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Letter in Opposition of Petition for Review
[Rule 8.500(g)]

Chief Justice Tani Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: Daniel Ramirez v. Workers' Compensation Appeals Board, California Dep't of
Health Care Services, (adjusted by State Compensation Ins Fund), et. al.,
Supreme Court Case No. S241697
Court of Appeal Case No. C078440

Dear Chief Justice and Associate Justices:

This office represents the California Workers' Compensation Institute (hereafter CWCI), whose briefs were accepted for filing before the Court of Appeal below as *amicus curiae*. CWCI has also been granted *amicus curiae* status in numerous other appellate cases challenging the Utilization Review and/or Independent Medical Review statutes involved herein.¹ On behalf of our members, we submit this letter pursuant to Rule 8.500(g) to urge this Court to deny the Petition for Review

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 83% of California's workers' compensation premium, and self-insured public entities and private employers with \$57B of annual payroll (26% of the state's total annual self-insured payroll). The Institute's research

¹ See, *California Highway Patrol v. WCAB (Margaris)* (2017) (248 Cal.App.4th 349); *McFarland v. WCAB* (2015) (First Appellate District No. A144561); *Stevens v. WCAB & Outspoken Enterprises* (2015) (241 Cal.App.4th 1074); and *Baker v. WCAB* (2017) (Third Appellate District No. C080895).

offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the Constitution of the State of California. On behalf of its membership, the Institute frequently provides input at legislative and regulatory hearings.

In this case, under the guise of challenging the Independent Medical Review (hereafter IMR) determination, Petitioner herein seeks to invalidate the WCAB's jurisdictional limitations over Utilization Review (hereafter UR) as held in the *en banc* decision in *Dubon v. World Restoration, Inc.* (2014) 79 Cal.Comp.Cases 1298 (*Dubon II*)², and thereby reinvest the Workers' Compensation Appeals Board with original jurisdiction over a UR determination that is alleged to have any error. Preliminarily, we note the Court below specifically observed that

Ramirez never tendered the utilization review decision itself to the Board. Instead, he requested independent medical review under the statutory scheme, and then sought to appeal the independent medical review determination to the Board. However, as previously stated, an independent medical review determination can be appealed to the Board only on limited grounds: (1) the administrative director acted without or in excess of his or her powers, (2) the administrative director's determination was procured by fraud, (3) the independent medical review had a material conflict of interest, (4) the determination was the result of bias, or (5) the determination was the result of an erroneous finding of fact not subject to expert opinion. (§ 4610.6, subd. (h).) Ramirez makes no claim that the Board had jurisdiction on one of these grounds over his independent medical review, and we see no basis for the Board's jurisdiction of his independent medical review. (*emphasis added*)

² *Dubon II* held that the WCAB has original jurisdiction to adjudicate medical treatment disputes where the employer's UR is untimely, but that the sole means to challenge an employer's timely UR decision is through the IMR process of Labor Code Section 4610.5.

Putting the issue in the context of the statutory framework demonstrates that Petitioners' arguments to expand the WCAB jurisdiction over a UR decision are fundamentally flawed. SB863 specifically was intended to take medical dispute resolution out of the traditional litigation process and put it into the hands of trained medical professionals schooled in principles of "evidence based medicine."^{3,4}

³ Assembly Committee on Insurance, August 31, 2012 Hearing ("SB 863 proposes to change the way medical disputes are resolved. Currently, when there is a disagreement about medical treatment issues, each side attempts to obtain medical opinions favorable to its position, and then counsel for each side tries to convince a workers' compensation judge based on this evidence what the proper treatment is. This system of "dueling doctors" with lawyers/judges making medical decisions has resulted in an extremely slow, inefficient process that many argue does not provide quality results. Long delays in obtaining treatment result in poorer outcomes, reduced return to work potential, and excessive costs in the system, none of which are good for injured workers. SB 863 would instead adopt an independent medical review system patterned after the long-standing and widely applauded IMR process used to resolve medical disputes in the health insurance system. Thus, a conflict-free medical expert would be evaluating medical issues and making sound medical decisions, based on a hierarchy of evidence-based medicine standards drawn from the health insurance IMR process, with workers' compensation-specific modifications. The bill contains findings that this system would result in faster and better medical dispute resolution than existing law.

The IMR system is designed to ensure that medical expertise is used to resolve medical disagreements. Thus, the decision from the IMR is final and binding on the parties. Nonetheless, in the exercise of the Legislature's plenary authority to establish a workers' compensation system that includes a review of decisions, there is a process to appeal the IMR result, but this review process does not allow the second-guessing of medical expertise. Rather, the appeal is limited to circumstances where there was fraud, conflict of interest, discrimination based on protected classes, or clear mistakes of facts that do not involve medical expertise.")

⁴ Section 1 of SB863 itself emphasizes the reasons as follows: "(d) That the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment.(e) That having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy.(f) That ...that independent medical review is a new state function pursuant to paragraph (2) of subdivision (b) of Section 19130 of the Government Code that will be more expeditious, more economical, and more

Labor Code Section 4610.5 expressly makes IMR the sole avenue for an employee to appeal an employer's adverse UR decision.⁵ Section 4610.6 emphasizes that even where IMR is overturned, the remedy is a new IMR and the WCAB cannot adjudicate the medical issue.⁶ Section 4062 removed medical treatment issues from the dueling doctors' adversary process.⁷ And Section 4604 removed the WCAB's original jurisdiction over medical treatment disputes.⁸

From the foregoing, it should be abundantly clear that the outcome sought by Petitioners (*i.e.*, to expand the WCAB's original jurisdiction over UR disputes) is unsupportable. It is directly contrary to the express language of the statutes, contrary to the clear legislative intent as manifest by both the preamble to SB863 and legislative declarations, and would eviscerate the legislative declaration that decisions of medical necessity be made by independent experts relying on evidence-

scientifically sound than the existing function of medical necessity determinations The existing process ... is costly and time-consuming, and it prolongs disputes and causes delays in medical treatment for injured workers. Additionally, the process of selection of ... evaluators can bias the outcomes. Timely and medically sound determinations of disputes over appropriate medical treatment require the independent and unbiased medical expertise”

⁵ Section 4610.5(a) (This section applies to any dispute over UR); 4610.5(e) (A utilization review decision may be reviewed or appealed only by independent medical review); 4610.5(k) (If there appears to be any medical necessity issue, the dispute shall be resolved pursuant to an independent medical review).

⁶ Section 4610.6(i) (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).

⁷ Section 4062 (b) (If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a request for authorization of a medical treatment recommendation made by a treating physician, the objection shall be resolved only in accordance with the independent medical review process established in Section 4610.5).

⁸ Section 4604 (Controversies between employer and employee arising under this chapter shall be determined by the appeals board, upon the request of either party, except as otherwise provided by Section 4610.5).

based medical principles and not by “dueling doctors” and the litigation process. As such, we urge this Court to deny the Petition for Review.

Dated: May 11 , 2017

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By: _____
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