

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
REPLY TO RESPONDENT'S ANSWER TO WCAB RESPONSE BRIEF

And
REPLY TO RESPONDENT'S ANSWER TO WCAB RESPONSE BRIEF

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 REPLY TO
RESPONDENT'S ANSWER TO THE WCAB'S 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, according to the Court's Docket, on May 10, 2016, Respondent Margaris filed an Answer to WCAB Response to Petition for Writ of Review. CWCI hereby applies to this Court for an order granting leave to file the within *amicus curiae* REPLY TO RESPONDENT'S ANSWER TO WCAB RESPONSE BRIEF, and thereby further support Petitioners CALIFORNIA HIGHWAY PATROL and STATE COMPENSATION INSURANCE FUND.

As demonstrated by the within Reply of CWCI to the Respondent's Answer responding to the WCAB's brief, Respondent's arguments in their Answer to WCAB response brief are premised upon numerous exaggerations and omissions, outdated and superseded publications, and mischaracterizes the state of the IMR system.

TABLE OF CONTENTS

Application of CWCI for Leave To File REPLY TO RESPONDENT'S ANSWER TO WCAB RESPONSE BRIEF	2
CWCI Reply to Respondent's Answer	3
Table of Contents	3
Table Of Authorities Cited	4
Verification & Word Count	5
Declaration of Service	6
Argument & Authorities	
RESPONDENT'S ARGUMENTS MISCHARACTERIZE THE CURRENT STATE OF THE INDEPENDENT MEDICAL REVIEW SYSTEM	7
SIMILAR LANGUAGE IN WORKERS' COMPENSATION STATUTES HAVE LONG BEEN HELD DIRECTORY ONLY, AND BECAUSE THE WCAB LACKS AUTHORITY TO HEAR A UR DISPUTE (EXCEPT AS AN IMR APPEAL), TO HOLD IMR TIMELINES TO BE JURISDICTIONAL WOULD DEPRIVE THE PARTIES OF A REMEDY	9
Conclusion	11

TABLE OF AUTHORITIES

Cases

<i>Coombs v. Industrial Acc. Com.</i> , (1926) 76 Cal.App. 565 [245 P. 445]	9
<i>In re Jerry R.</i> , (1994) 29 Cal. App. 4th 1432, 1437	9
<i>Janet v. Industrial Acc. Com.</i> (1965) 238 Cal.App.2d 491, 497;	9
<i>Jiminez v. San Joaquin Valley Labor</i> (2002) 67 CCC 74 (Appeals Bard <i>en banc</i>)	9
<i>Liberty Mutual Ins. Co v. LAC</i> (1964) 231 Cal. App. 2d 501.	9
<i>Peak v. Industrial Acc. Com.</i> , (1947) 82 Cal.App.2d 926 [187 P.2d 905]	9

Statutes

Labor Code § 4604	9
Labor Code § 4610.5	10
Labor Code § 4610.6	9, 10, 11
Labor Code § 5313	8, 9, 10

SECONDARY SOURCES

CWCI Research Update: Swedlow, et al., “Medical Review and Dispute Resolution in the California Workers’ Compensation System” (Dec 2015); [see cwci.org/research.html]	8
July 2015 - SB 863: Assessment of Workers’ Compensation Reforms	7

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 1651 words [the entire brief contains 2,155 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 17th day of May, 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 May 17, 2016, I both filed with the Court and served a true copy of the *Application of California Workers' Compensation Institute for Leave To File Reply to Margaris' Answer to WCAB Response Brief AND Reply to Margaris' WCAB Response Brief* 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
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 May 17, 2016, at Essex, Vermont.



Michael A. Marks, Esq. (SBN 071817)

ARGUMENT & AUTHORITIES

RESPONDENT'S ARGUMENTS MISCHARACTERIZE THE CURRENT STATE OF THE INDEPENDENT MEDICAL REVIEW SYSTEM

Respondent's arguments (Brief, Pg. 11-13) refer to the out-dated "July 17, 2014 SB863 Assessments of Workers Compensation Reforms" to suggest the IMR system is overwhelmed by volume, that 85% of treatment requests are denied, and the money would be better spent on treatment of injured workers rather than "denial of care". That argument is jiggery-pokery.

- The following year's study [alluded to by Respondent at Brief, Pg. 12, but not quoted] indicates that they have solved the workload from the unexpectedly high IMR demand, and that timeliness of IMR decision-making is no longer an issue.¹
- IMR isn't a "denial of care". Rather, it is a denial of unproven, inappropriate and potentially harmful treatment.²
- But the suggestion that overwhelming percentage of treating physician treatment recommendations are denied through UR/IMR is false. CWCI statistical studies show that nearly 85% of treatment requests are approved without even going through UR, that of the 15% that did go to UR, 59.8% were approved without physician review. Only 6.1.% even needed physician

¹ July 2015 - SB 863: Assessment of Workers' Compensation Reforms, Pg. 8 ("Although issues remain regarding the timely submittal of medical records by claim administrators and the proper documentation for appropriate care on behalf of the medical providers, *final determination letters are now issued within the statutory time frames from the date of receipt of medical records, as the chart on the next page shows.*") (italics added)

² Given the national epidemic of prescription drug abuse from improper physician prescribing, workers need this added layer of protection. For example, according to the July 2015 - SB 863: Assessment of Workers' Compensation Reforms, Pg. 15, "Nearly half (42%) of the 2014 IMR applications are appeals of the employer's or insurer's denial of pharmaceuticals, such as opioids, non-FDA-approved products or off-label prescriptions. Twenty-six percent (26%) of the pharmaceutical IMR decisions were for narcotic analgesics."

review, and nearly 1/3 of those were also approved. What that means is that the “UR denial rate” is less than 5%. The employer having applied evidence-based medical guidelines (first by claims adjusters for approval, then by UR nurses for approval, then by UR doctors for approval) it is no wonder that by the time an adverse decision reaches IMR, again applying evidence-based medical guidelines, the employer is found to have been correct in the overwhelming majority of the small percentage of denials.³

- Of ±220,000 IMR’s state-wide,
 - 97 doctors (1% of the physician pool of about 9,600 doctors) were found to be involved in 40% of the IMR’s ... which means that 1% of the doctors produced 88,000 IMRs.
 - 960 doctors (10% of the physician pool of about 9,600 doctors) were found to be involved in 80% of the IMR’s ... which means that 10% of the doctors produced 176,000 IMRs.
 - Altogether they had an 85-90% IMR denial rate.

The bottom line is that a relatively small percentage of treating physicians are recommending inappropriate and/or potentially harmful medical treatment, which accounts for a system-wide denial rate of less than 5% of all treatment, wherein decisions are timely made within statutory requirements.

SIMILAR LANGUAGE IN WORKERS’ COMPENSATION STATUTES HAVE LONG BEEN HELD DIRECTORY ONLY, AND BECAUSE THE WCAB LACKS AUTHORITY TO HEAR A UR DISPUTE (EXCEPT AS AN IMR APPEAL), TO HOLD IMR TIMELINES TO BE JURISDICTIONAL WOULD DEPRIVE THE PARTIES OF A REMEDY

Though passionately arguing that the AD’s untimely issuance of an IMR determination must vest the WCAB with jurisdiction to decide the medical issue (despite the absence of any statutory authority to do so), there are clear historical reasons why that argument must fail, to wit:

³ CWCI Research Update: Swedlow, et al., “*Medical Review and Dispute Resolution in the California Workers’ Compensation System*” (Dec 2015); [see cwci.org/research.html]

- Similar language regarding time limits for workers' compensation judicial decision-making are set forth in Labor Code § 5313⁴, and have repeatedly been found to be directory only, thus not invalidating the late decision.⁵
- In enacting legislation, the Legislature is presumed to have knowledge of existing judicial decisions ... and to have adopted or amended statutes in light of such decisions⁶.
- When legislation has been judicially construed and a subsequent statute on a similar subject uses identical or substantially similar language, the usual presumption is that the Legislature intended the same construction, unless a contrary intent clearly appears.⁷

Workers' compensation is entirely statutory. The statute expressly states that an employer's utilization review determination may ONLY be challenged through IMR.⁸ The WCAB's jurisdiction over medical treatment disputes is statutorily limited to a review of that IMR decision.⁹ The statute expressly prohibits the WCJ/WCAB from making its own determination of medical necessity,¹⁰ instead mandating that the

⁴ Labor Code § 5313 states, "The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties."

⁵ See, e.g., *Coombs v. Industrial Acc. Com.*, (1926) 76 Cal.App. 565 [245 P. 445]; *Peak v. Industrial Acc. Com.*, (1947) 82 Cal.App.2d 926 [187 P.2d 905]; *Janet v. Industrial Acc. Com.* (1965) 238 Cal.App.2d 491, 497; *Liberty Mutual Ins. Co v. LAC* (1964) 231 Cal. App. 2d 501.

⁶ *Jiminez v. San Joaquin Valley Labor* (2002) 67 CCC 74, 83 (Appeals Bard *en banc*)

⁷ *In re Jerry R.*, (1994) 29 Cal. App. 4th 1432, 1437

⁸ Labor Code § 4610.5(e)

⁹ Labor Code § 4604 was amended when IMR was enacted, and now limits WCAB jurisdiction over medical treatment disputes .

¹⁰ Labor Code § 4610.6(i) states, "In no event shall a workers' compensation administrative law judge, the appeals board, or any higher court make a determination

remedy from a successful IMR challenge is limited to ordering a new IMR.¹¹ Therefore, if the late IMR is void (i.e., time limits are jurisdictional), there is nothing the WCAB can review and the parties would be without a remedy. That very possibility is one reason why the Court rejected the “mandatory/jurisdictional” argument when made in relation to the “shall” language regarding time for judicial decisions under Labor Code § 5313 (*supra*), and consistent with the statutory scheme the same “directory” outcome is warranted herein to assure that doctors (and not lawyers/judges using litigation process that the legislature found doesn’t produce high quality medical outcomes) , applying scientifically-based medical quality standards as their foundation, make medical appropriateness decisions.

CONCLUSION

The legislature expressly found that litigation does not result in delivery of quality medical care to injured workers, and intended that doctors schooled in scientific evidence-based medicine do the decision-making (not lawyers/judges). Though admittedly initially plagued by an unanticipated volume of IMR requests (caused by a small percentage of physicians submitting an overwhelming number of inappropriate treatment requests to IMR) the backlog has been solved and the IMR process is working effectively to protect injured workers from inappropriate and potentially harmful medical interventions. This Court should interpret the AD’s time limits under 4610.5 consistent with the WCAB’s time limits under 5313, and 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 the

of medical necessity contrary to the determination of the independent medical review organization.”.

¹¹ Labor Code § 4610.6(i)

time for the Administrative Director's Independent Medical Review decision is directory (not mandatory), and that the WCAB, though authorized to invalidate an IMR decision on statutory grounds in Labor Code 4610.6(h), is expressly prohibited by Labor Code §4610.6(i) from making a determination of medical necessity contrary to an IMR determination

Respectfully submitted,
May 17, 2016.

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