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December 5, 2025

Eva McClintock, Clerk/Executive Officer
Court of Appeal
Second Appellate District, Division Eight
300 South Spring Street, 2nd Floor
Los Angeles, CA 90013

RE: 2nd Civil Case No. B349584, Redwood Fire and Casualty Company Administered by Berkshire Hathaway Homestate Companies (BHHC) v. Workers' Compensation Appeals Board and Rogelio Toscano [WCAB Case No. ADJ17821210]

Dear Ms. McClintock:

On behalf of the membership of the California Workers' Compensation Institute ("CWCI"), we submit this letter to urge this Court to issue a Writ of Review or in the alternative a Writ of Mandate to address the above identifed pending Petition on its merits. Review on the merits is necessary because the petition raises an ongoing issue regarding the authority of the Workers' Compensation Appeals Board to assume jurisdiction over medical treatment determinations contrary to specific public policy expressed by the legislature. A further consideration is to obtain uniformity of the law as this exact issue has recently been the subject of a published opinion of the 2nd Appellate District.

Should permission to file this letter supporting the petition be required, please treat this letter as a request for leave to file.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 76% of California's workers' compensation premium, and self-insured employers with $92B of annual

payroll (30.3% of the state's total annual self-insured payroll). CWCI further serves as a liaison for employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral testimony at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, CWCI has been judicially permitted to join in multiple cases as amicus curiae before the California Supreme Court and Courts of Appeal.

ISSUE PRESENTED:

Does the Workers' Compensation Appeals Board have jurisdiction to Award medical treatment contrary to the Utilization Review process set out by the legislature?

In 2003 in legislation designated as SB228, the legislature created a mandatory system of review by employer, insurance companies and third-party claims administrators administrating workers' compensation benefits for making determinations regarding the reasonableness and necessity of medical treatment. Beginning on January 1, 2004, employers were required to submit requests for medical treatment to the claims administrator utilizing a Request for Authorization (RFA) (Cal Code Regs. Title 8, Section 9885.5 [1]). The employer, upon receipt of an RFA, had a specified timeframe depending on whether the request was prospective, retrospective or expedited to approve, modify, delay or deny the treatment request in the Request for Authorization. However, pursuant to the same code section, medical treatment could be delayed or denied only with a decision of a physician reviewing the request in making a determination as to whether the medical treatment was consistent with the Medical Treatment Utilization Guidelines (MTUS) adopted by the administrative director under Labor Code §4604.5[2].

Under the scheme enacted effective January 1, 2004, the response to a request for medical treatment reviewed through Utilization Review (UR) could be appealed to the Workers' Compensation Appeals Board for a judicial review of whether the treatment was reasonable or necessary and in compliance with the MTUS (*State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Sandhagen) (2008) 44 Cal. 4th. 230, 73 Cal. Comp. Cases 981*). Under this process, issues involving medical determinations of the reasonable and necessary medical treatment continued to be extensively litigated before the Workers' Compensation Appeals Board with Workers' Compensation Judges making the medical determination whether treatment was reasonable or necessary and consistent with the MTUS adopted by the administrative director.

In 2012, the legislature passed SB863. In that enactment, the legislature made significant alterations to the process for determining the reasonableness and necessity of medical treatment. The initial UR process of submission of RFAs, review by claims administrator's UR process and limiting denial or modifications based upon medical decisions by licensed physicians remained fundamentally unchanged. However, superimposed upon that process was a subsequent appeal process available to injured workers alone in the event they disputed a UR determination for modification or denial of medical treatment. If the employee wished to appeal the UR determination to deny or modify medical

[1] All references to regulations refer to the California Code of Regulations, Title 8.
[2] All references to code sections refer to the Labor Code unless otherwise indicated.

treatment, they could request review by an independent organization through Independent Medical Review (IMR). The state selected a contractor to perform IMR, which reviews determinations by the employer's UR physician and determines whether the medical treatment requested was in compliance with the MTUS adopted by the administrative director and, hence, should be provided.

In addition, if the employee wished to dispute an adverse determination of IMR, a limited appeal was allowed to the Workers' Compensation Appeals Board on specifically identified factual issues, *but not on the medical determination made through IMR*. Even if the Workers' Compensation Appeals Board determined the IMR ruling was flawed and should be reversed, it could not make a determination regarding the medical necessity of the disputed medical treatment but must refer the matter back to the IMR process for review by a different independent physician.

This process was consistent with the legislature's expressed policy that medical treatment decisions should be made by physicians rather than by lawyers and/or judges. This was expressed most succinctly in the Preamble Section 1 of SB863 which declared the legislative intent concerning medical determinations as follows:

> "…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…
>
> …that having medical professionals ultimately determined the necessity of requested treatment furthers the social policy of the state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and the provision(s) of the act establishing Independent Medical Review are necessary to implement that policy."

The legislative intent as expressed in SB863 was clearly intended to remove from the Workers' Compensation Appeals Board jurisdiction over questions of medical necessity and that such determinations should be made by medical professionals. Safeguards for the employee allowed, in effect, three separate bites at the apple on that issue. It should be noted the employer had no legal right to appeal any determination made by its Utilization Review process. There is no avenue for an employer to dispute a UR determination regarding medical treatment and the treatment approved by UR must be provided. (Stevens *v. Workers' Comp. Appeals Bd. (2015) 241 Cal.App.4th 1074, at 1090)*

The legislature has therefore made it very clear it wishes medical treatment determinations to be made by medical professionals and not by Workers' Compensation Judges or the Workers' Compensation Appeals Board.

In spite of the clear legislative direction removing the ability to make determinations regarding medical treatment from the Workers' Compensation Appeals Board, the Appeals Board has on its own created a broad exception without any supporting legislation or affirming case law which allows it to make determinations regarding specific forms of medical treatment it deems to be "continuing care".

The foundation for the Appeals Board's assertion of this authority is based upon its decision in a case designated a significant Panel decision [3]. In that decision, the Workers' Compensation Appeals Board determined if a claims administrator authorized a specific form of treatment; in that case assignment of a nurse case manager; the claims administrator was not allowed to seek Utilization Review to determine whether continuing such treatment was reasonable or necessary and must continue to authorize that treatment until the employer was able to make a demonstrated showing of change in circumstances justifying the change in treatment, whether reduction or termination. While *Patterson* did not specifically apply to a case involving UR, the Workers' Compensation Appeals Board has, in subsequent cases (many which resided in the petitioner's brief at footnote three), consistently found it had jurisdiction to ignore a UR Determination regarding treatment and issue its own determination to award continuing treatment.

The Appeals Board rationale for this usurpation of authority, as expressed in the letter brief of the WCAB to the Appellate Court, is the determination as to whether there has been a change in the employee's condition to justify altering or terminating the previously provided medical treatment was a legal determination and not a medical one. This, however, represents a fallacy on the part of the WCAB. The issue of whether there is a significant change in the applicant's condition to alter treatment is by its very nature a *medical determination* and one which the WCAB is specifically prohibited from making based upon the entire scheme set out in SB863. It is further argued the WCAB's shifting of the burden to the employer to demonstrate a change of circumstances sufficient to alter or terminate previously provided medical treatment is inconsistent with the California Supreme Court determination in *Sandhagen, cited supra* which specifically held that medical treatment is to be provided consistent with the Medical Treatment Utilization Schedule and it was the employee's burden to present affirmative evidence the medical treatment requested was consistent with reasonable and necessary medical treatment as defined by the MTUS. The Board's holdings relying on *Patterson* in shifting the burden to the defendant to show medical treatment is not consistent with the MTUS are contrary to specific legislative intent and are contrary to both case and statutory law.

The WCAB's reliance upon its own rationale in *Patterson* has resulted in increased litigation over issues involving medical treatment contrary to the expressed legislative intent expressed in SB228 and SB863. The intent in the passage of SB863 could not be more clearly set out to express the legislative policy that medical determinations should be made by medical professionals and not by judicial personnel whether Workers' Compensation Judges or the Workers' Compensation Appeals Board. The Board's usurpation of the authority to make medical determinations is an effort to return authority to itself to make medical determinations such as existed before the passage of SB863.

One of the hallmarks of the *Patterson* decision which has been applied in numerous subsequent cases is a requirement by the employer to show a "change of circumstances" in order to terminate or limit previously authorized care. However, not only is there a lack of definition for the so-called "change of circumstances" requirement, but even a determination regarding change of circumstances requires a medical determination as to whether there is a medical basis justifying a change of medical treatment. Such a determination is not for the WCAB to make, but a medical determination required to be made by a physician according to the MTUS pursuant to §4610. Workers' compensation judges

[3] *Patterson v. The Oaks Farm (2014) 79 Cal. Comp. Cases 916*

and the WCAB, however, are not obligated to and make no reference to the MTUS in issuing their determinations to enforce the rationale of *Patterson*. Instead, the Board or Trial Judges solely looked to see whether the treatment was previously authorized and then make a medical determination as to whether there is sufficient medical evidence for the treatment to be altered or terminated. The WCAB cites no case or statutory authorities for its ability to make determinations in its reliance on *Patterson*, but simply decide *Patterson* is its own authority to make those determinations.

It should also be noted the legislature could have created an exception for cases such as those for which the rationale of *Patterson* has been applied. The legislature has frequently made exceptions to specific statutory schemes in workers' compensation benefits. The legislature has created exceptions to the requirements for six months of employment in order for a psychiatric injury to be found as set out in Labor Code §3208.3. It has defined exceptions on the limitation to receipt of psychiatric permanent disability benefits for specific kinds of injuries in Labor Code §4601.1 among others. However, the legislature has not created an exception for the WCAB to award medical treatment which Utilization Review has determined is not consistent with the MTUS and therefore, is not reasonable or necessary.

Conclusion:

> "A fundamental rule of statutory construction is that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*DuBois v. Workers' Comp. Appeals Bd*. (1993) 5 Cal.4th 382, 387) (*DuBois*). In interpreting a statute, the text of the statutory language is typically the best and most reliable indicator of the Legislature's intended purpose. (Larkin *v. Workers' Comp. Appeals Bd*. (2015)62 Cal.4th 152, 157.) "When the language is clear and there is no uncertainty as to the legislative intent, we look no further and simply enforce the statute according to its terms." (*DuBois*, at p. 387–388.)

This issue has recently been the subject of appellate determination in the case referenced in the petitioner's brief at footnote 4. Since the Petition in this matter was filed, this Court has published *Illinois Midwest Insurance Agency, LLC v. WCAB (Rodriguez)* (B344044/ADJ1153224), In that decision, the Second Appellate District held as follows:

> "…We conclude that there is no exception to the statutorily mandated dispute resolution procedures for ongoing or continued treatment. We reject *Patterson v. the Oaks Farm* (citation omitted) to the extent it set forth a contrary rule for injuries of medical treatment necessity determinations arising after the 2013 reforms. When a Request for Authorization of treatment is submitted and there is a dispute over whether the requested treatment is medically necessary, that dispute must be resolved through the Utilization Review and independent medical review processes, rather than in an extra-statutory proceeding before the WCAB."

The above cited case presents a fact pattern very similar to the instant case. The Institute believes the court in *Illinois Midwest Insurance Agency versus W.C.A.B., cited supra* understood and

properly decided the issue of whether the WCAB had jurisdiction over medical treatment disputes absent the limited circumstances identified by that court in its footnote 4.

Particularly in light of the decision in *Illinois Midwest Insurance Co et, cited supra,* this Court should grant review to provide clarity and consistency for the Board and the practitioners before the WCAB.

We thank the court for your consideration of this request.

Very truly yours,
MICHAEL SULLIVAN & ASSOCIATES LLP

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Attorney at Law on behalf of
California Workers' Compensation Institute

RMJ/lag
cc: Sara Widener-Brightwell, Consultant Expert ***(sent via email)***

[End]

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I am over the age of eighteen years and not a party to the within entitled action. Michael Sullivan & Associates LLP's business address is: 266 Grand Avenue, Suite 200, Oakland, CA 94610.

On December 5, 2025 I electronically served the foregoing document(s) described as Letter Brief and Request to submit Letter Brief in this matter, in the method indicated on the parties registered for electronic service through TrueFiling:

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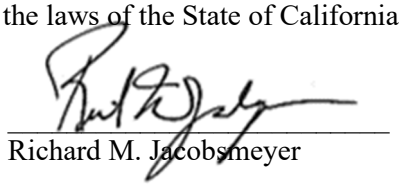
Executed on 12/5/2025

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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