Civil Case No.:A143043

In The

Court of Appeal

of the

State of California

First Appellate District, Division 1

FRANCES STEVENS, Petitioner

vs.

OUTSPOKEN ENTERPRISES

and STATE COMPENSATION INSURANCE FUND;

WORKERS' COMPENSATION APPEALS BOARD;

And the ACTING ADMINISTRATIVE DIRECTOR,

DOVISION OF WORKERS' COMPENSATION, Respondents

Civil Case # A143043; WCAB Case No. ADJ1526353

Honorable Francie Lehmer, San Francisco Office, WCAB

APPLICATION OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, FRANCES STEVENS

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

Court of Appeals Number: A143043

Case Name: Frances Stevens v. Outspoken Enterprise and State Compensation Insurance Fund; Workers' Compensation Appeals Board; and the Acting Administrative Director, Division of Workers' Compensation

Please check the appropriate box:
X There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3)

___ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest

Dated: November 25, 2014 _____
Signature of Attorney/Party Submitting Form

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III.

Application to File Amicus Curiae Brief

TO THE HONORABLE PRESIDING JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO

Pursuant to Rule 8.520 (f) of the California Rules of Court, the California Applicants' Attorney Association (hereinafter "CAAA") 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, CAAA states as follows:

1. CAAA is an association and organization comprised of the members of the California State Bar who regularly engage in the representation of men and women in the state who sustain injuries arising out of, and occurring in the course of, their employment. As a regular part of its activities, CAAA, after leave is granted, files Amicus Curiae briefs before the Workers' Compensation Appeals Board (hereinafter "WCAB"), Courts of Appeal, and the Supreme Court in cases of far-reaching significance and/or first impression. (See, for example, *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, 76 Cal. Comp. Cases 565 and *Ogilvie v. WCAB* (2011) 197 Cal. App. 4th 1262, 76 Cal. Comp. Cases 624, which are examples of cases where CAAA requested permission to file Amicus Curiae briefs and the Court accepted CAAA's brief.) CAAA respectfully submits that the instant matter is a case of far-reaching significance in that it seeks interpretation of recently-enacted statutes creating a new system for determination of appropriateness of medical care, i.e. Independent Medical Review (hereinafter "IMR"). Issues include

Constitutionally based challenges to the IMR process.

2. The Court's ruling and decision in the instant case will have an immediate impact upon Amicus Curiae, its members, and their clients.

3. CAAA is familiar with the issues before the Court and the scope of their presentation. CAAA believes that further briefing will assist the Court by demonstrating the correct constitutional standard for provision of medical care within the workers' compensation system, scope of judicial review, and standards of due process. CAAA respectfully submits that these particular issues are not fully addressed by the parties' briefs.

4. No party or counsel for any party in the pending appeal participated in authoring this Amicus Curiae brief in whole or in part, nor did any party or their attorney make a monetary contribution to fund the preparation or submission of this brief.

5. CAAA therefore respectfully requests leave to file the following proposed Amicus Curiae brief.

DATE: Nov. 25, 2014 RESPECTFULLY SUBMITTED,

_____

Joseph V. Capurro
State Bar # 95698
Attorney for Amicus Curiae
California Applicants' Attorney Association

AMICUS CURIAE BRIEF

IV

Factual Introduction

Petitioner and both Respondent State Compensation Insurance Fund (hereinafter State Fund) and Respondent the Acting Administrative Director (hereinafter DWC) provide the Court with factual summaries which are not at great variance. This Amicus will rely on those representations in connect with the arguments set out below.

Of significance to this argument is that the injured worker's designated treating physician sought authorization for several treatment modalities for this injured worker who suffers from multiple complicated medical conditions which has resulted in a finding of total permanent disability and need for future medical care to cure and relieve from the effects of the injury. State Fund referred the requests to Utilization Review (hereinafter UR) per Labor Code section 4610. The UR determination supported a denial of care. Thereafter Petitioner Stevens (hereinafter Stevens) sought review of the UR determination through the Independent Review (hereinafter IMR) procedure enacted by the Legislature in 2012 as parts of SB 863. (Labor Code section 4610.5) That statute became effective on January 1, 2013 for injuries occurring on or after January 1, 2013. As to all other treatment requests, the statute became effective on July 1, 2013 without regard to the date of injury. There is no dispute that the requests of the designated treating physicians were subject to the IMR process.

While the IMR process was pending Stevens sought to challenge the IMR statute on constitutional grounds. Relying upon Article III Section 3.5 of the California Constitution which prohibits the Workers' Compensation Appeals Board (hereinafter WCAB) from declaring a statute unenforceable or unconstitutional, Stevens filed a Petition for Writ of Mandate/Petition for Writ of Review before the final resolution of the dispute over the care. Stevens then notified the Court of the issuance of the IMR findings upholding the UR determinations. The Court without opinion denied both Petitions. Stevens continued to pursue her remedy of appeal before the WCAB pursuant to Labor Code section 4610.6(h). After receiving the final determination of the WCAB which was constitutionally prohibited from addressing the concerns over constitutionality, Stevens timely filed the instant Petition for Writ of Review from the determination of the WCAB. In her Petition Stevens identifies three facial challenges to the IMR statutory scheme; (1) that the preclusions from review of the determination of medical necessity violates the constitutional mandate that all determination be subject to review by the appellate courts, (2) that the newly enacted IMR process violates that constitutional mandate for substantial justice in all cases expeditiously and (3) without encumbrance of any kind. Additionally he raises due process challenges and a challenge based upon Article III section 3, the separation of powers clause.

V

QUESTIONS PRESENTED

Is the Legislative mandate of Labor Code section 4610(5)(i) prohibiting judicial review of Independent Medical review determinations regarding disputes of medical necessity a direct facial violation of the Constitutional mandate of Article

XIV, Section 4 that all decisions of any legislatively created tribunal within a complete system of workers; compensation be subject to review by the appellate courts of this State?

Does a statutory scheme which transfers from the Legislature to a nameless, faceless corporate agent the final determination of the definition of adequate care to cure or relieve from the effects a work related injury, without a meaningful review of such determination, violate the Constitutional mandate to provide full provision for medical, surgical, hospital and other remedial treatment as is requisite to cure or relieve from the effects of a work-related injury?

Does a statutory scheme which requires a return to the same failed independent medical review process following limited review, even where substantial evidence to the contrary exists, represent a constitutionally prohibited encumbrance and a violation of the mandate for expeditious and inexpensive resolution of disputes?

Whether the Independent Medical Review process constitutes a denial of due process where there is inadequate opportunity to present evidence and be heard before an unidentified quasi-judicial officer, inadequate opportunity to seek review of a determination of that quasi-judicial officer, and where there are no protections that the quasi-judicial officer follows the appropriate standard of law?

Where Article XIV, Section 4 clearly preserves the right of appellate review, a statutory scheme which precludes such review, even as to a single determination within the system, infringes upon the powers of the Court under Article III Section 3 of the California Constitution?

VI

LEGAL ARGUMENT

A.

General Standards of Review in Constitutional Challenges

Both SCIF and the DWC provide the Court with multiple case citations setting forth general rules for judicial review of constitutional based challenges to the Legislatures statutory enactment. CAAA does not disagree with the assertion that the legislation is entitled to a presumption of constitutionality with all doubts resolved in favor of the statutes validity. CAA acknowledges the board authority of the Legislature under the plenary power language of Article XIV, section 4 to enact a complete system of workers' compensation. However, it is clear that that power is not limitless. A closer scrutiny of both the standard of review applicable to a constitutionally based challenge and the true extent of the definition of a "complete system" is necessary for the Court to reach a proper conclusion in this case. Amicus asserts that there is simply no interpretation of the restrictions on review and denial of due process in the statutory scheme that can be reconciled with the plain meaning of the definitional words of Article XIV, section 4.

A more complete summary of the scope of review can be found in *The Hess Collection Winery v California Agricultural Labor Relations Board* (2006) 140 Cal.App.4th 1584. The Court provides the following summary:

> "In considering a facial constitutional challenge to a statute, we uphold the statute unless its unconstitutionality plainly and unmistakably appears; all presumptions favor its validity. (City of Los Angeles v Superior Court (2002) 29 Cal. 4th 1, 10-111[,124 Cal. Rptr.2d 202, 52 P.3d 129]; Pryor

v Municipal Court (1979) 25 Cal.3d 238, 253-255 [,158 Cal. Rptr. 330, 599 P2d 636]

It has been said that a facial challenge can succeed only if the statute inevitably poses a present total and fatal conflict with applicable constitutional prohibitions. (People v Gallegos (1997) 54 Cal. App.4th 252, 262[, 62 Cal. Rptr.2d 666].) However, in American Academy of Pediatrics v. Lundgren (1997) 16 Cal.4th 307[, 66 Cal. Rptr.2d 210, 940 P. 797], which held invalid a statute requiring a pregnant minor to secure parental consent or judicial authorization for an abortion, the California Supreme Court said: 'A statute that imposes substantial burdens on fundamental privacy rights with regard to a large class of persons may not be sustained against a facial constitutional attack simply because there may be a small subclass of persons covered by the statute as to whom a similarly but much more narrowly drawn statute constitutionally could be applied. Thus, a facial challenge to a statutory provision that broadly impinges upon fundamental constitutional rights may not be defeated simply by showing that that there may be some circumstances in which the statute constitutionally could be applied, when there is nothing in the language or legislative history of the provision that would afford a reasonable basis for severing the asserted constitutionally permissible application of the statute from the provision's unconstitutional applications.' [Citation] (Banning v Newdow (2004) 119 Cal.App.4th 438, 446-447, 14 Cal. Rprt.3d 447)

It is established that in reviewing quasi-legislative actions of administrative agencies the scope of judicial review is limited to an examination of the proceedings before the agency to determine whether its actions have been arbitrary, capricious, or entirely lacking evidentiary support, or whether it has failed to follow the procedure or give notice required by law." (McKinny v Board of Trustees (1982) 31 Cal.3d 79,88, 181 Cal Rptr 549, 642 P.2d 460, quoting County of Orange v Heim (1973) 30 Cal App.3d 694, 719, 106 Cal.Rptr. 825.)"

The Court in *The Hess Collection* lays out the distinction between quasi-judicial and quasi-legislative action:

"An administrative action is quasi-judicial, or quasi-adjudicative, when it consists of applying existing rules to existing facts. (20th Century Ins. Co. v Garamendi (1994) 8 Cal.4th 216, 275, 32 Cal. Rptr. 807, 878 P.2d 566.) The creation of new rules for future application, such as is done here, is quasi-

> legislative in character. (Ibid). This is even though the action is, as here, taken in an individual case. (Id at p. 277, 32 Cal. Rptr 2d 807, 878 P.2d 566.)
>
> The distinction has considerable significance because a variety of matters, such as the decision-maker, the right to and nature of hearing, the standards applied, and the scope of judicial review, vary between quasi-judicial and quasi-legislative acts."

Key to the more in depth analysis of constitutional review, which the arguments of both Respondents fail to fully address, is the decision in the matter of *Bayscene Resident Negotiators v Bayscene Mobile Park* (1993) 15 Cal. App.4th 119 in which a statutory scheme requiring private parties to submit to compulsory binding arbitration was struck down as a denial of due process where appellate review was limited to issues of fraud, corruption or other misconduct by the arbitrator. Failure to provide judicial review of evidentiary issues proved fatal to the Legislation.

In an unsuccessful constitutional challenge to a legislation to allow for an alternative dispute resolution of workers' compensation claim through a mediation/arbitration process negotiated as part of a collective bargaining agreement outside the normal adjudication process before the WCAB, the statutory scheme was found to be within the plenary power of the Legislature. (*Costa v. WCAB* (1998) 65 Cal. App. 4th 1177). However it should be noted that the Court found that the system provided adequate protections "since it requires the administrative director to approve proposed ADR plans and monitor their operations. The statute also expressly prohibits such plans from diminishing certain benefits and makes arbitration decisions subject to review by the WCAB." The Court specifically declined to address concerns of due process and equal protection which were only raised in amicus briefs and not by the Petitioner.

Likewise, the Courts have held that with regard to due process challenges the standard is whether a legitimate government purpose exists in restricting access to benefits. The strict scrutiny standard is not applicable in matters of workers' compensation as injured workers are not members of a suspect class, nor does the provision of workers' compensation benefits bear upon a fundamental right. (*Sakotas v WCAB* (2000) 80 Cal.App. 4th 262**.** The Court may not overturn a statute where the legislative history demonstrates the legislation it is related to a legitimate government purpose. (*Hansen v. WCAB* (1993) 18 Cal. App. 4th 1179)

While the powers of the Legislature are broad they are still limited by the definitional provisions imbedded in the statute. Thus it is beyond the authority provided in Article XIV, Section 4 for the Legislature to attempt to extend benefits to entities not specified. That is past legislative attempts to extend benefits to the State before modification of the Constitution and to the estate of the injured worker where no dependents existed were rejected as beyond the authority of the legislature. Likewise while a provision that limits or excludes certain employees from benefits based upon intentional actions, efforts to impose or exclude additional liability based upon tort principles grounded in negligence would fail constitutional review. Likewise, a system which provided for no medical care, only first aid care or limit care to either that which was designed to cure or that which was designed to relieve from the effects of the injury would likely not survive a facial constitutional challenge. It is clear that the Legislature has the power to limit or cap access to specific modalities of care. The Constitution provides that the elements of a complete system defined within Article XIV Section 4. The Legislature does not have the power to go beyond those definitions. One such

definition is that “all” dispute determinations must be subject to review by the courts of appeal. Even the exclusion of one such determination exceeds the authority of the Legislature despite the broad nature of that authority.

B
The Role of the IMR Reviewer

Respondent State Fund argues extensively that the IMR review is an arbitrator. However nowhere in the legislation does the legislature express an intent to set up a system of arbitration. Likewise, the scheme is not akin to an alternative dispute resolution system. If the Legislature had intended such alternatives one would expect the Legislature to clearly identify the intent to do so. The Legislature has established both systems of arbitration and alternative dispute resolution mechanisms within the workers’ Compensation system. On each occasion these systems have been clearly defined as either a system of arbitration or as an alternative dispute resolution mechanism. Here the Legislature has simply removed from the WCAB the jurisdiction to determine disputes regarding medical appropriateness and assigned the adjudication of those disputes to the administrative director through the IMR review mechanism.

Respondent State Fund set forth the applicable uncodified sections of sections SB 863 beginning at page 10 of its Answer. These sections demonstrate the complex three part role the Legislature has assigned to the IMR physician. The physician is assigned quasi-legislative, expert witness and quasi-judicial duties. Here the Legislature has assigned to the IMR the final determination of the new standard of evidence based medicine- a quasi-legislative process as defined by *The Hess*

Collection (supra). The second identified purpose is to replace the expert opinion of the AME/QME expert witness process. Finally, the purpose to replace the role of the WCAB is a quasi-judicial act.

The arbitrary nature of the quasi-legislative function of the IMR reviewer is clearly illuminated based on the facts of this case. Petitioner's designated treating physician submitted four requests for authorization of medical care. In connection with these requests he submitted written reports citing specific provisions within the MTUS supporting the requested treatment. State Fund pursuant to the utilization procedures submitted the requests to its selected UR physician who cited different portions of the MTUS to justify the denial of care. The matter then went to the IMR reviewer. Without any analysis as to why the treating physician's analysis was lacking or improper the IMR reviewer adopted the UR physician's approach under the MTUS. Here a different IMR reviewer could have just as easily justified the care based upon the provisions of the MTUS relied upon by the treating physician. Thus both parties must try to apply an ill-defined standard of care in making treatment decisions prior to the ultimate determination of the definitional scope of care which must be the first step to each IMR determination

Certain aspects of the quasi-legislative role are of concern. Here the Legislature has directed the Administrative Director to refer the quasi-legislative role out to a nongovernmental private corporation who then assigns the responsibility to an agent outside the control of the any governmental agency. Each IMR reviewer is free to establish a unique standard of care subject to arbitrary and capricious determinations without the parties knowing his identity.

There appears to be no legitimate governmental purpose in hiding allowing a

private corporate entity to perform a government function particularly where the statutory provisions create a rebuttable presumption in the treatment utilization schedule (hereinafter MTUS) developed by the Administrative Director. Here we now have two separate presumptively correct standards of care with the unidentified agent of a nongovernmental entity who sets the second standard having complete control over which applies.

Petitioner's concerns regarding ability to cross-examine the expert IMR reviewer is legitimate despite the contention that as the quasi-judicial officer is not subject to such a requirement. The IMR reviewer is directed to employ his or her medical expertise to the question of need for medical care. However, there is simply no mechanism for determining whether the IMR reviewer's opinion constitutes substantial evidence. Both the UR physician and the IMR physicians do not examine the injured worker. It is difficult to imagine that a non-examining physicians can acquire the sufficient clinical knowledge to assess the many expert medical judgments necessary both in the application of the MTUS and the rebuttal of the MTUS. Clinical observations and adequate medical histories play a significant role in such determinations. The MTUS itself highlights the importance of the physical examination in general and with regard to many specific treatment determinations. Historically in workers' compensation a non-examining physician's opinion rarely rose to the level of substantial evidence. Likewise, an opinion based upon incorrect medical or legal theories, incorrect histories, or based upon surmise or conjecture could not stand as substantial evidence. Here there is simply no opportunity to demonstrate any potential defect in the determination of the IMR doctor as an expert.

Without judicial review of the issue of medical treatment conflicts it renders the presumption of correctness in the MTUS without meaning. The stated legislative goal of assuring that the ultimate determination of appropriate care rest with medical experts rather than non-expert judicial officers is not served by this scheme. Clearly dispute only arises where there exists a difference of opinion between medical experts as to appropriate care. It has long been established that neither the WCAB nor the appellate courts have the authority to substitute unsubstantiated lay opinion for expert medical evidence. It has always been the case, that the judicial officer does not make determinations of medical necessity. Instead it is the role of the judicial officer to resolve disputes in the medical evidence and must rely upon expert opinion that rises to the level of substantial evidence to award medical care. It is without a doubt within the power of the Legislature to define medical care as that which is supported by the MTUS subject to a further hierarchy of review where the MTUS is either inapplicable or subject to rebuttal. However, transferring the role of judicial determination from the WCAB and appellate courts to a nongovernmental agency serves no governmental purpose. Clearly, the Legislature could create a “medical court” to address treatment disputes without allowing for judicial review in the form of Reconsideration and appellate court review as was done in the ADR process discussed in *Costa*. (supra)

Two individuals injured in the course of their employment with the exact same diagnosis and treatment recommendations are subject to two different standards of scope of care without meaningful opportunity to challenge such determinations where the “ultimate” determiner controls that scope of care; serves in the capacity

of expert medical witness; and the final adjudicator of the dispute.

C

A statutory scheme which eliminates judicial review of one type of decisions is facially constitutionally defective.

The plain language of Article XIV, Section 4 clearly states that all decisions of any legislative created tribunal must be subject to judicial review by the appellate courts of this State. To the extent that the decision adopted by the Administrative Director after IMR on the issue of medical necessity represents a determination by an administrative tribunal a bar to any judicial review of that determination presents an unmistakable, total and fatal conflict with the applicable constitutional prohibition. The mandate of judicial review extends to all decision; not some decisions; not all but one decision. Both Respondents affirm the adjudicative nature of the role of the IMR review. State Fund goes to great length to describe the IMR reviewer as an arbitrator despite the fact the statute does not identify the reviewer in that capacity. The reviewer is a nongovernmental quasi-judicial officer when fulfilling his duties to resolve the disputed care. The determination of the reviewer is limited to the disputed care.

While the Legislature clearly has the power to define the scope and extent of care necessary to cure or relieve from the effects of a work injury, set evidentiary standards and presumptions, and define the scope of review even to a standard of clear and convincing evidence, it does not have the power to outright ban review of the treatment determination.

D

Where there is no ultimate remedy for defective IMR, the Legislature has created an encumbrance upon the system affecting both parties

If either party is aggrieved by an IMR determination adopted by the Administrative Director, the limited review cannot address the question of medical necessity even where there is clear and convincing evidence that the decision is contrary to the presumed correct MTUS. To the extent that such evidence requires more than ordinary knowledge it cannot serve as a basis for reversing the determination. Thus where an expert medical opinion of the designated treating doctor exists which substantially supports the presumed correct MTUS recommended treatment the determination remains beyond the scope of review. Likewise even where the injured worker obtains the unlikely result of overturn an initial IMR determination under one of the specified limited basis for review the only remedy is return to the same process that has already failed the parties. Thus the injured worker has the prospect of never-ending process of repeatedly being returned to a process while treatment deemed presumptively necessary under the MTUS is delayed and denied. The lack of an avenue to provide a final determination is contrary to the mandate of expeditious resolution. Even though the DWC set out a scenario where in some cases the newly adopted procedure might be more expeditious than the previous AME/QME process, the fact that no final relief is guaranteed renders the process fatally flawed as discussed in *Banning v Mewdow* (supra).

Such a system encourages injured worker to seek necessary care outside the workers' compensation transferring the employers' responsibility to bear the expense of work injuries as a cost of providing goods and services to general

medical health plans and governmentally funded systems of health care. The need for care does not disappear as a result of an arbitrary, capricious or incorrect IMR based denial. It is only human nature that people will seek out alternative avenues to obtain care.

This is the essence of the concern of an encumbrance. Clearly, it is settled law that an encumbrance is not a restriction upon specific modalities of care such as hard limits on the number of chiropractic or physical therapy session. It is not a limitation on access to doctors through an employer sponsored Medical Provider Network. A constitutional prohibited encumbrance has not been clearly defined. However, where a statutory scheme serves to block or preclude care which is otherwise presumed appropriate it rises to the level of an encumbrance

E

The limited scope of review which is purportedly provided under Labor Code Section 4610.6 is wholly illusory and constituted a denial of due process

As noted above, the core determination of the IMR review is not subject to any review. The determination of medical necessity is outside the reach of either the WCAB or the appellate courts. The remaining ground for appeal are no more meaningful where the review is done without a hearing by an unidentified reviewer. The parties are precluded from developing evidence to support any of the enumerated grounds for review. The system provides only for a declaration by the IMR organization regarding the qualifications of the reviewer, the absence of conflict of interest or bias. The standard of proof requiring clear and convincing evidence cannot be met without a full hearing, an evidentiary record and a full

analysis of the determination by the reviewer. A mere listing of submitted documents and reference to a particular section or provision of the MTUS does not provide enough information to determine what evidence might satisfy the clear and convincing standard. Finally, as to the fifth criteria – "that the determination was the result of plainly erroneous express or implied finding of fact is a matter of ordinary knowledge … and that is not a matter that is subject to expert opinion" (Labor Code section 4610.6(h)(5)) this likewise is meaningless as the IMR reviewer is limited to making a determination of medical necessity which is defined as an act requiring medical expertise.

This conundrum is highlighted by the recent WCAB *en banc* decision of *Dubon v World Restorations* (2004) 79 Cal Comp Cases 1298. The case involved the scope of review by the WCAB of the validity of the employer controlled utilization review process which proceeds the IMR process. In this case the Board reversed its own earlier ruling asserting jurisdiction over all technical and procedural defects in the utilization review process with a reservation of the authority to rule upon treatment disputes where substantial medical evidence exists to support the award of care. In its most recent opinion the WCAB found it only had jurisdiction over the question of timeliness of the UR process and no other defect as those should be submitted to the IMR expert. However, the statutory mandate of the IMR review is limited to questions of medical necessity and not procedural UR defects. The board application of IMR with its limited appeal is to in effect render UR meaningless.

F

The legislative scheme represents an constitutionally prohibited infringement by the Legislature upon the powers of the Judiciary in violation of the

Separation of Powers Clause and the mandate for judicial review in Article XIV, Section 4

While it is clear that the plenary power of the Legislature regarding the creation of a system of workers' compensation is unrestricted by any other provision of the Constitution, Article XIV, Section 4 specifically reserves the role of judicial review by the appellate courts. The Legislature attempts to infringe upon the role of the courts by asserting that there is a crisis of judicial officers rendering determinations with regard to the need for medical care without the benefit of expert medical opinion. In fact the Courts have repeatedly acknowledged that where a determination requires expert opinion it is inappropriate for a judicial officer to substitute his or her lay opinion for the opinion of the expert. The Courts have consistently acknowledge within the content of workers compensation claims it is inappropriate to rule on medical in the absence of expert medical opinion that constitutes substantial evidence. (see *Levesque v WCAB* (1970) 1 Cal 3d 627; *Ronnie Barnes v WCAB* (2000) 23 Cal.4th 681; *State Compensation Insurance Fund v WCAB(Sanhagen)* (2008) 44 Cal 4th 236)

V
CONCLUSION

CAAA respectfully submits that the actions of the Legislature in enacted the IMR review process facial violated the provisions of Article XIV, Section 4 of the California Constitution in the manner set out above, violates due process protections of all parties to a workers' compensation claim, and unnecessarily

infringe upon the role of the appellate courts.

CAAA respectfully urges the court to grant the Petition for Writ of Review and find the provisions of Labor Code section 4610.5 and 4620.6 and their related statutes unconstitutional.

CAAA respectfully urges the court to resist Respondents prayer to determine severability of the overall scheme as to do so would require the court to engage in quasi-legislative action.

Dated: Nov. 25, 2014 Respectfully submitted

_____

Joseph V. Capurro
Attorney for Amicus Curiae
California Applicants' Attorneys Association

Verification

I, the undersigned, say that I am the attorney of record for the California Applicants' Attorneys Association, in the matter of Frances Stevens vs. Workers' Compensation Appeals Board of the State of California, et al, Civil No. A143043. I have read the foregoing **Application to File Amicus Curiae Brief and Amicus Curiae Brief** and know of the contents thereof, and that the same is true of my own knowledge, except as to those matters which are therein stated upon my information and belief, and as to those matters that I believe to be true.

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

Executed on November 25, 2014 at San Jose, California

_____

Joseph V. Capurro
Attorney for Amicus Curiae
California Applicants' Attorneys Association

CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using 14 point Times New Roman typeface. According to the Word Count in my Microsoft Word for Windows software contains 5984 words up to and including this Certificate of Compliance.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on:

November 25, 2014

_____

Joseph V. Capurro
Attorney for Amicus Curiae
California Applicants' Attorneys Association

PPROOF OF SERVICE BY MAIL
(Code Civ. Proc., 1013a, 2015.5)

I declare that I am a Citizen of the United States, employed in the City of San Jose in the County of Santa Clara. I am over the age of eighteen years and not a party to the within entitled action. My business address is 300 S. First Street, Suite 245, San Jose, CA 95113. On November 25, 2014, I served the attached **APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF** on the parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid for deposit with the United States Postal Service at San Jose, CA addressed as follows:

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Administrative Director of Division of Workers' Compensation
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Workers' Compensation Appeals Board (2 Copies)
Attention: Writs
P.O. Box 429459
SAN FRANCISCO, CA 94142-9459

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

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

Executed on November 25, 2014, at San Jose, CA

Norma Martinez