Civil A143043

In The

Court of Appeal

of the

State of California

First Appellate District, Division 1

FRANCES STEVENS,
Petitioner,

vs.

OUTSPOKEN ENTERPRISES /
STATE COMPENSATION INSURANCE FUND;
WORKERS' COMPENSATION APPEALS BOARD;
and the ADMINISTRATIVE DIRECTOR,
DIVISION OF WORKERS' COMPENSATION,
Respondents.

Civil A143043; WCAB Case No. ADJ1526353 (SFO 0441691)
Hon. Francie Lehmer, San Francisco Office, WCAB

Response to the Amicus Curiae Brief of the California Applicants' Attorneys Association

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To the Honorable Presiding and Associate Justices of the California Court of Appeal, First Appellate District, Division 1, from Respondents, OUTSPOKEN ENTERPRISES and its workers' compensation insurer STATE COMPENSATION INSURANCE FUND ("STATE FUND"):

Introduction

California's workers' compensation system obliges employers to provide medical treatment which is reasonably required to cure or relieve the injured worker from the effects of his or her injury.[1] "Reasonable" has been defined as treatment pursuant to the Medical Treatment Utilization Schedule (MTUS) or other evidence-based medical treatment guidelines that are recognized generally by the national medical community and scientifically based. [2]

Before SB 863 (Stats. 2012, ch. 363), an injured worker's primary treating physician (PTP) would submit a request for authorization (RFA) for medical treatment, on which the employer (or its insurer) may conduct utilization review (UR). If the employer denied the RFA, and if the injured worker disputed the UR denial, then the parties sought opinions from other medical evaluators and the UR dispute was decided by a workers' compensation judge (WCJ). The injured worker had the burden of proof. [3] Thereafter, an injured worker could file a petition for reconsideration with the Workers' Compensation Appeal Board (WCAB), [4] and if still aggrieved,

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[1] Labor Code section 4600

[2] Labor Code section 4604.5

[3] *State Comp. Ins. Fund. v. Workers' Comp. Appeals Bd.* (*Sandhagen*) (2008) 44 Cal.4th 230, 242: "The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden of proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34, § 9.) Accordingly, notwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§ 4604.5)."

[4] Labor Code section 5900

an injured worker could file a petition for writ of review with a Court of Appeal. [5]

After SB 863, the procedure is similar, except now the injured worker, who disputes a UR denial, must carry his or her burden of proof via the independent medical review (IMR) process under the Administrative Director and not before the WCJ and WCAB. [6] [7] The injured worker or his/her representative may send to IMR the medical records, clinical observations, medical histories, and other records s/he deems relevant, to support his/her claim for the requested treatment. If the IMR decision is adverse, the IMR Appeal process enables an injured worker to obtain an additional IMR. [8] And the injured worker continues to have the legal right to file a petition for reconsideration with the (WCAB), [9] and if still aggrieved, an injured worker may still file a petition for writ of review with a Court of Appeal. [10]

Even if the UR denial is not reversed, a UR denial of an RFA is not permanent. A UR decision to modify, delay or deny a RFA remains effective only for 12 months (from the date of the UR decision when it is the same doctor) or until there is a documented change in the facts. Thus, a

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[5] Labor Code section 5950

[6] Labor Code section 4062, subdivision (b); see also *Dubon v. World Restoration* (*Dubon II*) (2014) 79 Cal.Comp.Cases 1298, 1304 - 1305 (en banc)

[7] The workers' compensation IMR provisions are fashioned upon the IMR provision found in group health care, including California Health & Safety Code sections 1374.30 – 1374.36. The California workers' compensation and HMO IMR both use anonymous IMR evaluators. Both DWC (workers' compensation) and DMHC (HMO) post the IMR results online. And both DWC and DMHC use the same IMRO.

[8] Labor Code section 4610.6, subdivision (i)

[9] Labor Code section 5900

[10] Labor Code section 5950

RFA for the same treatment could be immediately re-submitted when: the RFA is submitted by a different doctor; or the doctor (same treating physician) documents a change of facts. [11]

Questions Presented

(1) Does the Legislature have broad plenary power over workers' compensation?

(2) May the Legislature fix the manner of review of IMR determinations?

(3) Do the Labor Code sections permit appellate review?

(4) Are the Labor Code sections compliant with due process?

(5) Does Labor Code section 4610.6 provide substantial justice, expeditiously, and without encumbrance?

ARGUMENT

I.

The Legislature has broad plenary power

Article XIV, section 4 of the California Constitution provides, in pertinent part:

> The Legislature is hereby expressly vested with **plenary power**, **unlimited by any provision of this Constitution**, to create, and enforce a complete system of workers' compensation, . . .
>
> 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**

[11] Labor Code section 4610, subdivision (g)(6)

> **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. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.
> . . .
> (Emphasis added.)

Per the California Constitution, the Legislature has plenary power to decide who decides issues, what evidence may be used, and how such decisions may be reviewed. Article XIV, section 4 of the California Constitution specifically provides the Legislature may fix the manner of review.

The Supreme Court in *Mathews v. Workmen's Comp. Appeals Bd* (1972) 6 Cal.3d 719 (*Mathews*), clarified that rather than imposing a mandate on the Legislature to create and enforce an unlimited system of workers' compensation benefits, the California Constitution re workers' compensation was intended to safeguard the full, unfettered authority of the Legislature to legislate in this area, as it saw fit. That intent was not to impose a lawmaking mandate upon the Legislature, but to endow that body expressly with exclusive and "plenary" authority to determine the contours and content of our state's workers' compensation system, including the power to limit benefits.

SB 863 uncodified section 1(g) declares the Legislature's plenary power to create the independent medical review process under the Administrative Director:

> That the establishment of independent medical review and provision for limited appeal of decisions resulting from independent medical review are a necessary exercise of the

> Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of this state and to control the manner of review of such decisions.
>
> (Stats. 2012, ch. 363, § 1(g) [uncodified].)

II.

Constitutional Construction Rules

In considering a facial constitutional challenge to a statute, it will be upheld unless its unconstitutionality appears plainly and unmistakably; and all presumptions favor its validity. *City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 10-11; *Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 780; *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 253-255; *Fox v. Federated Department Stores, Inc*. (1979) 94 Cal.App.3d 867; *L. B. Foster Co. v. County of Los Angeles* (1968) 265 Cal.App.2d 24. Any doubt as to the Legislature's authority to act in a given area must be resolved in favor of the legislative action and the enactment must not be construed to embrace matters not covered by the language of such enactment. *City and County of San Francisco v. Workers' Comp. Appeals Bd*. (1978) 22 Cal.3d 103. Legislative enactments must be construed in a manner that seeks to harmonize the statute and the Constitution. *Welton v City of Los Angeles* (1976) 18 Cal.3d 497.

III.

IMR determinations are subject to appellate review

CAAA asserts the statutory process strips injured workers of the right to judicial review of an IMR determination. Per Labor Code 4610.6, subdivision (h), an injured worker may appeal an adverse IMR decision on one or more of the following grounds:

> **(1)** The administrative director acted without or in excess of the administrative director's powers.
> **(2)** The determination of the administrative director was procured by fraud.
> **(3)** The independent medical reviewer was subject to a material conflict of interest that is in violation of Section 139.5.
> **(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.
> **(5)** The determination was the result of a plainly erroneous express or implied finding of fact, provided that the mistake of fact is a matter of ordinary knowledge based on the information submitted for review pursuant to Section 4610.5 and not a matter that is subject to expert opinion.

If the IMR appeal is unsuccessful, then the injured worker continues to have the legal right to file a petition for reconsideration with the WCAB,[12] and if still aggrieved, an injured worker may still file a petition for writ of review with a court of appeal. [13]

The Board is required to set aside any IMR determination that is based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or action in excess of the AD's powers. This is similar to the statutory scheme of the Agricultural Relations Board which the Third District Court of Appeal held was constitutional. In *Hess Collection Winery v. Agricultural Labor Relations Boar*d (2006) 140 Cal.App.4th 1584, 1601, the Court stated:

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[12] Labor Code section 5900

[13] Labor Code section 5950

> The statutory scheme requires that the mediator set forth the basis for his determinations and that the record support those determinations. (§ 1164, subd. (d).) The Board is required to set aside any portion of the mediator's decision that is based upon clearly erroneous findings of fact or that is arbitrary and capricious in light of the findings. (§ 1164.3, subds. (a), (b).) A party has the right to judicial review of the Board's decision, which includes whether the Board acted without or in excess of jurisdiction and whether the Board's order was an abuse of discretion. (§ 1164.5, subd. (b).) Excess of jurisdiction and abuse of discretion necessarily include limited factual review, that is, whether the decision is wholly lacking in evidentiary support. That is all the judicial review to which a party challenging a quasi-legislative determination is entitled. Thus, the statutory scheme gives Hess the scope of judicial review that is constitutionally required.

Similar to *Hess*, the Legislature provided for limited factual review of IMR determinations as one of the grounds for appeal in Labor Code section 4610.6, subdivision (h)(5).

III.

Bayscene and *Costa* are distinguishable

CAAA's reliance on *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 (*Bayscene*) and *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177 (*Costa*) are misplaced. As explained in *Hess Collection Winery v. Agricultural Labor Relations Boar*d (2006) 140 Cal.App.4th 1584, 1601 - 1602:

> Hess's reliance on *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 [18 Cal.Rptr.2d 626] (*Bayscene*), is misplaced. That case involved a city's ordinance providing for compulsory

> arbitration of disputes over proposed rent increases. The ordinance did not provide for review of the arbitrator's decision by anyone, either the city council or the courts. The Court of Appeal assumed that general Code of Civil Procedure provisions applicable to private, voluntary arbitration would apply. Those provisions generally limit review of an arbitration award to issues of fraud, corruption, or other misconduct. (*Id*. at p. 134.) Unless the parties have agreed otherwise, a private, voluntary arbitration decision will not be reviewed for errors of fact or law, and will not be reversed even for error on the face of the award that causes substantial injustice. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 11, 28 [10 Cal.Rptr.2d 183, 832 P.2d 899].)
>
> It ought to be clear, as the *Bayscene* court concluded (*Bayscene, supra,* 15 Cal.App.4th 119), that a legislative body cannot compel a private party to submit to final, binding arbitration without any right of judicial review for errors of fact or law. But the Legislature did not do so with respect to agricultural employers. The statutory scheme at issue preserves the right to judicial review with adequate factual review for quasi-legislative purposes. The *Bayscene* decision is inapposite.

As explained in *Facundo-Guerrero v Workers' Compensation Appeals Board* (2008) 163 Cal.App.4th 640, 653:

> Nor are petitioner's citations to *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 [18 Cal.Rptr.2d 626] (*Bayscene*) and *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177 [77 Cal.Rptr.2d 289] (*Costa*), of assistance. In *Bayscene*, Division One of the Fourth District Court of Appeal struck down on due process grounds a city ordinance which required binding arbitration for mobilehome 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.) 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.

In *Costa,* an electrician filed a claim for benefits with the WCAB and requested an expedited hearing because he was in " 'dire need of medical treatment including home care.' " (*Costa, supra*, 65 Cal.App.4th at p. 1181.) There, the court considered the constitutionality of provisions in a collective bargaining agreement that required employees to exhaust contractual grievance and arbitration procedures before exercising their constitutional right of review by the WCAB. Because the applicable constitutional provision specifically authorized the use of arbitration to resolve workers' compensation claims and the arbitration decisions were subject to review by the WCAB and the Courts of Appeal, the court held that the provisions were lawful. Not only did *Costa* involve a clear legal and factual dispute, but it is difficult to understand how the holding in this case bears on petitioner's argument, and petitioner's brief on this point is unhelpful.

In conclusion, we find nothing unconstitutional about section 4604.5(d). As we have already discussed, the Legislature has legal authority to enact a law limiting petitioner's right to receive chiropractic treatment. The fact that our state lawmakers decided to allow an employer to remove the 24-visit cap does not constitute an unconstitutional delegation of power. 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)

In *Bayscene*, *supra*, 15 Cal.App.4th 119 the city ordinance did not provide for review of factual errors; thus, it was constitutionally flawed. In the present case, the Board is required to set aside any IMR determination that is based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or action in excess of the AD's powers. (Lab. Code § 4610.6, subd. (h).) When an IMR determination is reversed by the WCJ/WCAB, it is referred back to the AD for another IMR (by a different evaluator). This is similar to the statutory scheme of the Agricultural Relations Board addressed in *Hess, supra,* 140 Cal.App.4th 1584, which utilized an interim remedy of referral back to the arbitrator. In *Costa*, *supra*, 65 Cal.App.4th 1177, the Court held workers' compensation could be supplanted by mandatory arbitration (ADR). Thus, it is respectfully submitted the IMR statutes in this case are similar to *Hess* and *Costa*, and are therefore facially valid.

IV.

Labor Code section 4610.6 provides for substantial justice, expeditiously, and without encumbrance

SB 863 uncodified section 1(d) declares the Legislature's recognition of problems with the Appeals Board resolving disputes over medical necessity:

> That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.
>
> (Stats. 2012, ch. 363, § 1(d) [uncodified].)

Uncodified section 1(e) is evidence of the Legislature's intent to have the independent medical review process under the Administrative Director replace the Appeals Board as the arbiter of medical necessity disputes. Section 1(e) states:

> That having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to **using evidence-based medicine** to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy.
>
> (Stats. 2012, ch. 363, § 1(e) [uncodified]. Emphasis added.)

The Legislature's motivation was to help both employers and injured workers. The report of the Senate Committee on Labor and Industrial Relations states the purpose of SB 863 is:

> To **reduce frictional costs**, **speed up medical care** for injured workers, and to increase Permanent Disability (PD) indemnity benefits to injured workers.
>
> (Senate Committee on Labor and Industrial Relations, 3d reading analysis of SB 863 (2011-2012 Reg. Sess.) as amended August 30, 2012, at pg. 1. Emphasis added.)

That same report explains why the legislature chose to eliminate the Appeals Board's jurisdiction to determine issues of medical necessity:

> SB 863 proposes to change the way medical disputes are resolved. Currently, when there is a disagreement about medical treatment issues, each side attempts to obtain medical opinions favorable to its position, and then counsel for each side tries to convince a workers' compensation judge based on

> this evidence what the proper treatment is. **This system of "dueling doctors" with lawyers/judges making medical decisions has resulted in an extremely slow, inefficient process that many argue does not provide quality results.** Long delays in obtaining treatment result in poorer outcomes, reduced return to work potential and excessive costs in the system, none of which are good for injured workers. SB 863 would instead adopt an independent medical review system patterned after the long-standing and widely applauded IMR process used to resolve medical disputes in the health insurance system. Thus, a conflict-free medical expert would be evaluating medical issues and making sound medical decisions, based on a hierarchy of evidence-based medicine standards drawn from the health insurance IMR process, with workers' compensation-specific modifications. The bill contains findings that this system would result in faster and better medical dispute resolution than existing law.
>
> (*Id*. at pgs. 7, 8. Emphasis added.)

"Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Ca1.3d 1379, 1387. The Legislative history demonstrates SB 863 is to change the way medical disputes are resolved and the uncodified portions of SB 863 contain Legislative findings that the independent medical review process under the Administrative Director would result in faster and better medical dispute resolution. Therefore, it is respectfully submitted the statutes result in substantial justice, expeditiously, and without encumbrance.

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Conclusion

The IMR statutes at issue are constitutional because:

- The Legislature has broad plenary power;
- Article XIV, section 4 authorizes the Legislature to establish the appropriate manner for resolving disputes, and it may fix the manner of review.
- IMR determinations, which are adverse to an injured worker, are subject to judicial review.
- The IMR process is a non-intrusive process that simply puts medical determinations in the hands of qualified medical people, instead of judges.
- The IMR process is similar to *Hess* and *Costa* (where statutes were found constitutional) and different from *Bayscene* (where a city ordinance was found unconstitutional).
- The IMR statutes are entitled to a presumption of constitutionality, will all doubts resolved in favor of the statutes validity.
- The IMR process is nondiscriminatory on its face, with a right of review of any IMR determination that are based upon plainly erroneous (express or implied) findings of fact, bias, conflict of interest, fraud or any action in excess of the AD's powers.
- The IMR process is designed to provide substantial justice, expeditiously, and without encumbrance.
- IMR determinations are common in other regulated contexts, like the group heal plans.

Therefore, OUTSPOKEN ENTERPRISES and STATE FUND respectfully request this Court hold Labor Code Sections 4610.5 and 4610.6 are a constitutional exercise of the Legislature's broad plenary power.

Dated: December 15, 2014

Sacramento, California

Respectfully submitted,

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Verification

Under penalty of perjury, I declare the truth of the following:

- The contents of the foregoing document are true and correct to my own knowledge, except as to matters stated therein on information and belief;

- The matters so stated are believed by me to be true and correct; and

- I make this verification because the facts set forth in said document are within my knowledge and because, as attorney for Respondent State Compensation Insurance Fund, I am more familiar with such facts than are the officers of State Fund.

Dated: December 15, 2014

Sacramento, California

Respectfully submitted,

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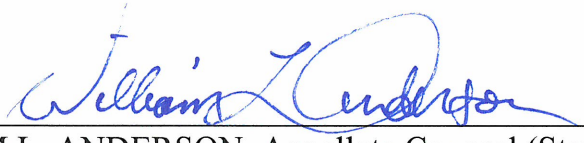
Word Count Certification

Pursuant to California Rules of Court, Rule 8.204(c)(1), I certify that the attached brief contains less than 14,000 words including footnotes, according to the word count of the computer program used to prepare the brief. According to that word count program, this brief contains 4,243 words.

Dated: December 15, 2014

Sacramento, California

Respectfully submitted,



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PROOF 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 Sacramento in the County of Sacramento, CA. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2275 Gateway Oaks Drive, Suite 200, Sacramento, CA 95833. On December 15, 2014, I served the attached **RESPONSE TO THE AMICUS CURIAE BRIEF OF THE CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION** 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 Sacramento, CA addressed as follows:

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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 Service 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 December 15, 2014, at Sacramento, CA.

Michelle I. Florentine