

Civil No: B269038

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT – DIVISION 3

CALIFORNIA HIGHWAY PATROL, and STATE COMPENSATION INSURANCE
FUND

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD and
DOROTHY MARGARIS

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ9397913

Application of Amicus Curiae

CALIFORNIA WORKERS' COMPENSATION INSTITUTE

For Leave to File

ANSWER TO BRIEF FILED BY CALIFORNIA APPLICANTS' ATTORNEYS
ASSOCIATION

And

ANSWER TO BRIEF FILED BY CALIFORNIA APPLICANTS' ATTORNEY'S
ASSOCIATION

In Support Of Petitioners

CALIFORNIA HIGHWAY PATROL, and STATE COMPENSATION INSURANCE
FUND

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**APPLICATION OF CALIFORNIA WORKERS' COMPENSATION
INSTITUTE FOR LEAVE TO FILE AMICUS CURIAE ANSWER TO
CALIFORNIA APPLICANTS' ATTORNEY'S ASSOCIATION AMICUS
BRIEF**

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE
JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND
APPELLATE DISTRICT:

The California Workers' Compensation Institute (hereafter CWCI or Institute) was previously granted *amicus curiae* status herein by order dated March 2, 2016. Subsequently, by order dated March 29, 2016, the Court allowed California Applicants' Attorneys' Association [hereafter CAAA] to file an *amicus curiae* brief. CWCI hereby applies to this Court for an order granting leave to file the within *amicus curiae* ANSWER TO BRIEF FILED BY CALIFORNIA APPLICANTS' ATTORNEY'S ASSOCIATION, in rebuttal to the CAAA brief and in support of Petitioners CALIFORNIA HIGHWAY PATROL and STATE COMPENSATION INSURANCE FUND.

As demonstrated by the within ANSWER of CWCI to the CAAA *amicus* brief, the CAAA argument actually supports the employer/carrier's position that, where an employer timely conducts Utilization Review, an Administrative Director's subsequent IMR decision issued outside the statutory time constraints does not vest the WCAB with jurisdiction to decide the disputed medical issue. Moreover, as a judicial body of limited jurisdiction, with no powers beyond those conferred on it by the Constitution and the Labor Code, the WCAB lacks the authority to review an employer's timely Utilization Review decision [Labor Code §4610.5(e)]. The sole statutory remedy for a defective IMR determination is a new IMR decision [Labor Code §4610.6(i)], and the WCAB is expressly prohibited from making a determination of medical necessity contrary to an IMR determination [Labor Code §4610.6(i)].

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VERIFICATION & WORD COUNT

I, Michael A. Marks, swear that I have read the within Amicus Curiae brief and know the contents thereof; that the within Argument & Authorities contains 1,245 words [the entire brief contains 2,250 words] based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as their attorney I am more familiar with such facts and law than are the officers.

I declare the truth of the foregoing under penalty of perjury of the laws of the State of California, and that this verification was executed this 31st day of March, 2016, at Essex, Vermont.

Michael A. Marks (SBN 071817)

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT**

CALIFORNIA HIGHWAY PATROL, and
STATE COMPENSATION INSURANCE
FUND

Petitioner

VS.

WORKERS' COMPENSATION APPEALS
BOARD and DOROTHY MARGARIS

Respondent(s)

Civil No: B269038

WCAB Case No. ADJ9397913

Declaration of Service

I, the undersigned, declare under penalty of perjury that I am a citizen of the United States, over the age of 18, and not a party to the within cause of action. My business address is Allweiss & McMurtry, 18321 Ventura Blvd, Suite 500, Tarzana, CA 91356

On March 31, 2016, I both filed with the Court and served a true copy of the *Application of California Workers' Compensation Institute for Leave To File Answer To CAAA Amicus Brief AND Answer of California Workers' Compensation Institute* via USPS with postage fully prepaid, addressed as follows:

William LeRoy Anderson State Compensation Ins. Fund 2275 Gateway Oaks Dr. Suite 200 Sacramento, CA 95833	Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142-9459 Attn.: Writs	Jill Suzanne Breslau Law Offices Of Jill Suzanne Breslau 815 Moraga Drive, Suite 1200 Los Angeles, CA 90049
Ellen Sims Langille Finnegan, Marks, Theofel & Desmond PO Box 478011 San Francisco, CA 94147	Justin Carl Sonnicksen Law Office of Mark Gearheart 367 Civic Drive, Suite 17 Pleasant Hill, CA 94523	

.I declare, under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct. Executed on March 31, 2016, at Essex, Vermont.

Michael A. Marks, Esq. (SBN 071817)

ARGUMENT & AUTHORITIES

**WITH ENACTMENT OF SB863 [STATS. 2012 CH. 363] THE
APPEALS BOARD'S JURISDICTION OVER MEDICAL TREATMENT
DISPUTES WAS REPLACED BY NEW LABOR CODE SECTIONS
4610.5 AND 4610.6 WHICH EXPRESSLY FORBID THE WCAB
FROM DECIDING A DISPUTED MEDICAL ISSUE ARISING FROM
AN EMPLOYER'S TIMELY UTILIZATION REVIEW DETERMINATION.**

Lost in the CAAA's and Margaris' passionate briefing is the fact that workers' compensation is entirely statutory, and that the jurisdiction of the WCAB must be predicated on the statutory grant of authority. This jurisdictional limitation was expressly acknowledged by the Appeals Board in its *en banc* decision in *Weiner v. Ralphs Company, et al.*, 74 Cal. Comp. Cases 736; 2009 Cal. Wrk. Comp. LEXIS 143 (WCAB En Banc), wherein the Appeals Board noted,

The WCAB is a judicial body of limited jurisdiction, with no powers beyond those conferred on it by the Constitution and the Labor Code. (*State Comp. Ins. Fund v. Ind. Acc. Com. (Hansen)* (1942) 20 Cal.2d 264, 266 [125 P.2d 42] [7 Cal.Comp.Cases 102, 103]; *Scott v. Industrial Acc. Com.* (1956) 46 Cal.2d 76, 82–83 [293 P.2d 18] [21 Cal.Comp.Cases 55, 58].) ⁸If it attempts to exercise powers beyond those granted to it by statute, it acts in excess of its authority and without jurisdiction. (*Ogdon v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 192, 196 [520 P.2d 1022, 113 Cal. Rptr. 206] [39 Cal.Comp.Cases 297, 299].) Moreover, as stated long ago by our Supreme Court, "It is clear that, when the jurisdiction of the cause depends upon [a] statute, the repeal of the statute takes away the jurisdiction." (*People v. Bank of San Luis Obispo* (1911) 159 Cal. 65, 70 [159 Cal. 65]; see also *First National Bank v. Henderson* (1894) 101 Cal. 307, 309 [35 P. 899].)

The Court in *Stevens v. WCAB* (2015) 241 Cal. App. 4th 1074, 1088-1092, recognized that the WCAB formerly had jurisdiction to decide disputed medical issues, but with enactment of SB863 [Stats. 2012 ch. 363] that jurisdiction was replaced by a new Labor Code Section 4610.6 which expressly forbids the WCAB from deciding a disputed medical issue arising from an employer's timely utilization

review determination. Thus, because of that legislative change, the WCAB has no jurisdiction to decide the disputed medical issue herein.

This Court should not lose sight of the fact that the medical treatment dispute herein arises from an employer's timely utilization review determination rejecting the employee's treating physician's recommendation as medically unnecessary, and that the only statutorily permitted avenue to appeal that employer's timely utilization review determination is via Independent Medical Review per Labor Code Section 4610.5(e). That section states,

(e) A utilization review decision may be reviewed or appealed only by independent medical review pursuant to this section. Neither the employee nor the employer shall have any liability for medical treatment furnished without the authorization of the employer if the treatment is delayed, modified, or denied by a utilization review decision unless the utilization review decision is overturned by independent medical review in accordance with this section.

No statute authorizes the WCAB to hear and determine the issue of medical necessity in the face of the employer's timely utilization review decision. But that is what CAAA and Margaris seek to vest the WCAB with original jurisdiction to hear and determine the disputed issue of medical necessity arising from an employer's timely utilization review decision ... in the absence of a statutory grant of authority to do so, and in direct contravention of the express language of the statute.

As a judicial body of limited jurisdiction, with no powers beyond those conferred on it by the Constitution and the Labor Code, the WCAB lacks the authority to review an employer's timely Utilization Review decision, as IMR is the sole avenue of appeal [Labor Code §4610.5(e)]. The sole statutory remedy for a defective IMR determination is a new IMR decision [Labor Code §4610.6(i)], and the WCAB is expressly prohibited from making a determination of medical necessity contrary to an IMR determination [Labor Code §4610.6(i)].

**EVEN ASSUMING ARGUENDO THAT AN AD'S IMR DECISION
ISSUED BEYOND THE STATUTORY TIME FRAME IS REVERSIBLE
BY THE WCAB WITHIN THE CONTEXT OF LABOR CODE
SECTION 4610.6(h)(1) AS CLAIMED BY CAAA, THE REMEDY
FOR THAT IS SPECIFIED IN LABOR CODE SECTION 4610.6(i) AS
A SECOND IMR, AND DOES NOT ALLOW THE WCAB TO
DECIDE THE DISPUTED MEDICAL ISSUE**

CAAA's amicus brief actually proves the employer/carrier's point ... that untimely IMR does not vest the WCAB with jurisdiction to decide the disputed medical issue following an employer's timely UR determination. CAAA argues,

It is through this appeal process in Labor Code Section 4610.6 (h) that petitioner is allowed to bring her grievance regarding the untimeliness of the IMR determination in her case. Subsection (1) states that one of the grounds for an IMR appeal is if the Administrative Director acts in excess of her powers in issuing the IMR determination. Clearly the Administrative Director is not empowered by the Labor Code to issue an IMR determination more than 30 days after receipt of the application and the necessary documentation in order to make the determination. This Labor Code Section reveals the Legislative intent that the WCAB would maintain some oversight regarding medical treatment disputes in the workers' compensation system. (CAAA Amicus brief, at pg. 16)

Thus, even assuming *arguendo* that an Administrative Director's IMR decision issued beyond the statutory time frame is reversible by the WCAB within the context of Labor Code Section 4610.6(h)(1)¹ as claimed in the above-quoted excerpt from CAAA's Amicus brief, the remedy is expressly set out in the statute at Labor Code Section 4610.6(i), which states,

(i) If the determination of the administrative director is reversed, the dispute shall be remanded to the administrative director to submit the dispute to independent medical review by a different independent review organization...

¹ Section 4610.6(h)(1) states one of the bases for appeal of an IMR determination is that "The administrative director acted without or in excess of the administrative director's powers."

Thus, contrary to the outcome that CAAA and Margaris seek, the very language of the statute mandates NOT that the WCAB have independent jurisdiction to decide the disputed medical issue, BUT INSTEAD that the case must be remanded to the AD for a new IMR decision to be issued². Any doubt about the WCAB's lack of jurisdiction to decide the disputed medical issue should be conclusively squelched by the express language of Labor Code Section 4610.6(i), which also states,

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

CONCLUSION

Based upon the foregoing, it is respectfully submitted that this Court should find that the WCAB lacks jurisdiction to decide a disputed medical issue arising from an employer's timely utilization review determination [Labor Code §4610.5(e)]; that regardless of the timeliness of the Administrative Director's Independent Medical Review decision, the sole statutory remedy for a defective IMR determination is a new IMR decision [Labor Code §4610.6(i)]; and that the WCAB is expressly prohibited from making a determination of medical necessity contrary to an IMR determination [Labor Code §4610.6(i)].

Respectfully submitted,
March 31, 2016.

LAW OFFICES OF ALLWEISS & McMURTRY
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² This presumes there has been a timely appeal of both the employer's UR decision and of the Administrative Director's IMR decision per Labor Code Sections 4610, et seq. and 4610.5, et seq..