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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

FRANCES STEVENS, Applicant, vs. OUTSPOKEN ENTERPRISES, INC., and STATE COMPENSATION INSURANCE FUND, Defendants.	Case No.: ADJ1526353 (SFO 0441691) **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF ON RECONSIDERATION [Labor Code §133; WCAB Reg. §10848] and PROPOSED AMICUS CURIAE BRIEF ON RECONSIDERATION BY CALIFORNIA WORKERS' COMPENSATION INSTITUTE, CALIFORNIA CHAMBER OF COMMERCE, and CALIFORNIA COALITION ON WORKERS' COMPENSATION**

COME NOW California Workers' Compensation Institute ("CWCI"), the California Chamber of Commerce ("CalChamber"), and the California Coalition on Workers' Compensation ("CCWC") and motion this court for leave to file an amicus curiae brief in this matter pursuant to Labor Code § 133 and Cal. Code Regs., tit. 8, § 10848.

Motion for Leave to File Amici Curiae Brief

On 05/19/2017, the Appeals Board issued a new Decision After Remittitur in this case. Being newly aggrieved, defendant State Compensation Insurance Fund has on 06/12/2017 filed a Petition for Reconsideration of the decision. Because of the important legal issues surrounding the decision in this

case, the California Workers' Compensation Institute and the California Chamber of Commerce request that the Appeals Board recognize that consideration of a broad perspective of legal analysis of the issues involved will help to foster a fair and complete presentation of the facts and law in dispute and grant this request for leave to file the proposed *amici curiae* brief.

Statements of Interest

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 employers with $65B of annual payroll (30% of the state's total annual self-insured payroll). The Institute publishes research that is typically based on claims data collected from member companies, 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 further serves as a liaison with employer, labor, medical, regulatory and legal communities within the workers' compensation system, and frequently provides written and oral input at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, the Institute has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal.[1] Even more to the point, CWCI was previously been granted *amicus* status in the appellate proceedings in this case.

[1] CWCI has been granted amicus status in the cases of *Christian v. WCAB* (1997); *SCIF v. WCAB (Stuart)* (1998); *Avalon Bay Foods v. WCAB* (1998); *Rosales v. Depuy Ace Medical Company* (2000): *Lockheed Martin v. WCAB (McCullough)* (2002); *Wal-Mart v. WCAB (Garcia) (2003); Honeywell v. WCAB (Wagner)(2005); Green v. WCAB* (2005); *Rio Linda School District v. WCAB (Schefiner)* (2005); *Nabors v. WCAB* (2006); *Yeager Construction v. WCAB (Gatten)* (2006); *Chang v. WCAB* (2007); *Vaira v. WCAB* (2007); *Brodie v. WCAB* (2007); *Babbitt v. Ow Jing (2007); Pendergrass v. Duggan Plumbing)* (2007); *Tanimura & Antle v. WCAB (Lopez)* (2007); *Palm Medical Group v. State Compensation Insurance Fund* (2007); *Smith & Amar v. WCAB* (2007); *Facundo-Guerrero v. WCAB* (2008); *Smith & Amar v. WCAB)* (2009); *Benson v. WCAB* (2009); *Boughner v. WCAB* (2009); *Aguilar v. WCAB* (2009); *El Aguila Food Products v. WCAB (Cervantes)* (2010); *Almaraz & Guzman v. WCAB* (2011); *Baker v. WCAB & X.S.* (2011); *Ogilvie v. WCAB (2011); Valdez v. WCAB* (2012); *Pacific Compensation v. WCAB (Nilsen)* (2013); *Southern California Edison v. WCAB (Martinez)* (2013); *Stevens v. Outspoken Enterprises* (2014); *CIGA v. WCAB (Elite Surgery Centers) (2014); South Coast Framing v. WCAB (Clark)*

As a primary representative of the business community in the State of California, CalChamber has a legitimate interest in this litigation. CalChamber is comprised of over 13,000 member employers, both large and small. CalChamber is dedicated to improving California's business climate by providing businesses with a voice in state politics, legislative activities, and judicial matters. CalChamber is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the California Constitution of the State of California. CalChamber has been granted *amicus curiae* status in numerous workers' compensation cases, including this one.[2]

The California Coalition on Workers' Compensation (CCWC) is a non-profit education and advocacy association representing California employers. The CCWC membership consists exclusively of California employers, both large and small, and includes corporations, non-profit entities, trade associations, and public entities. CCWC serves its memberships by directly advocating on their behalf in front of the California State Legislature as well as administrative agencies that regulate the workers' compensation system. CCWC is a recognized leader in workers' compensation advocacy in California, and has a long history of working toward a reasonable workers' compensation system that provides timely benefits to injured workers while maintaining a fair and affordable system for employers. CCWC is interested in administrative, statutory, and judicial matters that substantively affect the California workers' compensation system. CCWC has also been granted *amicus* status in past workers' compensation cases.

(2014); *Angelotti Chiropractic v. Baker (*2014); *Ramirez v. WCAB (Calif. Dept. of Health Care Services)* (2015); *Contra Costa County v. WCAB (Dahl)* (2015); *State Compensation Ins. Fund v. WCAB (Margaris)* (2016); and *Ramirez v. WCAB* (2017).

[2] CalChamber has most recently been granted amicus status in *City of Jackson v. WCAB (Rice)* (2017); *Ramirez v. WCAB* (2017); *Angelotti Chiropractic v. Baker* (2015); *Southern California Edison v. WCAB (Martinez)* (2013); *Valdez v. WCAB* (2013); *Baxter v. WCAB (XS)* (2011); *Environmental Services v. WCAB (Almaraz)* (2011); *Milpitas Unified School District (Guzman)* (2011); *City & County of San Francisco v. WCAB (Ogilvie)* (2011); *Diaz v. Carcamo* (2011); and *Benson v. WCAB* (2009).

As the Appeals Board itself has stated, amicus involvement at the WCAB level is not unusual.[3] The Appeals Board has from time to time invited *amicus curiae* briefs.[4] Furthermore, despite the Appeals Board's previously stated admonition that "generally, it does not accept unsolicited amicus briefs,"[5] the Appeals Board has accepted unsolicited *amicus curiae* briefs at the Reconsideration level in other cases involving important legal issues of concern to the entire workers' compensation community.[6]

Proposed Amici Curiae Brief

The proposed *amici curiae* brief makes the following arguments:

- That the appellate instructions on remittitur were clear and express, and were nevertheless ignored by the Appeals Board;
- That the Decision after Remittitur was made in excess of the Appeals Board's authority, because there is no legal basis for the Appeals Board to have invalidated the MTUS, and the binding 2015 Court of Appeal decision did not include an option for the Appeals Board to engage in a wholesale nullification of Guidelines that are presumptively correct on the issue of extent and scope of medical treatment;

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[3] *Wiener vs. Ralph's Co.* (2009) 74 Cal.Comp.Cases 484, fn. 2 (Appeals Board en banc).

[4] For example, the Appeals Board invited amicus briefs following grants of reconsideration of the en banc decisions in *Wiener vs. Ralph's Co.* (2009) 74 Cal.Comp.Cases 484 (Appeals Board en banc); *Almaraz/Guzman* (2009) 74 Cal.Comp.Cases 201 (Appeals Board en banc); *Ogilvie v. CCSF* (2009) 74 Cal.Comp.Cases 248 (Appeals Board en banc); *Phillips v. Sacramento Municipal Utilities District* (2000) 63 Cal.Comp.Cases 585 (Appeals Board en banc); *Moran v. Bradford Building* (1992) 57 Cal.Comp.Cases 273 (Appeals Board en banc); *Lechner v. Solar Turbines, Inc.* (1992) 57 Cal.Comp.Cases 366 (Appeals Board en banc); *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377 (Appeals Board en banc); and *Cabrera v. Intercell Industries* (1980) 45 Cal.Comp.Cases 3 (Appeals Board en banc).

[5] *Dubon v. World Restoration, Inc. (Dubon II)* (2014) (Appeals Board en banc) 79 Cal.Comp.Cases 1298, 1304 fn. 11.

[6] Submission (and acceptance) of unsolicited amicus briefing is not without precedent. *See, e.g., Enriquez v. Couto Dairy* (2013) 78 Cal.Comp.Cases 323 (Appeals Board en banc); *see also Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc); *Escobedo v. Marshall's* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc); *Greenwald v. Carey Distributing Co.* (1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc); *Rountree v. Time D.C.* (1979) 44 Cal.Comp.Cases 223 (Appeals Board en banc); *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.Comp.Cases 625 (Appeals Board en banc); and *Cabello v. NL Industries* (1976) 41 Cal.Comp.Cases 605 (Appeals Board en banc). While each of the cited cases has involved an en banc decision and Stevens does not, the extraordinary history of the *Stevens* case equals if not surpasses those en banc decisions in both impact and importance to the community. *See, e.g.,* WORKERSCOMPENSATION ACADEMY.COM (19 Jun 2017), describing *Stevens* as "one of the most closely watched cases in California workers' compensation."

- That the Appeals Board could have, and should have, simply followed the explicit instructions from the Court of Appeal to conclude that the IMR determination had been adopted without authority, and then remanded the case for the proper remedy of a new Independent Medical Review.

WHEREFORE, pursuant to Tit. 8 Cal. Code Regs. § 10848, CWCI, CalChamber, and CCWC request that the Appeals Board grant leave to CWCI, CalChamber, and CCWC to file the proposed *amici curiae* brief, attached hereto.

I declare that the foregoing facts are true and correct under the laws of penalty of perjury in the State of California, except as to those matters stated on information and belief, and as to those matters, I believe them to be true; that I make such verification as an officer of amicus curiae CWCI, and on behalf of amici curiae CalChamber and CCWC because the officers of CalChamber and CCWC are absent from the County where my office is located and are unable to verify the Motion for Leave to File Amicus Curiae Brief; and that because as attorney for amici curiae CalChamber and CCWC I am more familiar with such facts than are the officers. Sworn this date at Oakland, California.

Dated: June 21, 2017

Respectfully submitted,

California Workers' Compensation Institute
California Chamber of Commerce
California Coalition on Workers' Compensation

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Ellen Sims Langille, CWCI General Counsel

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WORKERS' COMPENSATION APPEALS BOARD
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FRANCES STEVENS, Applicant, vs. OUTSPOKEN ENTERPRISES, INC., and STATE COMPENSATION INSURANCE FUND, Defendants.	Case No.: ADJ1526353 (SFO 0441691) **[PROPOSED] AMICI CURIAE BRIEF ON RECONSIDERATION BY CALIFORNIA WORKERS' COMPENSATION INSTITUTE, CALIFORNIA CHAMBER OF COMMERCE and CALIFORNIA COALITION ON WORKERS' COMPENSATION**

Amici curiae California Workers' Compensation Institute, California Chamber of Commerce, and California Coalition on Workers' Compensation hereby submit this *amici curiae* brief in support of Defendant State Compensation Insurance Fund in the pending Petition for Reconsideration of the Appeals Board's Decision after Remittitur in this matter, dated 05/19/2017.

I. INTRODUCTION

In the Decision After Remitter, the Appeals Board has improperly expanded its powers to include the authority to determine that the MTUS Guideline is contrary to California law, that it is unlawful and invalid, and that the IMR determination based upon that Guideline was adopted without authority. In so doing, the Appeals Board has misapplied the appellate instructions on remittitur, and acted in excess of its authority.

II. LEGAL ARGUMENT

In the 2015 published opinion by the First District Court of Appeal,[7] it was determined that California's IMR process does not violate either the state or federal Constitution, and specifically that the IMR process does not violate applicant's due process rights.

In reaching this decision, the Court of Appeal carefully examined both the legislative history as well as the legislative intent behind the medical dispute resolution process. The Court determined that the 2004 and 2013 reforms were adopted in full accordance with the Legislature's plenary power over the state's workers' compensation system, and that California's scheme for evaluating treatment requests is fundamentally fair and affords injured workers sufficient opportunities to present evidence and be heard.

In reaching this decision, the Court took care to note that IMR determinations are subject to meaningful further review even though the Board is unable to change medical-necessity determinations.[8] The case has now returned to the Appeals Board level for further proceedings consistent with the published appellate decision -- specifically, a determination whether the administrative director acted in excess of authority in deciding that personal care given by home health aides was not medically necessary for this injured worker.

[7] *Stevens v. WCAB* (2015) 241 Cal.App.4th 1074, 80 Cal.Comp.Cases 1262.

[8] *Stevens, supra*, 241 Cal.App.4th 1074 at 1100.

A. The appellate instructions on remittitur were clear and express, and were nevertheless ignored by the Appeals Board.

1. THE APPELLATE INSTRUCTIONS ON REMITTITUR WERE CLEAR AND EXPRESS, AND INCLUDED EXPLICIT EXAMPLES OF THE EXTENT OF THE BOARD'S AUTHORITY.

In its Decision After Remittitur, the Appeals Board correctly quoted[9] the appellate instructions to be followed in any further proceedings:

> The Board's authority to review an IMR determination includes the authority to determine whether it was adopted without authority or based on a plainly erroneous fact that is not a matter of expert opinion. (§4610.6, subd. (h)(1) & (5).)

As stated by the Court of Appeal, there are two avenues for Board review: **(1)** the Board can determine that the IMR determination was based on a plainly erroneous fact, or **(2)** the Board can determine that the IMR determination was adopted without legal authority. But rather than simply issuing these rules as part of some esoteric, enigmatic pronouncement from on high, the Court of Appeal took the time and trouble to provide explicit examples of exactly what circumstances might constitute either "a plainly erroneous fact" on the one hand, or a determination adopted "without authority" on the other:

> If, for example, an IMR determination were to deny certain medical treatment because the treatment was not suitable for a person weighing less than 140 pounds, but the information submitted for review showed the applicant weighed 180 pounds, the Board could set aside the determination as based on a plainly erroneous fact.
>
> Similarly, the denial of a particular treatment request on the basis that the treatment is not permitted by the MTUS would be reviewable on the ground that the treatment actually *is* permitted by the MTUS. An IMR determination denying treatment on this basis would have been adopted without authority and would thus be reviewable.[10]

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[9] Opinion and Decision After Remittitur, dated May 19, 2017, at p. 6 (citing *Stevens, supra,* 241 Cal.App.4th 1074 at 1100-1101).

[10] *Stevens, supra,* 241 Cal.App.4th 1074 at 1100-1101 (emphasis in original; paragraph break included for clarity).

Having provided these clear and descriptive illustrations, the Court of Appeal held that "[i]f the Board were to conclude that the IMR determination incorrectly affirmed the denial of these services by wrongly interpreting the MTUS… it would have the power to conclude that the determination was adopted without authority."[11]

The Court of Appeal then remanded the case to the Appeals Board for a determination as to whether the Administrative Director had acted without authority. Armed with those marching orders from the Court of Appeal, the Appeals Board undertook a new review after remittitur.

2. THE APPELLATE INSTRUCTIONS ON REMITTITUR WERE IGNORED BY THE APPEALS BOARD.

As described in detail above, the Court of Appeal provided two alternative options for the Appeals Board to consider in its "meaningful further review" of the IMR determination. In its Decision After Remittitur, the Appeals Board addressed only one of those options: whether the IMR determination was adopted without authority.[12]

But the Appeals Board did *not* proceed to find that the treatment request at issue in this case was denied as "not permitted by the MTUS … [but] actually is permitted by the MTUS," pursuant to the example in the Court of Appeal opinion. Instead, the Appeals Board took it upon itself to not only examine the legitimacy of the MTUS, but actually determined that the entire MTUS was "unlawful and invalid" -- a result completely unsanctioned by the directives of the Court of Appeal opinion.

The Decision After Remittitur wholly ignored the example from the Court of Appeal as to the extent of its review. Instead, the Appeals Board grossly expanded and redefined its authority of review to encompass a determination that the entire 2009 MTUS was unlawful. This unwarranted

[11] *Stevens, supra,* 241 Cal.App.4th 1074 at 1101.

[12] In a footnote, the Appeals Board explained that it did not provide a detailed analysis of whether the IMR determination was based on a plainly erroneous fact. Opinion and Decision After Remittitur, dated May 19, 2017, at p. 7 fn. 12.

determination is contrary to long-standing statutory authority defining "medically necessary" treatment as treatment that is set forth by the MTUS.[13]

B. The Decision after Remittitur was made in excess of the Appeals Board's authority, because there is no legal basis for the Appeals Board to have invalidated any section of the "presumptively valid" MTUS nor to have set of regulations.

1. THE APPEALS BOARD HAS THE POWER TO INVALIDATE A REGULATION IF IT IS IN CONFLICT WITH THE RELEVANT STATUTORY AUTHORITY.

Amici curiae do not dispute that the WCAB has exclusive original jurisdiction to determine the validity of regulations adopted by the Administrative Director.[14] In considering the validity of a regulation, the duty of the Appeals Board "is to inquire into the legality of the . . . regulation, not its wisdom."[15] The Appeals Board is "limited to determining whether the regulation (1) is within the scope of the authority conferred and (2) is reasonably necessary to effectuate the purpose of the statute."[16]

California's Government Code provides that no regulation is valid or effective unless it is (a) consistent with and (b) not in conflict with the enabling statute.[17] Extensive case law has consistently permitted invalidation of administrative regulations ***if*** those regulations contravene the terms of the statutes

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[13] Labor Code §4600(b) [as amended by SB 899, effective April 19, 2004]: "As used in this division and notwithstanding any other law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means medical treatment that is based upon the [MTUS]." The amendments under SB 899 applied prospectively from the date of enactment, regardless of the date of injury.

[14] Lab. Code § 5300(f) and Gov. Code §11351(c); *see Mendoza v. Huntington Hospital* (2010) 75 Cal.Comp.Cases 634, 640 (Appeals Board en banc); *Boughner v. Comp USA, Inc.* (2008) 73 Cal.Comp.Cases 854 (Appeals Board en banc) (writ denied, 74 Cal.Comp.Cases 770).

[15] *Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1014; accord, *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1040.

[16] *State Farm, supra*, 32 Cal.4th at p. 1040 [quoting from *Agric. Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 411 (*Agric. Labor Relations Bd.*) (internal citations and quotation marks omitted).

[17] Govt. C. §11342.2: Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

under which they are adopted.[18] Accordingly, when exercising its power to declare a regulation invalid, the Appeals Board has routinely limited itself to a determination of whether the regulation is in conflict with the relevant statutory authority.[19]

2. WHERE A REGULATION IS NOT IN CONFLICT WITH THE LABOR CODE, THERE IS NO LEGAL BASIS FOR THE APPEALS BOARD TO INVALIDATE IT.

As outlined above, the law acknowledges that any regulation promulgated by the Administrative Director that contradicts the Workers' Compensation Act is invalid. But where the disputed regulation is within the scope of the authority conferred by statute, and is reasonably necessary to effectuate the purpose of the statute, the Appeals Board has no jurisdiction to invalidate the regulation.

In reviewing an Administrative Director regulation for potential invalidity, the Appeals Board has previously acknowledged the ***presumptive validity*** of such administrative regulation, noting that "if there is a reasonable basis for it, a reviewing court will not substitute its judgment for that of the administrative body."[20] In this case, the MTUS is presumptively correct on the issue of extent and scope of medical treatment and diagnostic services addressed in the MTUS for the duration of the medical condition.[21] Because the Administrative Director's regulation is presumed valid, the burden shifts to the

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[18] *See, e.g., Bohem & Associates v. Workers' Comp. Appeals Bd.* (1999) 76 Cal.App.4th 513, 519, 64 Cal.Comp.Cases 1350 (regulations contained in Title 8 of the California Code of Regulations cannot contravene the workers' compensation statutes); *see also Esberg v. Union Oil Co*. (2002) 28 Cal.4th 262, 269 ("A regulation that is inconsistent with the statute it seeks to implement is invalid."); *Mooney v. Pickett* (1971) 4 Cal.3d 669, 679 ("When a statute confers upon a state agency the authority to adopt regulations . . . , the agency's regulations must be consistent, not in conflict with the statute");

[19] *See, e.g., Navarro v. City of Montebello* (2014) 79 Cal. Comp. Cases 418 (Appeals Board en banc) (holding that Rule 35.5(e) was in conflict with Labor Code §§4062.1 and 4062.2) ; *Robles v. Workers' Comp. Appeals Bd.* (2013) (writ denied) (holding that, to the extent that Reg. §9767.5(b) exceeds the scope of Labor Code §4616(a)(1), the statute is controlling); *Mendoza v. Huntington Hospital* (2010) 75 Cal.Comp.Cases 634 (Appeals Board en banc) (holding that Rule 30(d)(3) was in conflict with Labor Code §§4060(c) and 4062.2).

[20] *Boughner*, *supra*, 73 Cal.Comp.Cases at 860 (citing *Tomlinson v. Qualcomm* (2002) 97 Cal.App.4th 934, 941).

[21] Tit. 8 Cal. Code Reg. § 9792.21(c).

party challenging the validity to demonstrate its invalidity.[22] In order to do so, that party must prove that the regulation is both arbitrary and capricious.[23]

Of course, no "party" directly challenged the validity of the 2009 MTUS Guideline; only the Appeals Board has done so *sua sponte.* But instead of acknowledging the presumptive validity of the MTUS and then providing a careful consideration of a conflict with an enabling statute, the Appeals Board simply pronounced the entire 2009 MTUS Guideline as "contrary to California law."[24] Rather than engage in a scholarly analysis of whether the MTUS is arbitrary and capricious, or was adopted in an arbitrary and capricious manner,[25] the Appeals Board grounded it decision in prior case law (that notably predated the advent of the MTUS), determined that the MTUS was in conflict with that case law, and invalidated the MTUS in its entirety with the stroke of a pen.[26]

Simply put, the binding 2015 Court of Appeal decision did not include an option for the Appeals Board to engage in a wholesale invalidation of Guidelines that are presumptively correct on the issue of extent and scope of medical treatment.

3. THE APPEALS BOARD EXCEEDED ITS AUTHORITY WHEN IT INSTRUCTED THE WCJ TO DETERMINE THE SPECIFIC EVIDENCE TO BE SUBMITTED ON SECOND IMR REVIEW.

The documentation to be submitted to Maximus for IMR review is governed by Labor Code section 4610.5(*l*) and Tit. 8 Reg. §9792.10.5. These statutory and regulatory provisions define the records that must be submitted to IMR.

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[22] *Boughner, supra,* 73 Cal.Comp.Cases at 860.

[23] *Id. See Western States Petroleum Assn. v. Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1007; *see also Credit Ins. General Agents Assn. v. Payne* (1976) 16 Cal.3d 651, 657 ("the burden of proof is on the party challenging the regulation. The agency's action comes before the court with a presumption of correctness and regularity, which places the burden of demonstrating invalidity upon the assailant.").

[24] Opinion and Decision After Remittitur, dated May 19, 2017, at p. 7.

[25] For a textbook example of how the Appeals Board has previously and appropriately addressed the standards for rebutting the presumptive validity of an administrative regulation, see *Boughner v. Comp USA, Inc.* (2008) 73 Cal.Comp.Cases 854 (Appeals Board en banc) (writ denied, 74 Cal.Comp.Cases 770).

Despite these statutory and regulatory mandates, the Decision After Remittitur has instructed the WCJ on remand to "determine what evidence, if any, should be provided to the new IMR reviewer with submitted for review."[27] In doing so, the Appeals Board has acted in excess of its authority.

It is entirely appropriate that the Appeals Board wishes for any new IMR reviewer to have a complete and updated medical record.[28] But the law already provides for submission of "any newly developed or discovered relevant medical records" to be forwarded immediately to Maximus.[29] The law does not allow the Appeals Board to instruct the WCJ to determine what evidence is to be submitted to the IMR reviewer, nor does it allow the WCJ to make that determination. The evidence to be presented to IMR is governed by the relevant statutory and regulatory authority, and is not within the purview of the Appeals Board or the WCJ.

C. The Appeals Board could have, and should have, simply followed the explicit instructions from the Court of Appeal to conclude that the IMR determination had been adopted without authority, and then remanded the case for the proper remedy of a new Independent Medical Review.

In its decision, the Court of Appeal admonished the Appeals Board for failing to appreciate its own powers on appeal of an IMR determination. Included in the instructions on remand, the Court of Appeal provided the Appeals Board with a ready-made solution for this case:

> If the Board were to conclude that the IMR determination incorrectly affirmed the denial of [home health services] by wrongly interpreting the MTUS, and it were to find there are no other reasons supporting the

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[26] In the Decision After Remittitur, the Appeals Board did not provide even a suggestion of legal analysis on the issue of whether prior case law properly trumps any subsequently enacted statutory or regulatory authority.

[27] Opinion and Decision After Remittitur, dated May 19, 2017, p. 13.

[28] Of course, the UR/IMR determinations at issue in this case have long since expired. A subsequent RFA including additional justification for the requested services has resulted in provision of home health care services as of 11/29/2016 per UR certification dated 12/10/2016; a new IMR determination dated 2/28/2017 has provided further certification, and services are now being provided at 9 hours/day x 7 days/week. These facts are stated on information and belief.

[29] Tit. 8 Cal. Code Reg. §9792.10.5(a)(3).

> denial, ***it would have the power to conclude that the determination was adopted without authority***.[30]

In other words, the Court of Appeal expressly permitted the Appeals Board to conclude that the IMR determination was adopted without authority simply by finding that the IMR reviewer wrongly interpreted the MTUS. And it is evident from the record that this is precisely what happened in this case.

The IMR reviewer based his determination on the 2009 version of the MTUS. As described by the Decision After Remittitur, the 2009 Guidelines provided that "medical treatment" does not include homemaker services and personal care ***"when this is the only care needed."***[31] The record in this case, and indeed the Appeals Board's own order immediately preceding the 2015 Court of Appeal decision, clearly outlines how ***applicant's "condition required care other than homemaker's services."***[32] Because the 2009 Guideline exclusion of homemaker services / personal care from the definition of "medical treatment" applied solely "when this is the only care needed," the necessary conclusion is that the 2009 MTUS simply did not address this injured worker's medical condition.[33]

From that point, rather than forcing an unwarranted and baseless finding of invalidity of a presumptively correct regulation, the Appeals Board could have simply utilized the applicable legal standards for interpreting the MTUS. The MTUS Guidelines specifically state that treatment may not be denied for the sole reason that the medical condition is not addressed by the MTUS.[34] Under such

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[30] *Stevens, supra,* 241 Cal.App.4th 1074 at 1101 (citing Lab. C. §4610.6(h)).

[31] Opinion and Decision After Remittitur, dated May 19, 2017, p. 2 fn. 3.

[32] *Stevens, supra,* 241 Cal.App.4th 1074 at 1101 (quoting from the Board's order). Applicant has been deemed 100% permanently and totally disabled, and the medical record reflects that her ongoing care requirements include not only the homemaker / personal care services in dispute but also the use of a wheelchair, ongoing doctor visits, significant pain medications, and the use of antidepressants.

[33] The Appeals Board found that the applicable 2009 Guideline "fails to address the medical treatment in the form of personal care services sought by Ms. Stevens." Opinion and Decision After Remittitur, dated May 19, 2017, p. 2. Importantly, the legal remedy proposed by *amici curiae* is applicable to situations where the MTUS does not address the *condition or injury* (as opposed to the medical treatment).

[34] Tit. 8 Cal. Code Reg. §9792.21(d).

circumstances, the Guidelines instruct that medical care may be provided in accordance with other medical treatment guidelines or peer-reviewed studies pursuant to Reg. §9792.21.1.[35]

This ready-made solution could have simply and completely resolved the medical treatment conundrum presented by this case. The Appeals Board should have utilized it.

III. CONCLUSION

It is not clear why the Appeals Board did not simply: (1) follow the step-by-step instructions from the Court of Appeal to find that the IMR determination was adopted without authority because the IMR reviewer wrongly interpreted the MTUS; (2) remand the case to the WCJ for the statutory remedy of a new IMR determination; and (3) allow the new IMR reviewer to either apply the current MTUS to the disputed medical treatment request (in which case the disputed treatment would presumably be authorized) or alternatively, apply the Medical Evidence Search Sequence and the criteria under Labor Code §4610.5 (c)(2) (in which case the disputed treatment would presumably be authorized). This epic case could have come to a merciful conclusion.

What is clear is that there is no valid, legal support for the Appeals Board's broad expansion of its powers to include a declaration of invalidity of the MTUS Guidelines. *Amici curiae* CWCI, CalChamber, and CCWC respectfully urge the Appeals Board to accept this brief, grant the Petition for Reconsideration, and issue a new Decision After Remittitur that validly and effectively resolves the medical treatment dispute herein.

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[35] According to the Medical Evidence Search Sequence set forth in Tit. 8 Cal. Code Reg. §9792.21.1, the reviewer is required to search the most current version of ACOEM or ODG to find an applicable recommendation, and choose the recommendation that is supported with the best available evidence; the physician may also search the most current version of the other evidence-based medical treatment guidelines if there is another recommendation supported by a higher quality and strength of evidence. *See also* Lab. C. §4610.5(c)(2).

Dated: June 21, 2017

Respectfully submitted,

California Workers' Compensation Institute
California Chamber of Commerce
California Coalition on Workers' Compensation

_____

Ellen Sims Langille, CWCI General Counsel

IV. VERIFICATION

I declare that the foregoing facts are true and correct under the laws of penalty of perjury in the State of California, except as to those matters stated on information and belief, and as to those matters, I believe them to be true; that I make such verification as an officer of amicus curiae CWCI, and on behalf of amici curiae CalChamber and CCWC because the officers of CalChamber and CCWC are absent from the County where my office is located and are unable to verify the Motion for Leave to File Amicus Curiae Brief; and that because as attorney for amici curiae CalChamber and CCWC I am more familiar with such facts than are the officers. Sworn this date at Oakland, California.

Dated: June 21, 2017

Respectfully submitted,

California Workers' Compensation Institute
California Chamber of Commerce
California Coalition on Workers' Compensation

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Ellen Sims Langille, CWCI General Counsel

DECLARATION OF SERVICE BY MAIL

I, Ellen Sims Langille, am a citizen of the United States of America and am employed in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action. My business address is: California Workers' Compensation Institute, 1333 Broadway, Suite 510, Oakland, CA 94612. On the date noted below, I filed and served the attached

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF ON RECONSIDERATION
and
PROPOSED AMICI CURIAE BRIEF ON RECONSIDERATION
by CALIFORNIA WORKERS' COMPENSATION INSTITUTE,
CALIFORNIA CHAMBER OF COMMERCE,
and CALIFORNIA COALITION ON WORKERS' COMPENSATION

by causing the original thereof enclosed in a sealed envelope to be filed by hand delivery at San Francisco, California, addressed as follows:

Reconsideration Unit
Workers' Compensation Appeals Board
450 Golden Gate Ave., 9th Floor
San Francisco, CA 94142
original and one copy +1 copy for endorsed return

and by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the U.S. Post Office mailbox at Oakland, California, addressed as follows:

Joseph Waxman, Esq.
Law Offices of Joseph Waxman
220 Montgomery St., Suite 905
San Francisco, CA 94104

Darren Wong, Esq.
State Compensation Insurance Fund
PO Box 3171
Suisun City, CA 94585-6171

Yvonne Hauscarriague, Esq.
Department of Workers' Compensation - Legal Unit
1515 Clay St., 18th Floor
Oakland, CA 94612

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Upland, CA 91786

Ms. Heather Wallace
California Chamber of Commerce
1215 K Street, Suite 1400
Sacramento, CA 95814

Mr. Jason Schmelzer
California Coalition on Workers' Compensation
1415 L Street, Suite 1000
Sacramento, CA 95814

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

Executed on June 22, 2017, at San Francisco, California.

_____
Ellen Sims Langille