cal.3d 103, our Supreme Court explained the Legislature's authority to enact workers' compensation legislation vis-à-vis Article XIV, Section 4 of California's Constitution as follows:

> To begin with, the employer's claim that the Legislature's authority to enact workers' compensation legislation derives solely from, and is limited by the specific authorizing

[18] Petition for Writ of Mandate and Writ of Review, at p. 10.

> language of, article XIV section 4 ignores the fundamental proposition that, unlike the federal Constitution, "[the] Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the [federal] government, or prohibited by the Constitution of the United States." ([Citations omitted].) [¶] As our court explained nearly a half century ago, "[We] do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the legislature is vested with the whole of the legislative power of the state." (*Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234 [57 P.2d 510].) Moreover, the governing authorities additionally establish that "[if] there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used."

(*San Francisco v. Workers' Comp. Appeals Bd. (Wiebe)*, *supra*, 22 Cal.3d at pp. 112-113.)

Hence, while in general California's Constitution is a restriction on the power of the Legislature, Article XIV, Section 4 of California's Constitution acknowledges and endorses the Legislature's authority to create and enforce a complete system of workers' compensation. The first sentence of Article XIV, Section 4 of California's Constitution provides in relevant 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, by appropriate legislation, and in that behalf to

> create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability . . . incurred or sustained by . . . said workers in the course of their employment, irrespective of the fault of any party."

(*San Francisco v. Workers' Comp. Appeals Bd.*, *supra*, 22 Cal.3d at p. 113.)

Regarding the impact of these constitutional provisions on the Legislature's authority to enact legislation for the protection of employees, the Court in *Weibe* unequivocally declared they do not limit the Legislature's authority. The Court said:

> While this provision clearly acknowledges and endorses the Legislature's authority to provide for employer-financed compensation of work-related injuries and illnesses, absolutely nothing in this section purports to limit the Legislature's authority to enact additional appropriate legislation for the protection of employees. Moreover, the ballot arguments supporting this constitutional provision when the measure was adopted in 1918 make it clear that the purpose of the provision was simply to remove any doubt as to the constitutionality of the existing workers' compensation legislation, and not to erect any new restrictions on the exercise of legislative power."

(*San Francisco v. Workers' Comp. Appeals Bd.*, *supra*, 22 Cal.3d at p. 114.)

Hence, given Section 4610.6's salutary purpose of implementing the social policy of providing the highest quality medical care to injured workers,[19] State Fund submits Labor Code section 4610.6 is consistent with, and does not violate Article XIV, Section 4 of California's Constitution.

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[19] SB 863, Section 1 (e) (here and *ante*, at p. 13) provides:

(e) That having medical professionals ultimately determine

(footnote continued on next page)

FURTHER ARGUMENTS

II

Labor Code section 4610.6, subdivision (i)'s provision—restricting a workers' compensation judge, the appeals board, or any higher court from making a determination of medical necessity contrary to the determination of the independent medical organization—does not violate California Constitution, Article XIV, Section 4's requirement that all decisions of any such tribunal shall be subject to review by the appellate court of this state.

With italics added, Labor Code section 4610.6, subdivision (i) provides:

> (i) 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 a different independent 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.*

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> 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.

With italics added, California Constitution, Article XIV, Section 4 provides in relevant part:

> The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions *rendered by the tribunal or tribunals designated by it; provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.* The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

Petitioner argues the prohibition in italicized language of section 4610.6, subdivision (i), above contravenes the provision for appellate review in the italicized language of Art. XIV, Sec. 4 of California's Constitution. In other words, petitioner argues that workers' compensation administrative law judges, the appeals board, or any higher court must be able to review the expert medical determinations of the IMRO/Administrative Director. State Fund respectfully disagrees.

Whether the treating physician's treatment recommendation is reasonably required to cure or relieve from the effects of the injury is a question of fact. (*Smyers v. Workers' Comp. Appeals Bd.* (1984) 157 Cal.App.3d 36, 41.) Hence, the IMRO's determination of whether the treating physician's recommended treatment is reasonably required to cure or relieve is also factual.

The standard of review of questions of fact concerning medical opinions is well settled as summarized by the excerpt below:

> It is well settled, of course, that the Board may choose between conflicting medical opinions, and that the relevant and considered opinion of one physician, although inconsistent with other medical opinions, may constitute substantial evidence in support of a decision of the Board. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd. (Bolton) [(1983)* 34 Cal.3d 159, 169.) Expert medical opinion, however, does not always constitute substantial evidence on which the Board may rest its decision. The Board may not rely on medical reports which it knows to be erroneous, upon reports which are no longer germane, or upon reports based upon inadequate medical history or examinations. (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [90 Cal.Rptr. 424, 475 P.2d 656]; *Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798 [69 Cal.Rptr. 88, 441 P.2d 928].) A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (*Zemke, supra, at p. 801.*)

(*Kyles v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 614, 621.)

Hence, the medical opinion found persuasive by the *Board* must be supported by substantial evidence. And, it is well established that in matters requiring scientific medical knowledge, the Board must defer to the expert's evidence.

> In this state 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 and can only be established by their testimony. (*Perkins v. Trueblood,* 180 Cal. 437, 443 [181 P. 642]; *Houghton v. Dickson,* 29 Cal.App. 321, 324 [155 P. 128]; *Dameron v. Ansbro,* 39 Cal.App. 289, 300 [178 P. 874];

> *Pearson v. Crabtree*, 70 Cal.App. 52 [232 P. 715].) [¶] The rule to be drawn from these decisions, as we understand them, appears to be that whenever 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, but, on the other hand, they are bound by such evidence, even if it is contradicted by nonexpert witnesses. The same rule would, of course, apply to a proceeding before the Industrial Accident Commission. Under this rule, the Commission, in the present proceeding, could not reject the evidence of the medical experts when testifying upon any subject peculiarly within their own knowledge.*

(*William Simpson Constr. Co. v. Industrial Acci. Com.* (1925) 74 Cal.App. 239, 243 (italics added).)

With regard to review by the Court of Appeal, the court in *Sweeney v. Industrial Acci. Com.* (1951) 107 Cal.App.2d 155 explained that the court may not reweigh the evidence when reviewing the Board's determinations.

> Also in determining whether the decision on the evidence is proper we cannot determine the weight, effect and sufficiency of the evidence, but merely whether there is substantial evidence to support the commission's ruling. . . . It is not a question of how we might decide the matter but merely one of whether we can say as a matter of law that the commission's conclusion is unsupported. This we cannot do. ". . . the conclusion of the Commission upon questions of this character [permanency of injury] is a determination of a question of fact and is not subject to review by courts unless palpably contrary to the undisputed evidence." (*Hart v. Industrial Acc. Com.* (1931) 119 Cal.App. 200, 202.)

(*Sweeney v. Industrial Acci. Com., supra,* 107 Cal.App.2d at pp. 158 - 160.)

These cases demonstrate that workers' compensation administrative law judges, the appeals board, or any higher court have never been permitted to substitute their opinions in place of the expert medical opinions of physicians and surgeons. In other words, the only judicial inquiry of physicians' and surgeons' treatment recommendations has been, and remains, whether the recommendations are supported by substantial evidence. State Fund submits this judicial inquiry has been preserved in Labor Code section 4610.6, subdivision (h), which provides the grounds for appealing the IMRO's determination. Included are the grounds in subdivision (h) (5) (*ante* at page 9) that the determination was the result of a plainly erroneous express or implied finding of fact, and not a matter that is subject to expert opinion. State Fund submits these grounds, in essence, constitute review for substantial evidence. In other words, Section 4610.6, subdivision (h) does not change the standard of review on questions of fact. The standard remains whether the factual finding is supported by substantial evidence. Thus, State Fund agrees with the Division of Workers' Compensation that Section 4610.6 "ensures that the medical treatment decisions are made by medical professionals with the appropriate expertise."[20] The social policy served by implementation of the IMR procedure bears repeating.

> "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 . . . ."

(Senate Bill 863, Section 1, subdivision (e), (*ante* at p. 13).

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[20] [DWC's] Answer To Petition for Writ of Review and Mandate, at p. 18:¶1.

Hence, petitioner argument a writ of mandate must be granted because she has been denied review of the IMRO's adverse determination is without merit. Review for substantial evidence remains available, and petitioner has a speedy and adequate remedy at law.

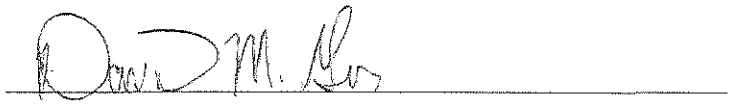
State Fund notes the new medical treatment dispute resolution procedure does not provide for a competing medical opinion. Thus, State Fund agrees with respondent Division of Workers' Compensation that the role of the IMR physician reviewer effectively has been elevated to the status of medical treatment arbiter.

CONCLUSION

For the foregoing reasons, and for the reasons contained in the answer brief of the Acting Administrative Director of the Division of Workers' Compensation respondent State Compensation Insurance Fund respectfully submit the petition for writ of mandate and writ of review should be denied.

Dated: May 13, 2014, at Pleasanton, California

Respectfully submitted,



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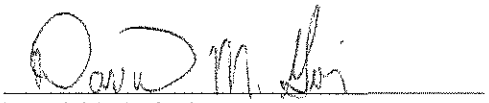
Attorneys for Respondent State Compensation Insurance Fund.

CERTIFICATION OF BRIEF LENGTH

Pursuant to Rule 8.204(c)(1) and (3), the undersigned counsel hereby certifies that the foregoing Motion To Dismiss Petition for Writ of Review and Mandate and Answer to Petition for Writ of Review and Mandate contains 5,383 words. Said word count is made in reliance on the computer program used to prepare this petition.



David M. Goi,
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Attorney for Respondent
State Compensation Insurance Fund

Dated: May 13, 2014

PROOF OF SERVICE BY MAIL

I declare that I am a citizen of the United States, employed in the City of Pleasanton, County of Alameda, CA. I am over the age of eighteen years and not a party to the within entitled action. My business address is 5880 Owens Drive, Pleasanton, CA. 94588. On May 13, 2014, I served the attached **MOTION TO DISMISS PETITION FOR WRIT OF REVIEW AND MANDATE, AND ANSWER TO PETITION FOR WRIT OF REVIEW AND MANDATE** on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid for deposit with the United States Postal Service at Pleasanton, CA., addressed as follows:

W.C.A.B.
ATTENTION, WRITS
P. O. BOX 429459
SAN FRANCISCO, CA. 94142-9459

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

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

Executed on May 13, 2014, at Pleasanton, CA.

Sarita Lockett
SARITA LOCKETT

STATE COMPENSATION INSURANCE FUND