First Civil 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

CALIFORNIA CHAMBER OF COMMERCE'S AMICUS BRIEF

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INTRODUCTION

Section 4 of Article 14 of the California Constitution provides the Legislature with the broad plenary power to provide for arbitration of disputes arising under the workers' compensation laws, so long as the decisions of the entity vested with arbitration power are subject to review by the appellate courts of California. Faced with the ever increasing demands on our state's workers' compensation system, and mindful of the constitutional requirement that its laws accomplish substantial justice

expeditiously, inexpensively, and without encumbrance, the Legislature enacted California *Labor Code* section 4610.6 ("Section 4610.6").

Section 4610.6 provides that medical professionals will be the arbiters of medical treatment disputes. Taking the final determination of medical necessity out of the hands of judges and placing it in the hands of medical professionals is aimed towards providing scientifically supported medical treatment to injured employees, and aims to ensure that treatment decisions are based on the highest standards of evidence-based medicine. Vesting the final decision of medical necessity in the hands of unbiased medical experts permits the workers' compensation administrative law judges to administer justice expeditiously to more injured employees, and without the encumbrance of time-consuming and costly procedures leading to non-scientifically based medical decisions. Such was the system in effect before the enactment of Section 4610.6. Improving this system was the intention of the legislature as declared in Section 1(e)-(f) of the legislation:

> 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.

(Senate Bill 863, at § 1(e), Exh. 1 to Request for Judicial Notice.)

The procedures set forth in Section 4610.6 also provide the injured employee with the requisite procedural and substantive safeguards of due process. Section 4610.6 requires the independent medical review ("IMR") physician, before making a determination, to be fully informed through the

review of all medical records, reports, and other documents submitted by the parties. The IMR physician's decision must cite the applicant's condition, relevant documents reviewed, and the findings as to medical necessity based on, among other things, the medical treatment utilization schedule adopted by the administrative director pursuant to California *Labor Code* section 5307.27. The IMR physician does not issue a recommendation but a decision. The physician's reports are not received as evidence but instead as the arbitration decision of the medical treatment dispute. Applicants therefore are no more entitled to cross-examine the independent medical reviewer than they are entitled to cross-examine the workers' compensation administrative law judge.

As required by Section 4 of the Constitution, Section 4610.6 provides for review of an IMR physician's decision by the appeals board and the courts of appeal. The Legislature set forth specific guidelines by which the IMR physician's decision may be reviewed. If the IMR physician fails to comply with such guidelines in issuing a decision, such failure will appear on the face of the decision. Thus, where an injured employee can show that the IMR physician failed to comply with the safeguards set forth in Section 4610.6, the determination is reversed, and is remanded for further review by a different IMR physician. In requiring that medical professionals make the final medical treatment decision in all cases, the Legislature precludes any administrative judge or court of appeal judge from substituting a lay determination that a particular treatment is medically necessary. The concept that a reviewing court is precluded from making a factual determination inconsistent with that of an arbiter best situated to evaluate the factual evidence is not new or novel, and is

consistent with those cases upholding the limits of judicial review of arbitrator's decisions.

In summary, Section 4610.6 was, in the Legislature's wisdom, enacted to raise the scientific bar on medical decision making in our workers' compensation system. Section 4610.6 moves treatment decisions from what may be "popular, but sometimes unproven or non-cost-effective, test and treatment options," and toward the scientifically based and peer reviewed. (AM. COLL. OF OCCUPATIONAL AND ENVTL. MED., Occupational Medicine Practice Guidelines 45 (Lee S. Glass, M.D. et al. eds., 2d ed. 2004.) This is an appropriate goal of legislation and is the goal of Section 4610.6. The section provides for judicial review of the IMR physician's compliance with the guidelines set forth in Section 4610.6, and thus provides due process to the parties. As Section 4 of the California Constitution grants the Legislature the power to enact the procedures set forth in Section 4610.6 so long as the procedures respect the parties rights to due process, Appellant's petition for writ of mandate should be denied, and this Court should hold that Section 4610.6 is a constitutional exercise of Legislative power.

ARGUMENT

I.
Disputes Over Medical Treatment Are To Be Resolved Pursuant to California Labor Code Sections 4610.5 and 4610.6.

Except for disputes concerning the medical appropriateness of a treatment recommendation, controversies between employer and employee shall be determined by the Workers Compensation Appeals Board. (Cal. *Labor Code* § 4604.) Under *Labor Code* section 4610, when an

employee's treating physician makes a treatment recommendation, such recommendation is submitted to the employer's utilization review process for determination of whether to approve, modify, delay, or deny the recommended treatment. (*Id.* at § 4610.) A medical director designated by the employer or insurer reviews all information that is "reasonably necessary" to make the determination. (*Id.* at § 4610(d).) The medical director's decision shall be consistent with the medical treatment utilization schedules adopted pursuant to *Labor Code* section 5307.27(f)(2). The independent medical review ("IMR") process does not come into play until a utilization review decision to modify, delay, or deny the recommended treatment is issued.

Pursuant to the authority granted to it by Section 4, with respect to the issue of appropriateness of recommended treatment, the Legislature set forth the following method for arbitrating the dispute between the utilization review medical director and employee's treating physician. That arbitration is a state function, and is performed by a disinterested medical professional. (*Id.* §§ 4610.5, 4610.6.)

A. Independent Medical Review Is the Arbitration of Disputes Over Medical Appropriateness of Treatment Recommendations.

If an employee disputes a utilization review decision denying, modifying, or delaying a treatment recommendation, the employee may request an IMR. (Cal. *Labor Code* § 4610.5(d).) Upon receipt of a case, an IMR physician shall conduct a review of all pertinent medical records, provider reports, and any other information submitted to the organization or requested from any of the parties by the reviewers. (*Id.* § 4610.6(b).) Based on a review of the records, and application of the treatment

algorithms for determining effectiveness of the desired treatment, the IMR physician shall determine whether the disputed health care service is medically appropriate. (*Id.* § 4610.6(c).) The scope of the review is limited only to a determination of the medical propriety of the disputed medical treatment based on scientifically-based treatment algorithms. (*Id.* § 4610.6(a).)

The IMR physician's decision shall (1) state whether the disputed health care service is medically necessary, (2) cite the employee's medical condition, (3) cite the relevant medical records, and (4) set forth the relevant findings associated with the standards of medical necessity. (*Id.* § 4610.6(e).) In resolving the dispute concerning the appropriateness of recommended medical treatment, the IMR physician's decision shall be based upon the following standards in the order listed: (1) medical treatment utilization schedule adopted by the administrative director pursuant to California *Labor Code* Section 5307.27, (2) peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed treatment, (3) nationally recognized professional standards, (4) expert opinion, and (5) generally accepted standards of medical practice. (*Id.* § 4610.5(c)(2).) The determination of the IMR physician shall be deemed to be the determination of the administrative director. (*Id.* § 4610.6(g).)

The IMR physician shall make a determination within 30 days of the receipt of the requested review and supporting documentation. (*Id.* § 4610.6(d).) However, if the employee's medical provider certifies in writing that there may exist an imminent and serious threat to the health of the employee, the determination must be expedited and rendered within three days of the receipt of the information. (*Id.*)

B. Appeal of the Independent Medical Review Decision.

An employee or employer aggrieved by the decision reached by the IMR physician may appeal the decision to the Workers' Compensation Appeals Board. (*Id.* § 4610.6(h).) The determination may be reversed upon a showing of clear and convincing evidence that: (1) the administrative director acted without or in excess of her powers, (2) the determination was procured by fraud, (3) the independent medical reviewer was subject to a material conflict of interest, (4) the determination was the result of bias, or (5) the determination was the result of a plainly erroneous finding of fact that is not a matter subject to expert opinion. (*Id.*)

If the IMR physician's decision is reversed, it is remanded to the administrative director for submission to a different IMR physician. (*Id.* § 4610.6(i).) The Legislature granted deference to the decisions of the arbitrating IMR physicians. For that reason, although the Workers Compensation Appeals Board may reverse a determination of medical necessity, under no circumstances shall an administrative law judge, appeals board, or any higher court make a factual determination of the appropriateness of recommended medical treatment contrary to the determination of the IMR physician. (*Id.*)

II.
The Legislature Acted Within Its Broad Plenary Powers Granted by the California Constitution in Enacting This Method of Arbitration.

A. The Source of the Legislature's Power to Enact Section 4610.6.

Appellant challenges the constitutionality of Section 4610.6 on the bases that (1) she is not permitted to cross-examine the independent medical reviewer, (2) she is not permitted to have access to the identity of the reviewer, and (3) she is not afforded a plain, speedy, and adequate remedy because Section 4610.6 precludes "any Workers' Compensation Judge, the Workers Compensation Appeals Board, or any Appellate Court from reviewing a determination of medical necessity of treatment." (Appellant's Petition for Writ of Mandate and Writ of Review ("Petition"), at p. 2.)

The principles of constitutional interpretation are similar to those governing statutory construction. *Facundo-Guerrero v. WCAB* (2008) 163 Cal.App.4th 640, 648.) In interpreting a constitutional provision, the "paramount task is to ascertain the intent of those who enacted it." (*Id.*) To ascertain that intent, courts look to the language of the constitutional text, giving the words their ordinary meaning. (*Id.*) If the language is clear, there is no need for construction. (*Id.*) However, if the language is ambiguous, extrinsic evidence of the enacting body's intent is considered. (*Id.*)

Section 4 of Article 14 of the California Constitution ("Section 4") vests in the Legislature "plenary power, unlimited by any provision of th[e]

Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation." (Art. 14 Cal Const. § 4.) A complete system of workers' compensation includes adequate provisions for such medical treatment as is requisite to cure and relieve from the effects of injury sustained by workers in the course of their employment. (*See id.*)

Section 4 provides the Legislature with vesting power in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under legislation enacted under Section 4, so long as such administration accomplishes substantial justice expeditiously and inexpensively. (*Id.*) To accomplish this goal, Section 4 grants the Legislature the plenary power to "provide for the settlement of any disputes arising under such legislation by arbitration, or by 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," provided that all decisions rendered by the tribunal are subject to review by the California Courts of Appeal. (*Id.*)

The California Supreme Court has recognized that these constitutional provisions are intended as a "safeguard to the full, unfettered authority of the Legislature to legislate in this area, as it saw fit." *Facundo-Guerrero*, 163 Cal.App.4th at 650; *Mathews v. WCAB* (1972) 6 Cal.3d 719, 734-35.) The provisions, therefore, do not impose a lawmaking mandate upon the Legislature, but instead endow the Legislature with "plenary" authority to determine the "contours and content of our state's workers' compensation system," including the power to provide for the

arbitration of disputes, and provide for the bases of appeal of such disputes. (*Facundo-Guerrero*, 163 Cal.App.4th at 650.)

B. The Legislature Acted Within Its Constitutionally Granted Power by Providing for Arbitration of Disputes Over Medical Treatment by Disinterested Medical Professionals.

1. The Use of Private IMR Physicians As Arbiters of Medical Treatment Decisions is a Constitutional Delegation of Power.

In resolving constitutional challenges, "all presumptions and intendments favor the validity of a statute. . . . Statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780.)

Appellant argues in her Reply in Support of Petition for Writ of Mandate ("Reply") that Section 4 "does not specifically state that the use of private mediation or dispute resolution system may be employed in the workers' compensation system." (Reply, at p. 13.) However, Section 4 *unambiguously* grants the Legislature power to "provide for the settlement of disputes arising under [workers' compensation] legislation by *arbitration*," and to fix the method and manner of trial of any such dispute. (Art. 14 Cal Const. § 4 (emphasis added).) The Legislature exercised this power by delegating the task of arbitrating medical treatment disputes to IMR physicians, and by setting forth the "method and manner" by which the IMR physician shall resolve such disputes. (Cal. *Labor Code* § 4610.6.)

Declaring "[t]hat 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," (Sen. Bill No. 863, § 1(d), Exh. 1 to Request for Judicial Notice), the Legislature concluded 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." (*Id.*, Exh. 1 to Request for Judicial Notice.) The Legislature determined that IMR is necessary to implement that policy. (*Id.* at § 1(e), Exh. 1 to Request for Judicial Notice.) It therefore enacted Section 4610.6, and further declared that the performance of IMR is a new state function, and that it is of such a special and unique service that it must be contracted to an IMR organization such as Maximus. (*Id.* at § 1(f).) The use of a contracted organization to arbitrate these disputes was judged by the Legislature to be more expeditious, more economical, and more scientifically sound than the then existing procedure for resolving disputes related to medical necessity. (*Id.*)

The Legislature acted within its constitutional confines in delegating dispute resolution of medical treatment to a private entity. In *Simon v. Cameron*, plaintiff mounted a constitutional challenge to a California statute providing that local or regional voluntary health planning agencies were to decide whether to approve or deny a convalescent home's application for a license. (*Simon v. Cameron* (C.D. Cal. 1970) 337 F.Supp. 1380, 1381.) The legislature vested final decision making authority concerning license application approval in such local health planning agencies. (*Id.*) In *Simon*, plaintiff refused to submit its application for such a license to a private, non-profit corporation as required by the state statute. (*Id.*)

In upholding the legislative delegation, the court noted:

> The voluntary health planning agencies were intended by the legislature to be fact finding, decision making bodies to determine community need for health services and analyze existing facilities and their utilization. . . . This delegation of power is not without adequate standards. . . . Assessment of need is a definite and reviewable delegation. . . . The legislature has guided the voluntary agencies in their determinations of need by requiring certain information of license applicants.

(*Id.* at 1382.) Moreover, applying the due process clause to invalidate delegation of authority would "lead to the invalidation of numerous delegations of authority to private bodies which Congress and state legislatures have established and which are generally acceptable." (*Id.* at 1383.) The delegation is predicated upon a judgment on the part of the legislature "to entrust a private body" with decision making power because such decisions require "expertise and experience in a particular area requiring the exercise of professional judgment and specialized skill." (*Id.*)

The court therefore concluded that "the law contains sufficient standards to guide the agency in its function of assessing community need for health facilities and granting or withholding of its approval accordingly." (*Id.*) Interestingly, the court found that "community need and desirability" were adequate guidelines by which the local health planning agencies were to abide. (*Id.* at 1382.) The court held that delegation of licensing authority was "clearly constitutional." (*Id.* at 1382.)

Following the logic in *Simon*, Section 4610.6 manifests the Legislature's determination that decisions concerning the medical appropriateness of proposed treatment are best made by medical professionals. It "entrusted" decisions of the appropriateness of medical treatment to a private IMR organization equipped with the "expertise and experience in a particular area requiring the exercise of professional" medical judgment and "specialized" medical skill. (*See Simon*, 337 F.Supp. at 1383.)

In issuing decisions concerning medical necessity, the IMR physician is required to comply with guidelines set forth in Section 4610.6(e). Those guidelines are far more particular than those upheld in *Simon*, and the IMR physician's compliance with those guidelines are reviewable by the appeals board and courts of appeal. Section 4610(e) requires that "[e]ach analysis [ ] cite the employee's medical condition, the relevant documents in the record, and the relevant findings associated with the provisions of subdivision (c) to support the determination." (Cal. *Labor Code* § 4610.6(e).) The court in *Simon* concluded that guidelines such as "community need and desirability" were not vague and overbroad, and further concluded that "assessment of need is a definite and reviewable delegation." (*Simon*, 337 F.Supp. at 1383.) This Court should therefore hold that Section 4610.6(e) provides for definite and reviewable delegation.

Finally, as will be discussed below in Section II.C of this Brief, the decisions of IMR physicians are subject to appellate review. While the Legislature has limited the bases of such an appeal, Section 4610.6 provides for reversal of an IMR determination that was not made pursuant to the guidelines set forth in Section 4610.6(e).

2. Due Process Does Not Require the Legislature to Provide for Cross Examination of an IMR Physician

Appellant argues that she is deprived of due process because Section 4610.6 does not provide for cross-examination of the IMR physician, and precludes her from learning the IMR physician's name. Due process requires that "[all] parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine *witnesses*, to inspect documents and to offer evidence in explanation or rebuttal." (*Fidelity and Casualty Company of New York v. Workers' Compensation Appeals Board* (1980) 103 Cal.App.3d 3001, 1015 (emphasis added).)

However, Appellant has cited no case law supporting the argument that she is entitled to cross-examine an arbiter of a dispute. Cases cited by Appellant are factually distinguishable, and are therefore inapplicable here. In *Fidelity and Casualty Company of New York v. Workers' Compensation Appeals Board* ("*Fidelity*"), applicant Harris, having entered into a compromise and release agreement with Fidelity, filed a Motion to Set Aside Compromise and Release, arguing that the settlement agreement lacked proper execution. (*Id.* at 1006.) The WCAB judge denied Harris's Motion. (*Id.*) On Harris's petition for reconsideration, the WCAB granted reconsideration, and issued an order for an examination of Harris by a physician, even though Harris's petition did not address medical issues. (*Id.* at 1007.) A physician then examined Harris, issued a report, and a permanent disability rating was issued based on the treating physician's report. (*Id.*) Each was admitted into evidence. (*Id.*) The WCAB denied Fidelity's request to cross-examine the physician and to present rebuttal

evidence. (*Id.* at 1008.) The Court of Appeal held that the WCAB deprived Fidelity of due process because (1) the WCAB had an invalid reason for the medical reexamination of the applicant, (2) failed to give notice to the parties of the relevance of the medical examination to reopening the applicant's case, and (3) failed to give the parties the right to introduce rebuttal evidence. (*Id.* at 1016.)

Appellant also cites *Stingley v. Research Packaging of California* (1969) 34 Cal. Comp. Cases 462 in support of her due process argument. There, as in *Fidelity*, the Referee denied defendant's request to cross examine the rating specialist before the Referee fixed the extent of permanent disability. (*Id.* at 464.)

Fidelity and *Stingley* do not support Appellant's position that she is constitutionally entitled to cross-examine the independent medical reviewer. Here, unlike in *Fidelity* and *Stingley*, Appellant is not deprived of cross-examination of a witness, be that a treating physician or rating specialist, before the decision concerning appropriateness of recommended treatment is made. The physician in *Fidelity* was a *witness* whose opinion was admitted into evidence. (*Id.* at 1007.) That opinion was then used to determine a disability rating, which was also admitted into evidence. (*Id.*) Similarly, in *Stingley*, the Referee considered the rating specialist's recommendation to the Referee without permitting defendants to rebut the rating or cross-examine the rating specialist. (*Stingley*, 34 Cal. Comp. Cases at 464.) The employers in *Fidelity* and *Stingley* were deprived of due process because they were not afforded an opportunity to present rebuttal evidence or to cross-examine those witnesses testifying against them.

The IMR physician does not stand on the same level in the decision making hierarchy as do the treating physician in *Fidelity* or the rating specialist in *Stingley*. Instead, the IMR physician is akin to the workers' compensation administrative law judge or the WCAB in that the IMR physician considers evidence presented by the parties and makes an independent decision. Under Section 4610.6, as the arbiter of the dispute over the scientific appropriateness of medical treatment, the IMR physician reviews the facts contained within (1) all pertinent medical records, (2) provider reports, and (3) any other information submitted to the organization or requested from any of the parties. (Cal. *Labor* Code § 4610.6(b).)

Section 4610.6 does not prevent applicants from presenting or obtaining evidence, and is not the first or last decision concerning appropriateness of recommended medical treatment. The procedures set forth in Section 4610.6 are only used once an utilization review decision to modify, delay, or deny treatment is issued pursuant to California *Labor Code* section 4610. (Cal. *Labor Code* §§ 4610.5(a), 4610.6(a).) When an employee's treating physician makes a treatment recommendation, such recommendation is submitted to the employer's utilization review process for determination of whether to approve, modify, delay, or deny the recommended treatment. (*Id.* at § 4610.) A medical director designated by the employer or insurer reviews all information that is "reasonably necessary" to make the determination. (*Id.* at § 4610(d).) The medical director's decision shall be consistent with the medical treatment utilization schedules adopted pursuant to *Labor Code* section 5307.27(f)(2). Therefore, the IMR process does not come into play until a factual determination concerning medical appropriateness of recommended

treatment has been made pursuant to utilization review. IMR therefore constitutes a second level of fact-finding and medical record review for purposes of adjudicating the limited question of medical appropriateness of a particular course of treatment. The IMR treating physician therefore resolves the dispute between the employer's utilization review and the employee's treating physician.

Further, applicants are free to cross-examine any of the medical examiners *advising* for or against a particular treatment recommendation. Indeed, the utilization review medical director is subject to cross-examination. Nothing in Section 4610.6 precludes applicants from submitting to the IMR physician deposition testimony of any medical provider or the utilization review medical director. Then, based on *all information* before her, the IMR physician arbitrates the dispute between the employee's treating physician and the utilization review physician as to whether a particular recommended treatment is medically appropriate. (*Id.*) This arbitration is the process of applying the facts provided by the parties to complete a "[c]omparison of specific treatments and results to usual or best-practice treatments outcomes." (AM. COLL. OF OCCUPATIONAL AND ENVTL. MED., Occupational Medicine Practice Guidelines, *supra* at 136). The IMR physician's decision is not to be considered rebuttable evidence subject to cross-examination, but is, based on the evidence presented to it, the *decision* of the administrative director with respect to the appropriateness of medical treatment. Appellant is therefore no more entitled to cross-examine the independent medical reviewer than she is entitled to "go outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators." (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 777; *see also Camp v.*

Pitts (1973) 411 U.S. 138, 142-143 (citing *United States v. Morgan* (1941) 313 U.S. 409, 422 (setting forth the Morgan Rule as precluding one from probing into the thought processes of the decision-maker of a quasi-judicial administrative agency decision)).)

Appellant argues in her Reply that reliance on the Morgan Rule is misplaced because the Administrative Director and Maximus are "not one and the same, but in fact two separate independent bodies." (Reply, at p. 21.) Appellant goes on to argue that "Maximus provides medical review which is then relied upon by the DWC who ultimately makes the administrative decision." (Reply, at p. 21.) This is a mischaracterization of Section 4610.6(g).

Section 4610.6(g) provides that "the determination of the independent medical review organization shall be *deemed* to be the determination of the administrative director." Thus, although Maximus is a private entity, it is performing a state function as set forth in the Legislative findings in Senate Bill 863. (Exh. 1 to Request for Judicial Notice.) Thus, the DWC does not *rely* upon the decision of the independent medical review organization, but instead *adopts* the decision as its administrative decision. (*See* Cal. *Labor Code* § 4610.6(g).) Based on the clear statutory language in Section 4610.6(g), the administrative director's decision *is* the IMR physician's decision. Therefore, examination of the thought processes behind the IMR physician's decision cannot be characterized as cross examination of a witness, but instead would necessarily constitute examination of the thought processes behind the decision of the administrative director, which is expressly prohibited by *United States v. Morgan*.

C. *Section 4610.6's Limitations on Bases of Appeal Are Not Constitutionally Suspect, and Appellant Is Not Denied Appellate Review of the IMR Physician's Decision.*

1. Decisions Made by IMR Physicians are Subject to Appellate Review

Appellant argues that Section 4610.6 precludes appellate review of a determination of medical necessity of treatment. (Petition, at p. 2.) Appellant goes so far as to argue that "the adverse determination of medical necessity is simply not reviewable by any judicial body." (Petition, at p. 19.)

Appellant misinterprets the plain statutory language of Section 4610.6. Appellant would have this Court read Section 4610.6 as precluding *any* appellate review of a medical necessity determination made by an IMR physician, in contravention of Section 4 of Article 14 ("Section 4") of the California Constitution, which requires that decisions rendered by arbitration be subject to appellate review. (Art. 14 Cal. Const. § 4.) Appellant appears to draw this argument from Section 4610.6, subsection (i), which provides, in part: "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." (Cal. *Labor Code* § 4610.6.)

Section 4 unambiguously provides that the Legislature may (1) provide for settlement of disputes by arbitration, (2) fix and control the manner and method of trial, and (3) fix and control the manner of review of decisions rendered by the tribunal or tribunals designated by it. (Art. 14 Cal. Const. § 4.) The Legislature's power in this arena is limited only in that "all *decisions* of any such tribunal shall be subject to *review* by the

appellate courts." (Art. 14 Cal. Const. § 4 (emphasis added).) Section 4 does not require the Legislature to grant appellate courts the power to make factual determinations contrary to those decided by an arbiter. Appellant would have this Court hold that Section 4 requires the Legislature to provide for repetitive factual determinations concerning medical necessity at every level of appeal, including the administrative law workers' compensation judge, the appeals board, California Courts of Appeal, and California Supreme Court. Such a construction would contravene the legislature's plenary authority to determine who is the best judge of an issue arising under the workers' compensation scheme, and how that issue is to be adjudicated.

The clear, unambiguous language of Section 4610.6 precludes Workers Compensation administrative law judges, the Workers Compensation Appeal Board, California Court of Appeal, and California Supreme Court only from making determinations "of such a special and unique nature" concerning medical necessity. (Cal. *Labor Code* § 4610.6.) Such language cannot reasonably be construed to preclude appellate review of the process of making a medical necessity determination, or to preclude appellate review of the accumulation of facts and treatment records applied by the arbiter. Contrary to Appellant's argument, Section 4610.6 does not preclude appellate review of a medical necessity determination. It simply precludes a higher court's making a factual medical determination.[1] (*Id.*)

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[1] Despite the clear statutory language of Section 4610.6, Appellant presents factual evidence to this Court concerning the medical necessity of the treatment recommended by Dr. Jamasbi. (Petition, at p. 22-27.) By

Footnote continued on next page.

The extent of the Legislature's broad power is clear and unambiguous, and does not warrant construction. (*Facundo-Guerrero*, 163 Cal.App.4th at 648.) As permitted by Section 4, Section 4610.6, subsection (h), fixes and controls the manner of review of decisions rendered by IMR physicians. Specifically, the IMR physician's *decision* is appealable to the Workers Compensation Appeals Board upon a showing of the administrative director's (1) acting without or in excess of its powers, (2) fraud in the procurement of the decision, (3) conflict of interest, (4) bias, or (5) plainly erroneous mistake of fact concerning a matter of ordinary knowledge. (Cal. *Labor Code* § 4610.6(h).)

Appellant argues that because the IMR physician is anonymous, an applicant has no basis upon which to mount an appeal of an IMR physician's decision. (Petition, at p. 17.) That assertion completely ignores the IMR organization's obligation to provide a description of the qualifications of the medical professional. Further, the Legislature has set forth the particular requirements with which the IMR physician must comply in issuing a decision on medical necessity. The decision *shall* (1) state whether the disputed health care service is medically necessary, (2) cite the employee's medical condition, (3) cite the relevant medical records, and (4) set forth the relevant findings associated with the standards of medical necessity. (*Id.* § 4610.6(e).) The IMR physician *shall* base its decision on, among other things, the medical treatment utilization schedule

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presenting such evidence, it appears that Appellant would have this Court hold that the recommended treatment is medically necessary. Section 4610.6 unambiguously precludes such a holding by this Court, and even assuming reversal of the IMR physician's decision, Appellant would be entitled, at most, to remand to the administrative director for further review.

adopted by the administrative director pursuant to California *Labor Code* section 5307.27. (*Id.*)

Because there are clear-cut guidelines with which the reviewer must comply, and the reviewer must identify its qualifications to make the "special and unique decision," the WCAB's review of the IMR decision can reveal compliance (or lack thereof) with those guidelines. For example, if an IMR physician did not review the available medical treatment utilization schedules in rendering the decision, the failure to do so would be revealed on the face of the reviewer's decision. Therefore, contrary to Appellant's arguments, it is not impossible to obtain evidence to mount an appeal to a medical necessity decision made by IMR.

Upon an Appellant's proof of one of the bases for an appeal, the medical necessity determination is *reversed*, which is precisely what an applicant contesting such a decision would desire. (*Id.* § 4610.6(i).) The dispute is then remanded to the administrative director for review by another IMR physician. (*Id.*)

Appellant's argument, therefore, is not so much based on a supposed lack of appellate review, but based upon dissatisfaction with the lost opportunity to substitute the decision of the workers' compensation administrative law judge for the evidence-based decision of the medical arbiter. An applicant's dissatisfaction with the Legislature's decision is simply insufficient to form the basis for a constitutional challenge.

2. Appeals Under Section 4610.6 Are Analogous to those Appeals Taken From Arbitration Awards

Section 4610.6's limitations on bases of appeal of an independent medical review organization's decision, and limited standards of review, are not novel or unique. The bases for appeals taken from arbitration awards are similarly limited.[2] Constitutionality of statutory schemes requiring arbitration usually depends on whether judicial review of the arbitrator's decision is provided. (*Bayscene*, 15 Cal.App.4th at 132.) As discussed above in Section II.C of this Brief, although the bases of such appeals are limited, Section 4610.6 does provide for judicial review of an independent medical review organization's determination concerning medical necessity of a recommended course of treatment. These limitations are similar to those found in California *Code of Civil Procedure*'s arbitration statutes, and are not reasonably susceptible to constitutional attack for lack of judicial review.

Under sections 1286.2 ("Section 1286.2") and 1287 ("Section 1287") of California *Code of Civil Procedure*, the court shall vacate an arbitration award if the court determines: (1) the award was procured by

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[2] CalChamber is aware that, as between private citizens, arbitration is usually used in situations where the parties have agreed to it. However, as noted above in Section II.B of this Brief, Section 4 gives the Legislature power to provide for the settlement of any disputes by arbitration so long as the same is subject to review by the California Courts of Appeal. (Art. 14 Cal. Const. § 4.) Therefore, because the Legislature has provided for arbitration of disputes concerning medical necessity, the statutes governing limited appeals to arbitration awards, and the cases interpreting them, are relevant to this Court's determination of the constitutionality of Section 4610.6.

corruption, fraud, or other undue means, (2) there was corruption in any of the arbitrators, (3) the rights of the party were prejudiced by an arbitrator's misconduct, or (4) the arbitrators exceeded their powers. (Cal. *Civ. Pro.* § 1286.2; *San Francisco Housing Authority v. SEIU Local 790* (2010) 182 Cal.App.4th 933, 943 ("The superior court is to vacate an award if the arbitrators *exceeded their powers* and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." (emphasis added)).) The California Supreme Court noted, "this provision does not supply the court with a broad warrant to vacate awards the court disagrees with or believes are erroneous." (*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal.4th 1179, 1184.) If the award is vacated, "the court may order a rehearing before new arbitrators," or, with the consent of the parties, may "order rehearing before the original arbitrators." (Cal. *Civ. Pro.* § 1287.) Section 1287 does *not* provide that the court may hold a trial de novo, or that the court vacating the award may make a determination of the underlying dispute.

A party to arbitration may also appeal an order vacating or confirming an arbitration award to the California Courts of Appeal. (Cal. *Civ. Pro.* § 1294.) However, the Legislature set forth the limitations on the Courts of Appeals' scope of review of such orders. (Cal. *Civ. Pro.* § 1294.2.) For example, an appellate court "cannot correct an error merely of judgment in a proceeding" designated as a third party whose decision is binding upon the parties. (*Glesby v. Balfour* (1943) 63 Cal.App.2d 414, 417) (affirming arbitration award, and dismissing appeal, where appeal was "based solely upon the ground that the arbitrators drew an erroneous conclusion").) Further, neither the superior court, upon motion to confirm arbitration award, nor appellate court reviewing lower court's order, has

power to review sufficiency of evidence to sustain award. (*Crofoot v. Blair Holdings Corp.* (1953) 119 Cal.App.2d 156, 184.) Before the superior and appellate courts, every intendment of validity must be given the award, and the burden is upon one claiming error to support his contention. (*Id.* at 185.) Therefore, while courts will enforce awards in arbitration as valid, and, for cause, will annul them, the merits of such controversies are not subject to judicial review. (*Riley v. Pig'n Whistle Candy Co.* (1952) 109 Cal.App.2d 650, 651.)

Like arbitration awards, the bases for appeal from medical necessity determinations made pursuant to Section 4610.6 are limited. For example, both arbitration awards and IMR determinations are appealable upon a showing that the arbitrator or administrative director acted in "excess" of its powers. (*See* Cal. *Labor Code* § 4610.6(h); Cal. *Civ. Pro.* § 1294.2.) Further, both arbitration awards and IMR are granted deference by reviewing courts, and a decision will not be vacated based simply on an allegation that an erroneous (or unfavorable) conclusion was reached. (*See* Cal. *Labor Code* § 4610.6(h); Cal. *Civ. Pro.* § 1294.2.) Moreover, like an appeal to an arbitration award, if the medical necessity determination is reversed by the WCAB or California Court of Appeal, the matter is *remanded* to the arbitrator for further proceedings. In the same vein, neither a court reviewing an IMR determination, nor a court reviewing an arbitration award, reaches the merits of the dispute between the parties, and as a result, does not make factual determinations different than those made by the arbitrator of the dispute. (*See* Cal. *Labor Code* § 4610.6(i); Cal. *Civ. Pro.* § 1294.2.)

Therefore, as required by Section 4, either party may pursue judicial review of an IMR determination, and judicial review of whether the determination was made in compliance with the mandates of Section 4610.6. Appellant would ask this Court to read Section 4 as a constitutional mandate that the Legislature provide for judicial review of every aspect and medical conclusion of the IMR decision, and that it also provide for reviewing courts to reach the merits of the dispute, and to substitute judicial judgment for the "special and unique" medical judgment on those merits. This, the Legislature is simply not required to do. (*See Facundo-Guerrero*, 163 Cal.App.4th at 648 (noting that it was not the "voters' intent to command the Legislature to act in the way petitioners perceive, including removing from lawmakers the power to enact laws which limit the scope of benefits available to workers injured by industrial accidents").

CONCLUSION

For the foregoing reasons, CalChamber respectfully requests that this Court deny Appellant's petition for writ of mandate, and hold that Section 4610.6 is a constitutional exercise of the Legislature's broad plenary power.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.204(C)(1)

I, the undersigned, Melinda Carrido, declare that:

I am an attorney in the law firm of Haight Brown & Bonesteel, which represent Attorneys for Amicus Curiae California Chamber of Commerce.

This certificate of Compliance is submitted in accordance with Rule 8.204(c)(1) of the California *Rules of Court.*

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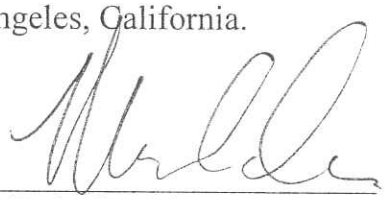
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 10, 2014, at Los Angeles, California.



Melinda Carrido

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

Case Name: Stevens v. Outspoken Enterprises and State Compensation Insurance Fund and the Workers' Compensation Appeals Board, et al.
Case No.: First Civil A141435

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, California, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 555 South Flower Street, Forty-Fifth Floor, Los Angeles, California 90071; that on June 10, 2014, I served the within

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Roberta Williams

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