Case No. A150681

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

CALIFORNIA WORKERS' COMPENSATION INTERPRETERS ASSOCIATION, et al.,
Petitioners,

v.

THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA
Respondent.

RESPONDENT'S OPPOSITION TO PETITION FOR PEREMPTORY AND/OR ALTERNATIVE WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF

Christopher Jagard, Chief Counsel Kim E. Card (State Bar No. 147779) DEPARTMENT OF INDUSTRIAL RELATIONS OFFICE OF THE DIRECTOR, LEGAL UNIT 1515 Clay Street, Suite 701 Oakland, California 94612 Telephone No.: (510) 286-3800 Facsimile No.: (510) 286-1220	Mi Kim, Counsel (State Bar No. 240413) DEPARTMENT OF INDUSTRIAL RELATIONS OFFICE OF THE DIRECTOR, LEGAL UNIT 355 S. Grand Avenue, 14th Floor Los Angeles, California 90071 Telephone No.: (213) 897-3241 Facsimile No.: (213) 897-3260

Attorneys For Respondent
The Workers' Compensation Appeals Board

(Service on Attorney General required by Rules of Court 8.29(c)(2)(B))
Filing Fee Exempt – Govt. Code § 6103

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

California's Constitution grants the Legislature "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation . . . ." (Cal. Const., art. XIV, § 4.) As this Court recently instructed in *Stevens v. Workers' Comp. Appeals Board* (2015) 241 Cal.App.4th 1074, *rev. denied, cert denied,* __U.S. __, 137 S.Ct. 384 (2016), "nearly any exercise of the Legislature's plenary powers over workers' compensation is permissible so long as the Legislature finds its action to be 'necessary to the effectiveness of the system of workers' compensation.'" (*Id.*, at 1095, citing *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038, fn. 8.) Nevertheless, the Petition for Writ of Mandate before the Court presents a facial challenge to the constitutionality of workers' compensation legislation, specifically to the provisions of Senate Bill No. 1160 (2015-2016 Reg. Sess.) ("SB 1160") that amended Labor Code section 4903.05, subdivision (c), in another attempt to implore the Court to second guess the Legislature's policy decisions. (See *Stevens, supra,* 241 Cal.App.4th at p. 1096 [it is not the court's place to "second-guess the wisdom of the Legislature" in determining how best to reform the workers' compensation system].)

When the hyperbole and rhetoric of the Petition are set aside, the allegations and claims are, at bottom, nothing more than a disagreement with the manner in which the Legislature chose to deal with problems relating to provider fraud and liens in the workers' compensation system. As is addressed in detail below, the Petitioners' arguments are based on misrepresentations and errors as to the requirements of the law with respect to interpreter services and liens, both prior to SB 1160, and under the applicable statutory provisions as amended by the bill. The Petitioners do not, and cannot, establish that they have no other "plain, speedy, and

adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086; see also Labor Code § 5955; *Greener v. Workers' Comp. Appeals Bd.*, *supra*, 6 Cal.4th at p. 1045 [a writ of mandate challenging the constitutionality of a workers' compensation statute will lie only if "the criteria for relief by extraordinary relief under Code of Civil Procedure section 1085 have been met"].) Nor can they establish that they have a concrete and particularized "beneficial interest," as is required to establish standing to seek extraordinary relief. (See Code Civ. Proc., § 1086; *People ex rel. Dep't of Conservation v. El Dorado Cty.* (2005) 36 Cal.4th 971, 986 ("*Dep't of Conservation"*) [the standard requires a party to prove that it has suffered an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent].)

To the extent Petitioners have liens on file in the workers' compensation system, or new liens they wish to file, that they claim are valid under statutory and regulatory provisions pre-dating SB 1160, they may file the declarations in support of those liens now required by Labor Code section 4903.05, subdivision (c) (referred to by Petitioners as "the Declaration provision"). Because the workers' compensation system is an adjudication system, Petitioners will have a full opportunity "in the ordinary course of law" to litigate and to defend both the validity of those liens and the propriety of the declarations they file in support of them. (Code Civ. Proc., § 1086.) The Workers' Compensation Appeals Board ("WCAB") is charged with and fully capable of adjudicating lien claims, including the basic threshold question of whether an interpreter's lien was valid under the law pre-dating SB 1160. The WCAB is also wholly capable of adjudicating whether a proper declaration has been filed in support of a lien, and of construing the categories in new Labor Code section 4903.05, subdivision (c), consistent with the Legislature's express intent to include all categories of valid liens in the Declaration provision. (See discussion,

infra.) To the extent any interpreter is denied recovery on a lien, and blames such denial on the new Declaration provision in Labor Code section 4903.05, he or she is entitled under Labor Code section 5950 to appeal that decision by petition for a writ of review to a Court of Appeal or the Supreme Court, and will have the opportunity at that point to raise any alleged claim of unconstitutionality. Thus, Petitioners clearly have a "plain, speedy, and adequate remedy, in the ordinary course of law," and extraordinary relief is entirely unnecessary and unwarranted. (Code Civ. Proc., §§ 1085, 1086.)

The Petition must also be denied because the underlying claims of unconstitutionality are without substance or merit. (See, e.g., *Stevens, supra,* 241 Cal.App.4th at pp. 1092-93; *Bldg. Indus. Ass'n of the Bay Area v. City of San Ramon* (2016) 4 Cal. App. 5th 62, 90 ["Facial challenges to statutes and ordinances are disfavored."].) This is demonstrated by the Petition itself, almost the entirety of which is devoted to descriptions of difficulties faced by lien claimants in the workers' compensation system, arguments about the necessity of the decisions made in this latest round of reforms, and bickering over the precise terms used in crafting the anti-fraud provisions (i.e., arguments "second guessing" the Legislature). Of the 66-page Petition, there are only five pages addressed to the substantive legal arguments concerning Petitioner's alleged due process claims, and only one page devoted to legal arguments concerning the alleged "right to petition." (Petition, at pp. 60-65.) As will be addressed in detail below, those arguments are wholly without merit. There is no viable constitutional claim presented. The Petition should be denied outright in its entirety.

BACKGROUND

I. Introduction to the 2016 Reform Legislation.

In the 2016 legislative session, as part of its continual oversight and review of the workers' compensation system, the California Legislature sought to address a number of issues, including a long-simmering problem of fraud perpetrated by medical and other ancillary service providers and a related backlog of workers' compensation liens of questionable validity. The problem was essentially three-fold: 1) some medical and other providers were engaging in fraud or criminal conduct, and were filing liens within the workers' compensation system for services that were either never authorized or never provided, and for which no lien was authorized and no payment was owed; 2) some providers, while not engaging in fraud, were rendering services without proper attention or documentation as to whether the service was authorized and compensable by lien recovery; and 3) some providers were rendering services properly compensable by lien filings that failed to comply with existing law and failed to establish the validity of the lien. (See, discussion *infra;* see also Labor Code §§ 4903; 4903.05; 4903.8, subd. (d).) Under earlier reforms passed in 2012 as part of Senate Bill No. 863, all liens filed within the workers' compensation were (and still are) required to be "accompanied by a full statement or itemized voucher supporting the lien *and justifying the right to reimbursement* . . . ." (Lab. Code, § 4903.05, subd. (a).)[1] (See also Cal. Code Regs., tit. 8, § 10770, subd. (c) [lien claims must be accompanied by a declaration under penalty of perjury supporting the lien pursuant to Labor Code section 4903.8, subdivision (d) and "any other declaration or form required by law . . . ."].) Despite these provisions, too many service providers were filing and serving liens without supporting documentation

[1]All future section references are to the Labor Code unless otherwise specified.

and without providing the necessary justification as required under existing provisions of the Labor Code and applicable regulations.

In response, and as part of a package of bills that also addressed a number of other issues within the system, the Legislature passed Senate Bill No. 1160. Section 16 of the bill contains, in relevant part, the following important legislative findings and declarations about the anti-fraud provisions of the bill, and how they relate to the lien filing requirements:

> (a) Section 4 of Article XIV of the California Constitution vests the Legislature with plenary power to create and to enforce a complete system of workers' compensation by appropriate legislation, and that plenary power includes, without limitation, the power and authority to make full provision for the manner and means **by which any lien for compensation for those services may be filed or enforced within the workers' compensation system.**
>
> (b) Despite prior legislative action to reform the lien filing and recovery process within the workers' compensation system, including Senate Bill 863 in 2012, **there continues to be abuse of the lien process within the workers' compensation system by some providers of medical treatment and other medical-legal services who have engaged in fraud or other criminal conduct within the workers' compensation system, or who have engaged in medical billing fraud, insurance fraud, or fraud against the federal Medicare or Medi-Cal systems.**
>
> (c) Notwithstanding fraudulent and criminal conduct by some providers of medical treatment or other medical-legal services, those providers **have continued to file and to collect on liens within the workers' compensation system** while criminal charges alleging fraud within the workers' compensation system, or medical billing or insurance fraud, or fraud within the federal Medicare or Medi-Cal systems, are pending against those providers. . . .

(Sen. Bill No. 1160 (2015-2016 Reg. Sess.) § 16, emphasis added.) (See Respondent's Request for Judicial Notice and Exhibits, Exh. 1, at pp. 41-42.)[2]

[2]A summary of the Department of Industrial Relations' efforts in 2016 to

It was out of this background that the amendments challenged in this Petition were passed. Specifically, among other provisions, SB 1160 amended section 4903.05 to require, for liens filed after January 1, 2017, the filing of an accompanying declaration under penalty of perjury verifying that the dispute is not subject to independent medical review or independent bill review, and that the lien claimant satisfies one of seven categories. (Lab. Code, § 4903.05, subd. (c).) Contrary to Petitioners' representation, the amendment containing what Petitioners refer to as "the Declaration Provision," was not a data collection measure. It was an *anti-fraud* measure, and an express attempt, once again, to require that service providers filing liens within the workers' compensation system demonstrate that the liens are valid and that the services were provided under circumstances authorized by existing provisions of the Labor Code.

The amendments to Labor Code section 4903.05 did not narrow the categories of services for which liens could be filed and payments obtained. The amendments simply required, more explicitly, that the lien filing be

---

address provider fraud, including through the provisions enacted in SB 1160, is set forth in a paper entitled "Report on Anti-Fraud Efforts in the California Workers' Compensation System," (January 2017), available at http://www.dir.ca.gov/Fraud_prevention/FRAUD-white-paper.pdf. The report contains the following description of one type of scheme resulting in improper lien filings for ancillary services:

> In some schemes, workers are solicited to present dubious claims (e.g., for a different body part supposedly affected by a previously resolved injury claim), then referred for evaluation and treatment outside the insurer's Medical Provider Network and without the insurer's knowledge, thereby eluding the Utilization Review and IMR processes and ultimately resulting in the filing of lien claims with the WCAB. [Footnote omitted.] Additional liens may be filed for drugs **and for ancillary services such as interpreters**, and the liens may be bundled and assigned to others to file, making the service provider more difficult to identify.

(Report on Anti-Fraud Efforts, p. 5, emphasis added.)

accompanied by a declaration stating, by category, the basis for the validity of the lien under other existing provisions of the Labor Code. This is noted expressly in multiple legislative committee analyses of the bill, including in this statement by the Senate Committee on Insurance:

> 5) *Lien filing requirements.* This bill establishes two new requirements that are necessary when a lien is filed. First, this bill requires additional data to be included in the filing so that, on its face, it is much easier to ascertain what services were provided, and the reasons those services were provided. Second, this bill requires the lien filer to specify from a list of statutory categories the basis upon which the lien is being pursued by a proper lien filer. The filing notification contained in the proposed amendments to Labor Code Section 4903.05 does not expand the circumstances under which the law authorizes a lien to be filed. Those authorizations are contained in other substantive Labor Code provisions. This bill is merely requiring that the lien filer specify the basis upon which the lien would be lawful.

(Sen. Com. on Ins., Sen. Floor Analysis, 3d Reading of Sen. Bill 1160 (2015-2016 Reg. Sess.), as amended August 29, 2016, p. 5; (Respondent's RJN, Exh. 3, pp. 4-5.)

II. Interpreters' Services Before SB 1160.

Much of the Petitioners' brief is misleading because it misrepresents the law governing interpreters' right to seek payment for services in the workers' compensation lien system prior to SB 1160. A brief review of the law as it existed prior to SB 1160, and as it was amended, is therefore necessary.

Labor Code section 4600 requires an employer to provide medical treatment to an injured worker, as specified (and did so long before SB 1160). If the employer neglects or refuses to do so, the employer is liable for the reasonable expenses incurred by or on behalf of the employee securing treatment (i.e., the employer is liable for the employee's "self-procured" treatment). (See § 4600, subd. (a) [medical treatment "that is

reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer. In the case of his or her neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment"].)

Subdivision (g) of 4600 specifically addresses the use of interpreters in medical treatment appointments.

> (g) If the injured employee cannot effectively communicate with his or her treating physician because he or she cannot proficiently speak or understand the English language, the injured employee is entitled to the services of a qualified interpreter during medical treatment appointments. . . . The administrative director shall adopt a fee schedule for qualified interpreter fees in accordance with this section. Upon request of the injured employee, the employer or insurance carrier shall pay for interpreter services. An employer shall not be required to pay for the services of an interpreter who is not certified or is provisionally certified by the person conducting the medical treatment or examination unless either the employer consents in advance to the selection of the individual who provides the interpreting service or the injured worker requires interpreting service in a language other than the languages designated pursuant to Section 11435.40 of the Government Code.

(Lab. Code, § 4600, subd. (g).) Thus, under section 4600, interpreters' services may be considered part of the medical treatment an employer must provide, under the conditions specified.

If the employer has established a Medical Provider Network ("MPN"), the employee is required to obtain treatment within the MPN. (Lab. Code, §§ 4600, subd. (c), 4616.3.) An MPN may include interpreting services as "ancillary services." (Cal. Code Regs., tit. 8, §§ 9767.1, subd. (a)(1); 9767.3, subd. (d)(8)(I), (J).) If the MPN includes interpreting services as ancillary services, a worker is required to obtain his or her interpreting services as part of his or her medical treatment through the MPN, unless the ancillary services are not available within a reasonable

period of time or a reasonable geographic area, in which case the injured worker may obtain the services outside the MPN within a reasonable geographic area. (Cal. Code Regs., tit. 8, § 9767.5, subd. (d).)

Conversely, if the employer has not established or contracted with an MPN, the employee may be treated by a physician of his or her choice within a reasonable geographic area. (Lab. Code, § 4600, subd. (c).) Likewise, if an employee had notified his employer in writing prior to the date of injury that he or she has a personal physician (referred to as "predesignation"), the employee has the right to be treated by that physician if the employee has appropriate health care coverage that meets the criteria for "predesignation." (See Lab. Code, §§ 4600, subd. (d); 4616.7.)

Under Labor Code section 4620, interpreters' fees, "as needed," are also defined as "medical-legal expenses" within the workers' compensation system. (Lab. Code, § 4620, subd. (a).) Subdivision (d) specifically provides:

> If the injured employee cannot effectively communicate with an examining physician because he or she cannot proficiently speak or understand the English language, **the injured employee is entitled to the services of a qualified interpreter during the medical examination.** Upon request of the injured employee, **the employer or insurance carrier shall pay the costs of the interpreter services, as set forth in the fee schedule adopted by the administrative director pursuant to Section 5811.** An employer shall not be required to pay for the services of an interpreter who is provisionally certified unless either the employer consents in advance to the selection of the individual who provides the interpreting service or the injured worker requires interpreting service in a language other than the languages designated pursuant to Section 11435.40 of the Government Code.

(Lab. Code, § 4620, subd. (d), emphasis added.)

Labor Code section 5710 also provides for the payment of interpreters' services, when necessary, for the deposition of the injured applicant or any other person claiming benefits as a dependent. (See Lab.

Code, § 5710, subd. (b)(5) ["If interpretation services are required because the injured employee or deponent does not proficiently speak or understand the English language, upon a request from either, the employer shall pay for the services of a language interpreter certified or deemed certified pursuant to . . . ."].)

And Labor Code section 5811 provides, in general terms, for the payment of interpreters' fees "that are reasonably, actually and necessarily incurred" for services during a deposition, an appeals board hearing, a medical treatment appointment, or a medical-legal examination. (Lab. Code § 5811, subd. (b)(2); see also Cal. Code Regs., tit. 8, § 10564 [WCAB Rules of Practice and Procedure provide for payment of interpreters' fees that are "reasonably, actually and necessarily incurred" as allowed by Labor Code sections 4600, 4620-21, 5710, and 5811.].)

Thus, interpreters are authorized to provide services, and to claim fees for those services, under the following circumstances:

> 1) For medical treatment appointments when both the medical treatment and the interpreting services have been authorized;
> 2) For medical treatment appointments through an MPN when the interpreting services are provided through the MPN, when the MPN has authorized the interpreting services, when the MPN does not provide interpreting as an "ancillary" service, or when interpreting services through the MPN are not available within a reasonable period of time or geographic area;
> 3) For medical treatment appointments when the employer has neglected or refused to provide treatment, and the employee has self-procured the treatment pursuant to section 4600;
> 4) For medical treatment appointments, whether through an MPN or otherwise, when the employer has authorized the medical treatment, but has neglected or refused to provide necessary interpreting services, forcing the employee to self-procure the interpreting services;
> 5) For medical-legal examinations as specified in sections 4620 and 4621;
> 6) For services provided in a deposition (§ 5710); and

7) For services provided in an appeals board hearing (§ 5811.)[3]

These provisions concerning the circumstances under which interpreters' services are authorized to perform services for workers' compensation applicants and may claim fees that are "reasonably, actually, and necessarily incurred" by way of a lien filing, were not changed—either narrowed or expanded—by SB 1160.

III. Liens Before SB 1160.

The way liens function within the workers' compensation system was recently summarized in *Chorn v. Workers' Comp. Appeals Bd.* (2016) 245 Cal.App.4th 1370:

> Under the workers' compensation statutes, "an employee injured in the workplace may request workers' compensation benefits by delivering a claim form to the employer within 30 days of the injury. [Citations.] Benefits include compensation for medical treatment and other services 'reasonably required to cure or relieve [the employee] from the effects of the injury.' [Citations.]" . . . Employers or their workers' compensation insurers assume liability for these benefits owed to the employee. (*Ibid.*) . . .
>
> [¶]
>
> A medical provider whose bill is contested or otherwise unpaid generally may not seek payment from the employee. (§ 3751.) **The provider may, however, file a lien claim for the costs of his or her services directly with the WCAB.** . . .; §§ 4903, 5300.) The filing of a lien claim renders the medical provider a party in interest to the WCAB proceedings and endows the provider with "full due process rights, including an opportunity to be heard." . . . "Because

[3]Regulations promulgated concerning Fees for Interpreter Services, at California Code of Regulations, title 8, section 9795.1, et seq., reference additional circumstances under which interpreters may be authorized, including preparation for a deposition, an arbitration (i.e., regarding insurance coverage), a conference held by an Information and Assistance Officer, and "other similar settings determined by the [WCAB] to be reasonable and necessary to determine the validity and extent of injury to an employee." (Cal. Code Regs., tit. 8, § 9795.3, subd. (a).)

> injured workers and their employers are often ready to resolve the worker's claim for indemnity before resolution of claims by lien claimants, the law grants a lien claimant an independent right to prove its claims in a separate proceeding. (Lab. Code, § 4903.4.)" . . . A lien claimant also may initiate an action if the injured worker does not pursue his or her own claim. (*Ibid*.; § 5501.)

(*Chorn*, *supra*, 245 Cal.App.4th, pp. 1377-78, citations omitted, emphasis added.)

Within the system as summarized above, there are statutory and regulatory provisions concerning the filing of liens that preceded SB 1160, and that were not changed in the recent amendments.

Labor Code section 4903 provides that:

> The appeals board may determine, and allow as liens against any sum to be paid as compensation, any amount determined as hereinafter set forth in subdivisions (a) through (i). . . . The liens that may be allowed hereunder are as follows:
>
> [¶]
>
> (b) The reasonable expense incurred by or on behalf of the injured employee, as provided by Article 2 (commencing with Section 4600), [i.e., medical treatment-related expenses] and to the extent the employee is entitled to reimbursement under Section 4621, medical-legal expenses as provided by Article 2.5 (commencing with Section 4620) of Chapter 2 of Part 2, except those disputes subject to independent medical review or independent bill review.

(Lab. Code, § 4903, bracketed reference added.)

In addition, prior to SB 1160, section 4903.05, subdivisions (a) and (b), provided as follows:

> (a) Every lien claimant shall file its lien with the appeals board in writing upon a form approved by the appeals board. **The lien shall be accompanied by a full statement or itemized voucher supporting the lien and justifying the right to reimbursement** and proof of service upon the injured worker or, if deceased, upon the worker's dependents, the employer, the insurer, and the respective attorneys or other agents of record. Medical

> records shall be filed only if they are relevant to the issues being raised by the lien.
>
> (b) Any lien claim for expenses under subdivision (b) of Section 4903 or for claims of costs shall be filed with the appeals board electronically using the form approved by the appeals board. The lien shall be accompanied by a proof of service and any other documents that may be required by the appeals board. . . .

(Lab. Code, § 4903.05, subds. (a), (b), emphasis added (text prior to amendments of SB 1160.)

Similarly, prior to SB 1160, WCAB regulations required that liens be adequately supported and justified. Title 8 of the California Code of Regulations, section 10770, subdivision (c)(4), required that a lien filed with the appeals board be accompanied by, *inter alia*, a declaration under penalty of perjury as required by Labor Code section 4903.8(d), and "any other declaration or form required by law to be filed concurrently with a lien claim." (Cal. Code Regs., tit. 8, § 10770, subd. (c)(4) (text and numbering prior to SB 1160.)[4] The regulations also required (and continue

---

[4]This regulation was amended after SB 1160, although not with respect to the language referenced above. The amendment changed the numbering so that subdivision (c)(4), referenced above, is now subdivision (c)(3).

Labor Code section 4903.8, subdivision (d), referenced in the regulation, provides as follows:

> (d) At the time of filing of a lien on or after January 1, 2013, or in the case of a lien filed before January 1, 2013, at the earliest of the filing of a declaration of readiness, a lien hearing, or January 1, 2014, ***supporting documentation shall be filed including one or more declarations under penalty of perjury by a natural person or persons competent to testify to the facts stated***, declaring both of the following:
> (1) The services or products described in the bill for services or products were actually provided to the injured employee.
> (2) The billing statement attached to the lien truly and accurately describes the services or products that were provided to the injured employee. (Emphasis added.)

to require) that when serving a lien on other parties, the lien claimant provide supporting documentation, and a full statement or itemized voucher showing all previous payments and any additional payments owed. (Cal. Code Regs., tit. 8, § 10770, subd. (d).)

Thus, prior to the adoption of SB 1160, section 4903.05 and applicable regulations already required lien claimants to have, and to provide, documentation and other support as necessary to justify the lien.

Lastly, it is important to emphasize that no lien claimant is necessarily entitled to or assured of recovery through the workers' compensation system. As explained in *Angelotti Chiropractic, Inc. v. Baker* (9th Cir. 2015) 791 F.3d 1075, 1079, "[w]hether a provider of medical or ancillary services obtains payment on its lien depends on the result reached in the underlying case. These providers are entitled to payment of their liens if the injured worker establishes that the injury was work-related and that the medical treatment provided was 'reasonably required to cure or relieve the injured worker from the effects of his or her injury.' Cal. Lab. Code § 4600; see also id. § 4903." Furthermore, "[p]roviders of medical-legal services must demonstrate that the expense was 'reasonably, actually, and necessarily incurred,' Cal. Labor Code § 4621, 'for the purpose of proving or disproving a contested' workers' compensation claim, . . . Medical-legal lien claimants may still obtain payment even if the injured worker does not prevail in the underlying workers' compensation proceeding, provided that the medical-legal expenses are 'credible and valid.'" (*Angelotti, supra*, 791 F.3d, p. 1079, citations omitted.)

This language was not amended by SB 1160.

IV. SB 1160, Fraud, And The Lien Backlog.

Senate Bill 1160 was introduced on February 18, 2016 and ultimately signed into law on September 30, 2016. Most of the bill addresses changes to the utilization review ("UR") process that are intended to speed the delivery of medical services to injured workers. (See Senate Bill No. 1160 (2015-2016 Reg. Sess.) §§ 3-6; new Labor Code § 4610, operative Jan. 1, 2018.)

SB 1160 also included several provisions that arose out of concerns about fraud perpetrated by medical treatment and ancillary services providers within the workers' compensation system.[5] These provisions were contained in sections 7 through 9 of the bill, which added new section 4615 to the Labor Code, and amended sections 4903.05 and 4903.8. (See Respondents' RJN, Exh. 1, at pp. 35-38; 41-41.) The anti-fraud focus and purpose of these amendments is discussed explicitly in the bill's legislative history. The analysis by the Senate Committee on Labor and Industrial Relations, for example, notes:

---

[5]These concerns rose to the fore during early 2016 in part due to a series of stories on medical provider fraud within the California worker's compensation system published by the Center for Investigative Reporting. Links to some of those stories are listed below.
https://www.revealnews.org/article/holes-in-oversight-leave-california-workers-comp-vulnerable-to-fraud/
https://www.revealnews.org/article/profiteering-masquerades-as-medical-care-for-injured-california-workers/
https://www.revealnews.org/article/lawmakers-labor-chief-seek-reviews-of-california-workers-comp-fraud/
Some of the articles specifically referenced the issue of interpreter's fees in relation to capping and referral schemes. (See "Holes in oversight leave California workers' comp vulnerable to fraud," *Reveal from the Center for Investigative Reporting* (April 14, 2016) ["Kim Reeder, a worker who requested her medical records and discovered bills for transportation and language-interpreting services she never used, said mailing such information to workers would be beneficial."]

> In a recent letter to the Commission on Health and Safety and Workers' Compensation, the author of SB 1160 identified fraud as a specter haunting the workers' compensation system and presenting a fundamental challenge to the operation of system for all stakeholders. Specifically, the letter cited the recent press coverage by the Center of Investigative Reporting, which detailed more than $1 billion in fraudulent activity by a variety of medical providers. While all of the schemes were different, each had one common feature: the use of the workers' compensation lien system to monetize the fraud.
>
> Despite the criminal charges, medical bills and workers' compensation liens from doctors charged or even convicted of medical fraud continue to be pursued. . . . . Overall, DWC places the dollar amount of liens held by providers who have been charged or convicted of workers' compensation fraud at $600 million – or 17% of all liens in the system.

(Sen. Com. on Labor and Indus. Relations, Analysis of Sen. Bill 1160 (2015-2016 Reg. Sess.) as amended August 29, 2016 ("Sen. Labor SB 1160"), p. 5, emphasis added, (Respondent's RJN, Exh. 5, p. 5).)[6]

The reason that provider fraud is connected to lien filings is that when injured workers' claims are "accepted," medical treatment (typically provided through an MPN), ancillary services, including interpreters' fees when authorized, and medical-legal services, are administered and compensated through the employer's insurer. Disputes concerning the amount of the bill are resolved through independent bill review (§ 4603.6), and disputes over medical treatment are resolved through utilization review

[6](See also Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill 1160 (2015-2016 Reg. Sess.), August 29, 2016 ("Sen. Floor SB 1160"), p. 6 (same explanation), (Respondent's RJN, Exh. 4); Ass. Floor Analysis, Sen. Bill 1160 (2015-2016 Reg. Sess.), August 29, 2016 ("Assbm. Floor SB 1160"), p. 5 (same), (Respondent's RJN, Exh. 3.) In addition to the copies provided in Respondents' RJN, these legislative analysis documents may be found at: http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB1160

and independent medical review (§§ 4610-4610.6). Lien filings are typically unnecessary in these circumstances.

But when an employer or insurer denies an injury claim (e.g., as non-work related), or when the employee fails to present the claim before obtaining medical treatment, or when an additional "body part" claimed to be injured on an existing accepted injury is denied, injured workers might "self-procure" medical treatment. In these circumstances, workers may become victims of "capping" and referral schemes, through which they are referred to particular medical providers (for services they may or may not need). And those providers may then refer the worker to other providers for more services, and so on. The services provided may include ancillary services, including interpreting at medical treatment appointments. In these circumstances, all of the providers rendering services will file a lien claim to recover compensation for their services.[7]

In other circumstances in which workers "self-procure" medical treatment, even absent fraud, the treatment might nevertheless be unauthorized under the statutory provisions summarized above, and accordingly, the services provided, including any interpreting services, may not be compensable through the workers' compensation system, and no lien claim is valid in those circumstances.

This does not suggest that all – or even a majority – of lien filings involve fraud or invalid claims. But, given the potential for improper liens and the enormity of their impact on the workers' compensation system, the

[7](See, e.g., Respondents' RJN, Exh. 4 (Sen. Floor SB 1160), p. 7 [referring to a "running and capping" scheme]; see also "Holes in oversight leave California workers' comp vulnerable to fraud," *Reveal from the Center for Investigative Reporting* (April 14, 2016); "Report on Anti-Fraud Efforts in the California Workers' Compensation System," (January 2017) (www.dir.ca.gov/Fraud_prevention/FRAUD-white-paper.pdf)

Legislature has deemed it important to focus efforts on lien reform and changes necessary to ensure the validity of liens within the system.[8]

The specific amendment adopted by SB 1160 that Petitioners challenge is the addition of a new subdivision (c) to Labor Code section 4903.05, which provides as follows:

> (c) (1) For liens filed on or after January 1, 2017, any lien claim for expenses under subdivision (b) of Section 4903 that is subject to a filing fee under this section shall be accompanied at the time of filing by a declaration stating, under penalty of perjury, that the dispute is not subject to an independent bill review and independent medical review under Sections 4603.6 and 4610.5, respectively, [and] that the lien claimant satisfies one of the following:
>
> (A) Is the employee's treating physician providing care through a medical provider network.
> (B) Is the agreed medical evaluator or qualified medical evaluator.
> (C) Has provided treatment authorized by the employer or claims administrator under Section 4610.

---

[8]As discussed at length in *Chorn*, *supra*, there were earlier reforms to the lien filing system in 2012 as part of SB 863. Those reforms, which included amendments requiring a new lien filing fee and prohibiting lien assignments, were described in *Chorn* as follows:

> In 2012, the Legislature enacted Senate Bill 863 . . . to reform the lien claim system, among other things. . . .
> The legislative history of SB 863 described the lien payment system as "out of control." . . . The legislative analysis stated that "hundreds of thousands of backlogged liens, possibly in excess of a million" were clogging the workers' compensation system. . . . It described an environment in which courts were overwhelmed and "lien abuse" was common, where medical providers and third parties who purchased old receivables from medical providers commonly filed frivolous lien claims and used the delays in the system to leverage excessive settlements. . . . "To address this growing volume of problem liens," the analysis explained, SB 863 proposed "to re-enact a lien filing fee, so that potential filers of frivolous liens have a disincentive to file." . . .

(*Chorn*, *supra*, 245 Cal.App.4th at p. 1378, citations omitted.)

(D) Has made a diligent search and determined that the employer does not have a medical provider network in place.
(E) Has documentation that medical treatment has been neglected or unreasonably refused to the employee as provided by Section 4600.
(F) Can show that the expense was incurred for an emergency medical condition, as defined by subdivision (b) of Section 1317.1 of the Health and Safety Code.
(G) Is a certified interpreter rendering services during a medical-legal examination, a copy service providing medical-legal services, or has an expense allowed as a lien under rules adopted by the administrative director.

(2) Lien claimants shall have until July 1, 2017, to file a declaration pursuant to paragraph (1) for any lien claim filed before January 1, 2017, for expenses pursuant to subdivision (b) of Section 4903 that is subject to a filing fee under this section.

(3) The failure to file a signed declaration under this subdivision shall result in the dismissal of the lien with prejudice by operation of law. Filing of a false declaration shall be grounds for dismissal with prejudice after notice.

(Lab. Code, §4903.05, subd. (c).)

This new provision requires new lien claimants, as of January 1, 2017, to choose one of seven categories (categories (A) through (G) quoted above) that most accurately represents the circumstances that authorized the rendering of services and that justify the filing of a lien. Claimants in pending lien claims must file the declaration by July 1, 2017. (§ 4903.05, subd. (c)(2).) Although the declaration must be filed under penalty of perjury, the consequences of the filing of a false declaration, per the terms of the statute, are "dismissal with prejudice after notice." (Lab. Code, § 4903.05, subd. (c)(3).) As such, even if there is an allegation that a false declaration has been filed, the lien claimant will have notice and an opportunity to defend the lien.

The legislative committee analyses addressing this amendment make clear that the new declaration requirement was not intended to, and did not,

narrow any of the circumstances under existing law in which the filing of a lien claim is authorized. Rather, the categories essentially capture the existing circumstances under which liens are authorized, but the statute now requires lien claimants to state explicitly the category that they claim gives rise to their valid lien claim. (See, e.g., Sen. Labor SB 1160, at p. 5 [". . . SB 1160 requires all lien claimants to file a declaration as to which specific category provided under existing law allows the claimant to file a lien. As the statute that provides the specific categories for filing a lien is unchanged by SB 1160, the causes for filing a lien under existing law remain unchanged by SB 1160 – including denied industrial injuries. The only change is that a lien claimant must now file a declaration to support an assertion of rights."] (Respondent's RJN, Exh. 5); Sen. Floor SB 1160, at p. 6 [". . . SB 1160 requires all lien claimants to file a declaration as to which specific category provided under existing law allows the claimant to file a lien. As the statute that provides the specific categories for filing a lien is unchanged by SB 1160, the causes for filing a lien under existing law remain unchanged by SB 1160—including denied industrial injuries. The only change is that a lien claimant must now file a declaration to support an assertion of rights."] (Respondent's RJN, Exh. 4.)

Despite the limited nature of the amendment, and the recognized need to curb improper lien filings and improper treatment, Petitioners take issue with the decisions made by the Legislature in tackling the fraud problem and claim they have been harmed. The gist of Petitioners' claims is that the provisions of new section 4903.05, subdivision (c), which Petitioners refer to as "the Declaration Provision," violate Petitioners' constitutional rights to due process and the "right to petition" because the categories, as drafted, exclude "valid" lien claims. Petitioners make this incorrect assertion based on the apparent claim that notwithstanding all of the pre-existing statutory provisions setting forth the limited circumstances

under which medical treatment and ancillary services are authorized for workers' compensation applicants, and notwithstanding all of the pre-existing requirements that lien claims be supported with proper declarations and documentation justifying the lien, Petitioners nevertheless lack sufficient information concerning their own alleged lien claims to be able to file a simple declaration stating a category that establishes the validity of the lien. These claims lack merit and should be rejected in their entirety.

ARGUMENT

I. PETITIONERS CANNOT MAKE THE NECESSARY SHOWING FOR ISSUANCE OF AN EXTRAORDINARY WRIT.

A. The Petition Must Meet The Criteria for Relief Under Code of Civil Procedure Sections 1085 and 1086.

Petitioners invoke this Court's subject matter jurisdiction pursuant to Labor Code section 5955. That section provides that "[n]o court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases." (Lab. Code, § 5955.)

In *Greener v. Workers' Comp. Appeals Bd., supra,* 6 Cal.4th at p. 1048, the Supreme Court held that under section 5955, the appellate courts of this state may entertain a challenge to the constitutional validity of a statute within the workers' compensation system by petition for writ of mandate, *but only if* the petitioners "are able to satisfy the court in a properly presented petition that the criteria for relief by extraordinary relief under Code of Civil Procedure section 1085 have been met." (*Greener,*

supra, 6 Cal.4th at p. 1044; see also *id.* at p. 1046 [petitioners must be able "to satisfy the Court of Appeal that mandamus is appropriate under section 1085"].)

The standards for demonstrating the necessity of extraordinary relief under Code of Civil Procedure section 1085 are well established. "A writ of mandate may be issued by any court to any inferior tribunal, . . . to compel the performance of an act which the law specially enjoins, ..." (Code Civ. Proc., § 1085.) Code of Civil Procedure section 1086 provides that the writ "must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested." (See also *Flores v. California Dep't of Corr. & Rehab*. (2014) 224 Cal.App.4th 199, 205.)

"Two basic requirements are essential to the issuance of the writ: (1) A clear, present and usually ministerial duty upon the part of the respondent [citations]; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty [citation]." (*Flores, supra,* 224 Cal.App.4th at p. 205, citation omitted; see also *California High-Speed Rail Auth. v. Superior Court* (2014) 228 Cal.App.4th 676, 707.) "A 'ministerial duty' is one generally imposed upon a person in public office who, by virtue of that position, is obligated 'to perform in a prescribed manner required by law when a given state of facts exists." (*Flores, supra,* 224 Cal.App.4th at p. 205, citations omitted.)

It is a fundamental prerequisite to any claim for extraordinary relief that the petitioners demonstrate they lack a "plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) Thus, "[t]o obtain writ review, a petitioner generally must show his or her remedy in the ordinary course of law is inadequate or that petitioner would suffer irreparable injury were the writ not granted." (*Interinsurance Exch. of Auto. Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1225, citing

Powers v. City of Richmond (1995) 10 Cal.4th 85, 113–114, *City of Half Moon Bay v. Superior Court* (2003) 106 Cal.App.4th 795, 803.) "The burden, of course, is on the petitioner to show that he did not have such a remedy." (*Flores, supra,* 224 Cal.App.4th at p. 205.) Moreover, a remedy will not be deemed inadequate merely because it may take additional time and effort to pursue "through the ordinary course of the law." "Irreparable inconvenience" does not meet the definition of "irreparable injury." (*Omaha Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1266, 1274.)

And in order to establish standing to bring a claim for extraordinary relief, a party must be "beneficially interested" (Code Civ. Proc., § 1086), which requires demonstration of a "legally protected interest" that is both "concrete and particularized," and "actual or imminent." (*People ex rel. Dep't of Conservation v. El Dorado Cty*., *supra*, 36 Cal.4th at p. 986, citation omitted.)

Here, Petitioners cannot meet these standards for three basic reasons. First, if in fact the interpreting services they provided were authorized under existing law prior to SB 1160, either expressly or by operation of law under section 4600 or otherwise, Petitioners need only file the appropriate declaration under section 4903.05, subdivision (c), specifying the grounds for the lien. The liens (and the declaration, if necessary) will then be adjudicated in the ordinary course of the law through WCAB processes. Second, and in the alternative, if the interpreting services were provided under circumstances that were not authorized, permissible or compensable under pre-existing law, there never were any valid grounds for a lien, and Petitioners will suffer no harm from having such invalid lien claims dismissed. Thus, Petitioners have not, and cannot, establish either that they lack an adequate remedy in the ordinary course of the law, or that they are "beneficially interested" and will suffer irreparable injury if the writ is not

granted. (*Interinsurance Exch. of Auto. Club v. Superior Court, supra,* 148 Cal.App.4th at p. 1225.) And thirdly, the duty Petitioners seek to impose on Respondent WCAB, "to perform its legal obligations by not implementing these new unconstitutional provisions" (Petition, at p. 20), is not a "clear, present, and ministerial duty" because the amendments to section 4903.05 were entirely within the Legislature's plenary power to create and to enforce the workers' compensation system, and are in no way unconstitutional. (Cal. Const., art. XIV, § 4; *Stevens, supra*, 241 Cal.App.4th at p. 1095.)

B. Petitioners Cannot Show That They Lack An Adequate Remedy In The Ordinary Course of Law.

In support of their Petition, Petitioners have filed six separate Declarations by individuals who own and/or operate businesses that provide interpreting services to applicants in the workers' compensation system. These are the Declarations of Joyce Altman, Marta N. Granados, Gilbert Calhoun, Pilar Garcia, Lorena Ortiz Schneider, and Bac Duong. The declarations are all essentially identical with respect to the declarants' complaints about the amendments to Labor Code section 4903.05.

Specifically, those complaints boil down to the following:

- Petitioners provide interpreting services to workers' compensation applicants in reliance on laws that require employers and insurers to pay for the services. (Altman Decl., ¶7; Granados Decl., ¶7; Calhoun Decl., ¶ 5; Garcia Decl., ¶ 6; Schneider Decl., ¶ 11; Duong Decl., ¶7.)

- Often after interpreters provide services, the insurance carrier refuses to pay the bill, makes specious objections to the bill, or pays only part of the bill, and forces the interpreter to pursue the claim through the lien process. Using the lien process forces the

defendants to pay a reasonable fee. This typically occurs because the treatment was authorized and there is no legitimate basis for disputing the lien. (Altman Decl., ¶ 9; Granados Decl., ¶ 10; Calhoun Decl., ¶ 7; Garcia Decl., ¶ 9[; Schneider Decl., ¶ 14 ; Duong Decl., ¶¶ 9-10.)

- The only specific reference to interpreters in the seven categories of the new "Declaration provision" is in reference to medical-legal appointments, and many interpreters do not provide services at these types of appointments (Altman Decl., ¶ 5; Granados Decl., ¶ 15; Calhoun Decl., ¶ 11; Garcia Decl., ¶ 15; Schneider Decl., ¶ 20; Duong Decl., ¶¶ 14-15.)

- Petitioners believe that category "(E)" in the new Declaration provision (that the lien claimant "[h]as documentation that medical treatment has been neglected or unreasonably refused to the employee as provided by Section 4600") cannot be used by them because they do not have and cannot get, medical records showing that treatment was neglected or "unreasonably refused." (Altman Decl., ¶¶ 16-27; Granados ¶¶ 17-22; Calhoun Decl., ¶¶12-21; Garcia Decl., ¶¶ 17-25; Schneider Decl., ¶¶ 21-29; Duong Decl., ¶¶ 16-22.)

- Petitioners believe that category "(E)" does not apply when the insurer has authorized treatment for the worker, but still refuses to pay the interpreters' fees. (Altman Decl., ¶ 28; Granados Decl., ¶ 23; Calhoun Decl., ¶ 22; Garcia Decl., ¶ 26; Schneider Decl., ¶ 30; Duong Decl., ¶ 23.)

- In many cases, the issue is not that the treatment was unauthorized, but the insurer later refused to pay the interpreter's fee or offered less than was billed. As stated in one declaration, "[w]e even have had cases where the carrier has accepted the workers' claim but completely ignores our bills . . . ." (Altman Decl., ¶ 28;

see also Granados Decl., ¶ 10; Calhoun Decl., ¶ 22; Garcia Decl., ¶ 26; Schneider Decl., ¶ 30; Duong Decl., ¶ 23.)

- Petitioners believe that categories "(A), (B), and (C)" do not apply to them "since those categories are limited to treatment providers." (Altman Decl., ¶ 30; Granados Decl., ¶ 25; Calhoun Decl., ¶ 24; Garcia Decl., ¶ 28; Schneider Decl., ¶ 31; Duong Decl., ¶ 25.)

- Petitioners believe that interpreters cannot file declarations under subsection (D), in reference to care outside an MPN because: 1) the interpreters do not keep track of whether the employer had an MPN; 2) the employee needed care outside the MPN, or because, even if the care was provided within the MPN, the insurer refused to pay. (Altman Decl., ¶ 32 ["For example, in some cases our services are provided at a medical appointment with a provider in the employer's MPN, and the carrier still refuses to pay some or all of our bill."]; Granados Decl., ¶ 27; Calhoun Decl., ¶25-26; Garcia Decl., ¶¶ 29-30; Schneider Decl., ¶ 33; Duong Decl., ¶¶ 26-27.)

- Petitioners believe that they cannot file liens under the "(G)" category ("or has an expense allowed as a lien under rules adopted by the administrative director") because they claim such rules have not yet been written. (Altman Decl., ¶¶ 34-35; Granados Decl., ¶ 29-30; Calhoun Decl., ¶¶ 28-29; Garcia Decl., ¶¶ 32-33; Schneider Decl., ¶¶ 35-36; Duong Decl., ¶¶ 29-30.)

All of these arguments are misguided and fail for the simple reason that Petitioners have misunderstood the plain meaning and import of the new statutory provisions. Petitioners' single most fundamental error is Petitioners' failure to fail to comprehend that when medical treatment and interpreting services are authorized, interpreters may, and should, file lien declarations pursuant to the "(C)" category in new subdivision (c)(1) of

section 4903.05 (which specifies that the lien claimant "[h]as provided treatment authorized by the employer or claims administrator under Section 4610"). (Lab. Code, § 4903.05, subd. (c)(1)(C).) As discussed above, Labor Code section 4600, subdivision (g) specifically includes interpreting services within the medical treatment to which an injured worker is entitled when necessary. Thus, when category "(C)" refers to "treatment" that was authorized, it includes both medical treatment and interpreting services when the services were authorized.

Almost all of the arguments made by Petitioners, who repeatedly assert that their services were authorized but the bills were nevertheless not paid, are answered by this. Lien declarations arising from medical treatment and interpreting services that were authorized should be filed pursuant to category (C). To the extent there are any disputes concerning the authorization, and/or the reasonableness or necessity of the interpreting fees claimed, those disputes may be resolved through the ordinary course of law, i.e., through the existing lien process and administrative adjudication system.

Any liens arising from circumstances in which medical treatment was *not* authorized, or when the medical treatment itself was authorized but the interpreting services were *not* (for example, if the worker received treatment through an MPN that included interpreting as an ancillary service but self-procured his or her own interpreting services), should be filed under category "(E)" above – which requires a statement that the lien claimant has "documentation that medical treatment has been neglected or unreasonably refused to the employee as provided by Section 4600." (Lab. Code, § 4903.05, subd. (c)(1)(E).) Petitioners' complaints about the infeasibility of this category (that they must obtain medical records and must be able to prove the "legal standard" that treatment was "unreasonably" refused) are manufactured and unwarranted. This category

simply mirrors the provision in section 4600 authorizing an injured worker to self-procure medical treatment (including interpreting services) when the employer neglects or refuses to provide that treatment.

Thus, in any case in which the worker is obtaining treatment *not* authorized by the employer or insurer, including interpreting services, the interpreter would need to know the basic circumstances establishing that the self-procured medical treatment (or interpreting) is permissible, i.e., that the employer has neglected or refused to provide the treatment. Notwithstanding Petitioners' arguments, this is not a burdensome requirement. It is not a complicated legal standard, it need not be based on medical records of any kind, and it need not be based on any specific form of documentation. A simple letter from the insurance company denying the claim, demonstrating why the worker is self-procuring care, would suffice under section 4600 and the new provisions of section 4903.05. Alternatively, a simple declaration from the interpreter describing the circumstances justifying the provision of the services (e.g., that the insurer failed to supply an interpreter for an appointment despite being informed of the need for one) would also be sufficient. And again, as discussed in the preceding section, existing law already required lien claimants to have proper documentation and to file appropriate declarations supporting their lien claims. This certainly would include a basic record of when treatment was authorized or denied, or when the employer or insurer neglected or refused to provide necessary interpreting services.

Petitioners' arguments concerning category (D), which requires that the lien claimant state he or she "[h]as made a diligent search and determined that the employer does not have a medical provider network in place," are similarly unavailing. The purpose of this provision is to determine when lien claims are valid because the employer did not have an MPN. Providers of medical treatment and ancillary services, including

those providing interpreting services, are charged with knowing and supporting the basis of their lien claims filed within the workers' compensation system. If an employer or insurer has an MPN in place, an injured worker is not authorized to seek treatment outside that network except in certain circumstances. Many MPNs include interpreting as ancillary services, and in those circumstances, workers are limited as to when they may self-procure interpreting services. (Cal. Code Regs., tit. 8, § 9767.5, subd. d). An interpreter filing a lien for services outside an MPN should have the basic knowledge to declare that the employer had no MPN in place.[9]

As discussed, the purpose of this legislation was to weed out fraudulent or invalid lien claims by requiring lien claimants to specifically declare the basic grounds establishing the validity of the claim. Petitioners' arguments, at bottom, are essentially that they might lack sufficient information to declare the grounds establishing the validity of liens they previously filed, or liens they intend to file for services they have already rendered. This is the very problem the amendments to section 4903.05 sought to address—lien claimants who, despite the requirements of existing law, failed to take sufficient care in determining and documenting whether their services were actually authorized before providing those services and

[9]Some of the declarants assert that category (D) is unfair because interpreters do not keep track of whether a worker's employer has an MPN. This is simply further evidence of the problem the Legislature was trying to fix. Because workers whose employers or insurers have an MPN do not have the right to obtain treatment, including interpreting services, outside of that MPN, with limited exceptions, interpreters have an obligation to make an inquiry into whether the injured worker is subject to an MPN. They cannot simply ignore the issue and then file liens seeking to be paid for services they never should have provided in the first place. As Petitioners admit, the Division of Workers' Compensation has a website that allows the public to look up if an employer/carrier has an MPN: http://www.dir.ca.gov/dwc/mpn/DWC_MPN_Main.html.

demanding payment by filing workers' compensation liens. If interpreters provided their services under permissible circumstances (i.e., the services were authorized either expressly or by operation of law, as in when the employer or insurer neglected or refused to provide the service), they will have an adequate remedy in that they can file the newly-required declaration, and retain all rights to justify their liens through the workers' compensation adjudication process. If there was no legal basis for the interpreter to provide the services in the first place, no valid lien claim exists, and Petitioners suffer no harm. Furthermore, as noted, the statute itself provides that the consequence of filing a false declaration is "dismissal with prejudice after notice," which means that lien claimants will have the opportunity to defend and to justify their declarations, in the ordinary course of law. (Lab. Code, § 4903.05, subd. (c)(3).)

C. Petitioners Lack Standing Because They Cannot Meet The "Beneficially Interested" Standard.

Standing to seek a writ of mandate requires that a party be "beneficially interested." (Code Civ. Proc., § 1086). The petitioner must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." (*Dep't of Conservation v. El Dorado Cty., supra,* 36 Cal.4th at p. 986, quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) The California Supreme Court has interpreted this standard as being "'equivalent to the federal 'injury in fact' test, which requires a party to prove by a preponderance of the evidence that it has suffered 'an invasion of a legally protected interest that is [both] "(a) concrete and particularized, and (b) actual or imminent ...."'" (*Dep't of Conservation, supra,* 36 Cal.4th at p. 986, quoting *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 362; see also *City of Garden Grove v. Superior Court* (2007) 157

Cal.App.4th 355, 366 ["This standard ... is equivalent to the federal injury in fact test, which requires a party to prove by a preponderance of the evidence that it has suffered an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical."].)

In this case, the Petitioners, as providers of interpreting services in the workers' compensation system who seek payment by way of liens, may have an interest in the issues above that held by the public at large, but they have not, and cannot, establish that they have suffered an actual—rather than conjectural or hypothetical—invasion of a "legally protected interest." This is because, as discussed above, to the extent they do indeed have "valid" liens, the circumstances of those liens must fall into one of the categories in section 4903.05, subdivision (c)(1), and Petitioners can easily protect those liens by simply filing the declarations and selecting one of the categories. They will then have a full opportunity to support and to justify the liens, and the declarations, through the ordinary lien adjudication process. There is no actual or imminent "invasion of a legally protected interest" in requiring Petitioners to simply state the basic grounds on which they claim their liens are valid.

All of Petitioners' arguments about what might happen if they lack the proper documentation, or if they file a declaration that turns out to be wrong, or if they are accused of a filing a declaration that is "arguably fraudulent," are entirely "conjectural or hypothetical." There is no discussion anywhere in the Petition, or in any of the declarations, of any actual facts concerning specific liens. Nor are there any facts whatsoever presented concerning actual section 4903.05 declarations that have been filed by Petitioners with the WCAB concerning specific liens in specific cases, and as to which any invasion of a legally protected interest has occurred. The Petition is devoid of any such facts. To the contrary,

Petitioners' claims have been presented solely based on broad and vague generalities, hypotheticals, conjecture, and, as discussed, misinterpretations of the law both prior to, and as amended by, SB 1160. This is insufficient to establish the requisite "beneficial interest."

Moreover, and of particular importance here, to the extent Petitioners have filed liens that are legally invalid under applicable pre-existing provisions of the Labor Code, (i.e., if they provided interpreting services that were not authorized either expressly or by operation of law), they have no "legally protected interest" in those liens and in demanding to be paid for those unauthorized services. Thus, the Petitioners' claims are insufficient to establish an actual or imminent invasion of a legally protected interest, and accordingly, Petitioners lack the requisite standing to seek extraordinary relief from this Court. (Code Civ. Proc., § 1086; *Dep't of Conservation, supra,* 36 Cal.4th at p. 986.)

II. THE ANTI-FRAUD PROVISIONS OF AMENDED LABOR CODE SECTION 4903.05 DO NOT VIOLATE THE DUE PROCESS RIGHTS OF PROVIDERS OF INTERPRETING SERVICES.

The Petition must also be denied because Petitioners cannot establish any due process violation. In general terms, Petitioners argue that they have a property interest in their "valid" lien claims, and that the Declaration provision in amended section 4903.05 impairs this interest in violation of the federal and state due process clauses. The argument fails on several grounds.

A. There Can Be No State Due Process Violation.

Initially, Petitioners may not challenge the Legislature's exercise of its plenary authority over the workers' compensation system on state due process grounds. Article XIV, section 4 of the state Constitution provides that 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, by appropriate legislation, ..." (Cal. Const., art. XIV, § 4, emphasis added.) As this Court recognized in *Stevens*, this provision "trumps the state Constitution's due process clause." (*Stevens, supra*, 241 Cal.App.4th at p. 1093.) "Our state Supreme Court has made clear that constitutional amendments can be 'understood as carving out an exception to the preexisting scope of the ... due process clause[ ] with respect to the particular subject matter encompassed by the new provision.' (*Strauss v. Horton* (2009) 46 Cal.4th 364, 407, 93 Cal.Rptr.3d 591, 207 P.3d 48.) By giving the Legislature plenary powers over the workers' compensation system, Section 4 modified the reach of the state Constitution's due process clause." (*Stevens, supra*, 241 Cal.App.4th at p. 1093.)

Thus, "nearly any exercise of the Legislature's plenary powers over workers' compensation is permissible so long as the Legislature finds its action to be 'necessary to the effectiveness of the system of workers' compensation.'" (*Stevens, supra*, 241 Cal.App.4th at p. 1095, citation omitted; see also *Bautista v. State of California* (2011) 201 Cal.App.4th 716, 725 [the Constitution's grant of plenary authority "gives the Legislature complete, absolute and unqualified power to create and enact the workers' compensation system"]; *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 650 [the constitutional grant of authority to the Legislature "was intended to safeguard the full, unfettered authority of the Legislature to legislate in this area as it saw fit"], citing *Mathews v. Workers' Comp. Appeals Bd.* (1976) 6 Cal.3d 719.)

In this case, the record is abundantly clear that the Legislature saw fit to impose additional lien filing requirements in order to address a problem of fraud by medical and other service providers, and a general problem of lien claimants' failing to sufficiently support and document

their lien claims. This is plainly within the Legislature's express plenary authority, and no state due process challenge may be properly asserted. (*Stevens, supra,* 241 Cal.App.4th at pp. 1092-93.)

B. There is No Federal Due Process Violation Because Petitioners Lack a Property Interest in Liens They Cannot Support By Declaration.

Petitioners assert a facial challenge to the constitutionality of amended section 4903.05. As summarized recently by Division Two of this Court:

> Facial challenges to statutes and ordinances are disfavored. Because they often rest on speculation, they may lead to interpreting statutes prematurely, on the basis of a barebones record. . . . Also, facial challenges conflict with the fundamental principle of judicial restraint that courts should not decide questions of constitutional law unless it is necessary to do so, nor should they formulate rules broader than required by the facts before them. . . .
>
> Accordingly, we start from "the strong presumption that the ordinance is constitutionally valid." . . . "We resolve all doubts in favor of the validity of the ordinance. . . . Unless conflict with a provision of the state or federal Constitution is clear and unmistakable we must uphold the ordinance. . . . Plaintiffs bear the burden of demonstrating that the ordinance is unconstitutional in all or most cases."

(*Bldg. Indus. Ass'n of the Bay Area, supra,* 4 Cal.App.5th at p. 90, citations omitted; see also *Chorn, supra,* 245 Cal.App.th at 1381.)

"To prevail on a federal due process claim, plaintiffs must show that the state deprived them of a property or liberty interest without affording sufficient notice and opportunity to be heard." (*Stevens, supra,* 241 Cal.App.4th at pp. 1096-97.) "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.' . . . Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process." (*American Manufacturers Mutual Ins. Co. v. Sullivan* (1999)

526 U.S. 40, 59, citing U.S. Const., Amdt. 14, *Mathews v. Eldridge* (1976) 424 U.S. 319, 332.) The U.S. Supreme Court explained this issue further in *Town of Castle Rock, Colorado v. Gonzalez* (2005) 545 U.S. 748:

> The procedural component of the Due Process Clause does not protect everything that might be described as a "benefit": "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a ***legitimate claim of entitlement to it***." Such entitlements are, "'of course, ... not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'"

(*Castle Rock, supra,* 545 U.S. at p. 756, [emphasis added and citations omitted].)

Petitioners assert that they have a protected property interest in their liens because they are a "statutorily-conferred benefit and therefore are protected under California's due process clause." (Petition, at p. 60.) As noted, however, there is no state due process claim at issue. And under federal due process law, a benefit does not rise to the level of a protected entitlement if the conditions to establish the right to such benefit, as set forth in state law, have not been met.

This was the basis of the Supreme Court's holding in *American Manufacturers, supra*. Petitioners claim this case supports their alleged property interest, but in fact, the holding is contrary. In that case, involving a challenge to a utilization review procedure within the Pennsylvania workers' compensation system, the Court held that there was no underlying substantive entitlement to medical treatment (i.e., a property right), until and unless such treatment had been found to be reasonable and necessary through the required utilization review process. (*See American Manufacturers, supra,* 526 U.S. at pp. 60-61 ["for an employee's property interest in the payment of medical benefits to attach under state law, the

employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary."].) And as such, because there was no underlying property right until the utilization review process had completed, the Court held that there was no due process challenge to the utilization review process itself. (*Id.* at p. 61 ["Consequently, ***they do not have a property interest*** – under the logic of their own argument – in having their providers paid [sic] for treatment that has yet to be found reasonable and necessary. . . . Having concluded that respondents' due process claim falters for lack of a property interest in the payment of benefits, we need go no further."], emphasis added.)

Similarly, courts have held that for purposes of claims asserted under the Takings Clause, workers' compensation liens are not "property interests" because they do not vest until reduced to judgment. This was the holding in *Angelotti Chiropractic*, *supra*, which challenged a statutorily-imposed $150 filing fee for liens within the California workers' compensation system. Rejecting both Takings Clause and due process claims, the Ninth Circuit held that "[s]ince an injured worker's right to benefits does not vest until final judgment, the same is true for the liens at issue here, which are derivative of the underlying workers' compensation claim." (*Angelotti, supra,* 791 F.3d at p. 1082.)

In this case, Petitioners assert they have a protected property interest, justifying federal due process protection, in pending and future lien claims for which they claim to be unable to file a basic declaration justifying the grounds for the lien. For all the reasons addressed above, if the Petitioners truly cannot file the declaration required under new section 4903.05, subdivision (c), for a lien, then that lien is not "valid" under the law as it existed prior to SB 1160, and there is no protected property interest. Petitioners cannot, on the one hand, claim to have "valid" liens and

protected property interests, while also claiming, on the other hand, that they lack basic information establishing the grounds for, and validity of, such liens.

C. The "Declaration Provision" Provides Adequate Process Under the Applicable *Mathews* Balancing Test.

Even if the Court assumes *arguendo* that Petitioners have a federally protected property interest in their pending and future lien claims, it is clear that the section 4903.05 amendments comport with federal due process. The well-established judicial test for determining what level of process is "due" in any particular circumstance is referred to as the "*Mathews*" due process balancing test, derived from the United States Supreme Court's seminal decision in *Mathews v. Eldridge, supra*, 424 U.S. at p. 319.

The test was summarized by the U.S. Supreme Court in *Wilkinson v. Austin* (2005) 545 U.S. 209, as follows:

> Because the requirements of due process are "flexible and cal[l] for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), we generally have declined to establish rigid rules and instead have embraced a framework to evaluate the sufficiency of particular procedures. The framework, established in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), requires consideration of three distinct factors:
>
> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id*., at 335, 96 S.Ct. 893.

(*Wilkinson, supra*, 545 U.S. at pp. 224-225.) As is apparent from this test, there are no specific procedures or processes that are necessarily required. Due process is a flexible concept, which varies according to both the nature

of the private right and the government interests at issue. (See *Wilkinson, supra,* 545 U.S. at p. 224; *Chorn, supra,* 245 Cal.App.4th at p. 1388 ["This approach also recognizes the flexible nature of the due process requirement, which calls only for such procedural requirements as the particular situation demands."].)

Applying this analysis to the new lien declaration requirements, it is clear there is no due process violation. First, the "private interests" at stake are those of the Petitioners, and of other medical treatment and ancillary service providers, in obtaining payment for services they have provided, and for which they have filed liens, or intend to file liens, within the workers' compensation system. It may be assumed for purposes of this analysis that these interests are genuine and have value when the services were authorized (either expressly or by operation of law) and provided under circumstances that justify the filing of a lien under section 4903, and when the claimed fees were "reasonably, actually and necessarily incurred." (Cal. Code Regs., tit. 8, § 10564.) Under these circumstances, however, as has been made clear, service providers may file declarations stating the basis of their liens under one of the seven categories in section 4903.05, subdivision (c). The "private interests" of service providers, however, have much less value when the services at issue were not authorized in the first instance, when no documentation or other information was generated or maintained to justify the filing of a lien, and/or when the fees billed were unnecessary and/or unreasonable. And there are no "private interests" worthy of protection when the services were never provided and/or when actual fraud was involved.[10]

[10]It is also important to note that Petitioners are not compelled to provide services to workers' compensation applicants. They do so of their own choosing. And while they may do so with an expectation of recovering fees for their services through the lien system, that expectation must be deemed

With respect to the second factor – the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards – Petitioners' claim that the declaration requirement deprives them of "valid" liens is simply wrong, and is based on misinterpretations of the new statutory provisions. As the legislative history makes clear, the categories included in the new declaration requirement reflected existing law. Any lien claimant with a valid lien may protect and preserve that lien by simply filing the required declaration, and choosing the category that most accurately reflects the grounds justifying the lien. (Lab. Code, § 4903.05, subd. (c)(1).) Moreover, the new declaration requirement is just one part of an entire lien adjudication system. Any lien claimant who simply files the required declaration will preserve his or her lien in the first instance, and will then have a full opportunity, through the WCAB's ordinary administrative adjudication process, to defend the declaration, justify the lien, and document the charges. The filing of the declaration constitutes a minimal threshold requirement to specify the basic grounds on which a lien is claimed to be valid. The "additional or substitute" procedures Petitioners apparently advocate (i.e., to allow liens to proceed without any declaration in support) would not reduce the risk of erroneous determinations on lien filings, but would rather perpetuate the very problems the Legislature sought to address – namely fraud by some service providers and unsupported lien filings by others.

---

circumscribed by the applicable statutory and regulatory provisions specifying the circumstances under which a lien is authorized. (See, e.g., *Angelotti, supra,* 791 F.3d at 1083 ["plaintiffs here were never under any compulsion to provide services"]; *Chorn, supra,* 245 Cal.App.4th at p. 1389 ["independent medical providers like Chorn are not required to treat workers' compensation applicants. These considerations render the risk of erroneous deprivation of such interest less pressing than it would otherwise be."]

Lastly, with respect to the third factor (the government's interest), the record is clear that the Legislature had compelling reasons for amending section 4903.05 to require the new lien declaration. SB 1160 itself contains express legislative findings (quoted in the Background section above) as to the reasons for amendments. While Petitioners have complained about the manner in which the Legislature sought to achieve reform, there can be no dispute that the government's interest was significant, that substantial fiscal and administrative burdens resulted from fraudulent and questionable lien filings, and that "substitute" procedural requirements relieving lien claimants of the duty to verify their liens would be insufficient. (See, e.g., *Chorn*, supra, 245 Cal.App.4th at 1389 ["The substitute procedural safeguard Chorn implicitly suggests—the right to file liens before the WCAB free of charge—undeniably has a high value to lien claimants, but, as the legislative analysis and Liens Report demonstrate, comes at the significant cost of overburdening the entire workers' compensation system and delaying the administration of justice for all participants."], emphasis added.)

Thus, under the required balancing test, it is clear that the challenged provisions of section 4903.05 do not violate the federal right to due process.

III. THE DECLARATION PROVISION DOES NOT VIOLATE PETITIONERS' "RIGHT TO PETITION."

Petitioners make a perfunctory argument that the amendments to section 4903.05 violate their "right to petition" under article I, section 3 of the California Constitution because "the Declaration Provision" arbitrarily excludes "various categories of valid liens." (Petition, at p. 65.) This claim fails for three reasons.

First, it fails for the same reason Petitioners' state due process claim fails. The grant of plenary power to the Legislature in article XIV, section

4 of the California Constitution to create the workers' compensation system "unlimited by any [other] provision of this Constitution," trumps article I, section 3 to the extent of any alleged conflict. (See *Stevens, supra,* 241 Cal.App.4th at pp. 1092-93.) The Legislature's "complete, absolute and unqualified" power to determine the manner in which liens may be filed and must be documented within the workers' compensation system may not be constrained by generic complaints about the right to petition. (*Bautista, supra,* 201 Cal.App.4th at p. 725; *Stevens, supra*, 241 Cal.App.4th at pp. 1094-95.)

Second, the claim fails because, for the reasons discussed above, the "Declaration provision" does not exclude categories of valid liens. It was intended to, and does, reflect the existing categories of circumstances under which liens are valid. In particular, any interpreting services that were authorized in conjunction with medical treatment – which Petitioners repeatedly assert as the reason their liens are "valid" – can and should be supported with a declaration under category (C). (See Lab. Code, § 4903.05, subd. (c)(1)(C).)

Third, it is well established that the right to petition is not absolute. "Reasonable, narrowly drawn restrictions designed to prevent abuse of the right can be valid." (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1342; see also *Chorn, supra,* 245 Cal.App.4th at p. 1385.) "A corollary of this holding is that '[t]he general right of persons to file lawsuits – even suits against the government—does not confer the right to clog the court system and impair everyone else's right to seek justice.'" (*Chorn,* at p. 1385, citation omitted.) In this case, the Legislature has narrowly crafted a requirement that filers of lien claims within the workers' compensation system state, by simple declaration, the grounds on which the lien is claimed to be valid. The filing of this simple declaration preserves the lien, and makes available to the claimant the entirety of the existing lien

adjudication system, including the right to a full lien trial if the matter is not resolved. Under the circumstances, and even assuming the right to petition applies, the amendments to section 4903.05 were plainly a valid restriction on that right, enacted to combat fraud and a backlog of questionable liens.

CONCLUSION

For all the foregoing reasons, Petitioners have failed to demonstrate that they have standing to seek mandamus relief, that they lack a plain, speedy and adequate remedy in the ordinary course of law, or that Respondent has a clear, present and ministerial duty not to enforce the newly amended provisions of Labor Code section 4903.05, subdivision (c). Accordingly, the Court deny the Petition in its entirety.

Respectfully Submitted,

California Department of Industrial Relations
Office of the Director, Legal Unit
Christopher Jagard, Chief Counsel

__/s/_____
Dated: April 13, 2017 By: Kim E. Card

Counsel for Respondent
Workers' Compensation Appeals Board

CERTIFICATION OF WORD COUNT

Pursuant to California Rule of Court, rule 8.204(c), the undersigned counsel and author of the foregoing RESPONDENT'S OPPOSITION TO PETITION FOR PEREMPTORY AND/OR ALTERNATIVE WRIT OF MANDATE, PROHIBITION AND/OR OTHER APPROPRIATE RELIEF hereby certifies that the word count of this document, not including the cover page, Table of Contents, Table of Authorities, or this Certification, and determined using the "Word Count" function in the Microsoft Word program, is 13,093.

Date: April 13, 2017

/s/
KIM E. CARD