Civil No: A143290

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION TWO

SAUL ZUNIGA

Petitioner,

vs.

INTERACTIVE TRUCKING, INC., STATE COMPENSATION INSURANCE FUND, and THE WORKERS' COMPENSATION APPEALS BOARD

Respondents,

WORKERS' COMPENSATION APPEALS BOARD
WCAB Case No. ADJ2563341

AMICUS CURIAE BRIEF BY CALIFORNIA WORKERS' COMPENSATION INSTITUTE

In Support Of Respondents

INTERACTIVE TRUCKING, INC., STATE COMPENSATION INSURANCE FUND, and THE WORKERS' COMPENSATION APPEALS BOARD

[Submitted Concurrently With Application for Leave to File]

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FIRST **APPELLATE DISTRICT, DIVISION** TWP	Court of Appeal Case Number: A143290
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: Michael Marks, Esq. SBN 071817 Law Office of Saul Allweiss 18321 Ventura Blvd., Suite 500 Tarzana, CA 91356 TELEPHONE NO.: 818-343-7509 FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*: Amicus California Workers Compensation Institute	Superior Court Case Number: ADJ2563341 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: SAUL ZUNIGA RESPONDENT/REAL PARTY IN INTEREST: Interactive Trucking, SCIF & WCAB	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Amicus California Workers Compensation Institute

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: June / , 2016

Michael A. Marks, Esq.
(TYPE OR PRINT NAME)

▶ MAMark
(SIGNATURE OF PARTY OR ATTORNEY)

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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 brief contains 3,426 words (including footnotes), 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 1st day of June, 2016, at Essex, Vermont.

Michael A. Marks (SBN 071817)

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

SAUL ZUNIGA

Petitioner

VS.

INTERACTIVE TRUCKING, INC., STATE COMPENSATION INSURANCE FUND and WORKERS' COMPENSATION APPEALS BOARD

Respondent(s)

Civil No: A143290

WCAB Case No. ADJ2563341

Declaration of Service
Via
TrueFiling

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, and that on June 1, 2016, electronic filing and service of the *Application of California Workers' Compensation Institute for Leave To File Amicus Curiae Brief* AND *Amicus Curiae Brief of California Workers' Compensation Institute* was electronically performed through the TrueFiling electronic system of the court for service pursuant to California Rules of Court 8.70 and 8.71.

Michael A. Marks, Esq.
SBN 071817

Argument & Authorities

THE PROCEDURAL SAFEGUARDS BUILT INTO THE IMR PROCESS FULLY SATISFY PETITIONER'S DUE PROCESS RIGHTS

A. The Published Court of Appeal decision in *Stevens v. Outspoken Enterprises* correctly upheld IMR against the same Due Process challenges presented herein

Subsequent to the briefing herein, the First District, Division One issued a published opinion in *Stevens v. Outspoken Enterprises (2015)* 241 Cal. App. 4th 1074 [review denied by *Stevens v. Workers' Comp. Appeals Bd. & Outspoken Enter.*, 2016 Cal. LEXIS 1005 (Cal., Feb. 17, 2016)] rejecting the same federal and state due process challenges in the IMR context. In doing so, the Court specifically addressed both the adequacy of procedural safeguards and the IMR reviewer anonymity, as follows:

> ... Stevens's federal **due process claim fails because Stevens was afforded ample process**. "The core of due process is the right to notice and a meaningful opportunity to be heard." (*Lachance v. Erickson (1998) 522 U.S. 262, 266 [139 L. Ed. 2d 695, 118 S. Ct. 753]*; see *Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 547 [84 L. Ed. 2d 494, 105 S. Ct. 1487].*) When due process must be afforded, the amount of process required is determined by balancing the affected [***1280] private interest, the risk of erroneous deprivation of this interest, the probable value, if any, of additional or substitute safeguards, and the government's interest in the process. (*Mathews v. Eldridge (1976) 424 U.S. 319, 334-335 [47 L. Ed. 2d 18, 96 S. Ct. 893].*) In employing this analysis, we reiterate that workers seeking treatment under California's scheme receive far more process, including through UR, than just that which is provided in the IMR procedure.
>
> Our consideration of this issue is guided by *California Consumer, supra, 161 Cal.App.4th 684*. There, the Court of Appeal considered a federal due process challenge to denials of medical claims submitted under the Knox-Keene Health Care Service Plan Act of 1975, Health and Safety Code section 1340 et seq. (Knox-Keene Act). (*California Consumer, at pp. 687-688,*

690.) Under the Knox-Keene Act, requests for medical care are reviewed under an IMR process codified in *Health and Safety Code section 1374.30.* (*California Consumer, at p. 687.*) In filing a claim, patients are allowed to submit their own and their medical provider's records. The insurer is also allowed to submit material. But, while insurers are allowed to see and rebut claimants' filings, claimants are not allowed to see and rebut insurers' filings. (*Id. at p. 692.*)

Notwithstanding this disparity, the Court of Appeal held that the IMR process [**487] under the Knox-Keene Act comports with due process. It acknowledged the patients' interest in "receiving contracted-for medical care," but it found the risk of an erroneous deprivation to be low since both sides "submit documentation regarding the claim, and the statute allows sufficient time for adequate consideration." (*California Consumer, supra, 161 Cal.App.4th at p. 692.*) At the same time, the court found the governmental interests to be [*1099] strong. It concluded that forcing disclosure of all documents the insurer submits to the independent review organization would be "cumbersome" and "would slow down the process and create a substantial [governmental] burden ... with little resulting benefit in most cases." (*Id. at p. 693.*)

(16) Here, workers have an interest in obtaining medical services similar to that of the patients in *California Consumer, supra, 161 Cal.App.4th 684.* And **as a result of the multiple layers of review, the risks of erroneous deprivations under the workers' compensation system appear to be fewer, and certainly no more, than the risks under the Knox-Keene Act procedures**. Finally, **the government's interest in the IMR process is at least as compelling as the interest in not being forced to disclose insurance documents, and the former interest was expressly and comprehensively identified by the Legislature itself when it established that process**. Consistent with *California Consumer*, we cannot conclude after considering these factors that California's process for reviewing workers' medical requests violates "[t]he core of due process" by failing to provide notice and a meaningful opportunity to be heard. (*Lachance v. Erickson, supra, 522 U.S. at p. 266.*)

We are similarly **unconvinced by Stevens's insistence that the IMR process violates due process because the physician reviewer is anonymous and not subject to cross-examination. The reviewers are not workers' adversaries: they are statutorily authorized decision makers.** We have found no authority for the proposition [***1281] that a party has a right to cross-examine such decision makers. In *Jennings v. Jones (1985) 165 Cal.App.3d 1083 [212 Cal. Rptr. 134]*, the Court of Appeal concluded that welfare recipients had a due process right to cross-examine

caseworkers, who were authorized to discontinue benefits on "[their] own concept of 'good cause,'" at a subsequent hearing. (*Id. at p. 1090.*) Unlike a physician reviewer, however, these caseworkers were not reviewing a decision but were instead making the initial decision. Welfare recipients would lack a meaningful opportunity to challenge the basis of the caseworkers' decisions without having an opportunity to discover what that basis was. In contrast**, injured workers requesting treatment under the workers' compensation system are given detailed explanations of the reasons for a denial or modification of their request, and they are given multiple opportunities to submit evidence and challenge those decisions**. "Procedural due process is not a static concept, but a flexible one to be applied to the needs of the particular situation[s] ... ."[17] (*165 Cal.App.3d at pp. 1090-1091.*) The IMR is only one aspect of the process afforded to [*1100] workers who request treatment, and we conclude that the process in its entirety provides [**488] sufficient due process protections.[18]

17 For example, even if Stevens were seeking to cross-examine *witnesses*, she would not necessarily be entitled to do so. (See *Stardust Mobile Estates, LLC v. City of San Buenaventura (2007) 147 Cal.App.4th 1170, 1189 [55 Cal. Rptr. 3d 218]* [need for cross-examination less "critical" in "cases involving documentary evidence" than in "cases that turn upon the testimony of live witnesses"].)

18 In a related argument, Stevens claims that the confidentiality of the physician reviewer's identity renders meaningless the ability of workers to challenge an IMR decision on the basis of "a material conflict of interest" as allowed by section 4610.6, subdivision (h)(3). We agree that the confidentiality of the reviewer's identity makes such challenges more difficult, but as pointed out by counsel for Outspoken Enterprises and the SCIF at oral argument, **workers have the opportunity to obtain significant other information bearing on conflicts of interest, including information about the IMR organization's "method of selecting expert reviewers and matching [them] to specific cases," system of identifying and recruiting expert reviewers, and method of "ensur[ing] compliance with the [statutory] conflict-of-interest requirements."** (§ 139.5, subds. (d)(2)(F), (H); see *id.*, subd. (e).) (emphasis added)

We urge this Court to follow the lead of the *Stevens* decision, and reject the challenge presented herein.

B. The Multiple Opportunities to Introduce Evidence for Consideration by the IMR Reviewer In Rebuttal to the Employer's UR decision satisfy due process.

The structure of IMR is found in Labor Code[1] Section 139.5, which classifies the IMR physician reviewers as consultants to the Administrative Director (hereafter AD) [Section 139.5(b)][2] and sets out the standards applicable to such consultants insofar as licensing, conflict of interest, expertise, qualifications, affiliations (familial, financial and professional), etc. The AD is required to contract with a review organization that is "independent of any workers' compensation insurer or workers' compensation claims administrator."[Section 139.5(a)(1)]. The IMR contractor's extensive disclosures regarding licensing, conflict of interest, expertise, qualifications, affiliations, physician reviewer recruitment and selection procedures, etc. [Section 139.5(c) and (d)] are available to any interested person.[Section 139.5(e)]

The process for IMR after an employer's Utilization Review decision to delay/deny/modify a treatment recommendation is *de novo review* as detailed in Section 4610.5 and 4610.6, which together with 139.5, flesh out the requisites for an employee's appeal to IMR, the unlimited documentary record

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[1] All further statutory references are to the Labor Code unless otherwise specified.

[2] In Section 1(f) of SB863 [Stats. 2012 ch. 363], the Legislature expressly found "that independent medical review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code"

that can be created by the parties for the IMR reviewer [Section 4610.5(f)(3), (l) and (m), 4610.6(b)], the injured worker's right to representation and assistance in presenting evidence to IMR [Section 4610.5(j)], the strict scientific standards to be applied in weighing competing medical opinions and studies submitted for consideration [Sections 4610.5(c)(2), 4610.6(c)], and the extensive written analysis required of the reviewer [Section 4610.6(e), 4610.6(c), 4610.5(c)(2)] to support the AD's IMR determination on the limited issue of medical necessity [Section 4610.6(c)] of the disputed treatment.

The IMR physician consultant's detailed report becomes the decision of the AD [Section 4610.6(g)], which is then subject to no fewer than three levels of judicial review: (1) by a workers' compensation judge [Section 4610.6(h)], (2) whose decision is then subject to another appeal via Petition for Reconsideration to the WCAB [Section 5900, et seq.], and (3) whose decision is in turn subject to appeal by petition to the appellate courts [Section 5950, et seq.].

Against this extensive statutory backdrop of safeguards, this Court should reject any claim that the IMR process violates an injured worker's Due Process rights. As outlined herein, the employee may provide scientific and medical evidence for consideration by the employer's Utilization Review in support of a treating doctor's treatment authorization request and/or MTUS rebuttal; the employee may challenge an adverse Utilization Review

determination through IMR and in that process the IMR reviewer is not only provided with relevant medical documents and the entire UR file regarding the underlying decision, but also the claimant can provide the IMR reviewer with whatever they want by way of scientific and medical evidence in support of a treating doctor's treatment authorization request [see Section 4610.5(f)(3); and see 8 CCR § 9792.21.1(a)(2)] . Nothing prohibits any party from submitting appropriate scientific and medical evidence addressing any claimed shortcomings of the presumptively correct MTUS, and rebutting the MTUS with other evidence consistent with the statutory hierarchy of validity of evidence-based medicine.[3] In fact, this is exactly what is expected within the UR/IMR processes. Once that determination is made and becomes the opinion of the AD, there are ample opportunities to challenge the outcome, as outlined below.

C. The Opportunities for Judicial Review of the IMR Decision satisfy due process, despite IMR reviewer anonymity

The employee's first challenge to the AD's IMR decision is via judicial review by a workers' compensation judge for a trial on whether (1) the AD acted in excess of his/her authority [see Section 4610.6(h)(1)]; (2) the AD

[3] *see* 8 CCR 9792.25 (adopted 6/18/09) and 8 CCR 9792.21 - 9792.21.1

decision was procured by fraud [see Section 4610.6(h)(2)]; (3) reviewer conflict of interest [Section 4610.6(h)(3)] [which could be validated by the IMR company' extensive policies and procedures available for review],[4],[5] (4) for decision biased on basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, or disability [see Section 4610.6(h)(4)] [IMR reviewer's reliance upon unlawfully biased studies could be determined from review of the evidence-based medicine studies referred to and/or relied upon per the documentary record created by the parties and the reasoning within the AD's written decision], (6) for plainly erroneous express or implied factual error apparent from the record [see

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(effective 4/20/15)

[4] The IMR contractor's extensive required disclosures per Section 139.5(c) and (d) are available to the parties per Section 139.5(e). The AD has audit oversight of the IMR contractor, and has a unique reviewer ID number that could be used by the AD to audit and verify the compliance as appropriate when presented with a *bona fide* issue. Additionally, IMR file can be downloaded to the WCAB's electronic adjudication system for review per 8 CCR 10957.1(i)]

[5] A challenge based on IMR reviewer anonymity was specifically rejected in *Stevens v. Outspoken Enterprises*, id at fn. 18. [As noted in *Mercury Interactve Corp v. Klein,* 158 Cal.App.4th 60, 77 "The placement of the text expressing those holdings in footnotes does not negate their authoritative nature." *citing, Melancon v. Walt Disney Productions* (1954) 127 Cal.App.2d 213, 214, fn. * [273 P.2d 560] ["A footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect"]; see also *People v. Jackson* (1979) 95 Cal.App.3d 397, 402 [157 Cal.Rptr. 154] [same].)

Section 4610.6(h)(5)] [which could be determined by from review of the record as created by the parties and the IMR decision's reasoning].[6]

If the IMR decision is upheld by a Workers' Compensation Judge the employee's second appeal is via Petition for Reconsideration to the Appeals Board under Section 5903, on one or more of the statutory grounds set forth therein. If still dissatisfied with the result, the employee's third appeal is via Writ of Review to the Court of Appeal.

From the standpoint of "due process", the IMR determination is made by a "statutorily authorized decision maker"[7] based on an evidentiary record created by the parties. The Judge's decision follows a full trial to determine whether there is "clear and convincing evidence" to overturn the IMR decision and remand for a new IMR review. The Appeals Board's decision follows review of the record below as does the Court of Appeal's decision. Therefore, there are no fewer than three appellate opportunities to challenge an IMR determination. An additional safeguard allows the employee to resubmit a previously denied request for the same medical treatment by the same physician at any time, even after IMR rejection upheld on appeal, upon a

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[6] Though not precedent, the Lexis Nexis Noteworthy Panel Decisions reporter and the California Compensation Cases reporter system contain numerous reversals on this basis.

[7] *Stevens v. Outspoken Enterprises*, id at 1099

showing of a documented change in the facts material to the basis of the original adverse utilization review decision.[8]

In assessing the sufficiency of these multiple appellate opportunities and built-in safeguards in the context of the plenary authority of Article XIV, section 4 and the ills the legislature sought to remedy, and applying the accepted guideline for Due Process,[9] this Court should not second-guess the legislative policy choices[10] and instead should uphold the IMR process as achieving a reasonable balance regarding the private interest affected, the safeguards against risk of an erroneous deprivation of that interest through the procedures used, along with the government's interest, costs and administrative burdens which would be incurred by additional safeguards.[11]

D. Keeping Reviewer Identity Confidential Promotes Reviewer Independence and Objectivity While Preventing Retaliation and Harassment

As observed by the Acting Administrative Director in her *Informal Opposition of the Acting Administrative Director of the Division of Workers' Compensation to Petition for Writ of Review* dated February 23, 2016 and filed herein,

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[8] Section 4610(g)(6)

[9] Due process does not guarantee an opportunity to present oral testimony, but is satisfied where a party is entitled to submit written materials; (*see*, *State of Pennsylvania v. Riley* (3d Cir. 1996) 84 F.3d 125, 13 , *and see*, *Mathews v. Eldridge* (1976) 424 U.S. 319, 334)

[10] *Rio Linda Union School Dist. v. WCAB* (2005) 131 Cal.App.4th 517, 532]

[11] *Peretto v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 449, 460; *Mackey v. Montrym* (1979) 443 U.S. 1, 10) (*Mathews v. Eldridge* (1976) 424 U.S. 319, 348)

> The provisions of section 4610.6, in combination with the whole of the statutory scheme, reflect that the Legislature chose to strike this balance in favor of ensuring that medical treatment in the workers' compensation system be constrained by objective, evidence-based standards, as interpreted and applied by doctors *whose identity is shielded* in order to preserve their independence and to protect them from potential retaliation, harassment, or other forms of influence or backlash. The private interest of any party in simply knowing the identity of the reviewer is of no great weight.

The Administrative Director's concern that disclosing reviewer identity could subject the reviewer to "potential retaliation, harassment, or other forms of influence or backlash" is well founded. In fact, at a recent California Applicants Attorney Association meeting, a panelist expressly stated their intent to wage a social media campaign against physician reviewers.[12] This is precisely the kind of conduct that reviewer anonymity is designed to protect against, to assure the integrity of the medical decision-making process. Their insidious intent should not be condoned.

E. Conclusion

Considering the Legislature's balancing of the mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" alongside of the grant of "plenary power, unlimited by any provision of this Constitution" to do so, the ills sought to be cured, the historically unconscionable administrative burden and historically

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[12] See California Applicants' Attorney's Association CAAAMENTS magazine, January 2016 edition (advocating use of social media); and see 1/25/16 blog post by CAAA seminar presenter recommending use of physician reviewer's names on social media critique. [www.thomasfmartinplc.com/Blog/2016/January/Make-Change-Happen-Social-Media-the-Medical-Revi.aspx]

poor medical outcomes that the Legislature sought to remedy in order to improve the quality of workers' medical treatment and outcomes, and the additional safeguard that any IMR determination adverse to the employee is subject to three separate appeals and may be reopened at any time upon a showing of "a documented change in the facts material to the basis of the utilization review decision",[13] this Court should defer to the Legislature's judgment on the proper balance between procedures, cost and administrative burden, and the resulting improved quality of medical decision-making and treatment outcomes for injured workers. This Court should find that the procedural safeguards and appellate opportunities provided by the IMR statutes satisfy Due Process.

Respectfully submitted,

Allweiss & McMurtry
A Professional Corporation

By: _____
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[13] Section 4610(g)(6); *Nota Bene* that under Section 4610, the *employer* has no right to appeal a utilization review decision favorable to the employee.