IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

FRANCES STEVENS, Petitioner, vs. WORKERS' COMPENSATION APPEALS BOARD, OUTSPOKEN ENTERPRISES, et al. Respondents.	No.

After the Published Decision
of the Court of Appeal, First Appellate District, Division One
Court of Appeal No. A143043

On Appeal from the Workers' Compensation Appeals Board
San Francisco
Honorable Francie Lehmer
WCAB Case No: ADJ1526353

PETITION FOR REVIEW

LAW OFFICE OF JOSEPH C. WAXMAN
Joseph C. Waxman, Esq. (SBN: 67956)
James J. Achermann, Esq. (SBN: 262514)
220 Montgomery Street, Suite 905
San Francisco, CA 94104
415-956-5505 – telephone
415-956-6645 – facsimile

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

Frances Stevens respectfully petitions this Court for review of a published decision of the Court of Appeal, First Appellate District, Division One, issued on October 28, 2015 (Addendum A), modified November 4, 2015 (Addendum B), and further amended November 12, 2015 (Addendum C).

ISSUES PRESENTED

Article XIV, Section 4 of the California Constitution (Addendum D), vests the Legislature with plenary power, unlimited by any other provision of the Constitution, to create a complete system of workers' compensation, to, among other things, provide for all reasonable and necessary medical care to injured workers to cure or relieve from the effects of their injuries. Article XIV, Section 4 further vests the Legislature with authority for the settlement of workers' compensation disputes arising under such legislation by arbitration, by an Industrial Accident Commission (such as the Workers' Compensation Appeals Board ("WCAB")), or by the courts provided that "all decisions of any such tribunal shall be subject to review by the appellate courts of this State." The complete system of workers' compensation must provide for an expeditious remedy without encumbrance and must provide for substantial justice in all cases.

Recent statutory amendments governing the delivery of medical care within the California workers' compensation system, codified in Labor Code §§ 4610.5 and 4610.6 became, as of July 1, 2013, applicable to all injured workers in the State of California, regardless of their date of injury.

Under Labor Code §§ 4610.5 and 4610.6, when an employer/insurance carrier denies medical treatment recommended by an

injured worker's treating physician, the worker is no longer entitled to request a hearing before a workers' compensation judge ("WCJ") to settle a medical necessity dispute. Instead, the worker must submit the medical necessity dispute to an Independent Medical Review ("IMR") process.

Pursuant to the IMR process, an anonymous physician retained by a private company, who never examines the worker, decides whether the treatment is medically necessary, and settles the issue. Neither the injured worker nor the injured worker's attorney is allowed to cross-examine the anonymous reviewer in order to ascertain his/her rationale for the denial of care, nor is the injured worker permitted to present rebuttal evidence before a WCJ that would allow either the judge or the WCAB to order the necessary care. Although Labor Code § 4610.6 allows for a limited review by a WCJ or the WCAB, the IMR reviewer's decision is not subject to challenge before the WCAB or any court on matters subject to expert opinion (Labor Code § 4610.6 (h) (5)), which as a practical matter insulates the anonymous IMR reviewer's opinion from meaningful review. Indeed, the courts are explicitly precluded from making "a determination of medical necessity contrary to the determination of the independent medical review[er]." *Id.* § 4610.6 (i). This case presents the issue whether the new IMR process is constitutional.

The IMR process conflicts with Article XIV, Section 4 by delegating the adjudication of medical necessity decisions to a private corporation retained by the Administrative Director ("AD") of the Department of Industrial Relations, depriving Petitioner of her right to have decisions regarding her vested fundamental right to medical care decided by a

constitutionally permissible judicial tribunal, and depriving Petitioner of her right to due process, meaningful judicial review, an expeditious remedy without encumbrance, and substantial justice.

The Court of Appeal committed error by:

1. Finding that the Legislature had not exceeded its constitutional authority by providing for an IMR process for the settlement of medical necessity disputes under the sole authority of the AD of the Department of Industrial Relations (see Labor Code §§ 4610.6 (g), (h), and (i)), in contravention of the enabling provisions of California Constitution, Article XIV, Section 4, which permits the settlement of workers' compensation disputes only in a tribunal defined as arbitration, an Industrial Accident Commission (WCAB), or the courts. The Court of Appeal committed further error by finding that the Legislature is authorized to remove the WCAB from its constitutionally and statutorily vested judicial authority as the fact-finder regarding all workers' compensation issues.

2. Finding that Labor Code § 4610.6 allows Petitioner meaningful judicial review as required by Article XIV, Section 4, when in fact Labor Code § 4610.6 (i) prohibits review of the central question at issue under the statutes, the medical necessity of treatment, and thus prohibits the appellate courts from exercising their constitutionally vested function.

3. Finding that Labor Code §§ 4610.5 and 4610.6 do not violate Petitioner's right to an expeditious remedy without encumbrance.

4. Finding that Labor Code § 4610.6 does not violate Petitioner's right to due process guaranteed by Article I of the California Constitution, as well as by the 5th and 14th Amendments to the United

States Constitution, and by further denying Petitioner the due process required to allow her to obtain substantial justice in her case.

5. Finding that Labor Code § 4610.6 does not violate Article III, Section 3 of the California Constitution (separation of powers), even though Petitioner has been deprived of the right to have the medical necessity decision rendered by a constitutionally authorized judicial body rather than by an anonymous consultant to the AD.

NECESSITY FOR REVIEW

As of July 1, 2013, the IMR process became applicable to all injured workers in the State of California who are entitled to medical care under the workers' compensation system, regardless of date of injury.

As reported in the California Workers' Compensation Reporter in August 2015 (Addendum E, page 188)[1], injured workers are now forced to challenge denials of care by the emboldened employer/insurance companies at a rate of approximately 15,000 a month, and at least 87% of these denials are upheld by the anonymous, non-examining IMR reviewers. The result is that tens of thousands of injured workers are being denied medical care recommended by their treating physicians through a process in which the opinion of an anonymous physician/consultant retained by a private company is effectively final. This Court's review is necessary to decide whether this system for settling workers' compensation disputes is constitutional. The many amicus briefs filed in the Court of Appeal reflect the State-wide importance of the issue.

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[1] California Workers' Compensation reports have been declared by the appellate courts as properly citable authority, but not binding. *Griffith v. WCAB* (1989) 54 CCC 145 fn. 2.

Petitioner contends that not only does the IMR process violate the California Constitution, and the United States Constitution Due Process Clause, but also that the IMR process fails to accomplish the stated legislative intent, which was to provide injured workers a more expeditious remedy to resolve treatment disputes and provide them with the best quality care. By prohibiting the injured worker from obtaining a judicial decision based on substantial evidence as to the appropriate medical care, in accordance with evidence-based medicine (see Labor Code §§ 4604.5 and 5307.27), and by designating the anonymous consultant to the AD the "decision-maker" (as designated by the Court of Appeal), the IMR process is more cumbersome and time-consuming than the system it replaced. The IMR process, by prohibiting cross-examination of the IMR reviewer or rebuttal of the treatment denials as to the medical necessity of treatment, denies the injured worker the opportunity to present evidence before a judge as to the necessary care required considering the injured worker's particular treatment needs.

In upholding the IMR process as constitutional, the Court of Appeal held that California Constitution Article I (Due Process) and Article III (Separation of Powers) are "trumped" by the plenary power of the Legislature afforded by Article XIV, Section 4. In so doing however, the Court of Appeal has ignored Supreme Court and appellate court decisions that have applied Article I and Article III to workers' compensation proceedings. Moreover, the Stevens' appellate decision fails to address whether, by enacting the IMR process, the Legislature has impermissibly established a fourth method for settling workers' compensation disputes,

since the new IMR process exceeds the constitutional enabling provisions of Article XIV, Section 4, which also means that the new process is not exempted by those enabling provisions from scrutiny under other provisions of the California Constitution.

Petitioner acknowledges that all medical treatment must be supported by evidence-based medicine pursuant to Labor Code § 5307.27, which also incorporates the Medical Treatment Utilization Schedule ("MTUS") (a series of treatment protocols). Pursuant to Code of Regulations 8 CCR Section 9792.24 (Addendum F), the Chronic Pain Medical Treatment Guidelines, 127 pages in length, are also incorporated into the MTUS. The Court of Appeal decision does not acknowledge that experts often disagree on how the MTUS applies to a particular case. The Court does not explain how conflicts that exist within the MTUS are to be resolved, or how more appropriate provisions of the MTUS applicable to an individual case, can be settled at the WCAB in a manner that would permit an order of treatment. By designating the anonymous IMR reviewer as the "decision-maker" and by preventing cross-examination of the reviewer (defined as a consultant to the AD pursuant to Labor Code § 139.5), the Court of Appeal has prevented Petitioner from exploring the reviewer's rationale in upholding the denials of care, from the opportunity to persuade the IMR reviewer that a more appropriate MTUS provision should apply, or from offering other scientifically-based evidence in rebuttal as permitted by Labor Code § 4604.5.

The Court of Appeal erred by finding that the medical necessity review, conducted in secret by the anonymous reviewer of a private

corporation is compliant with Article XIV, Section 4's mandate that all decisions regarding the settlement of workers' compensation disputes be made in a tribunal. The Court's finding that the Legislature can permissibly remove the WCAB from its constitutionally and statutorily vested fact-finding authority and remove the appellate courts from meaningful judicial review conflicts with other workers' compensation statutes and with Article XIV, Section 4.

The Court of Appeal's decision fails to apprehend that the IMR process denies injured workers an expeditious remedy without encumbrance, since, as Petitioner's case illustrates, the IMR process is far more time-consuming than the medical evaluation system it replaced and creates far more litigation, leading to an injured worker's frustration but not treatment.

Finally, in upholding the IMR process, the Court has deprived Petitioner and all California injured workers entitled to the medical care guaranteed under Article XIV, Section 4 to cure or relieve from the effects of an industrial injury of that care, and of the substantial justice required by the Constitution. Because the IMR process has rendered entitlement to medical care meaningless in many, if not most cases, Petitioner believes it is necessary for the California Supreme Court to review this issue and reverse the appellate decision of October 28, 2015.

STATEMENT OF THE CASE

Petitioner Frances Stevens sustained a severe industrial injury on October 18, 1997 from a fall. She eventually developed Complex Regional Pain Syndrome which spread to her feet, shoulders, and low back. As the

years went by, Ms. Stevens became increasingly disabled. Her treating physicians attempted both conservative care and surgical intervention, all without success in alleviating Petitioner's chronic pain. She became depressed as a result of her chronic pain, her insomnia, her inability to be successfully vocationally rehabilitated, and her general inability not only to perform the activities of daily living, but also to remain part of the active world. She became wheelchair-bound.

After a trial, WCJ Lehmer issued her Findings and Award, finding that Petitioner was 100% permanently and totally disabled and finding:

> I have considered the opinions of all of the physicians and vocational rehabilitation expert in this case as well as applicant's testimony. I find that applicant is permanently and totally disabled. Applicant suffered an injury which has necessitated extensive treatment with numerous surgeries and use of medication. The synergistic effect of all of the applicant's conditions, renders her unable to compete in the open labor market.

More than 16 years had elapsed between Petitioner's date of injury and the IMR denial of her medical care, which is the subject of this petition.

Before 2013, if an employer/insurance company disputed treatment recommended by the treating physician, the employer/insurance company could submit the disputed treatment to its Utilization Review ("UR") vendor. The UR process mandated by Labor Code § 4610 was, (and is) completely under the control of the employer/insurance carrier, and the injured worker had (and has) no input into the selection of the employer's vendor or physicians who conduct UR. If the treatment was denied, the injured worker had the option of appealing that denial by undergoing a

medical evaluation process which required the injured worker to be evaluated by either a qualified medical examiner selected from a State panel, or an agreed-upon medical examiner (if the injured worker was represented). If the qualified or agreed medical examination did not resolve the treatment dispute, both the injured worker and the employer had the option of proceeding to a hearing before a workers' compensation judge for a decision based on substantial evidence, with full appellate review available before the WCAB and the appellate courts.

Petitioner, and the State Compensation Insurance Fund ("SCIF") defending against her claim, selected Dr. Leslie Schofferman, a board-certified pain management specialist, as an agreed medical examiner to resolve disability issues and medical treatment disputes. Dr. Schofferman consistently approved the treatment requests made by Petitioner's treating physician Dr. Jamasbi, also a board-certified pain management specialist.

With the enactment of Labor Code §§ 4610.5 and 4610.6, however, the process changed. Under the new legislation, if a treatment request is denied through an employer's UR process, the injured worker contesting that denial is limited to the new IMR process. IMR is the only option available to the injured worker, even if the employer/carrier failed to send all appropriate records to a utilization reviewer. (*Dubon v. World Restoration (Dubon II)* (2014) 79 CCC 1298 (*en banc*).) The IMR reviewer is an anonymous physician/consultant retained by a private corporation ("Maximus") who settles the treatment dispute. The IMR reviewer's decision as to medical necessity "shall be deemed a determination of the Administrative Director" of the Department of

Industrial Relations (Labor Code § 4610.6 (g)). The injured worker is permitted no appeal to a workers' compensation judge, the WCAB, or the appellate courts for a medical necessity determination contrary to that of the IMR reviewer. As the IMR reviewer is anonymous (Labor Code § 4610.6 (f)), neither the injured worker nor his/her attorney is permitted to depose or otherwise question the reviewer.

As of July 1, 2013, IMR became applicable to all injured workers entitled to medical care in the State of California under the workers' compensation system. On July 25, 2013 Respondent SCIF once again denied through its UR program the medication regimen and home health care recommended by Dr. Jamasbi. No longer was the denial of treatment permitted to be submitted to the agreed medical examiner, Dr. Schofferman. As mandated by Labor Code §§ 4610.5 and 4610.6, Petitioner submitted her appeal of the UR denials to IMR, which upheld the UR denials of care on February 20, 2014, approximately seven months after the UR denial.

It was clear to Petitioner and her counsel that further pursuit of an administrative remedy was futile, given the constraints of Labor Code §§ 4610.6 (h) and (i). However, Petitioner protected her procedural rights from the IMR denial by filing for a hearing before a WCJ. As WCJ Lehmer explained in her May 27, 2014 decision, she was powerless to render a decision premised upon substantial evidence as to medical necessity, or to order the treatment requested, even though the treatment was supported by the long-standing treating physician and had been approved by the agreed medical examiner. Nor was it permissible for WCJ Lehmer to rule on the

constitutionality of the IMR process. (See *Greener v. WCAB* (1993) 6 Cal. 4th 1028.) Since the issues presented were of first impression in workers' compensation law, Petitioner filed a Petition for Writ of Mandate in the Court of Appeal requesting that the IMR process be found unconstitutional, since it deprived Petitioner of meaningful judicial review, due process, violated separation of powers, failed to provide an expeditious remedy without encumbrance, failed to allow for cross-examination of the IMR reviewer in order to develop an adequate record for appeal, and that an IMR review process under the sole authority of the AD (Labor Code §§ 4610.6 (g) and 139.5), which allowed anonymous, non-examining physicians to render non-appealable decisions as to medical necessity, was not compliant with Article XIV, Section 4's requirement that Petitioner be provided with substantial justice.

On June 17, 2015, the Court of Appeal, without comment, denied Petitioner's Petition for Writ of Mandate.

Petitioner filed a Petition for Reconsideration before the WCAB, which on August 11, 2014 (more than a year after the UR denial of July 25, 2013) issued its Opinion Denying Reconsideration, finding that although the WCAB panel considered Labor Code § 4610.6 to be of dubious constitutionality, it had no authority to rule on constitutional issues and was powerless pursuant to Labor Code § 4610.6 (i) to render a medical necessity decision different from that of the IMR reviewer.

Petitioner then filed a Petition for Writ of Review in the Court of Appeal, challenging the constitutionality of Labor Code §§ 4610.5 and 4610.6.

Extensive briefing was provided to the Court of Appeal, by Petitioner, by Respondent SCIF, Respondent AD of the Department of Industrial Relations, as well as by Amici California Chamber of Commerce, California Workers' Compensation Institute, the California Applicants' Attorneys' Association, Voters Injured at Work, and the Sonoma County Law Enforcement Association.

On October 28, 2015, the Court of Appeal issued its decision upholding the constitutionality of the IMR process. The Court ruled that Petitioner was provided due process under the IMR procedure when considered in conjunction with the UR process, that the IMR reviewer was the "decision-maker," that no cross-examination was permitted of the IMR reviewer since the medical necessity dispute involved document review and testimony was not necessary, that the IMR process was expeditious, and presented no undue encumbrance to Petitioner. The Court found that if Petitioner believed that the IMR process was being performed in an untimely manner she had the option of filing a Petition for Writ of Mandate, which she had not done (this is factually incorrect as Petitioner did in fact file a Petition for Writ of Mandate raising the lack of an expeditious remedy in her case as an issue among other constitutional issues; the appellate court apparently did not remember denying Petitioner's Petition for Writ of Mandate, even though this factual error was brought to the court's attention in her Petition for Rehearing). While the Court of Appeal decision remanded the home health care issue to the WCAB to ascertain if the MTUS had been properly applied, the Court did not answer how Petitioner was to rebut the MTUS provision relied upon by

the reviewer with other MTUS provisions that also applied to Petitioner's case, or define the legal status of the IMR reviewer other than by designating him/her as the "decision-maker." The Court erroneously held that the limited grounds for appeal under Labor Code § 4610.6 (h) provided Petitioner with adequate judicial review of the medical necessity decision and that the Legislature had properly and constitutionally deprived the WCAB of its fact-finding authority. The Court of Appeal remanded the home health care issue to the WCAB, and concluded that the WCAB had erred in concluding that it had no authority to rule on whether the IMR decision had misinterpreted the MTUS.

On November 6, 2015, Petitioner filed a Petition for Rehearing. On November 12, 2015, the Court acknowledged only one factual error in its decision, but otherwise denied the Petition for Rehearing.

ARGUMENT

I. THE IMR PROCESS, CODIFIED IN LABOR CODE SECTIONS 4610.5 AND 4610.6, CONFLICTS WITH ARTICLE XIV, SECTION 4, ARTICLE I, SECTION 7 (a), AND ARTICLE III, SECTION 3 OF THE CALIORNIA CONSTITUTION.

A. By enacting the IMR process, the Legislature impermissibly established a fourth method for the settlement of disputes of medical necessity in violation of Article XIV, Section 4's mandate that the settlement of workers' compensation disputes be made only in a tribunal: and be made through arbitration, or by the WCAB, or by the courts, either separately or in combination.

While Article XIV, Section 4 gives the Legislature plenary

power to create a complete system of workers' compensation, the Legislature may not enact a statute prohibited by the Constitution itself.

In *Six Flags Inc. v. WCAB (Bunyanunda)* (2006) 145 Cal. App. 4th 91, the Court held a statute that provided death benefit payments to the estate of an injured worker when the decedent left no dependents was unconstitutional because the statute exceeded the constitutional enabling provision of Article XIV, Section 4, since the Constitution does not identify injured workers' estates as a class of beneficiaries entitled to receive workers' compensation death benefits. The *Six Flags* Court relied on *Yosemite L. Company v. Industrial Accident Commission* (1922) 187 Cal. 774 and C*ommercial Casualty Insurance Company v. Industrial Accident Commission* (1930) 211 Cal. 210 in which the California Supreme Court affirmed the principle that the plenary power of the Legislature does not extend to allow the Legislature to enact a statute that exceeds the specific enabling provisions of Article XX (now Article XIV, Section 4).

In *Atlantic Richfield Company v. WCAB (Arvizu)* (1982) 31 Cal. 3d 715, this Court characterized its holdings in *Yosemite* and *Commercial Casualty*, as finding that the Constitution gave the Legislature authority "to create a tribunal with judicial power to settle disputes arising between employers and their employees,..." but did not allow the Legislature to enact statutes to impose liability that exceeded the specific enabling provisions of the Constitution. *Arvizu, supra*, at 725.

In Petitioner's case, the Court of Appeal has allowed the Legislature to establish a methodology for the settlement of disputes of medical necessity in excess of the enabling provisions of Article XIV, Section 4.

As the Court noted on page 20 of its decision, the Legislature found 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.'

All parties and Amici acknowledged in their briefing before the Court of Appeal that the essential purpose of IMR is the settlement of medical necessity disputes.

In fact, on pages 23 and 24 of the decision, the Court stated: "The reviewers are not workers' adversaries: they are statutorily authorized decision-makers." Yet the IMR reviewer, retained by Maximus and whose decision is adopted by the AD, is not an arbitrator, is not a designated judicial authority of the WCAB, nor is (he/she) a judicial officer of a court.

The IMR process and the review conducted in secret by the IMR reviewer is not a tribunal, or at least not a tribunal known to American jurisprudence. The reviewer is an anonymous physician/consultant of a private corporation. The reviewer holds no hearings, issues no formal opinion on decision, makes no designation as to the weight given to submitted documents in rendering the decision settling the medical necessity dispute, and performs no examination of the worker.

While designating the IMR reviewer the "decision-maker," the Court of Appeal does not define the "decision-maker's" legal status. The IMR "decision-maker" is not an arbitrator. Labor Code § 4610.6 does not

identify the anonymous employee hired by Maximus as an arbitrator; Labor Code § 4610.6 does not identify the IMR process as an arbitration; nor can the IMR process be considered a tribunal of any sort, which is defined as a court, or more particularly as a court of justice.

Labor Code § 139.5 only defines the IMR reviewer as a consultant to the AD. In contrast, workers' compensation arbitrators are defined by Labor Code §§ 5272 et seq., which require that arbitrators only be selected when the injured worker is represented, that they be selected only by agreement, and that arbitrators are required (since they essentially have the same powers as workers' compensation judges) to write full Opinions on Decision and make evidentiary rulings. Those decisions are then subject to full judicial review, first at the WCAB and then by the appellate courts of this State.

The Court of Appeal has acknowledged that WCJs and the WCAB have been stripped of fact-finding authority, which has now been transferred to the unknown IMR "decision-maker." Even should the WCJ, the WCAB, or an appellate court find that substantial evidence supports the medical care requested by the treating physician, consistent with Labor Code §§ 5307.27 and 4604.5, or further find that the IMR reviewer has issued an erroneous decision, no constitutionally authorized judicial authority has jurisdiction to order the necessary care. A judicial body under Labor Code § 4610.6 (i) only has jurisdiction, after a very lengthy process to order another review by another anonymous, non-examining, non-judicial, physician "decision-maker" retained by a different private corporation. The Court's decision fails to recognize multiple statutes that

define WCJs and the WCAB as constitutionally and statutorily enabled fact-finders on all workers' compensation issues. The decisions of WCJs and the WCAB are subject to judicial review (see Labor Code §§ 111, 5309, 5310, 5952 and 8 CCR 10348) (Addendum G).

The Legislature must be presumed to have knowledge of existing statutes when it enacts legislation (In re *Misener* (1985) 38 Cal. 3d 543 at 552), yet when the Legislature enacted Labor Code § 4610.6, it did not repeal the statutory provisions pertaining to workers' compensation arbitrators, nor did it choose to repeal those statutes and regulations which provide fact-finding authority to workers' compensation judges and the WCAB regarding all issues arising under the Workers' Compensation Act.

The Court of Appeal erred in relying on *City and County of San Francisco v. WCAB (Wiebe)* (1978) 22 Cal. 3d 103. *Wiebe, supra,* held that the Legislature had police powers to enact statutes for the protection of injured workers that go beyond Article XIV, Section 4, not that the Legislature may enact workers' compensation statutes that are inconsistent with Article XIV, Section 4 because they deprive injured workers of the right to have medical disputes settled before a constitutionally permissible tribunal or allow the Legislature to deny injured workers meaningful judicial review. Nor was the Legislature authorized to restrict due process in a manner that prevented substantial justice in all cases.

Nor does *Facundo Guerrero v. WCAB* (2008) 163 Cal. App. 4th 640 cited by the Court of Appeal support the Court's conclusions. While upholding a constitutional challenge to Labor Code § 4604.5 (d) that

limited chiropractic visits to 24 visits per injury, the *Facundo Guerrero* Court stated:

> The decision does not turn on the worker's need for treatment, or any other factual determination. Therefore, because there is no legal or factual disagreement, or "dispute" arising from the decision to approve or disapprove more treatments, no adjudication by a neutral party is necessary.
> *Facundo Guerrero, supra,* at 652.

The *Facundo Guerrero* Court went on to review other workers' compensation statutes and stated:

> These are all examples of actual factual or legal disputes which legitimately are subject to a formalized adjudicatory regime. However, an employer's refusal to approve excess chiropractic treatments is not dependent on deciding any "dispute" of law or fact.
> *Facundo Guerrero, supra,* at p. 652, fn.5.

In contrast, the medical necessity dispute as to the medication regimen and the need for home health care present factual and legal issues that must be settled at the WCAB. The denial of the medication regimen was inconsistent with several provisions of the MTUS, and the denial of home health care was an error of law. *Smyers v. WCAB* (1984) 157 Cal. App. 3d 36; *Henson v. WCAB* (1972) 27 Cal. App. 3d 452; *Neri-Hernandez v. Geneva Staffing* (2014) 79 CCC 681 (Appeals Board *en banc*).

B. Labor Code § 4610.6 deprives Petitioner of the meaningful judicial review required by Article XIV, Section 4.

An appeal of the IMR decision may be mounted on certain limited grounds under Labor Code § 4610.6 (h), but grounds for appeal under Labor Code §§ 4610.6 (h) 2, 3, and 4 are impossible to prove. Because of

the anonymity of the reviewer (Labor Code § 4610.6 (f)), the ability to challenge the decision based on "fraud," "conflict of interest" or "bias" is illusory.

As the Court stated on page 19 of its decision:

> Whereas previously the Court of Appeal could 'determine whether the evidence, when viewed in light of the entire record, support[ed]the award of the [Board]' (*ibid.*) such substantial-evidence review is no longer available because the Board is precluded from making its own factual findings.

Neither WCJs, the WCAB, nor the appellate courts have ever made medical decisions. Workers' compensation judges and the WCAB must render decisions based on substantial evidence (Labor Code § 5952) after exercising their constitutionally and statutorily vested fact-finding authority; while appellate justices do not make findings of fact, they do have the authority to correct error made by the trial court below.

As this Court stated in *Leone v. Medical Board of California* (2000) 22 Cal. 4th 660,

> The ordinary and widely accepted meaning of the term "appellate jurisdiction" is simply the power of a reviewing court to correct error in a trial court proceeding... "Because the appellate jurisdiction clause is a grant of judicial authority, the Legislature may not restrict appellate review in a manner that would 'substantially impair the constitutional powers of the courts, or practically defeat their exercise.' " (*Leone, supra*, at pages 666, 668.)

Petitioner Stevens' right to medical care to cure or relieve from the effects of her industrial injury was first vested by Article XIV, Section 4 itself, when she was injured in 1997. Her right to medical care was further

vested with the award of medical care issued by the WCAB, which found her to be 100% permanently and totally disabled. Petitioner does not assert that she has a vested fundamental right to a particular modality of treatment; Petitioner still has to prove the medical necessity of the treatment requested by her physician, since Labor Code § 5307.27 requires that all treatment be based on evidence-based medicine and must further comply with the treatment protocol hierarchy set out in Labor Code § 4604.5. Petitioner Stevens' right to medical care is fundamental as defined by the California Supreme Court in *Strumsky v. San Diego County Employees Retirement Assoc.* (1974) 11 Cal. 3d 28, as follows:

> When an administrative decision affects a right which has been legitimately acquired or otherwise "vested," and when that right is of a fundamental nature from the standpoint of its economic aspect or its "effect... on human terms and the importance... to the individual and life situation," then a full independent judicial review of that decision is indicated because "[the] abrogation of the right is too important to the individual to relegate it to the exclusive administrative extinction." (*Strumsky, supra,* at page 34.)

C. The Court of Appeal erred by finding that Labor Code § 4610.6 provides Petitioner with an expeditious remedy without encumbrance as required by Article XIV, Section 4.

The Court of Appeal misapprehended the long delays that injured workers have faced, and will continue to face, as well as the substantial encumbrances placed upon injured workers by the onerous provisions of Labor Code §§ 4610.5 and 4610.6 in their efforts to seek necessary care. In

fact, Petitioner's case illustrates how lengthy delays are inherent in the IMR process.

1. The IMR process fails to provide an expeditious remedy.

Petitioner was denied her medications and home health care by the employer's insurance company, SCIF, under its UR process (Labor Code § 4610) on July 25, 2013. Dr. Jamasbi appealed the UR decision, explaining in detail that the treatment he had recommended for Ms. Stevens was compliant with evidence-based medicine as required by Labor Code § 5307.27, as well as relating Ms. Stevens' care to particular MTUS provisions. Dr. Jamasbi's appeal was denied by a second physician retained by the SCIF's utilization vendor. Neither of the utilization reviewers set out in detail the medical reports reviewed in issuing their decisions or the weight given to any particular evidence.

Although Petitioner sought IMR review within the 30-day statutory period, as required by Labor Code § 4610.5, it was not until February 14, 2014, almost seven months after the UR denial that the IMR reviewer upheld the denial of care. Labor Code § 4610.5 (l) mandates that the employer/insurance company must forward to the AD, within ten days of the IMR request, all relevant medical records and Labor Code § 4610.5 (k) mandates that the AD act expeditiously in forwarding the records to Maximus. Labor Code § 4610.6 (d) mandates that Maximus issue its decision (adopted as a matter of law by the AD in accord with Labor Code § 4610.6 (g)), within 30 days (or sooner) from the time of receipt of the records from the AD.

During that time, Petitioner sought a Writ of Mandate before the Court of Appeal on constitutional issues, as well as raising the timeliness and lack of an expeditious remedy, given that the AD and the IMR reviewer had not met the timelines required by Labor Code §§ 4610.5 (k) and (l), as well as 4610.6 (d). The Court of Appeal (the same panel that issued the decision of October 28, 2015) summarily denied the Writ of Mandate without comment.

The Court stated that Petitioner had the opportunity to file for a Writ of Mandate, but she had not. This statement is factually incorrect. Apparently the Court did not recall denying the Writ of Mandate filed by Petitioner. However, the Court also stated in dicta that the time frames provided by Labor Code §§ 4610.5 and 4610.6 were merely directory and not mandatory in any event.

With the denial of the Writ of Mandate, Petitioner went on to exhaust her administrative remedies including trial, reconsideration, and a Petition for Writ of Review. The WCAB did not issue its decision until more than a year after the UR denial and the Court of Appeal did not issue its decision until two years and three months had elapsed since the UR denial. Since under Labor Code § 4610 (g) (3) (B) (6), a UR denial is only effective for one year, it is clear that the IMR process provides no expeditious remedy to the injured worker. Even though the Court remanded the home health care issue to the WCAB for review as to whether the MTUS was properly applied by the IMR reviewer, the only remedy available under Labor Code § 4610.6 (i) would be another review by

another anonymous consultant to the AD retained by yet another private corporation. Petitioner would be required to start the process again.

2. The Court of Appeal misapprehended the encumbrances placed upon the injured worker in seeking a medical decision as to the medical necessity of treatment.

In order to find that the AD, by virtue of the IMR process, acted without or in excess of her powers pursuant to Labor Code § 4610.6 (h) (1), Petitioner would be required to engage in extensive litigation, first to a Mandatory Settlement Conference at the WCAB, then trial, then reconsideration at the WCAB, and then filing a Petition for Writ of Review in the Court of Appeal, with another IMR review as the only available remedy.

Nor does Labor Code § 4610.6 (h) (5), which provides that a new IMR can be ordered upon a finding of mistake of fact not subject to the opinion of an expert (according to the Legislature, expert opinion was the entire essence of the statute) provide a remedy without encumbrance, since in order to prove such a mistake not subject to expert opinion would require the same extensive litigation process.

Petitioner asks the Supreme Court to consider the practical impact of finding that Labor Code § 4610.6 (h) provides a remedy without encumbrance. In 2013, according to the AD's report on IMR (Addendum H) (www.dir.ca.gov/dwc/imr/reports/2014_IMR_Annual_Report.pdf), injured workers In Pro Per constituted the majority of those filing for IMR reviews. Injured workers In Pro Per were seven times more likely than those with counsel not even to have the IMR appeal heard at all, since they

were unable to complete the required paperwork. Maximus, in 2013 was upholding UR denials at a rate of 84% and in 2014 had managed to increase the denial rate to at least 87%.

The Court of Appeal also failed to recognize the encumbrances placed upon Petitioner, and all injured workers, by the IMR process regarding the ability of an injured worker to obtain, or retain, the counsel who previously resolved the underlying workers' compensation case, for medical necessity appeals under IMR.

No attorney fees are available for an injured worker's attorney to pursue an IMR appeal. The injured worker's attorney typically concludes active representation upon resolution of the underlying industrial case when a WCAB Findings and Award has issued, the applicant's attorney receiving the statutory 12% to 15% fee from the permanent disability award. With the enactment of Labor Code § 4610.6, many injured workers find themselves denied care that they have been receiving for years. Upon receiving a UR denial from the employer/carrier, many injured workers seek to return to their counsel years after representation has been concluded. Traditionally in the workers' compensation community, the injured worker's attorney remained attorney of record to assist an injured worker with problems as they arise over the years.

Labor Code § 4610.6 and the Court of Appeal's decision change that landscape. Since no fees are available, the injured worker's attorney, years after representation has ended (most applicants' attorneys are small practitioners including Petitioner's attorney in this case), is faced with a dilemma: does the attorney now undertake the obtaining of medical records

(sometimes hundreds or even thousands of pages), submit those medical records to Maximus, appeal the inevitable upholding of the UR denial to the WCAB, first to a mandatory settlement conference, then to trial, and then to reconsideration, most likely a futile effort considering both the 87% denial rate (in 2014) with the only available remedy being another IMR review? Is the injured worker or the worker's attorney to file a Petition for Writ of Mandate when neither Maximus nor the AD acts in a timely manner, particularly in light of the Stevens' court's comments concerning the directory nature of the time limits? For any practitioner handling IMR appeals for current and past clients it is more than a full-time job in itself, with no remedy available for the awarding of care by a constitutionally permissible judicial body. Under the circumstances, is the injured worker's attorney to withdraw at the conclusion of the disability/benefits portion of the case? That certainly would not be in the interest of the injured worker, but otherwise no applicants' practitioner can maintain a practice seeking benefits for injured workers, while taking the extensive steps for each injured worker that would be required to properly process a futile IMR appeal, when such a practice would require extensive attorney time, staffing, and would allow no fees.

Petitioner's attorney would ask the Supreme Court to consider that an injured worker In Pro Per almost certainly has neither the ability nor the legal wherewithal to subpoena the extensive medical records to properly pursue a UR denial of care through the IMR process, and even less to pursue the matter through a trial, Petition for Reconsideration at the

WCAB, Petition for Writ of Mandate at the Court of Appeal or a Petition for Writ of Review once the WCAB issues its decision.

Article XIV, Section 4 promises the injured worker that he or she will receive all reasonable and necessary medical care to cure or relieve from the effects of the industrial injury. That promise has now been rendered meaningless by the "real world" application of Labor Code § 4610.6, leading many injured workers simply to give up, or seek their care through alternative means supported by the taxpayers, such as Medicare, Medi-Cal, the Affordable Care Act, or emergency rooms.

D. The California Supreme Court should grant review to decide whether the IMR process violates injured workers' due process rights.

1. The Court of Appeal erred by finding that Article I of the California Constitution, which guarantees Petitioner due process, is "trumped" by the plenary power of the Legislature. Without due process, Petitioner is unable to obtain the substantial justice required by Article XIV, Section 4.

Contrary to the Court's decision that Article I is "trumped" by the plenary power of the Legislature, the California Supreme Court has held that Article I, Section 7 (a) is applicable to workers' compensation statutes. In *Arp v. WCAB* (1977) 19 Cal. 3d 395, this Court held that Labor Code § 3501 violated the equal protection clause of Article I, Section 7 (a), as well as violating the equal protection clause of the United States Constitution.

A recently published case, *Ogden Entertainment Services v. WCAB (Von Ritzhoff)* (2015) 233 Cal. App. 4th 970, cited extensive authorities

stressing the essential requirement of cross-examination as an element of a fair trial and stated:

> We address in this case nothing less than one of the fundamental guarantees of a fair trial or, as in this case, a fair hearing, for there is no doubt that the right of cross-examination is guaranteed to the parties in workers' compensation proceedings. (Citations omitted.) This right is not only guaranteed as a matter of constitutional law, it is specifically guaranteed by the Administrative Procedures Act in subdivision (b) of government code section 11513.
> *Ogden, supra,* at page 982.

Since an expert's opinion will be considered by the WCAB in determining whether that opinion constitutes substantial evidence, Petitioner's right to cross-examine the IMR reviewer is fundamental to basic due process. (See *Fidelity v. WCAB* (1980) 103 Cal. App. 3d 1001.)

In the October 28, 2015 decision, the Court erroneously stated that it was Respondent SCIF, the insurance carrier, disputing Petitioner's care and defending against her entitlement to benefits, who retained Maximus which in turn retained the IMR "decision-makers." After Petitioner filed her Petition for Rehearing pointing out this error, the Court amended its decision without stating who, in fact, retained Maximus. (It is the AD of the Department of Industrial Relations that retains Maximus pursuant to Labor Code § 139.5.) However, the Court made clear it found that the retention of the "decision-maker" by the Respondent party adverse to Petitioner to comport with fundamental due process.

In justifying the level of due process provided to Petitioner, the Court of Appeal fundamentally misunderstood the relationship between the

UR process and the IMR process as implemented in the workers' compensation system. The UR process conducted pursuant to Labor Code § 4610, as opposed to the IMR process conducted pursuant to Labor Code §§ 4610.5 and 4610.6, is strictly a claims' process conducted by the employer/insurance company which is adverse to the interest of the injured worker. The UR process under Labor Code § 4610 provides no due process to the injured worker. The UR physicians and the UR company that retains the physicians are selected by the employer/insurance company with no input from the injured worker. To conclude, as the Court of Appeals did, that the UR process, which is a claims' process entirely controlled by an adverse party, affords Petitioner "far more due process, including through utilization review" is to misunderstand the statutory scheme for resolving medical disputes in the California workers' compensation system.

The Court, at page 19, concluded that the opinions of the non-examining UR physicians, totally under the control of SCIF, constitute substantial evidence, and further concluded that "under the old system the conclusions of at least two physicians would have virtually always constituted substantial evidence to uphold an adverse medical necessity determination."

The Court of Appeals erred in concluding that the number of reports should determine the appropriateness of medical care. It is the substantial nature of those reports that is crucial. In *Kyles v. WCAB* (1987) 195 Cal. App. 3d 614, the court stated:

> 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 that are no longer germane, or upon reports that are based upon inadequate medical history or examinations (citations omitted)... 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.
> *Kyles, supra*, at page 621.

Nor is the fact that Petitioner is allowed to submit records to the IMR reviewer sufficient to satisfy Petitioner's right to due process. It is the employer/insurance carrier that is mandated to submit all relevant records to the IMR reviewer (Labor Code § 4610.5 (l)), and even though Petitioner may also submit records, since no cross-examination of the IMR reviewer is permitted, no opportunity is provided to Petitioner to inquire as to what weight was given to which document, or which documents were actually reviewed, regardless of which party sent them.

Because no opportunity is provided to inquire as to why one MTUS provision was relied upon to support the UR denial while others were ignored (including, in Petitioner's case, those that indicated the treatment should never be terminated without an examination, the treatment should not be terminated if it is working, and pain medications should be weaned, not terminated)[2], Petitioner is deprived of an opportunity to establish the substantiality of the IMR reviewer's opinion or even the opportunity to change the reviewer's opinion.

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[2] See pages 6, 88, 89, 124 of the Chronic Pain Medical Treatment Guidelines incorporated per § 9792.24.2 as part of the MTUS and Health & Safety Code Section 124960.

Petitioner has the burden of proof on the medical necessity of treatment pursuant to Labor Code §§ 5307.27 and 3202.5, but once she has established by a preponderance of the substantial evidence, as she has in this case, that the care is necessary, she is entitled to liberal construction of the workers' compensation laws and facts pursuant to Labor Code § 3202. *Lundberg v. WCAB (*1968) 69 Cal. 3d 436.

E. The Court of Appeal erred by finding that the separation of powers clause of Article III, Section 3 of the California Constitution, as well as in the United States Constitution, are "trumped" by the plenary power of the Legislature.

The Supreme Court of California has held that the separation of powers clause of Article III, Section 3 is applicable to California workers' compensation laws. In *Hustedt v. WCAB* (1981) 30 Cal. 2d 329, the Court stated "The legislature may put reasonable restrictions on constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." (*Hustedt, supra,* at 338.) By failing to allow meaningful judicial review of an IMR reviewer's medical necessity decision, the Legislature has defeated the stated purpose behind the legislation: to provide more effective and evidence-based treatment decisions to injured workers. Since there is no "check" by the judiciary of the IMR decision adopted by the AD, Petitioner is not permitted meaningful judicial review that would allow her to receive the necessary treatment in accord with evidence-based medicine.

While the Court of Appeal found Article III separation of powers "trumped" by the plenary power of the Legislature, the Court in *Bradshaw*

v. Park (1994) 29 Cal. App. 4th 1267 came to a different conclusion in holding that while a statute is to be construed whenever possible to preserve its constitutionality, courts will uphold an agency's authority to exercise a challenged power only if the administrative scheme also respects the "principal of check" by providing for judicial review of administrative determinations. The *Bradshaw* Court stated:

> The court must balance the private interest affected by the official action against the risk of an erroneous deprivation of that interest through the procedures used, along with the government's interest, including administrative burdens which would be incurred by additional safeguards. (Citations omitted)... The fundamental requisite of due process is an opportunity to be heard. *Bradshaw, supra,* at 1278.

Relying on *McHugh v. Santa Monica Rent Control Board* (1989) 49 Cal. 3d 348, the *Bradshaw* Court held that an agency may "hold hearings, determine facts, apply the law, impose certain types of monetary relief so long as... The essential judicial power (i.e. the power to make enforceable binding judgments) remains ultimately in the courts to review agency determinations." *Bradshaw, supra*, at 1275.

(See also *Bayscene Resident Negotiators v. Bayscene Mobile Home Park* (1993) 15 Cal. App. 4th 119; and *Bautista v. State of California* (2011) 201 Cal. App. 4th 716.)

Conclusion

The petition for review should be granted.

Dated: 12-04-2015

Respectfully submitted,

LAW OFFICE OF JOSEPH C. WAXMAN

By: _____
Joseph C. Waxman
James J. Achermann
Attorneys for Petitioner, Frances Stevens

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the Word Count in my Microsoft Word for Windows software, this brief contains 8,174 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on December 4, 2015.

By: _____
Joseph C. Waxman
Attorney for Petitioner, Frances Stevens