

Writ of Review Final

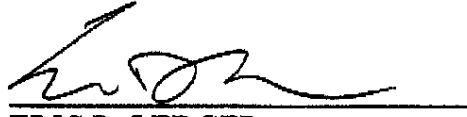
04974768  
Daniel Ramirez

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**  
California Rules of Court 8.208

<b>Name of Interested Entity or Person</b>	<b>Nature of Interest</b>
Workers' Compensation Appeals Board	Respondent
State Compensation Insurance Fund	Respondent
State of California, Dept. of Health Care Services	Respondent
Daniel Ramirez	Injured Worker; Petitioner

Dated: February 11 2015

Respectfully submitted,  
**MASTAGNI HOLSTEDT A.P.C.**



**ERIC D. LEDGER**  
Attorney for Petitioner  
Daniel Ramirez  
1912 "I" Street  
Sacramento, CA 95811

SCAN AS ONE DOCUMENT

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES ..... iv

TABLE OF EXHIBITS..... vii

PETITION FOR WRIT OF REVIEW..... 1

I. INTRODUCTION..... 3

II. STANDARD OF REVIEW..... 4

III. FACTS AND PROCEDURE..... 5

IV. POINTS AND AUTHORITIES..... 7

A. The WCAB has jurisdiction to resolve medical disputes where an employer fails to conduct utilization review properly.....7

1. Respondent, State Fund, failed to comply with utilization review because it did not follow the MTUS..... 9

2. *Dubon II* erred in denying jurisdiction over defective utilization review denials because such denials are untimely, subject to *Sandhagen*, and jurisdiction is expressly authorized per 8 Cal.Code.Reg. section 10451.2(c)(1)(C)..... 11

B. The legislature’s enactment of Independent Medical Review was an unconstitutional impairment upon the power of the WCAB to resolve medical treatment disputes..... 15

C. The lack of any substantive appeals process under IMR or the ability to conduct discovery on any limited appeals process violates Petitioner's right to procedural due process under the California Constitution, article I, section 7 and the Fifth and Fourteenth Amendments to the U.S. Constitution. .... 17

V. CONCLUSION..... 21

VI. VERIFICATION..... 22

CERTIFICATE OF COMPLIANCE..... 23

PROOF OF SERVICE..... 24

**TABLE OF AUTHORITIES**

**Cases**

*Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028..... 4

*Stevens v. W.C.A.B.*, (2015) Case No. A143043,  
(1<sup>st</sup> DCA, pending review) ..... 4

*Zenith Ins. Co. v. Worker's Comp. Appeals Bd.* (2008),  
71 Cal.App.4th 483..... 4

*Adventist Health v. Workers' Comp. Appeals Bd.* (2012),  
211 Cal.App.4th 376. .... 4

*Dubon v. World Restoration Corp.* (2014) (*Dubon I*)  
79 Cal.Comp.Cases 313 (En Banc). .... 5, 11, 12

*Dubon v. World Restoration Corp.* (2014) (*Dubon II*), 79 Cal.Comp.Cases  
1298 (En Banc, writ denied) ..... 6, 7, 11, 12, 13, 14, 19, 22

*State Comp. Ins. Fund v. W.C.A.B. (Sandhagen)* (2008), 44 Cal.4th 230  
Cal. Const., Article III, sec. 3.5. ....8, 9, 10, 12, 14, 16.

*Navarro v. City of Montebello*, (2014) 79 Cal.Comp.Cases 328  
(En Banc)..... 13

*San Francisco v. Workers' Comp. Appeals Bd.* (1978),  
22 Cal. 3d 103..... 15

*Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008),  
163 Cal. App. 4th 640..... 15

*Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (1982),  
31 Cal. 3d 715..... 15

*Six Flags, Inc. v. Workers' Comp. Appeals Bd.* (2006),  
145 Cal. App. 4th 91..... 15

*Hustedt v. Workers' Comp. Appeals Bd.*, 30 Cal. 3d 329..... 16

*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993)  
 15 Cal.App.4th 119..... 20  
*Blair v. Pitchess* (1971) 5 Cal.3d 258..... 21  
*Independent Energy Producers Assn. v. McPherson*,  
 38 Cal. 4th 1020..... 21

**Contitutions**

Cal. Const., Article XIV, sec. 4..... 1,7, 15, 16, 18, 20  
 Cal. Const., Article I, sec. 7 ..... 1, 17  
 U.S. Const., 5<sup>th</sup> Amendment ..... 1, 17  
 U.S. Const., 14<sup>th</sup> Amendment ..... 1, 17  
 Cal. Const., Article III, sec. 3.5 .....4

**Statutes**

Cal. Labor Code sec. 4610..... 1, 9, 10, 11, 12, 14  
 Cal. Labor Code sec. 4610.5..... 1, 16, 17, 21  
 Cal. Labor Code sec. 4610.6..... 1, 16, 17, 18, 19, 20, 21  
 Cal. Labor Code sec. 5950..... 1  
 Cal. Labor Code sec. 4600..... 8  
 Cal. Labor Code sec. 5307.27..... 8  
 Cal. Labor Code sec. 4062.9 (repealed)..... 8  
 Cal. Labor Code sec. 4604.5..... 8, 9, 12, 19  
 Cal. Labor Code sec. 4604..... 10, 11, 14, 16, 17  
 Cal. Labor Code sec. 4702..... 15  
 Cal. Labor Code sec. 4062..... 16

Cal. Labor Code sec. 4062.2 ..... 16  
Cal. Labor Code sec. 139.5 ..... 17  
Cal. Gov. Code sec. 11373 ..... 13

**Regulations**

8 Cal.Code.Regs. section 10957.1 ..... 6  
8 Cal.Code.Regs. section 9792.24.1 ..... 10, 11, 18, 19  
8 Cal.Code.Regs. section 10451.2 ..... 11, 12, 13, 14  
8 Cal.Code.Regs. section 9792.10.6 ..... 19

**Legislation**

2012 Cal. SB 863 ..... 15, 16, 17

**TABLE OF EXHIBITS**

<b><u>Number</u></b>	<b><u>Exhibit</u></b>	<b><u>Date</u></b>
Exhibit 1	Utilization Review Denial	7/16/2014
Exhibit 2	Independent Medical Review Determination	9/10/2014
Exhibit 3	Petition Appealing IMR et. al.	10/1/2014
Exhibit 4	First Amended Petition Appealing IMR et. al.	10/21/2014
Exhibit 5	Minutes of Hearing / Order Off Calendar	10/23/2014
Exhibit 6	Petition for Reconsideration / Removal	11/3/2014
Exhibit 7	Answer to Petition for Reconsideration	11/13/2014
Exhibit 8	Report and Recommendation on Petition for Reconsideration or Removal	11/12/2014
Exhibit 9	Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal	1/2/2015

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

DANIEL RAMIREZ,	)	WCAB CASE NO. ADJ6821103
	)	
Petitioner,	)	<b>PETITION FOR WRIT OF</b>
	)	<b>REVIEW</b>
v.	)	
	)	
WORKERS' COMPENSATION	)	
APPEALS BOARD; AND,	)	
STATE OF CALIFORNIA,	)	
DEPARTMENT OF HEALTH CARE	)	
SERVICES; AND, STATE	)	
COMPENSATION INSURANCE	)	
FUND	)	
	)	
Respondents.	)	
_____	)	

**TO THE HONORABLE PRESIDING JUSTICE AND HONORABLE  
ASSOCIATE JUSTICES OF THE DISTRICT COURT OF APPEAL  
OF THE STATE OF CALIFORNIA, IN AND FOR THE THIRD  
APPELLATE DISTRICT**

Petitioner, Daniel Ramirez, petitions this court for a writ of review to inquire and determine the lawfulness of the Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal in the proceeding before the Workers' Compensation Appeals Board ["WCAB"] in case number ADJ6821103, and in support of this petition alleges:



1. That the WCAB acted without or in excess of its power.
2. The orders of the WCAB were unreasonable.
3. Unless the WCAB's orders are annulled, Petitioner will be deprived of his property without due process of law in violation of Article I Section 7 and Article XIV Section 4 of the Constitution of the State of California and in violation of the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the Constitution of the United States.
4. The WCAB has jurisdiction to hear medical treatment disputes where an employer fails to conduct utilization review pursuant to Labor Code sec. 4610.
5. The Independent Medical Review statutes (Labor Code secs. 4610.5 and 4610.6) are unconstitutional.
6. This petition has been filed within the statutory period of forty-five days after issuance by the Respondent Board of its Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal. Petitioner believes that the question raised by this petition are purely questions of law.
6. Petitioner has no right to appeal from the Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal and has no plain, speedy, or adequate remedy other than by writ of review. Labor Code § 5950 authorizes this petition.
7. Petitioner resides in the County of Sacramento and is a party beneficially interested in the proceeding. The parties interested whose rights will be affected by this petition are petitioner and respondents named. They are all the parties to the proceeding and all the parties who entered an appearance

in the prior proceedings. The respondents, other than the Board, are the only parties whose interest in the action before the Board is adverse to petitioners.

**WHEREFORE**, Petitioner prays that:

- a. A writ of review issue out of this Court to inquire into the lawfulness of the finding of Respondent Board.
- b. The records and proceedings in this case be fully heard and considered by this Court, and that the Opinion and Orders Dismissing Petition for Reconsideration, Granting Removal on Board Motion and Decision After Removal be annulled, vacated, and set aside; and
- c. The Court remand this matter for a determination on the necessity of medical treatment; and
- d. The Court grant such other relief that the Court consider proper.

### MEMORANDUM

#### **I. INTRODUCTION**

This is a workers' compensation claim that resolved via stipulations with a future medical award in 2011. In 2014, Respondent denied authorization for twelve acupuncture visits and Petitioner objected. This case presents three issues of widespread interest that profoundly affect the administration of medical treatment in workers' compensation.

The issues are:

- 1) Does the Workers' Compensation Appeals Board ("WCAB") have jurisdiction to determine medical treatment disputes when the employer fails to conduct utilization review properly?
- 2) Was the enactment of the Independent Medical Review ("IMR") system constitutional?
- 3) Does the IMR appeals process violate the injured worker's due process rights?

The petition should be granted for four reasons. First, it presents a fundamental question of WCAB jurisdiction over medical treatment disputes. Second, the WCAB's denial of jurisdiction was clearly erroneous and if allowed to stand will not provide Petitioner any avenue for corrective relief upon appeal. Third, Petitioner lacked adequate means of relief within the WCAB because the WCAB lacks jurisdiction to rule statutes unconstitutional. *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028; cf. Cal. Const., Article III, § 3.5. Finally, this petition presents significant and novel constitutional issues regarding a recently enacted medical authorization appeals process.

Petitioner would note that the constitutional issues raised in this petition are on review in the 1<sup>st</sup> Appellate District, *Stevens v. W.C.A.B.*, Case No. A143043. Given the scope and effect that the ruling would have on the workers' compensation system, it may be prudent for multiple courts to address the subject.

## II. STANDARD OF REVIEW

On writ review of a decision by the WCAB, interpretation of governing statutes or application of the law to undisputed facts is decided *de novo* by the reviewing court. *Zenith Ins. Co. v. Worker's Comp. Appeals Bd.* (2008), 71 Cal.App.4th 483. The Court of Appeal's sole obligation is to review the entire record to determine whether (1) the WCAB acted without authority or in excess of its powers, (2) the order, decision, or award was procured by fraud, (3) the order, decision, or award was unreasonable, (4) the order, decision, or award was not supported by substantial evidence, or (5) the findings of fact, if made, supported the order decision, or award under review. *Adventist Health v. Workers' Comp. Appeals Bd.* (2012), 211 Cal.App.4th 376, as modified.

### III. FACTS AND PROCEDURE

The fact pattern of this case is relatively simple. The timeline of events follows:

- 7/9/2014 Respondent, State Fund, received a request for authorization from Petitioner's primary treating doctor, Natalya Shtutman M.D., who requested authorization for 12 sessions of acupuncture.
- 7/16/2014 State Fund issued a utilization review denial for the requested acupuncture. Exhibit 1.
- 7/22/2014 Petitioner appealed the denial to Independent Medical Review ["IMR"].
- 9/10/2014 IMR upheld the denial of medical treatment. Exhibit 2.
- 9/15/2014 IMR served the decision upholding the denial upon the parties. *Id.* The IMR reviewer found that the primary treater documented functional improvement following prior acupuncture. *Id.* at \*3. However, the IMR reviewer denied treatment by opining that the primary treater' continued reporting of functional improvement was not credible. *Id.*
- 10/1/2014 Petitioner filed an appeal of the IMR determination challenging the IMR on substantive grounds. Exhibit 3. Petitioner challenged the validity of State Fund's utilization review denial. *Id.* Petitioner requested a hearing in order to obtain an order of the WCAB awarding medical treatment per *Dubon v. World Restoration Corp.* (2014) (*Dubon I*) 79 Cal.Comp.Cases 313 (En Banc). Exhibit 3. At that time, *Dubon I* (discussed in detail *infra*) conferred jurisdiction upon the WCAB over Petitioner's request. Lastly, Petitioner requested an order of the WCAB disclosing the identity of the

- IMR doctor, so that Petitioner could conduct discovery on whether the IMR doctor was biased. *Id.*
- 10/6/2014 The WCAB issued a second holding in *Dubon*. The WCAB reversed itself and declared that the WCAB does not have jurisdiction to determine medical treatment denials where the employer failed to comply with utilization review statutes. *Dubon v. World Restoration Corp.* (2014) (*Dubon II*), 79 Cal.Comp.Cases 1298 (writ denied).
- 10/21/2014 Petitioner filed an amended appeal so as to comply with the pleading requirements of 8 Cal.Code.Regs. section 10957.1. Exhibit 4.
- 10/23/2014 At the mandatory settlement conference, Hon. Judge Cleveland advised that the WCAB did not have jurisdiction over any of Petitioner's arguments and over Petitioner's objection, granted Respondent's request for an order taking the matter off calendar. Exhibit 5.
- 11/3/2014 Petitioner filed a Petition for Reconsideration and/or Removal of the order taking Petitioner's appeal off calendar. Petitioner argued that reconsideration was proper because the order taking the matter off calendar was an effective dismissal of the appeal.
- 11/12/2014 Hon. Judge Cleveland issued his report and recommendation on Petitioner's petition advising against reconsideration or removal. Exhibit 8.
- 11/13/2014 Respondent, State Fund, filed its Answer. Exhibit 7. State Fund did not deny that its utilization review denial was defective. *Id.* Instead, State Fund relied upon the change in law that occurred under *Dubon II* after Petitioner appealed the

medical treatment denial. *Id.* State Fund raised other minor technical issues with Petitioner's appeal. *Id.*

1/2/2015 The WCAB issued its opinion and orders. Exhibit 9. The WCAB denied reconsideration, but granted removal so as to amend Judge Cleveland's order to an actual dismissal of Petitioner's appeal. *Id.* The WCAB did not substantively address the issues raised by Petitioner. *Id.* Instead, the WCAB was primarily concerned with providing Petitioner a final order from which this petition for writ of review could follow. *Id.*

#### IV. POINTS AND AUTHORITIES

##### A. The WCAB has jurisdiction to resolve medical disputes where an employer fails to conduct utilization review properly.

Petitioner challenges the WCAB holding in *Dubon v. World Restoration Corp.* (2014) (*Dubon II*), 79 Cal.Comp.Cases 1298 (writ denied). In short, *Dubon II* held that the WCAB does not have jurisdiction to resolve medical treatment disputes, even where the employer failed to conduct utilization review properly. *Id.* Jurisdiction only exists for untimely utilization review. *Id.* at 1299. Before getting into the details of Petitioner's argument, it may help to review workers' compensation medical treatment authorization procedures.

Medical treatment in workers' compensation begins with the California Constitution, which requires the legislature to provide a: "...full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury[.]" Cal. Const., art. XIV, sec. 4. To enforce the constitutional mandate, the legislature enacted a litany of codes administering medical treatment. We

start with Labor Code section 4600<sup>1</sup>, which defines medical treatment as treatment “. . . that is reasonably required to cure or relieve the injured worker from the effects of his or her injury[.]” The code further states that:

(b) As used in this division and notwithstanding any other law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27.

Section 5307.27 directed the administrative director for the Department of Industrial Relations to create a Medical Treatment Utilization Schedule (“MTUS”), which created “. . . evidence-based, peer-reviewed, nationally recognized standards of care . . . that shall address, at a minimum, the frequency, duration, intensity, and appropriateness of all treatment procedures and modalities commonly performed in workers' compensation cases.” The purpose of the MTUS was to create a more uniform system for authorizing medical treatment. *State Comp. Ins. Fund v. W.C.A.B. (Sandhagen)* (2008), 44 Cal.4th 230, 240.

Prior to the adoption of the MTUS, workers' compensation operated under the simple question of whether the treatment request was reasonable and necessary. *Id.* at 238. A rebuttable presumption existed that a request for treatment from the primary treating physician was reasonable and necessary. *See* former Lab. Code section 4062.9 (repealed). This system led to lengthy litigation. *Sandhagen*, 44 Cal.4th at 239. The Administrative Director adopted the MTUS at the direction of the legislature so that workers' compensation would have a uniform guide on when medical treatment is reasonable. *Id.* at 240. Now, the rebuttable presumption is that the MTUS is reasonable. Section 4604.5(a). To defeat this presumption a party must show “. . . by a preponderance of the scientific medical evidence establishing that a variance from the guidelines

<sup>1</sup> All future references will be to the Labor Code except where noted.

reasonably is required to cure or relieve the injured worker from the effects of his or her injury." *Id.*

In addition to the MTUS, the legislature created a mandatory utilization review system in 2003, which changed the way that an employer could object to treatment. *Sandhagen*, 44 Cal.4th at 240. Utilization review is a process where the employer hires an in-house doctor to review the request for medical treatment and determine whether that request is reasonable. *Id.* at 240-241; Section 4610. If the utilization review doctor approves of the treatment, the employer must authorize the treatment. *Sandhagen*, 44 Cal.4th at 238-240. The employer must comply with the utilization review regulations. Section 4610(b).

Utilization review is the only avenue that an employer has to deny a request for medical treatment. *Sandhagen*, 44 Cal.4th at 244. If an employer fails to conduct utilization review, it has waived its objection to providing medical treatment. *Id.* at 245. However, this does not result in the automatic award of medical treatment. *Id.* at 242. The injured worker still must prove that the medical treatment is reasonably and medically necessary. *Id.*

- 1. Respondent, State Fund, failed to comply with utilization review because it did not follow the MTUS.**

The legislature commanded that every employer follow the MTUS when conducting utilization review of medical treatment requests:

(c) Each utilization review process shall be governed by written policies and procedures. These policies and procedures shall ensure that decisions based on the medical necessity to cure and relieve of proposed medical treatment services are consistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27. Section 4610(c).



What happens when an employer refuses to follow the MTUS as part of its utilization review process? Petitioner argues that per the holding in *Sandhagen*, the employer has waived its objection to the treatment. Petitioner is entitled to a hearing before the WCAB to prove that the medical treatment was reasonably and medically necessary. Section 4604.

In *Sandhagen*, the question was whether an employer can object to medical treatment where the employer failed to follow the time guidelines for utilization review. *See generally Sandhagen*, 44 Cal.4th 230. The Supreme Court unanimously rejected that notion. The Supreme Court summarized its holding as follows:

. . . State Fund claims that section 4610 simply requires employers to “establish” a utilization review process, but does not require employers to actually use the process. We find this argument unpersuasive. Having broadly defined utilization review, and requiring every employer to establish such a process at considerable expense and with numerous statutory safeguards (discussed in further detail below), it is unlikely that the Legislature intended to allow employers to circumvent the process whenever an employer felt it expedient. To the contrary, the statutory language indicates the Legislature intended for employers to use the utilization review process when reviewing and resolving any and all requests for medical treatment. *Sandhagen*, 44 Cal.4th at 236.

The nuance between this case and *Sandhagen* is that State Fund did present a utilization review denial within the required five business days. *See Exhibit 1*. However, State Fund did not follow the MTUS in denying treatment.

State Fund denied 12 acupuncture sessions. Exhibit 1. The acupuncture MTUS is found in 8 Cal.Code.Reg. section 9792.24.1, which provides for the continuation of acupuncture if functional improvement is documented. Petitioner clearly documented functional improvement with

acupuncture.<sup>2</sup> Instead of referring to the acupuncture MTUS, State Fund improperly applied the American College of Occupational and Environmental Medicine (“ACOEM”) Guidelines 2<sup>nd</sup> edition, which is not adopted or incorporated for purposes of approving acupuncture. Exhibit 1 at \*8 “Guidelines Used”. State Fund quoted sections of the ACOEM, which state that “invasive techniques (e.g. needle acupuncture)... have no proven value.” *Id.* That position is completely inapposite to the actual MTUS guidelines for acupuncture. *Compare with* 8 Cal.Code.Reg. section 9792.24.1. State Fund was required to use the MTUS. Section 4610(c). State Fund did not use the MTUS.

State Fund’s utilization review denial is untimely because State Fund did not comply with all utilization review statutes within the five business days for that denial to be timely. Section 4610(g)(1). Pursuant to *Sandhagen*, Labor Code section 4604, and 8 Cal.Code.Reg. section 10451.2(c)(1)(C), the WCAB has jurisdiction to hear disputes where utilization review is defective. Petitioner is entitled to a hearing before the WCAB to resolve the medical treatment dispute. *Id.*

**2. *Dubon II* erred in denying jurisdiction over defective utilization review denials because such denials are untimely, subject to *Sandhagen*, and jurisdiction is expressly authorized per 8 Cal.Code.Reg. section 10451.2(c)(1)(C).**

The WCAB addressed this issue directly in a series of En Banc opinions in *Dubon v. World Restoration Corp.* (2014), 79 Cal.Comp.Cases 313 and 79 Cal.Comp.Cases 1298 (writ denied). Initially, the WCAB ruled

<sup>2</sup> See Exhibit 1, at \*3, records review of Dr. Natalya Shtutman, 2/25/2014 “[Petitioner] reports improvement to sensitivity to touch with acupuncture. The acupuncture helps to decrease the pain in his left leg and allows him to be more functional and continue working. The pain drops down from an 8/10 VAS to 3/10 VAS after treatment.”; *Compare to* record dated 7/3/2014 at \*4, “Acupuncture was not authorized. Mr. Ramirez reports more pain in left ankle. He started missing work days and/or going to work late because of the mobility issues and pain; he missed 5 days of work in June. Without acupuncture the pain level is 9-10/10 in intensity.”

unanimously that pursuant to *Sandhagen*, an employer could not rely upon a materially defective utilization review denial and that the WCAB had jurisdiction to hear such disputes. *Dubon I*, 79 Cal.Comp.Cases 313. The WCAB then granted State Fund's petition for reconsideration and rescinded its decision. *Dubon II*, 79 Cal.Comp.Cases 1298 (writ denied). In a new split decision, the WCAB held that it only had jurisdiction to review untimely utilization review denials, not materially defective denials. *Id.* The *Dubon* decision was improper because a materially defective utilization review decision is untimely; thus, pursuant to *Sandhagen*, the employer has waived its only avenue to object to the treatment. *Sandhagen*, 44 Cal.4th at 244. In addition, the WCAB has jurisdiction pursuant to a valid administrative regulation. 8 Cal.Code.Regs. section 10451.2(c)(1)(C).

A materially defective utilization review decision is untimely because the employer never completed the review process within the allotted time. Section 4610(g)(1). State Fund was required to follow the MTUS. Section 4610(c). A variance from the MTUS is only allowed where the variance is "... [reasonably] required to cure or relieve the injured worker from the effects of his or her injury[.]" Section 4604.5(a). A reasonable inference from the Labor Code is that a variance from the MTUS would never be allowed to deny medical treatment. State Fund had to comply with the MTUS to deny medical treatment, but did not. *See supra.*

Although State Fund failed to follow the MTUS, per the WCAB opinion in *Dubon II*, that violation does not invalidate the utilization review denial. *Dubon II*, 79 Cal.Comp.Cases 1298, 1311. Such a violation would only subject State Fund to potential administrative fines. *Id.* State Fund delivered its utilization review denial within the five business days required, but State Fund did not follow the required process. The situation is analogous to a marathon runner taking a taxi-cab to the finish line. Do

we crown him a winner because he finished in time, or do we state the obvious: “you never ran the race”? Yes, State Fund got to the finish line in five days, but they cheated. The *Dubon II* holding offers Petitioner no relief on appeal from what is a clear violation of State Fund’s statutory obligation.

Next, *Dubon II* is improper is because it directly conflicts with 8 Cal.Code.Reg. section 10451.2(c)(1)(C), which confers jurisdiction upon the WCAB where a utilization review is defective:

(1) Where applicable, independent medical review (IMR) applies solely to disputes over the necessity of medical treatment where a defendant has conducted a timely and *otherwise procedurally proper* utilization review (UR). . . . All other medical treatment disputes are non-IMR/IBR disputes. Such non-IMR/IBR disputes shall include, but are not limited to: . . .

(C) a dispute over whether UR was timely undertaken or was *otherwise procedurally deficient*; however, if the employee prevails in this assertion, the employee or provider still has the burden of showing entitlement to the recommended treatment; (emphasis added)

The rules regarding validity of administrative regulations were dissected in *Navarro v. City of Montebello*:

The WCAB has exclusive original jurisdiction to determine the validity of regulations adopted by the Administrative Director (AD). In considering the validity of a regulation, our task is to inquire into the legality of the regulation, not its wisdom. Thus, we are limited to determining whether the regulation (1) is within the scope of the authority conferred (Gov. Code, § 11373) and (2) is reasonably necessary to effectuate the purpose of the statute. Although in determining whether regulations are reasonably necessary to effectuate the statutory purpose we will not intervene in the absence of an arbitrary or capricious decision, we need not make such a determination if the regulations transgress statutory power. *Navarro v. City of Montebello*, (2014) 79 Cal.Comp.Cases 328, 336 (WCAB En Banc) (internal citations, ellipsis, and quotation marks omitted).

The holding in *Dubon II* is clearly contrary to 8 Cal.Code.Reg.s. section 10451.2(c)(1)(C). That regulation was within the administrative director's scope of authority. The regulation was reasonably necessary to effectuate the purpose of *Sandhagen*. In addition, the regulation was reasonably necessary to effectuate the purpose of Section 4610, which commands compliance with all utilization review regulations and Section 4604, which confers jurisdiction with the appeals board over such disputes.

The holding in *Sandhagen* was not simply limited to timeliness of utilization review, but rather clear that the employer must establish and follow a utilization review procedure with "numerous statutory safeguards." *Sandhagen*, 44 Cal.4th at 236. "[T]he Legislature enacted a comprehensive process that balances the dual interests of speed and accuracy." *Id.* at 241 (emphasis added). The accuracy of utilization review comes from the requirement that Defendant use the MTUS, for which compliance is mandatory. Section 4610(f)(2); *Sandhagen*, 44 Cal.4th at 236. The employer is not allowed to simply circumvent the utilization review process and ignore MTUS regulations at will. *Id.* *Sandhagen's* holding has been erased by *Dubon II*. Under *Dubon II*, an employer could violate every utilization review regulation (except time guidelines) and the employee is without a remedy in the court. This court should grant review on this question, reaffirm the holding in *Sandhagen*, and overturn the holding in *Dubon II*. The employer must follow the utilization review process in order to object to medical treatment. Where the employer fails to follow utilization review, the WCAB has jurisdiction to hear the dispute and if appropriate, award treatment.

//

//

//

**B. The legislature's enactment of Independent Medical Review was an unconstitutional impairment upon the power of the WCAB to resolve medical treatment disputes.**

Petitioner acknowledges a long history of upholding workers' compensation provisions subjected to constitutional scrutiny. *San Francisco v. Workers' Comp. Appeals Bd.* (1978), 22 Cal. 3d 103; *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008), 163 Cal. App. 4th 640. However, the Supreme Court has made clear that "... the Legislature may not go beyond the precise terms of the constitutional enabling provisions -- except, perhaps, that it may use its plenary or police powers to promote the overall purposes of the workers' compensation scheme." *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd.* (1982), 31 Cal. 3d 715, 725. *See also, Six Flags, Inc. v. Workers' Comp. Appeals Bd.* (2006), 145 Cal. App. 4th 91 (holding Lab. Code sec. 4702(a)(6)(B) unconstitutional because the legislature did not have expressed constitutional authority to provide for awards to estates of workers). The history of cases interpreting California Constitution, article XIV, section 4, indicate the need to balance the legislature's plenary power to promote the workers' compensation system against precise limitations on that power contained within the constitution. *Id.*

The constitutional question here is whether the legislature had plenary power to remove jurisdiction over medical treatment disputes from the WCAB and assign that jurisdiction to an independent agency contracted through the Administrative Director. The answer to this question first requires some background on the utilization review appeals process.

The utilization review appeals process was completely changed in 2013 with the enactment of SB863. Previously, when utilization review denied authorization, the injured worker could object to the denial under

Section 4062 and submit the dispute to a medical evaluator under Section 4062.2. *Sandhagen*, 44 Cal.4th at 231. The parties would generally follow the recommendation of the evaluator; however, the parties could have the WCAB decide the issue pursuant to Section 4604. *Sandhagen*, 44 Cal.4th at 239-243. The WCAB would generally follow the recommendation of the evaluator subject to a substantial medical evidence review.

SB863 completely changed the utilization review appeals process. Now, instead of receiving an evaluation pursuant to Sections 4062 and 4062.2, the injured worker must submit the matter to IMR pursuant to Sections 4610.5 and 4610.6. IMR is a record review only, not an evaluation. Sec. 4610.5(k). The WCAB no longer has power to substantively determine a medical treatment dispute. Secs. 4604, 4610.5(e), and 4610.6(i). There is no substantial medical evidence review of IMR determinations. *Id.* The Legislature created an IMR process, which removed jurisdiction over medical disputes from the WCAB and denied petitioner any substantive appeal of the determination. *Id.*

Section 4610.6(i) violates California Constitution, article XIV, section 4, which expressly forbids the Legislature from using its plenary power to "impair or render ineffectual in any measure the creation and existence of the industrial accident commission[.]" This is a separation of powers violation. As stated by the Supreme Court:

The standard for assessing whether the Legislature has overstepped its authority and thereby violated the separation of powers principle has been summarized as follows. "[The] legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Hustedt v. Workers' Comp. Appeals Bd.*, 30 Cal. 3d 329, 338.

The legislature overstepped its bounds in enacting the IMR statutes.

Per Section 4610.6(i):

In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization.

What the legislature has done is create a completely separate and distinct judicial body (IMR) to resolve medical treatment disputes. The ruling of this body is final and not appealable for substantive error.<sup>3</sup> The legislature has materially impaired a material function of the WCAB, which is to resolve medical treatment disputes. *See* amendment to Section 4604, 2012 Cal. SB 863 (modifying the jurisdiction of the WCAB to expressly exclude medical treatment disputes under Section 4610.5). IMR is unconstitutional.

**C. The lack of any substantive appeals process under IMR or the ability to conduct discovery on any limited appeals process violates Petitioner's right to procedural due process under the California Constitution, article I, section 7 and the Fifth and Fourteenth Amendments to the U.S. Constitution.**

Due process embodies the idea that where a mistake is made, there is an avenue to correct the mistake, or at the very least, be heard on the issue. Following the enactment of SB863, the Administrative Director contracted a private vendor, Maximus, to administer IMR. Section 139.5(a)(1). The decision of Maximus is blindly adopted by the Administrative Director without any substantive review by the courts. Sec. 4610.6(g). The Administrative Director's determination is final. Sec. 4610.6(h). Petitioner is not allowed to make any substantive appeal of the determination, regardless of whether the expert medical opinion was in error. *Id.*

---

<sup>3</sup> IMR is appealable for limited errors. Section 4610.6(h). However, the constitutional question presented in this petition concerns the lack of ability of the WCAB to make any determination on the actual merits of the IMR decision, which arguably should be subject to a substantial medical evidence review. Section 4610.6(i).



The due process violations are clear in this case. The plain text of the California Constitution directly conflicts with the text of Section 4610.6(i). Compare the text of the two provisions:

The Legislature is vested with plenary powers, to provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; **provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.** Cal. Const., art. XIV, sec. 4 (emphasis added).

-----  
In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization. Section 4610.6(i).

The clear, plain words of the California Constitution are violated by IMR. If the court were to somehow rule that IMR does not violate the California Constitution, IMR would still violate the due process provided under the United States Constitution because it strips Petition of his right to be appeal.

If Petitioner were provided an appeal, Petitioner could prove that the IMR determination was substantively in error. Unlike utilization review, the IMR reviewer correctly stated the MTUS standard for continued acupuncture, which requires functional improvement for additional visits. 8 C.C.R. section 9792.24.1(d). Exhibit 2 at \*3. The IMR reviewer found that "Acupuncture is reported to significantly decrease the pain and allows the claimant to be more functional and continue working." *Id.* IMR should have stopped at that moment as Petitioner had demonstrated functional improvement with past acupuncture and met the requirements of the MTUS. *See supra* at footnote two. However, the IMR reviewer

inexplicably interjected an opinion regarding the credibility of the primary treating doctor's continued reporting of functional improvement. In denying treatment, the IMR reviewer stated:

The claimant has had at least 24 acupuncture visits approved in the last year. The provider states the same benefit each time of decreased pain. The provider also states that it allows the claimant to be more functional and continue working. However, even after extensive treatment, the claimant still needs one treatment a week. Due to the lack of objective functional improvement and decreased dependence on medical treatment, further acupuncture is not medically necessary. Exhibit 2 at \*3.

The IMR reviewer committed several errors in his/her analysis. First, the reviewer failed to apply the MTUS. Section 4610.6(c). Petitioner demonstrated functional improvement following acupuncture, thus continued treatment was due. 8 Cal.Code.Reg. section 9792.24.1(d). Second, the reviewer confused acupuncture as having a 24 visit cap; however, acupuncture is not subject to a 24 visit cap. Section 4604.5(c). Third, and most egregious, the reviewer went beyond his role as a medical doctor and made determinations on the credibility of the treating doctor's reports. IMR is limited to reviewing the medical necessity of the requested treatment through documentary, scientific, and medical evidence. See Lab. Code sec. 4610.6(a) and 8 Cal.Code.Reg. sec. 9792.10.6(d). The IMR reviewer cannot read beyond those documents to make credibility determinations regarding whether the reports of functional improvement are credible. The *Dubon II* court was concerned with judges making determinations of medical necessity. 79 Cal.Comp.Cases at 1308. There should be equal concern over doctors making determinations on credibility.

As discussed supra in footnote three, there are limited grounds for appeal of an IMR, none of which allow the courts to address a substantive error. Section 4610.6(h). One area for which an injured worker can appeal is subsection (4), which allows an appeal where: "(4) The determination

was the result of bias on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability.” *Id.* However, the WCAB denied Petitioner his right to due process to present this appeal because the Labor Code forbids disclosing the identity of the IMR doctor. Section 4610.6(f). How could a petitioner ever prove that an IMR doctor was biased if the petitioner cannot even know who that doctor is? Petitioner was denied his right to due process because he was unable to conduct discovery upon one of the few points of appeal made available.

Petitioner challenged the reviewer’s substantive medical opinion as it failed to follow the MTUS and was improperly based on a doctor’s determination of credibility. However, Sections 4610.6(h) and 4610.6(i), prevent any court from reviewing this issue. To that extent, Petitioner was denied due process.

The IMR process could arguably survive if it is analogized as a form of binding arbitration; however, Section 4610.6(i) still violates the constitutional due process requirement for judicial review of all decisions of all tribunals as clearly stated in article XIV, section 4. Even if IMR is analogized to binding arbitration, arbitration must have adequate safeguards for review of the arbiter’s award. *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119. “Where a local rule has the effect of closing the courts to the defaulting party making the decision of the arbitrator the final determination in the case, the party is denied due process of law.” *Id.* at 130 (internal citations omitted).

A clear, plain, unambiguous reading of the IMR statute when compared to the constitution mandates the conclusion that IMR denies Petitioner due process of law. Petitioner sees two possible solutions that this court could adopt. First, the court could simply strike the offending portion of the statute and rule that the WCAB and the courts of this state may review all aspects of an IMR decision. Such a ruling would be

harmonious with the statute's saving clause, found in Section 4610.6(n), which states:

(n) If any provision of this section, or the application thereof to any person or circumstances, is held invalid, the remainder of the section, and the application of its provisions to other persons or circumstances, shall not be affected thereby.

The second alternative would be to strike the whole statute as a violation of due process and allow the legislature to redraft it. This would be consistent with court precedent. "If the scope of a statute cannot be limited to situations to which it may constitutionally apply except by reading into it numerous qualifications and exceptions amounting to a wholesale rewriting of the provision, the statute cannot be saved by judicial construction but must be declared invalid." *Blair v. Pitchess* (1971) 5 Cal.3d 258, 282 (internal citations omitted).

## V. CONCLUSION

A grant of plenary power to the legislature does not include a grant of power to violate the constitution. *Independent Energy Producers Assn. v. McPherson*, 38 Cal. 4th 1020, 1036. The plenary power must be read in harmony with the constitution as a whole. *Id.* at 1034. The Legislature wielded its power improperly in enacting IMR. The Legislature created a new system of dispute resolution that directly impaired the WCAB's authority to determine medical treatment disputes. *See supra*. The Legislature provided for no substantive review of IMR determinations with any court in this state. Section 4610.6(i). The IMR statutes, Labor Code sections 4610.5 and 4610.6, should be stricken as both an unconstitutional violation of the separation of powers and as an unconstitutional violation of the due process rights of injured workers.

The WCAB has jurisdiction to hear medical treatment disputes where the employer fails to properly conduct utilization review. The

Legislature created utilization review with a command that employers follow the MTUS in approving or denying medical treatment. The *Dubon II* holding allows an employer to ignore this clear statutory command and leaves the injured worker without any recourse in the courts. The *Dubon II* holding should be stricken and this matter returned to trial level for a determination on the necessity of medical treatment.

For all of the above reasons, Petition asks that this court please grant a writ of review.

Dated: February 11, 2015

Respectfully submitted,

**MASTAGNI HOLSTEDT A.P.C.**



**ERIC D. LEDGER**  
Attorney for Petitioner  
Daniel Ramirez

**VII. VERIFICATION**

**STATE OF CALIFORNIA**

I am the attorney for the petitioner in the above action or proceeding;

I have read the foregoing PETITION FOR WRIT OF REVIEW and know the contents thereof and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on February 11, 2015, at Sacramento, California.

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

Dated: February 11, 2015

Respectfully submitted,

**MASTAGNI HOLSTEDT A.P.C.**



---

ERIC D. LEDGER  
Attorney for Petitioner  
Daniel Ramirez

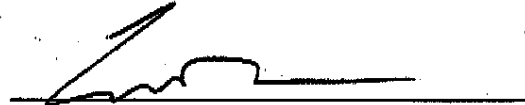
**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 8.204(d), I certify that Petitioner's brief has a typeface of 13 points, and contains 5,386 words.

Dated: February 11, 2015

Respectfully submitted,

**MASTAGNI HOLSTEDT A.P.C.**



**ERIC D. LEDGER**  
Attorney for Petitioner  
Daniel Ramirez