*In the*

# Court of Appeal

*of the*

# State of California

**FIRST APPELLATE DISTRICT**
**DIVISION ONE**

**A143043**

FRANCES STEVENS,

*Petitioner,*

v.

WORKERS' COMPENSATION APPEALS BOARD,
OUTSPOKEN ENTERPRISES/STATE COMPENSATION INSURANCE FUND and
THE ACTING ADMINISTRATIVE DIRECTOR DIVISION OF WOKERS' COMPENSATION,

*Respondents.*

FROM A DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD
HON. FRANCIE LEHMER · NO. ADJ1526353

## APPLICATION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE AND PROPOSED BRIEF OF AMICUS CURIAE VOTERS INJURED AT WORK IN SUPPORT OF PETITIONER FRANCES STEVENS


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# Court of Appeal

*of the*

# State of California

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.: A143043

Case Name: Stevens v. Workers' Compensation Appeals Board

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

☐ Interested entities or parties are listed below:

| **Name of Interested Entity or Person** | **Nature of Interest** |
|---|---|
| 1. | |
| 2. | |
| 3. | |
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| 7. | |
| 8. | |
| 9. | |
| 10. | |

s/ Charles E. Clark

Signature of Attorney/Party Submitting Form

Charles E. Clark, Esq.

Printed Name

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Party Represented: Voters Injured at Work - Amicus Curiae

State Bar No.: 86099

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## APPLICATION FOR LEAVE OF COURT TO FILE BRIEF AS AMICUS CURIAE

**TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST JUDICIAL DISTRICT, DIVISION ONE:**

Pursuant to Rule 8.520(f) of the California Rules of Court, Voters Injured At Work [hereinafter "VIAW"], hereby requests leave to file a brief as amicus curiae in support of Petitioner FRANCES STEVENS in the above-captioned case. In support of this application, VIAW states as follows:

1. VIAW is a non-profit political organization of injured California workers and their families established for the purpose of protecting and enforcing California's constitutional guarantee of a fair and adequate system of compensating workers and their dependents for injury and disability arising from work-related injuries.

2. The Court's ruling and decision in this case will determine the ability of California's injured workers to effectively access necessary medical treatment for their work-related injuries and, as such, will directly affect VIAW's members.

3. VIAW is familiar with the issues before this court and the scope of their presentation and believes that further briefing is necessary to address matters not fully addressed by the briefs filed by the parties to this case and various other parties as amicus curiae.

4. VIAW therefore requests leave to file the following proposed amicus curiae brief.

Dated: January 13, 2015 Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK

By: s/ Charles E. Clark
Charles E. Clark
Co-Counsel for Amicus Curiae
VOTERS INJURED AT WORK

## ISSUES PRESENTED TO THE COURT

1. In depriving all parties of the fundamental right of cross-examination, the right to meaningful judicial review, and the right to fair notice and procedure as to the definition and scope of essential terms, does Labor Code §4610.6 violate due process?

2. Does §4610.6 also violate Labor Code §5952 (d) which requires that decisions be made in accordance with substantial evidence?

## ARGUMENT

### I. LABOR CODE §4610.6 VIOLATES DUE PROCESS

#### A. PRELIMINARY CONSIDERATONS

Labor Code §4610.6 was enacted pursuant to the health, safety, and welfare powers of the Legislature, as more particularly described in the historical and statutory notes accompanying Government Code §11435.30 which include a letter from Legislator Kevin de Leon who was the author of this code section, to reduce the quantity of litigation and its costs and, from the savings in such cost reductions, increase benefits to the injured worker. Pursuant to §4610.6, all decisions concerning medical treatment are determined by a medical expert called an "Independent Medical Reviewer" (IMR).

However, to accomplish these goals, §4610.6 wrongly deprives the injured worker (as well as the employer and its insurer) of many valuable rights and, further, suffers from other fatal omissions, all in violation of due process:

- No cross-examination or any discovery of the IMR;
- No judicial review of the determination of the IMR (§4610.6 (i));

- Meaningless appeal of the decision of the IMR which cannot be proved since this expert's identity is concealed ((§4610.6 (f) and (h));
- Cannot secure rulings on objections to the evidence presented to the IMR;
- Omissions of the definition and scope of the essential terms in §4610.6 (b) including the terms "pertinent medical records" and "relevant information" and who and how this is decided which deprives the parties of due process notice and fair procedure;
- The standard for determination, medical necessity, under §4610.6 (c) violates Labor Code §5952 (d) which mandates substantial evidence as the standard.The injured worker is least able to bear the unreasonable burden of these deprivations and omissions in comparison to the employer and insurer.

The question is whether this complies with due process or whether it is excessive and unconstitutional. In answering this question at the beginning, it must be decided whether there has been a deprivation of a fundamental right to which the strict scrutiny test is applied to this analysis.

The due process guarantee to a right to a fair hearing in workers compensation proceedings was expressly affirmed in *Beverly Hills Multispecialty Group Inc. v WCAB* 26 Cal. App. 4th 789 (1994) at 806: "A denial of due process to a party ordinarily compels annulment of the Board's decision only if it is reasonably probable that, absent the procedural error, the party would have attained a more favorable result. ( Redner v. Workmen's Comp. Appeals Bd. (1971) 5 Cal.3d 83, 93 [95 Cal.Rptr. 447, 485 P.2d 799].) However, if the denial of due process prevents a party from

having a fair hearing, the denial of due process is reversible per se. (See Dvorin v. Appellate Dept. (1975) 15 Cal.3d 648, 651 [125 Cal.Rptr. 771, 542 P.2d 1363] [summary judgment ordered without motion]; Spector v. Superior Court (1961) 55 Cal.2d 839, 843-844 [13 Cal.Rptr. 189, 361 P.2d 909] [judge refused to allow party to present any evidence or argument]; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 364, p. 366.) Because BHMG was denied due process by the failure to serve the defense medical reports, BHMG was denied a fair trial. The issue of whether denial of a fair trial to a lien claimant should be reversible per se or evaluated under the prejudicial error standard appears to be a matter of first impression**. Although the California Constitution states that a goal of workers' compensation proceedings is to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character . . .." (**Cal. Const., art. XIV, § 4)**, the right to due process is paramount to the goal of conducting workers' compensation proceedings expeditiously. We therefore conclude that denial of a fair trial to a lien claimant is reversible per se." (emphasis added)**

Among these significant and essential rights identified by the Court in *Beverly Hills Multispecialty* supra at 805 is the right of cross-examination: "(i)t is fundamental that undue infringement on the right of cross-examination is a denial of due process."

To comply with *Beverly Hills Multispecialty* supra and other cases provided hereafter, these due process rights at a minimum must include in an adjudicatory proceeding under §4610.6:

- Right of cross-examination;
- Right of judicial review of the final decision;
- Right of discovery including the disclosure of the identity of the IMR;

- Right to object to the evidence and secure rulings from a judge;
- Right of notice of the definition and scope of the essential terms such as "relevant information" and "all pertinent medical records" which is omitted in §4610.6 (b) and the right to fair procedure and to object and secure rulings from a judge concerning these items;
- Right to the proper standard of review which is substantial evidence.

## B. DENIAL OF DUE PROCESS

As a general rule, the parties have a right to due process which requires a full hearing on the dispute after the parties have been given notice of the proceeding and an opportunity to appear and participate in it. (7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 640–642, pp. 1041–1044; 2 Witkin, Cal. Proc. (5th ed. 2008) Jurisdiction, §§ 302–304, 307–308, pp. 914–916, 918–921.)

"When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets established standards of procedure.... Procedure is the fair, orderly, and deliberate method by which matters are litigated. To judge in a contested proceeding implies the hearing of evidence from both sides in open court, a comparison of the merits of the evidence of each side, a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition of a judgment accordingly." *Estate of Buchman* 123 Cal.App.2d 546 (1954)

The right to a hearing includes the right to produce evidence and to cross-examine adverse witnesses. *Fewel v. Fewel* 23 C.2d 431 (1943) In this case the court appointed an investigator on its own motion to which there was no stipulation by the parties. The parties were instructed to return

to court at a later date "without witnesses because the report of the investigator will be final." The investigator produced a report which was received by the court in chambers and was not provided to the attorneys for the parties. The court refused to hear Plaintiff's evidence. At the hearing, the court immediately stated, "We are going to adopt the recommendation of the investigator, gentlemen, I will say to you." The Supreme Court held that this procedure "cannot be sustained." Clearly, this procedure and process deprived plaintiff of a fair trial in open court and of the right to produce and have her evidence heard and be considered. She was also denied the right of cross-examination of adverse witnesses, all of which was cited as in violation of due process.

These essential constitutional protections are applied to Workers Compensation cases in accordance with *Beverly Hills Multispecialty* supra and other cases, as follow below.

### 1. IMPROPER DENIAL OF THE RIGHT OF CROSS-EXAMINATION

Labor Code §4610.6 deprives the injured worker, the employer and insurer of their right of cross-examination of IMRs who are described as "physician reviewers (who) use their medical expertise, insight, and judgment (see page 6 of AD[1] APWR); who make a determination "(i)n accordance with the Legislature's intent to have medical decisions made by medical professionals (see page 10 of AD APWR). The IMR is held to be a so called expert according to Respondent AD; "(i)n California, it has frequently been held that the proper or usual practice and treatment by a physician or surgeon in the examination and treatment of a wound or

[1] AD is an abbreviation for Acting Administrative Director.

injury, is a question for experts" (See page 18 of AD APWR).[2] Respondent SCIF[3] likewise characterizes the IMR as a medical expert on pages 13, 17, and 28 of SCIF APWR.

Due process is the cornerstone of American jurisprudence since its genesis in Article 39 of the Magna Carta of 1215 which was written in Latin and also known as Magna Carta Libertatum, The Great Charter of the Liberties of England. Article 39 states "(n)o freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."

In 1608, Sir Edward Coke added to the phrase law of the land or lex terrae, as it was originally written, "that is, by the common law, statute law, or custom of England.... (that is, to speak it once and for all) by the due course, and process of law…."-See 2 *Institutes of the Law of England* 46 (1608). To emphasize the paramount importance of this phrase, Lord Coke said that "the King hath no prerogative, but that which the law of the land allows him." See Proclamations, 77 Eng. Rep. 1352 (K.B.), 1354, 12 Co. Rep. 74, 75 (1610).

The phrase law of the land was later declared by the U.S. Supreme Court in *Murray's Lessee v Hoboken Land & Improvement Co.* 59 U.S. 272 (1856) at 276 that "(t)he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Carta."

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[2] The AD claims on page 22 of the AD APWR that the IMR is not an expert witness for either party suggesting the IMR is a neutral medical expert.

[3] SCIF stands for State Compensation Insurance Fund.

Due process is part of Article 1 Section 7 of the California Constitution as a starting point although it is contained in other provisions of this Constitution.

In defining due process protection in Workers Compensation cases, the Court of Appeal in *Fremont Indemnity Co. v WCAB* 153 Cal App 3d 965 (1984) held that "the right of cross-examination of witnesses is fundamental, and its denial or undue restriction is reversible error." In accord with the holding that the right of cross examination in a Workers Compensation case is a fundamental right are *Beverly Hills Multispecialty Group Inc. v WCAB* supra at 805 "(i)t is fundamental that undue infringement on the right of cross-examination is a denial of due process." "Due process requires a meaningful opportunity to present evidence and have it considered in explanation or rebuttal. (Fidelity & Cas. Co. of New York v. Workers' Comp. Appeals Bd. ( 1980) 103 Cal.App. 3d 1001, 1015, 163 Cal.Rptr. 339; Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (1984) 153 Cal.App.3d 965, 971, 200 Cal.Rptr. 762.)" See *Gaytan v WCAB* 109 Cal. App. 4th 200 (2003) at 219 in which the Court cited for its authority cases involving the deprivation of the fundamental right of cross examination. See also *Rucker v WCAB* 82 Cal. App. 4th 151 (2000) in which the Court of Appeals held at 157-158 "The Board 'is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing.' 'The right to such a hearing is one of 'the rudiments of fair play' [citation] assured to every litigant by the Fourteenth Amendment as a minimal requirement.' [Citations.] 'The reasonable opportunity to meet and rebut the evidence produced by his opponent is generally recognized as one of the essentials of these minimal requirements [citations], and the right of cross-examination has frequently been referred to as another [citations]…. '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. In no other way can a party maintain its rights or make its defense.' "

*Fremont* supra was followed by the WCAB in the en banc decision of *Costa v Hardy Diagnostic* 71 Cal Comp Cases 1797 (2006) in which the WCAB held that "(p)resenting the deposition transcript of Dr. Reville from another unrelated case to which SCIF was not a party deprives SCIF of its **fundamental right** of cross-examination, and thus, of due process of law." See also, *Fidelity & Cas. Co. of New York v WCAB (Harris)* 103 Cal. App. 3d 1001 (1980) at 1015: "Due process requires that " '(a)ll 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. In no other way can a party maintain its rights or make its defense.' (Massachusetts etc. Ins. Co. v. Ind. Acc. Com., supra, 74 Cal.App.2d at p. 914, 170 P.2d at p. 38, quoting from Interstate Commerce Com. v. Louisville & N.R. Co. (1913) 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431; and see Redner v. Workmen's Comp. Appeals Bd., supra, 5 Cal.3d 83, 93, 95 Cal.Rptr. 447, 485 P.2d 799; Allied Corp. v. Ind. Acc. Com. (1961) 57 Cal.2d 115, 121, 17 Cal.Rptr. 817, 367 P.2d 409; Fireman's Fund Indem. Co. v. Ind. Acc. Com. (1963) 223 Cal.App.2d 350, 351-353, 35 Cal.Rptr. 729.)"

As will be further demonstrated, the due process rights at issue in this case are fundamental in nature. Accordingly, the strict scrutiny test rather than the rational basis test must be employed to determine if §4610.6 is constitutional. Under this test, the Court's task in this case is to determine: 1) whether §4610.6 furthers a compelling governmental interest; and 2) whether the provisions of §4610.6 are narrowly tailored to meet that

interest. See *Zablocki v Redhail* 434 U.S. 374 (1978); See also *Long Beach Employees Assn v City of Long Beach* 41 Cal. 3d 937 (1986).

To start with, for the right of cross-examination to attach, it must be an adjudicatory proceeding or a so called *Hannah* proceeding which is named after *Hannah v Larche* 363 U.S. 420 (1960) in which the U.S. Supreme Court held that there was no right to cross-examination in non-adjudicatory proceedings before the U.S. Civil Rights Commission which in this instance was involved in a purely fact finding legislative and investigative function instead of acting as an adjudicatory tribunal in which the right of cross-examination must be provided. However, if it is an adjudicatory proceeding such as the newly-created IMR process, then it is considered a *Hannah* proceeding in which the right of cross-examination is held to be a fundamental right; see *Fremont* supra and *Beverly Hills Multispecialty* supra.

In addition, Respondent AD argues (See pages 20-21 of AD APWR) that the opportunity to provide medical data to the IMR is an adequate substitute for cross examination and amounts to sufficient refutation. But that is not true. Clearly, §4610.6 (b) fatally omits the definition and scope and who decides what is "relevant information" and "all pertinent medical records" which are the evidentiary foundation of the decision. In *Costa v Hardy Diagnostic* supra, it was argued that a deposition of the doctor from another case was adequate refutation and SCIF's right to cross examine this doctor in the case at issue was not necessary because there was his deposition from another case which SCIF could use as a substitute. Admittedly, there was a voluminous record with exhibits from both sides, just as there usually is in cases involving medical review under §4610.6. Nevertheless, WCAB rejected this contention and held that the right to cross-examination was a fundamental right of due process. The WCAB could have held that SCIF had a sufficient substitute for cross-examination

with the evidence it identified for itself and the evidence to which it objected. That was not the ruling of the WCAB. It does not escape notice that SCIF in this case seeks to deprive the injured worker of the same right it so zealously sought to secure and protect in *Costa*.

To support this argument that there is an adequate procedure provided in §4610.6 of refutation which replaces the right of cross-examination, the Respondent AD analogizes this to the managed health care system (See page 24 of AD APWR). In *California Consumer Health Care Council Inc. v California Department of Managed Health Care* 161 Cal. App. 4th 684 (2008) the Court of Appeal held that the Independent Medical Review System set forth in Health and Safety Code §1378.30 et seq. complies with due process even though health maintenance organizations (HMOs) were permitted to see and rebut enrollees' filings but the enrollees could not. Overall, the Court viewed the procedures under a balancing test finding that the enrollees had sufficient rights to contest these decisions. The enrollees were able to file their claim and provide their own and their providers' records; there was adequate time to consider this evidence by independent medical review organization; the enrollees were informed of the procedures and the nature of the action taken. Against this, the Court measured the burden to the Department of Managed Health Care in requiring DMHC to provide enrollees with all records forwarded by HMOs to review organization and decided that that would slow down the process and create substantial burden on DMHC.

This case is markedly different from Stevens. §1378.30 et seq does not prevent judicial review or limits it in the manner that §4610.6 does nor did the petitioners in *California Consumer Health Care Council* supra contend that enrollees were deprived of the right of cross examination. Also, §1378.30 (h) provides that "(t)he independent medical review process authorized by this article is in addition to any other procedures or remedies

that may be available" which IMR process in Stevens does not. Court action under this section was permitted in *Arce v Kaiser Foundation Health Plan, Inc.* 181 Cal. App. 4th 471 (2010) and *California Physicians' Service v Aoki Diabetes Research Institute* 163 Cal. App. 4th 1506 (2008).

Furthermore, the absolute secrecy of the IMR's identity is unique to the Independent Medical Review system ushered in by SB 863. In the managed care Independent Medical Review system, the identity of the IMR is subject to disclosure: "in cases *where the reviewer is called to testify* and in response to court orders." Health and Safety Code 1374.33(e) (emphasis added). Similarly, in workers compensation cases involving the so-called "MPN IMR", the identity of the IMR is known from the beginning of the process since that IMR actually physically examines the injured worker. See Labor Code 4616.4(e) ("the independent medical reviewer *shall conduct a physical examination* of the injured employee at the employee's discretion.") (emphasis added). Thus, in the two most similar statutes related to IMR, both long predating the enactment of LC 4610.6, the identity of the IMR is not secret and the IMR is, thus, subject to cross examination. Other than making it impossible to obtain facts or evidence to support and appeal of an IMR decision no other legitimate or rational basis could exist for keeping the identity of the IMR secret."

This flawed claim of refutation as a substitute for the other omissions which is set forth in Section A above is materially encumbered by the failure to define the material terms "relevant information" and "all pertinent medical records" which data are supposed to be provided to the medical expert on which to base his or her determination and there is no mechanism to decide the what, how, or who decides what these data are. This flaw is described in more detail hereafter.

These data short of cross-examination do not allow for the analysis of the how and why that the IMR made his or her decision and whether it

conforms to substantial evidence requirements as required by Labor Code §5952. Stripping away and depriving the injured worker (as well as the employer and its insurer) of the fundamental right of cross-examination makes it impossible to fully determine whether the decision is based on substantial evidence.

In order to get around the violations of due process, Respondent AD depicts the IMR as a "physician arbiter" (See page 19 of the AD APWR), an "arbiter of disputes" (See page 22 of AD APWR), and "arbiter of medical treatment disputes" (See page 22 of AD APWR), as does Respondent SCIF on pages 12, 14, 23, 25, and 26 of SCIF's APWR. Respondents AD and SCIF in effect contend that the IMR is acting in the role of a workers compensation judge or a quasi-judicial officer and that therefore it would be improper to allow cross-examination of the IMR. In self-contradictory fashion, Respondents AD and SCIF acknowledge and even promote the IMR as a medical expert, which is how this person is described in the historical and statutory notes in Government Code §11435.30 and in various passages of the AD's APWR, as set forth above. On page 14 of Respondent SCIF APWR it states this boldly: "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." Added to this, it may claimed that the right of cross-examination is not a fundamental right or it is not so in the context of §4610.6, that the rational basis test should be used, and that cost reduction and from that an increase in benefits to the injured worker are important governmental interests. Respondent SCIF's due process argument follows the AD's and is on pages 22-28 of SCIF APWR.

This is superficial, inaccurate, and not suitable, and the quasi-judicial officer claim is also a false analogy. There are material differences between the two. Firstly, a workers compensation judge is bound by the Code of Judicial Ethics pursuant to Labor Code §123.6 (a) (see also *Robbins v Sharp Healthcare* 71 Cal Comp Cases 1291 (2006)) which he or she has sworn to uphold. The judge is appointed by a public agency after an examination and vetting process. The judge may be challenged either by automatic reassignment under 8 CCR §10453 or for cause in 8 CCR §10452. The judge conducts a hearing in open and adversarial proceedings and hears evidence. Each party has the right to object to the evidence and obtain rulings on his or her or its objections. There is provision for compulsory process. Witnesses testify. There is a record of the proceedings prepared by a court reporter and the judge creates a summary of evidence. The evidence must comport with the requirements of substantial evidence.

Secondly, Labor Code § 4610.6 makes clear that it is Respondent AD, and not the IMR, that acts as the final "arbiter" on the issue of medical necessity. Labor Code § 4610.6(g) provides: "The determination of the independent medical review organization shall be deemed to be the determination of the administrative director and shall be binding on all parties." Furthermore, Labor Code § 4610.6(h), which sets forth the procedures for appealing from a medical necessity determination, states: "The determination of the administrative director shall be presumed to be correct and shall be set aside only upon proof by clear and convincing evidence of one or more of the following grounds for appeal …." Finally, 4610.6(i), which sets forth the procedure to be followed when a medical necessity determination is successfully appealed, states: "If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to

independent medical review by a different independent review organization." Accordingly, there can be no doubt that the ultimate decision-maker as to all medical necessity dispute is Respondent AD.

Doubtless, the IMR is in reality a medical witness or, as the AD asserts, a physician reviewer with medical expertise; in effect a medical expert as SCIF admits. The statute does not expressly invest, however, the IMR with the role of a judge or even call this doctor one nor does this doctor perform any of the functions or duties described above for a judge. Limiting the role to just a medical expert, Labor Code §46010.6 (c) provides that "(f)ollowing its review, the reviewer or reviewers shall determine whether the disputed health care service was medically necessary based on the specific medical needs of the employee and the standards of medical necessity as defined in subdivision (c) of Section 4610.5."

In the historical and statutory notes contained in Government Code §11435.30, the process is depicted as "determinations of disputes over appropriate medical treatment." The Legislature uses the word "determine" and "determination" as it used those words in Labor Code §4663 about apportionment. Labor Code §4663 (c) states that "a physician shall make an apportionment determination." The Legislature intentionally omits from both code sections that the doctor is the judge or quasi judicial officer. Even though Labor Code §4610.6 (g) provides that the determination of the IMR is deemed to be the decision of the administrative director, it is still much like a "regular physician's" (under Labor Code §5701) medical opinion or agreed medical examiner's report and determination which the workers compensation judge can adopt as his or her decision. The regular physician and agreed medical examiner however are subject to cross examination as the IMR should be to comply with due process.

The Respondent AD then alleges to all of this that the so called *Morgan* Rule bars cross-examination of this medical witness (See page 23

of the AD APWR). In *U.S. v Morgan* 313 U.S. 409 (1941), made applicable to California by *City of Fairfield v Superior Court* 14 Cal. 3d 768 (1975), the Courts held that there is no right of cross examination of administrative officials. But the Respondent AD neglected to disclose both that this applies only to administrative officials and not to witnesses and that there are instances in which even officials can be subject to discovery and thus does not serve as case authority. First, in *Morgan* there was cross-examination of the Secretary of Agriculture; in *City of Fairfield* it was discovery of two city councilpersons sitting on the city council which acted as the official administrative agency making the final decision. No one contends that there is a right to cross examine the AD; just the medical expert IMR.

These distinctions were held to be essential in *William S. Hart Union High School District v Regional Planning Com.* 226 Cal. App. 3d 1612 (1991) at 1627: "Respondents argue that school districts should not be allowed to amend their petition to add allegations regarding the Mira decision's impact on the County's decision to grant the rezoning application. Respondents assert that it is irrelevant whether the board of supervisors relied on erroneous legal advice from county counsel regarding section 65996, since state and federal supreme court decisions hold that a litigant cannot inquire into what evidence a public official considered and what reasoning process he or she used when reaching a decision that is being challenged. They cite City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 777–779, 122 Cal.Rptr. 543, 537 P.2d 375; State of California v. Superior Court (Veta) (1974) 12 Cal.3d 237, 256–258, 115 Cal.Rptr. 497, 524 P.2d 1281, and United States v. Morgan (1941) 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429. While the language of those cases directed that rule to quasi-judicial acts, not legislative acts such as zoning decisions, other courts have held that a legislator's motives and mental processes are

likewise not open to discovery. (County of Los Angeles v. Superior Court (1975) 13 Cal.3d 721, 726–727, 119 Cal.Rptr. 631, 532 P.2d 495; Tri County Apartment Assn. v. City of Mountain View (1987) 196 Cal.App.3d 1283, 1292, 242 Cal.Rptr. 438.) However, we do not believe that any of those cases apply here. The Supreme Court in Morgan noted that such scrutiny, if applied to a *judge,* "would be destructive of judicial responsibility" and the court stated that decisions made in quasi-judicial proceedings such as administrative hearings should be accorded the same safeguards. (United States v. Morgan, supra, 313 U.S. at p. 422, 61 S.Ct. at p. 1004, 85 L.Ed. at p. 1435.) The Morgan court certainly did not mean to suggest that a reviewing court could not inquire into the *rules of law* that a judge or administrator applies to the facts of a case to make his or her decisions. Thus, the school districts' assertion that the board of supervisors misapplied section 65996 to this case because it did not consider its options under Mira is not subject to the Morgan rule."

Under the strict scrutiny test, there is no compelling governmental interest in depriving an injured worker and the employer and its insurer of the fundamental right of cross examination. The goals sought to be achieved can be accomplished through a more narrowly tailored statute. The deprivation of the right of cross examination is all the more egregious because it is coupled with a meaningless right of judicial review in §4610.6 (h) and with terms such as "pertinent medical records" and "relevant information" which are not defined in §4610.6 (b) and which deprives the parties of due process notice and fair procedure. These other points are explained in the sections which follow.

To make this a meaningful process, the injured worker, employer, and insurer must be allowed the fundamental right to cross examine the medical expert.

## 2. DEPRIVATION OF THE RIGHT OF JUDCIAL REVIEW VIOLATES DUE PROCESS

§4610.6 makes the right of judicial review meaningless and empty. Specifically, §4610.6 (g) states that the decision "shall be binding on all parties;" §4610.6 (h) provides limited and meaningless right of appeal in §4610.6 (h) 1-5 since the injured worker and employer and insurer cannot secure any evidence of bias or fraud of the IMR whose identity is concealed and who cannot be cross examined; §4610.6 (i) reinforces that the WCAB and WCJ have no authority to make "medical determinations" in which it is stated "(i)n 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."

Because the IMR makes factual and legal determinations, the parties must be given a meaningful right of judicial review. In *Facundo-Guerrero v WCAB* 163 Cal. App. 44th 640 (2008), the Court of Appeals held that there was no such determination in connection with the 24 visit limit for chiropractic treatments under Labor Code §4604.5 (d) and this limit imposed by the legislature under its plenary power did not thus violate due process. This holding is limited by its factual context as explained at 653, in which the Court held: "Moreover, because an employer's decision is not tethered to any factual or legal dispute requiring adjudication, due process under either the state or federal constitutions is not implicated by section 4604.5(d)."

The factual and legal determinations made by the IMR which should be subject to cross-examination are requirements covered in §§4610.6 (b) and (c):

"(b) Upon receipt of information and documents related to a case, the medical reviewer or reviewers selected to conduct the review by the independent medical review organization shall promptly review all pertinent medical records of the employee, provider reports, and any other information submitted to the organization or requested from any of the parties to the dispute by the reviewers. If the reviewers request information from any of the parties, a copy of the request and the response shall be provided to all of the parties. The reviewer or reviewers shall also review relevant information related to the criteria set forth in subdivision (c).

(c) Following its review, the reviewer or reviewers shall determine whether the disputed health care service was medically necessary based on the specific medical needs of the employee and the standards of medical necessity as defined in subdivision (c) of Section 4610.5."

In drawing this distinction, the Court of Appeals in *Facundo-Guerrero* distinguished at 652-653 *Bayscene Resident Negotiators v Bayscene Mobilehome Park* 15 Cal. App. 119 (1993) and *Costa v WCAB* 65 Cal. App. 4th 1177 (1998) in which there were factual and legal determinations which required the right of judicial review.

Nevertheless, *Bayscene* did in fact involve factual and legal determinations mandating the right of judicial review. At 653, the Court held that "(i)n *Bayscene,* Division One of the Fourth District Court of Appeal struck down on due process grounds a city ordinance which required binding arbitration for mobile home park rent disputes. The court stressed that the primary failing of the ordinance was that it did not provide for judicial review of the evidence; instead, the issues on appeal were 'essentially limited to fraud, corruption, or other misconduct of a party or the arbitrator.' (*Bayscene*, supra, 15 Cal.App.4th at p. 134, 18 Cal.Rptr.2d 626.) The case is inapposite,

involving a local ordinance compelling private parties to submit their rent control disputes to binding arbitration without any right of judicial review for errors of fact or law."

These same grounds for appeal which the Court of Appeals in *Bayscene* found to be fatally lacking the right of judicial review in violation of due process are nearly the same as those in §4610.6 (h) (1)-(5).

All parties must be given the right to meaningful judicial review.

### 3. IMPROPER FAILURE TO PROVIDE DUE PROCESS NOTICE OF THE DEFINITION AND SCOPE OF ESSENTIAL TERMS AND FAIR PROCEDURE BY WHICH TO OBJECT

The definition and scope of the essential terms such as "relevant information" and "all pertinent medical records" on which the determination is based are improperly omitted in §4610.6 (b) in violation of the due process requirement of notice and fair procedure.

8 CCR § 9792.10.5, which is entitled "Independent Medical Review-Medical Records" and which is the Regulation behind §4610.6 is no better. The medical records therein are described by category and not by definition in Subsection (a) (1) (A) records within 6 months; in Subsection (a) (1) (E) "other relevant documents and information;" and Subsection (a) (3) "(a)ny newly developed or discovered relevant medical records."

In *Mullane v Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950) at 314, the U.S. Supreme Court held "(a)n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

With these omissions, it is a guessing game for all parties and there are no conceivable limits to these terms or how to deal with them. But there are restrictions and a procedure on how to obtain rulings from a judge by the holding in *Allison v WCAB* 72 Cal. App. 4th 654 (1999), in which Justice Croskey held that: "(1) under physician-patient privilege and litigation exception to that privilege, scope of permissible discovery regarding claimant's general medical history was limited, and (2) workers' compensation judge had authority to hear discovery disputes and make appropriate discovery orders." This is based on the fundamental right to privacy set forth in the California Supreme Court case of *Britt v Superior Court* 20 Cal. 3d 844 (1978) which the Court in *Allison* supra made applicable to Workers Compensation proceedings.

Besides the failure to define these essential terms, §4610.6 (b) takes away the right of judicial intervention to raise objections and secure rulings in accordance with the ruling of *Allison*. This is an impossible situation for the injured worker, the employer, and the insurer and places an unconstitutional burden on the parties.

## II. THE FAILURE IN §4610.6 TO REQUIRE THAT THE MEDICAL NECESSITY DETERMINATION BE SUPPORTED BY SUBSTANTIAL EVIDENCE VIOLATES LABOR CODE §5952 (d)

§4610.6 does not base the determination of medical necessity on the substantial evidence standard and therefore violates Labor Code §5952 (d).

Labor Code §5952 mandates the substantial evidence rule in subsection as follows: "(d) The order, decision, or award was not supported by substantial evidence." See *Moulton v WCAB* 84 Cal. App. 4th 837, 65 Cal. Comp. Cases 1259 (2000). The IMR's conclusion becomes final once it reaches the AD and is described as a "decision" in subsections (e), (j), and (k). The IMR's conclusion ultimately becomes an Award of the

WCAB for future medical treatment even though in other parts of §4610.6 is called a "determination".

In *Escobedo v Marshalls* 70 Cal. Comp. Cases 604 (2006), the WCAB set forth the requirements of substantial evidence at 620-621 in this en banc decision:

> "This is because it is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310];Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500];LeVesque v. Workmen's Comp. Appeals Bd. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (McAllister v. Workmen's Comp. Appeals Bd. (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp.Cases 660];Travelers Ins. Co. v. Industrial Acc. Com. (Odello) (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp.Cases 54];Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93];Place v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525];Zemke v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at p. 798.)Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or

her conclusions. (Granado v. Workers' Comp. Appeals Bd. (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding); Zemke v. Workmen's Comp. Appeals Bd., supra, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also People v. Bassett (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based)."

§4610.6 fails to comply with Labor Code §5952 (d) and to provide these safeguards for all parties. The standard is not substantial evidence but only a much narrower and undefined one of "medical necessity" and what is set forth in §4610.6 which refers to §4610.5 and in that section to medical utilization treatment schedule which is narrower yet than substantial evidence requirements are. Furthermore, in subsection (b), "relevant information" and "all pertinent medical records" are to be reviewed but there is no mechanism by which the terms are defined, for objections, and for rulings upon these objections and by whom. In subsection (e), the decision is based on an "analysis and determination" with citation to "medical condition," "relevant documents," and "relevant findings," with "relevant documents" and "relevant findings" left undefined, which refers to subsection (c) but there is no requirement of identifying the reasoning or what the scope of these terms is and who decides and how. Adding to these failings, the decision can be made without an examination of the injured worker and as *Escobedo* supra holds an inadequate examination does not conform to substantial evidence and an omitted one would not either.

But §4610.6 (c)'s expressly restricting the determination to medical necessity and omitting reference to the legal standard of substantial evidence for this determination in violation of Labor Code §5952 (d) are telling points. In intentionally declaring in the legislative notes to §4610.6 (c) in Government Code §11435.30 that it was not abrogating *Milpitas USD v WCAB* (Guzman) 187 Cal. App. 4th 808 (2010)-in which the Court of Appeals held that a medical opinion challenging the AMA Guides must constitute substantial evidence-the Legislature clearly intended to keep the substantial evidence requirement in matters pertaining to §4610.6. The Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them. See *People v. Licas* 41 Cal.4th 362 (2007).

Since *Milpitas* supra was not abrogated and the Legislature did not expressly remove the legal standard of substantial evidence from §4610.6 or the applicability of Labor Code §5952 (d) to it, then §4610.6 is constitutionally flawed and in violation of due process for these additional reasons because there is no mechanism by which the substantial evidence requirement can be used in proceedings relating to §4610.6.

To this, the Respondents may claim that the Legislature by silence and by implication intended to continue to permit the use of the substantial evidence requirement in rebuttal to the AMA Guides, as was done in *Milpitas* supra, and require instead an entirely new standard in connection with §4610.6 and that the courts can make this distinction, but this is no answer by virtue of the fact that §4610.6 does not remove the applicability of §5952 (d) if that was the intent of the Legislature. Either with the substantial evidence standard implied or without it, there is no mechanism by which either party can secure rulings as to the medical opinions and determinations offered in connection with §4610.6 and as to the scope of

"relevant information" and "all pertinent medical records" in subsection (b) and because of this is unconstitutional.

In reaction to these arguments, Respondents may contend that the administrative director's function in adopting the determination of the IMR is ministerial and that the actual work of the decision is made by the IMR who is a quasi-judicial officer in this process. Nevertheless, the IMR does not have the same functions and duties as a judge and the statute fails to identify him or her as the judicial decision maker, judge or quasi-judge, and that he or she can make rulings upon the evidence. The right to object to any of these data and secure a ruling from anyone is not given in §4610.6.

In the case at issue in contrast to the limited determination of "medical necessity," there was substantial medical evidence in the form of the primary treating doctor and the agreed medical examiner who in fact examined, tested, and evaluated the injured worker, a standard taken away by §4610.6, in contrast to the narrower decision of the IMR, which violates Labor Code §5952 (d).

There was a complete and full record with much medical and other expert opinions in *Costa* for SCIF to refute the injured worker's medical evidence but the WCAB still deemed it a denial of due process right to cross examine the doctor.

It is acknowledged that the Respondents may assert that because the determination under §4610.6 is made by a medical expert, the IMR, and later adopted by the administrative director it is outside of the proceedings of the WCAB where the standard is substantial evidence under Labor Code §5952 (d) and as a result this standard is inapplicable to §4610.6. That is not true because §4610.6 (e), (j), and (k) all refer to "decision" to which §5952 (d) is expressly made applicable.

## CONCLUSION

For the reasons stated above, amicus curiae VIAW respectfully requests that this Court invalidate Labor Code §4610.6 as currently written.

Dated: January 13, 2015 Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK

By: s/ Charles E. Clark
Charles E. Clark
Co-Counsel for Amicus Curiae
VOTERS INJURED AT WORK

## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Application for Leave of Court to File Brief as Amicus Curiae and Proposed Brief of Amicus's Curiae Voters Injured at Work in Support of Petitioner Frances Stevens is produced using 13-point or greater Roman type, including footnotes, and contains 7,562 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 13, 2015 Respectfully submitted,

LAW OFFICES OF CHARLES E. CLARK

By: s/ Charles E. Clark
Charles E. Clark
Co-Counsel for Amicus Curiae
VOTERS INJURED AT WORK

State of California )
County of Los Angeles )
)

Proof of Service by:
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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

**On** 1/13/2015 declarant served the within: Application for Leave of Court to File Brief as Amicus Curiae and Proposed Brief of Amicus's Curiae Voters Injured at Work in Support of Petitioner Frances Stevens **upon:**

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Signature: s/Kirstin Largent