

A-3388

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION 1

FRANCIS STEVENS

Petitioner

WCAB Case No: ADJ1526353

(SEQ 0441691)

1 Civil No:

A111435

OUTSPOKEN ENTERPRISES/STATE
COMPENSATION INSURANCE
FUND; WORKERS' COMPENSATION
APPEALS BOARD;
ADMINISTRATIVE DIRECTOR
DIVISION OF WORKERS'
COMPENSATION

Respondents

PETITION FOR WRIT OF MANDATE
AND WRIT OF REVIEW;
MEMORANDUM OF POINTS AND
AUTHORITIES

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WORKERS' COMPENSATION
APPEALS BOARD
OFFICE OF THE COMMISSIONERS

PETITION FOR WRIT OF MANDATE AND

WRIT OF REVIEW

AND

MEMORANDUM OF POINTS AND AUTHORITIES

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- 2 Minutes of Hearing and Summary of Evidence dated May 20, 2013
- 3 Findings & Award and Opinion on Decision dated August 16, 2013
- 4 Independent Medical Review Final Determination Letter dated February 20, 2014
- 5 Medical Report of Leslie Schofferman, M.D. dated January 31, 2012
- 6 Medical Report of Michael Goldfield, M.D. dated January 1, 2013
- 7 Medical Reports of Babak Jamasbi, M.D. dated September 10, 2013 and August 14, 2013
- 8 Utilization Review denials from SCIF dated October 17, 2013, October 14, 2013, and July 25, 2013
- 9 Rehab Without Walls evaluation dated April 8, 2013
- 10 Letters to Maximus requesting Review of Denials dated December 10, 2013, December 9, 2013, October 15, 2013, October 1, 2013, September 19, 2013 (two), August 14, 2013

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**IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ____**

FRANCES STEVENS,

Petitioner,

vs.

**OUTSPOKEN ENTERPRISES/STATE
COMPENSATION INSURANCE
FUND; WORKERS' COMPENSATION
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Respondents.

WCAB Case No: ADJ1526353
(SFO 0441691)

1 Civil No:

**PETITION FOR WRIT OF MANDATE
AND WRIT OF REVIEW;
MEMORANDUM OF POINTS AND
AUTHORITIES**

**TO THE HONORABLE PRESIDING JUSTICE AND TO THE
HONORABLE ASSOCIATE JUSTICES OF THE COURT OF
APPEAL, FIRST APPELLATE DISTRICT:**

Petitioner, Frances Stevens, files this Petition for Writ of Mandate
and Writ of Review from the denial of her medical treatment by an
anonymous, non-treating, non-examining physician on February 20, 2014,

pursuant to Labor Code § 4610.6, following a Findings & Award issued by Workers' Compensation Judge, Francie Lehmer (hereinafter WCJ), on August 16, 2013 finding Ms. Stevens to be 100% permanently and totally disabled and suffering from intractable pain and severe depression.

Ms. Stevens asks this Court to issue the Writ of Mandate, finding that Labor Code § 4610.6 violates California State Constitution, Article XIV, Section 4, which provides, in pertinent part, that the State Legislature has plenary power to enact workers' compensation laws that provide substantial justice in all cases expeditiously, without encumbrance, and further, that all such laws and dispute resolution processes be subject to review by the Appellate Courts of this State.

Petitioner asserts the following:

1. Petitioner's attorney has his principal office and place of business in San Francisco, California, and represented Petitioner, Frances Stevens, an injured worker, in proceedings before the Workers' Compensation Appeals Board (hereinafter WCAB) in San Francisco.

2. Petitioner has no speedy or adequate remedy on appeal from the denial of medical treatment on February 20, 2014, since by its terms, Labor Code §4610.6 (i), denies any Workers' Compensation Judge (hereinafter WCJ), the WCAB, or any Appellate Court from reviewing a determination of medical necessity of treatment issued by a non-treating, non-examining anonymous physician. Since there is no plain, speedy and adequate remedy available to Petitioner, she seeks this Writ pursuant to California Code of Civil Procedure, §§ 1085 and 1086, as well as Section 5955 of the California Labor Code, and consistent with the California Supreme Court holding in *Greener v. WCAB* (1993) 6 Cal. 4th 1028.

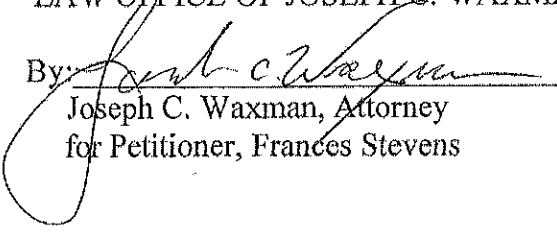
3. Petitioner also asks this Court to issue a Writ of Mandate, since California Labor Code § 4610.6 denies Petitioner her fundamental rights of due process by prohibiting cross-examination of the anonymous non-treating, non-examining medical reviewer, and by denying her a speedy or adequate remedy of judicial review.

WHEREFORE, Petitioner prays that:

- a) Petitioner's Petition for Writ of Mandate and Writ of Review be granted.
- b) Labor Code §4610.6 be found to violate the California Constitution, Article XIV, Section 4, and thus be declared unconstitutional, inapplicable to Petitioner's case, and to other cases involving injured workers throughout this State.
- c) Petitioner be afforded an opportunity to present the issue of medical necessity of her treatment to a WCJ with further rights to judicial review.
- d) That costs on appeal be awarded.
- e) For such other and further relief as may be deemed proper.

Dated: April 1, 2014 Respectfully submitted,

LAW OFFICE OF JOSEPH C. WAXMAN

By: 
Joseph C. Waxman, Attorney
for Petitioner, Frances Stevens

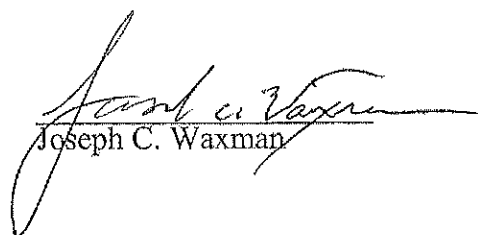
VERIFICATION

I DECLARE THAT:

I am the attorney representing Petitioner, Frances Stevens, in this action and I have read the contents of the foregoing document and that the matters so stated are believed to be true and correct, except as to the matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I, Joseph C. Waxman, declare under penalty of perjury that the foregoing is true and correct.

Dated this 1 day of April 2014 at San Francisco, California.


Joseph C. Waxman

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Respondent.

WCAB Case No: ADJ1526353
(SFO 0441691)

1 Civil No:

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PETITION FOR WRIT OF MANDATE
AND WRIT OF REVIEW

I.

INTRODUCTION

Article XIV, Section 4 of the California Constitution
provides, in part,

The Legislature is hereby expressly vested with

Plenary power unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation...

This includes a

...full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character; all of which matters are expressly declared to be the social public policy of this State, binding upon all departments of the state government.

Article XIV, Section 4, also states that the legislative authority includes the power to

provide for the settlement of any disputes arising under such legislation by arbitration, or by an industrial accident commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and may fix and control the method and manner of trial of any such dispute, the rules of evidence and the manner of review of decisions rendered by the tribunal or tribunals designated by it; Provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this state.

California Labor Code § 4600 (hereinafter Labor Code) provides in part that an injured worker is entitled to all medical care, reasonable and necessary to "cure or relieve from the effects of an industrial injury."

Prior to July 1, 2013 (the effective date of the Utilization Review/Independent Medical Review process for Petitioner's date of injury), the Utilization Review statutes pertaining to review of a denial of medical treatment allowed an injured worker to seek review of that adverse decision rendered by an employer/insurance company, by having the

agreed-upon or qualified medical examiner review the denial. If the dispute could still not be resolved, then the WCJ, the WCAB, and ultimately the Appellate Courts had jurisdiction to resolve and review issues relating to the medical necessity of an injured worker's treatment.

However, in 2013 injured workers became subject to Labor Code §§ 4610.5 and 4610.6, which as of July 1, 2013, applies to all dates of injury within the workers' compensation system, even those injuries that occurred many years before the effective date of the statute.

Labor Code § 4610.6 provides a statutory scheme that restricts an injured worker's right to review of an adverse medical determination rendered pursuant to Labor Code § 4610 (Utilization Review) to a new system entitled "Independent Medical Review."

Among other things, Labor Code § 4610.6 allows the Administrative Director to select an independent medical review organization to conduct an examination of the medical necessity of any disputed medical treatment.

Labor Code § 4610.6 (d) provides that to the extent practical, the reviewing organization shall render a decision within 30 days of receipt of the request for review and supporting documentation or, if there is a serious threat to the health of any employee, such as serious pain, potential loss of life, limb, or major bodily function or the immediate and serious deterioration of the health of the employee, then the reviewing organization must render a decision within three days.

Labor Code § 4610.6 (g) provides that the determination by the independent medical review organization shall be the determination of the Administrative Director and binding on all parties.

Labor Code § 4610.6 (i) states, in pertinent part, "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."

Labor Code § 4610.6 (f) provides, in pertinent part, "The independent medical review organization shall keep the names of the reviewers confidential in all communications with entities or individuals outside the independent medical review organization."

Labor Code § 4610.6 (h) prohibits review of the Administrative Director's decision pertaining to medical necessity, and limits appeals to a showing by clear and convincing evidence that the decision was procured by fraud, was based on conflict of interest, or based on bias of race, national origin, ethnic group, gender identification, religion, age, sex, sexual orientation, color or disability, or involved a decision not requiring an expert medical opinion.

Petitioner notes that Labor Code § 4610.6 (h) (1) also provides an appellate avenue to an aggrieved injured worker by claiming that the Administrator Director acted without or in excess of the Administrative Director's powers, but it is unknown how such an appeal could be brought with the WCAB on an issue involving the medical necessity of treatment, given the restrictions of Labor Code § 4610.6 (i), referenced above.

Petitioner, Frances Stevens, sustained a severe industrial injury on October 18, 1997 to her bilateral feet, bilateral shoulders, low back, and her psyche [Application for Adjudication of Claim, Petitioner's Exhibit 1]. The parties stipulated that applicant was entitled to medical care and the

defendant had provided all medical care through the date of the trial of this matter on May 20, 2013. [See Minutes of Hearing and Summary of Evidence, Petitioner's Exhibit 2.]

On August 16, 2013, WCJ Lehmer issued a Findings and Award, finding, among other things, that applicant was 100% permanently and totally disabled. Further, her Opinion on Decision found, that based on the medical evidence submitted, Petitioner suffered from intractable pain and was wheelchair-bound. The WCJ concluded,

I have considered the opinions of all of the physicians and vocational rehabilitation expert in this case as well as applicant's testimony. I find that applicant is permanently and totally disabled. Applicant has suffered an injury which has necessitated extensive treatment with numerous surgeries and use of medication. The synergistic effect of all of the applicant's conditions renders her unable to compete in the labor market.

[See Findings & Award and Opinion on Decision, Petitioner's Exhibit 3.]

Following WCJ Lehmer's decision, Dr. Jamasbi, Petitioner's treating physician, continued to provide medical reports requesting medication management and additional Home Health Care for Ms. Stevens. These requests were denied by Defendant/Respondent, State Compensation Insurance Fund (hereinafter SCIF) pursuant to Labor Code § 4610 (Utilization Review). Petitioner, through her counsel, appealed those denials pursuant to Labor Code §§ 4610.5 and 4610.6 to the Administrative Director's selected "independent medical review organization, "Maximus."

On February 20, 2014, "Maximus" upheld the SCIF denial of Petitioner's medications and the additional Home Health Care

recommended by her treating doctor, Dr. Jamasbi. The determination of "Maximus" pursuant to Labor Code § 4610.6 (f) was rendered by an anonymous, non-treating, non-examining physician. [See "Maximus" determination of February 20, 2014, Petitioner's Exhibit 4.]

Pursuant to Labor Code § 4610.6 (i) the determination of the anonymous physician became final and was not reviewable as to medical necessity by any Judge, the Appeals Board, or any Appellate Court.

Petitioner believes that Labor Code § 4610.6 violates California Constitution XIV, Section 4, and that the statutory scheme codified by Labor Code § 4610.6 denies Petitioner her due process rights, including her right to cross-examination, a fair hearing before a Judge, and judicial review; and further, is violative of the Constitutional mandate that workers compensation laws provide a system that is expeditious, without encumbrance, and accomplishes substantial justice in all cases.

II.

STATEMENT OF MATERIAL FACTS

Petitioner, Frances Stevens, a 46-year old magazine editor, sustained an admitted industrial injury on October 28, 1997. Ms. Stevens underwent a series of surgical interventions, including the fusion of the first and second metatarsals. Unfortunately, as time progressed, she developed Complex Regional Pain Syndrome. Petitioner requires a wheelchair for mobility. While the Respondent/Defendant, SCIF (after dispute) provided a manual wheelchair, unfortunately Petitioner then developed bilateral shoulder problems as a compensable consequence, since she strained to move the wheelchair. After an electric wheelchair was prescribed by Dr. Jamasbi (Ms. Stevens' treating physician), Respondent/Defendant at first denied it,

but eventually SCIF did provide the electric wheelchair, after Dr. Schofferman (the Agreed Medical Examiner, hereinafter AME) recommended it in his January 31, 2012 report [Petitioner's Exhibit 5].

Dr. Schofferman, the AME between the parties for Ms. Stevens' physical injuries, concluded that she was wheelchair bound, in need of significant pain medications, and that although confined to a wheelchair was able to work up to three to four hours a day, but that the medications themselves would render her drowsy (which Ms. Stevens herself corroborated during her trial testimony on May 20, 2013 [Petitioner's Exhibit 2]).

As a result of Petitioner's severe pain in her bilateral lower extremities, and later her moderate to severe pain in her bilateral shoulders, combined with her confinement to a wheelchair, Ms. Stevens became severely depressed. Dr. Michael Goldfield, Petitioner's Qualified Medical Examiner (hereinafter QME), issued eight medical reports concluding that Ms. Stevens was 100% permanently and totally disabled based on her depressive symptoms alone, and that all of the disability flowed from her industrial injury. [See Dr. Goldfield's report of January 1, 2013, Petitioner's Exhibit 6.]

Additionally, vocational expert opinions were obtained by Ms. Stevens and SCIF.

After hearing Ms. Stevens' testimony at the trial of May 20, 2013, WCJ Lehmer issued her decision on August 16, 2013, finding on the totality of the record that Petitioner suffered from severe orthopedic and psychiatric injuries, required significant medications which were necessary

but which impaired Ms. Stevens cognitively, and that Ms. Stevens was 100% permanently, totally disabled, and precluded from all work in the open labor market [Petitioner's Exhibit 3].

Petitioner has not attached the voluminous medical reports submitted at the May 20, 2013 trial, since the relevant evidence was summarized by WCJ Lehmer in her Findings and Award and Opinion on Decision [Petitioner's Exhibit 3]. However, certain pertinent medical reports submitted at trial are included as exhibits with this Petition.

Following WCJ Lehmer's decision of August 16, 2013, Petitioner continued to require medical care. Several follow-up reports were issued by Ms. Stevens' treating physician, Dr. Jamasbi, including reports of August 14, 2013 and September 10, 2013 [Petitioner's Exhibit 7.]

Dr. Jamasbi issued further recommendations and prescriptions for pain medications, antidepressant medications and Home Health Care.

In a series of Utilization Review denials from July 25 2013, Respondent/Defendant SCIF denied treating Dr. Jamasbi's requests. [See Utilization Review Denials, Petitioner's Exhibit 8.]

Petitioner, through her counsel, filed for Independent Medical Review of the SCIF denials, pursuant to Labor Code §§ 4610.5 and 4610.6. (Petitioner's Exhibit 9.)

On February 20, 2014, the Administrative Director reviewing organization, "Maximus," by and through an anonymous, non-treating, non-examining medical reviewer, upheld the Utilization Review denials of Ms. Stevens' medications and Home Health Care.

Petitioner has no plain, speedy and adequate alternate remedy other than this Petition for Writ of Mandate, since Labor Code § 4610.6 (i) prohibits a WCJ, the WCAB itself, or any Appellate Court from reviewing the denial of medical care rendered by the anonymous, non-treating, non-examining physician employed by "Maximus."

Moreover, the WCAB does not have jurisdiction to determine whether or not a statute is constitutional pursuant to *Greener v. WCAB* (1993) 6 Cal. 4th 1028.

Therefore, since Petitioner has no speedy or adequate remedy under Labor Code § 4610.6, Petitioner requests that the Court of Appeal issue a Writ of Mandate in this matter to determine that the provisions of Labor Code § 4610.6, specifically those allowing for an anonymous physician to issue a non-appealable decision, without affording Petitioner the right to cross-examination of the reviewer or judicial review of the denial of treatment be violative of California Constitution XIV, Section 4, that mandates that workers' compensation law accomplish substantial justice in all cases expeditiously, without encumbrance, and further provides that all decisions rendered pursuant to legislative acts pertaining to workers' compensation be subject to judicial review.

Petitioner believes she meets, in this case, the requirements the California Supreme Court set out in *Greener, supra*, in particular the California Code of Civil Procedure §§ 1085 and 1086, as well as Labor Code § 5955.

III.

QUESTIONS PRESENTED

A. IS IT APPROPRIATE FOR THE APPELLATE COURT TO GRANT A WRIT IN THIS CASE TO DETERMINE THE CONSTITUTIONALITY OF LABOR CODE SECTION 4610.6, IN LIGHT OF THE CRITERIA SET FORTH IN *GREENER v. WCAB, SUPRA*, CALIFORNIA CODE OF CIVIL PROCEDURE SECTIONS 1085 AND 1086, AND LABOR CODE SECTION 5955?

B. IS IT APPROPRIATE FOR THE APPELLATE COURT TO GRANT A WRIT TO DETERMINE THE CONSTITUTIONAL VALIDITY OF LABOR CODE SECTION 4610.6, WHICH ALLOWS (IN PART) THAT AN ANONYMOUS, NON-TREATING, NON-EXAMINING PHYSICIAN RENDER A DECISION ADVERSE TO A SEVERELY INJURED WORKER ON THE ISSUE OF MEDICAL NECESSITY OF RECOMMENDED TREATMENT, IN CONTRAVENTION OF THE RECOMMENDATIONS OF THE TREATING PHYSICIAN (AND IN LIGHT OF THE SUBSTANTIAL MEDICAL OPINIONS OF THE AGREED AND QUALIFIED MEDICAL EXAMINERS) WHEN, ACCORDING TO LABOR CODE § 4610.6, A MEDICAL DETERMINATION AS TO MEDICAL NECESSITY IS NOT SUBJECT TO REVIEW BY ANY JUDGE, THE WCAB, OR EVEN THIS COURT?

C. IS PETITIONER DEPRIVED OF HER DUE PROCESS RIGHTS, WHEN THE ANONYMOUS, NON-TREATING, NON-EXAMINING PHYSICIAN EMPLOYED BY THE INDEPENDENT MEDICAL REVIEW ORGANIZATION ("MAXIMUS"), WHICH UPHELD ADVERSE UTILIZATION REVIEW DENIALS OF MEDICAL CARE TO A SEVERELY INJURED WORKER RENDERED BY THE DEFENDANT EMPLOYER/INSURANCE COMPANY, EVEN AFTER A FINDINGS AND AWARD BY A WCJ, IS NOT SUBJECT TO CROSS-EXAMINATION?

D. IS CALIFORNIA LABOR CODE SECTION 4610.6
CONSISTENT WITH THE CALIFORNIA
CONSTITUTIONAL MANDATE THAT THE LEGISLATURE
ESTABLISH LAWS THAT ARE EXPEDITIOUS, WITHOUT
ENCUMBRANCE AND WHICH ACCOMPLISH
SUBSTANTIAL JUSTICE IN ALL CASES?

IV.

ARGUMENT

A. IT IS APPROPRIATE FOR THE APPELLATE COURT
TO ISSUE A WRIT IN THIS CASE TO DETERMINE THE
CONSTITUTIONALITY OF LABOR CODE SECTION
4610.6, IN LIGHT OF THE CRITERIA SET FORTH IN
GREENER v. WCAB (SUPRA) AND CODE OF CIVIL
PROCEDURE SECTIONS 1085 AND 1086, AND LABOR
CODE SECTION 5955.

It is not only appropriate for the Court to grant a Writ of Mandate,
but in fact, it is the only and last recourse Petitioner has. A denial of Writ
denies a just decision with due process, given of the strictures of Labor
Code § 4610.6; Petitioner has no other recourse.

In *Greener, supra*, the California Supreme Court stated that Article
III of the California Constitution, Section 3.5, withholds from any
administrative agency the power to determine the constitutional validity of
any statute, "An administrative agency... including an administrative
agency created by the Constitution or an initiative statute, has no power:...
(b) to declare a statute unconstitutional." *Greener, supra* at 1038.

Labor Code § 5955 mandates

No court of this state except the Supreme Court and
the courts of appeal to the extent herein specified has
jurisdiction to review, reverse, correct, or annul any
order, rule, decision, or award of the appeals board, or
to suspend or delay the operation or execution thereof,
or to restrain, enjoin, or interfere with the appeals
board in the performance of its duties but a writ of

mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

California Code of Civil Procedure § 1085, states that

A writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board or person.

California Code of Civil Procedure 1086, states a Writ of Mandate “must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.”

The *Greener* Court made it clear that a Writ of Mandate will not issue if there is an adequate remedy, including appeal to the WCAB, available to the Petitioner. However, Labor Code 4610.6 (i) provides that the decision by the anonymous, non-treating, non-examining physician employed by “Maximus” denying medical necessity of the treatment recommended by the treating physician, is not reviewable by a Judge, the WCAB, or any Appellate Court.

While Labor Code § 4610.6 (h) provides limited grounds for appeal (e.g., that the determination was procured by fraud, was subject to a material conflict of interest, was biased based on race, national origin, ethnic group gender identification, religion, age, sex or sexual orientation, color or disability, or pertains to an issue not requiring expert medical opinion), pursuant to Labor Code § 4610.6 (h), the injured worker is not

provided any information upon which to make an appeal on any of these grounds.

Ms. Stevens makes no allegation that the adverse medical determination was based on any of the grounds set forth in Labor Code § 4610.6 (h) 2-4, because she has no evidence of such a violation; however, the question must be asked: how would Ms. Stevens know? The reviewer is anonymous, so any fraudulent activity, conflict of interest, or bias on the part of the reviewer remains a mystery, although again, Ms. Stevens has no information regarding the reviewer in this case, and makes no such allegation, absent any available evidence. The issue is that since the process is a secretive one, the injured worker has no basis upon which to ever mount an appeal on the grounds cited above. However, even if Petitioner learns of information which enables her to surmount the otherwise insurmountable impediments of Labor Code § 4610 (h), she is then placed in the circular pattern mandated by Labor Code § 4610 (i): the medical necessity issue is returned to yet another anonymous, non-treating, non-examining physician who will issue another non-appealable decision.

It is the adverse determination as to medical necessity that Ms. Stevens believes requires transparency and speedy review by a WCJ (who would be able to weigh the presented evidence and assess the credibility of witnesses), and, if necessary, the WCAB with full rights to judicial review.

Due process and judicial review are the linchpins of any legal process that is mandated to deliver "substantial justice in all cases." Labor Code §4610.6 fails to provide either.

As *Greener, supra* affirmed, California Constitution, Article XIV, Section 4, requires that the process of resolving disputes under the workers' compensation system and that all decisions shall be subject to review by the Appellate Courts of this State. *Greener, supra* at 1037.

B. LABOR CODE SECTION 4610.6 (i) SPECIFICALLY PROHIBITS A WCJ, THE WCAB ITSELF, AND EVEN THE APPELLATE COURT WHERE THIS WRIT IS BEING DIRECTED, FROM REVIEWING DECISIONS AS TO MEDICAL NECESSITY.

Code of Civil Procedure §1086 provides that a writ is the appropriate remedy if there is no alternative speedy, adequate remedy available.

Petitioner is not requesting that the Court of Appeal compel the WCAB to exercise its discretion in a particular manner; rather, the Writ of Mandate must be granted in the case presented because the WCAB can act only in one way pursuant to Labor Code § 4610.6 (i). Pursuant to that provision, any request for appeal of the adverse decision by "Maximus" as to the medical necessity of Petitioner's treatment, must be denied by the WCAB, since the medical necessity provision is not reviewable by a WCJ, the WCAB, or any Appellate Court. When, according to the statute, the WCAB can only act in one way, that is, to deny a request for review, a Writ of Mandate must be granted.

Lissner v. Superior Court of Los Angeles County (1944) 23 Cal. 2d 711; *Wadey v. Justice Court, Upland Judicial Dist.* (1959) 176 Cal. App. 2d 426; *Kaiser Foundation Hospitals v. Superior Court of Los Angeles County* (1967) 254 Cal. App. 2d 327; *Mannheim v. Superior Court of Los Angeles County* (1970) 3 Cal. 3d 678; *Whitney's at the Beach v. Superior*

Court of San Francisco (1970) 3 Cal. App. 3d 258; *Babb v. Superior Court of Sonoma County* (1971) 3 Cal. 3d 841.

Under California Code of Civil Procedure § 1086, it has long been held that a Writ of Mandate will not issue when there is another plain, speedy, and adequate remedy at law available to the Petitioner. See *White v. Mathews* (1916) 29 Cal. App. 634; *Running Fence Corp. v. Superior Court* (1975) 51 Cal. App. 3d 400; *Sego v. Santa Monica Rent Control Bd.* (1997) 57 Cal. App. 4th 250.

However, in this case, no such remedy exists by the terms of Labor Code § 4610.6 (i). The adverse determination of medical necessity is simply not reviewable by any judicial body pursuant to the statute.

What is a plain, speedy and adequate remedy in the ordinary course of law is a question of fact to be determined upon the circumstances of each case. See *San Francisco v. Superior Court of San Francisco* (1928) 94 Cal. App. 318.

The existence of the restricted appeal grounds under Labor Code § 4610.6 (h) and the impossibility of establishing grounds for appeal, since the reviewer's name is not known to Petitioner, does not preclude the issuance of a writ of mandate where the remedy of administrative and judicial review is not plain, speedy and adequate since Petitioner is denied the very information on which to mount an appeal.

Ms. Stevens has no adequate and speedy remedy on appeal since the medical reviewer remains anonymous. Petitioner cannot ascertain whether or not that reviewer violated the strictures of Labor Code § 4610.6, and since the determination of medical necessity in this case is adverse to

Petitioner, it is not reviewable by any WCJ, WCAB or Appellate Court; and since Petitioner asserts that the whole statutory scheme of Labor Code § 4610.6, violates California State Constitution, Article XIV, Section 4, and since the WCAB has no jurisdiction over the constitutional validity of statutes pursuant to *Greener, supra*, the Writ must be issued by this Honorable Court.

While Petitioner has filed an appeal at the WCAB to preserve applicable time limits from the "Maximus" decision of February 20, 2014 pursuant to Labor Code § 4610.6 (h), the request for hearing on the adverse determination of "Maximus" and its employee physician who rendered, according to the statute, an anonymous, non-treating, non-examining, non-appealable decision, will be a futile gesture since the WCJ does not have the jurisdiction, according to Labor Code § 4610.6 (h), either to address the issue of medical necessity or the constitutionality of Labor Code § 4610.6. *Greener, supra*.

In light of the lack of a speedy and adequate remedy at the WCAB, Petitioner turns to this Court for relief and enforcement of the medical care award based on injury which she so desperately requires. Given Petitioner's serious physical and mental condition, treatment delayed is potentially health and/or life threatening. The provision of medical treatment, as substantial justice, must be provided to Ms. Stevens and the injured workers of the State; when both are delayed, both are denied.

Labor Code § 4600 provides in part that the employer/insurance carrier must provide all reasonable and necessary medical care to cure or relieve from the effects of the injury.

Prior to the effective date of Labor Code § 4610.6 (as of July 1, 2013 for all dates of injury), disputes as to the medical necessity of recommended treatment that was denied under Labor Code § 4610 (Utilization Review), were referred to the agreed and or qualified medical examiners, who in most cases would examine applicant and render a medical report; the AME or QME would be subject to cross-examination and their opinions ultimately reviewable by a WCJ, and if necessary by the WCAB and Appellate Courts.

In the agreed-upon medical examination of January 31, 2012 [Petitioner's Exhibit 5], Dr. Schofferman, the AME, indicated that the prior Utilization Review denial of medications was inappropriate. That opinion of the AME was dispositive as to the medical necessity of the medication regimen prescribed by the injured worker's treating physician, and SCIF provided the care.

At the hearing of May 20, 2013, Respondent/Defendant stipulated that it had provided all necessary medical care.

However, with the enactment of Labor Code § 4610.6, effective as of July 1, 2013 in Ms. Stevens' case, providing for "independent medical review" by the Administrative Director's selected review organization, "Maximus," SCIF was provided multiple "additional bites at the apple" to deny the necessary medications and Home Health Care, since it was now free of the opinion (according to Labor Code § 4610.6) of the AME, Dr. Schofferman, who had examined Ms. Stevens on multiple occasions and issued approximately 12 reports.

After the award of WCJ Lehmer of August 16, 2013, Dr. Jamasbi, the treating physician, in medical reports of August 14, 2013 and September 10, 2012 [Petitioner's Exhibit 7], continued to prescribe the necessary medications and additional Home Health Care.

In a medical report of September 10, 2013 [Petitioner's Exhibit 7], Dr. Jamasbi reported that Ms. Stevens presented with chronic lower extremity pain secondary to Complex Regional Pain Syndrome and that there have been no acute changes in her pain condition on that date, but she continued to have flare-ups when touched, aggravating her pain.

Most relevant, Petitioner reports that her pain level is six to seven out of ten with the medications, and without the medications her pain level is nine to ten on a scale of ten (which, by definition, renders the pain intolerable). Petitioner was reporting utilizing five to six tablets a day of Norco, but required eight tablets with flare-ups.

On that date, Dr. Jamasbi was trying to decrease her Norco usage from eight tablets to the five or six tablets, and he continued to refill the medications.

On August 14, 2013, Dr. Jamasbi noted that Ms. Stevens continued to have the lower extremity pain secondary to reflex sympathetic dystrophy and indicated in his appeal from the denial by SCIF by Utilization Review under Labor Code § 4610

Regarding the denial of Home health aid, please acknowledge that she continues to be wheelchair-bound and uses a motorized wheelchair as she cannot stand or walk due to her burning pain in feet. She has been wheelchair-bound for several years. She has a home health aid worker to help her at home. However, this worker recently hurt herself and will not be able to

help the patient for some time. The patient does require assistance for transferring from wheelchair to the shower/toilet/bed, and tasks such as going to the pharmacy, going grocery shopping, and reaching/carrying, and meal preparation. The patient is unable to carry out these activities herself due to risk of falling. The patient does have a history of frequent falls when she tries to do these activities herself.

Dr. Jamasbi went on to say that he was asking for replacement of the home health aid and requested that Respondent/Defendant SCIF acknowledge that Dr. Jamasbi was modifying the request for authorization to eight hours a day, four times a week, which met the medical treatment utilization schedule.

Dr. Jamasbi concluded his treatment recommendations on August 14, 2013, by requesting that SCIF reconsider its denial of authorization for home health aid, eight hours a day, four days a week and for the multiple medications. He asked that medications be refilled on that date. Dr. Jamasbi stated, "further delay of this patient's treatment would only serve to prolong her suffering and increase the overall cost to the California Workers' Compensation system through prolongation of the utilization review process."

In spite of the fact that the AMB, Dr. Schofferman, in his report of January 31, 2012 [Petitioner's Exhibit 5], recommended the continued usage of the medication regimen, and in spite of the fact that Dr. Jamasbi, with the cooperation of Ms. Stevens, was trying to decrease her dosage and dependence on the pain medications, Respondent/Defendant utilized the effective date of July 1, 2013 of Labor Code § 4610.6 in Petitioner's case to deny these long-term medications and essentially terminate Petitioner's

medications "cold turkey." As Dr. Jamasbi, the treating physician, points out, this only increases Ms. Stevens' suffering.

Defendant/Respondent SCIF undertook its own evaluation of Petitioner's home modification needs as well as home health needs. In a report of April 8, 2013 [Petitioner's Exhibit 9] obtained by SCIF, the company, Rehab Without Walls, stated on page 11, under the heading "Recommendation Summary for Caregiver Needs"

Due to her diagnosis of complex regional pain syndrome, Ms. Stevens' functional abilities may vary on a day-to-day basis depending on her pain symptoms and previous night's sleep pattern. She describes as having 'good' days where she can go out for a walk and run a couple of errands to the bank and store. A 'bad' day would be where she is unable to get out of bed. The fluctuation was apparent when this occupational therapist was completing this evaluation that had to be ultimately conducted in 2 parts due to her pain symptoms.

Due to the nature of her diagnosis and to the complexity of her symptoms, it is difficult to accurately assess her caregiver needs on a consistent basis. According to Chris Hagen Functional Living Scale (referenced below), Ms. Stevens' abilities would perhaps correspond with a category 6 with monitored living on a 'good day'; and perhaps vary the next day to a category 1 with total care for a 'bad day'. Ms. Stevens would benefit from having a caregiver between 4-8 hours a day 5 days a week.

In his report of August 14, 2013 [Petitioner's Exhibit 7], Dr. Jamasbi specifically addressed all of the denials by the SCIF and provides his reasons for the prescription of a home health aide eight hours a day, the Ativan, the Flexeril, the Diclofenac Sodium cream, and the Hydrocodone.

Dr. Jamasbi described multiple objective factors and the entire history of the case, and further described how the treatment recommendations met the medical treatment utilization schedule. All of this was documented extensively by Dr. Jamasbi, yet in the two-page denial of February 20, 2014 [Petitioner's Exhibit 4], the "Maximus" medical reviewer, without addressing Dr. Jamasbi's specific recommendations in rebuttal to the Utilization Review denial, upheld the UR denials.

Moreover, the "Maximus" Independent Medical Review denial of February 20, 2014 [Petitioner's Exhibit 4], denies the Home Health Care as not being medical treatment at all, contrary to Labor Code §§ 4600 and 4600 (h), and a line of cases finding Home Health Care to be medical treatment in appropriate cases. See *Smyers v. WCAB* (1984) 157 Cal. App. 3d 36, which specifically finds that housekeeping services and other home care services are reimbursable under Labor Code § 4600, as medical treatment reasonably required to cure or relieve from the effects of the injury in an appropriate case.

See also *Henson v. WCAB* (1972) 27 Cal. App. 3d 452, indicating that care would be provided by the injured worker's spouse, who had no medical training. Her care consisted of, among other things,

She emptied Mr. Henson's urinal, set out a tray with materials so he could wash himself, and prepared his breakfast and took it to him to his bed. After breakfast she helped him dress, helped him put on his artificial leg, and assisted him to the living room. Whenever he went to the bathroom, she had to assist him because his legs would sometimes give way. When he was in pain, she gave him medication which she kept in a drawer beyond his reach so he would not take excessive amounts. At lunch time she prepared a tray of food and took it to him in the living room. Before dinner she

assisted him with his bath by helping him undress, helping him remove his artificial leg, and assisting him in getting in and out of the tub. At bedtime she helped him undress and remove his artificial leg, and gave him medication for relief of pain and sleeping tablets. During the night she frequently had to get up because he complained of pain. She would give him medication and rub his shoulder and the stump of his leg for about 20 minutes until the pain ceased.

Henson v. WCAB (1972) 27 Cal. App. 3d 452, 455-56.

In fact, Labor Code § 5307.1 (a) (1) which establishes a medical fee schedule for medical treatment, lists Home Health Care as one of the items to be reimbursed pursuant to the medical fee schedule as medical treatment. For the Independent Medical Reviewer in his/her decision of February 20, 2014, to find that Home Health Care services are not medical treatment, demonstrates a fundamental lack of understanding of the scope of workers' compensation law.

Labor Code § 4600 provides for medical care for injured workers that is reasonable and necessary to cure or relieve from the effects of the injury. Unfortunately, medical science has not progressed to the point that there is a "cure" for Ms. Stevens; she suffers from intractable pain, severe depression, Complex Regional Pain Syndrome, and an inability to ambulate. The only treatment available to Ms. Stevens is the prescribed medication and home health assistance to assist her in activities of daily living that will provide her some relief from her intractable pain.

Ms. Stevens testified that the medications affect her cognitively. The record shows, and her testimony corroborates, that prior to her industrial injury she functioned at a high level. It is not by choice that she takes the

medicine, but at this point, it is the only treatment that is available to her to relieve, to some degree, her symptoms. The Home Health Care is necessary because she is unable to do things for herself.

Labor Code § 4610.6 (d) provides for a decision within 30 days or, if an injured worker's pain or body function demands it, requires a decision by the reviewing organization in three days. In this case, the Utilization Review denials issued on July 25, 2013 and October 17, 2013 [Petitioner's Exhibit 8], and Ms. Stevens' appeals were filed on August 14, 2013, September 19, 2013 (two), October 1, 2013, October 15, 2013, December 9, 2013, and December 10, 2013 [Petitioner's Exhibit 10], yet the reviewing organization did not issue its decision until February 20, 2014, which was out of compliance with Labor Code § 4610.6 (d). However, timeliness is not one of the grounds reviewable pursuant to Labor Code § 4610.6 (h), and the adverse medical necessity determination as discussed above, purportedly is not reviewable by any WCJ, WCAB, or Court.

In essence, Labor Code § 4610.6 has rendered Petitioner's WCAB award of future medical care for her devastating and permanently disabling industrial injury meaningless.

Based on these facts, Petitioner has no plain, speedy and adequate remedy at the WCAB to enforce the award or to seek a ruling on the constitutionality of Labor Code § 4610.6, or to compel the Administrative Director and "Maximus" to render a transparent decision subject to cross-examination and a fair speedy hearing before a WCJ with full appellate rights.

**C. PETITIONER HAS BEEN DENIED DUE PROCESS BY
LABOR CODE SECTION 4610.6, WHICH PREVENTS
CROSS-EXAMINATION OF THE REVIEWING PHYSICIAN
EMPLOYED BY "MAXIMUS" AND BARS JUDICIAL
REVIEW OF AN ADVERSE DETERMINATION
UPHOLDING THE DEFENDANT EMPLOYER'S
UTILIZATION REVIEW DENIALS OF MEDICAL CARE.**

In *Quinn v. State of California* (1975) 15 Cal. 3d 162, Justice Matthew Tobriner stated that Labor Code § 3202 "requires the courts to review the [Workers' Compensation Act] from the standpoint of the injured worker, with the objective of securing for him the maximum benefits to which he is entitled." *Quinn v. State of California* (1975) 15 Cal. 3d 162, 170.

In 1969, the WCAB issued an *en banc* decision in the case of *Stingley v. INA* 34 Cal. Comp. Cases 462. In *Stingley*, the WCAB held:

Even though appropriate restrictions may be imposed in the interest of orderly proceedings during the actual course of proceedings, an attempt to restrict cross-examination or rebuttal evidence prior to the proceeding itself is against all concepts of fair play, and accordingly is violative of a party's fundamental right to conduct cross-examination and present rebuttal evidence.
(emphasized in original opinion)

Stingley v. INA 34 Cal. Comp. Cases 462, 464.

In *Stingley, supra*, the WCAB also states:

[W]e are mindful of the heavy demands made upon This Board and its referees with our ever increasing case load, and are fully cognizant of the fact that it is administratively desirable to simplify procedures whenever possible in discharging our duty of 'expeditiously adjudicating cases before the Board.' (see California Constitution, Article XX, section 21).

However, where judicial procedures, no matter how desirable they may be, clash with the requirements of due process of law, the former must yield to the latter. *Stingley, supra* at 465.

In *Fidelity v. WCAB* (1980) 103 Cal. App. 3d 1001 the Court stated:

The WCAB 'acts as a Court and it must observe the mandate of the Constitution of the United States that this cannot be done except after due process of law...'

Due process requires that all parties must be fully apprised of the evidence submitted or to be considered, must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense.

Unfortunately, in this case the Board's rush to judgement has led it far afield of the essentials of due process. If this case is a measure, the Board has despite its sheath of rules of practice and procedure (California Administrative Code and Labor Code), operates in an essentially structureless environment where the vigilance of the petitioning and responding parties provides the only insurance against the arbitrary and capricious denial of due process.

Fidelity v. WCAB 103 Cal. App. 3d 1001, 1015-1016.

In light of the *en banc* decision in *Stingley, supra*, and the Appellate Court's determination in *Fidelity, supra*, the injured worker must be afforded the opportunity to cross-examine the witness. The statute's withholding of the name of the physician (Labor Code § 4610 (f)), the statute's prohibition of cross-examination, and the statute's denial of judicial review (Labor Code § 4610.6 (i)), is a denial of fundamental due process for Petitioner.

**D. LABOR CODE SECTION 4610.6 IS VIOLATIVE OF
THE MANDATE OF CALIFORNIA STATE CONSTITUTION,
ARTICLE XIV, SECTION 4, WHICH MANDATES THAT
THE LEGISLATURE PROVIDE A WORKERS'
COMPENSATION SYSTEM THAT PROVIDES
SUBSTANTIAL JUSTICE IN ALL CASES
EXPEDITIOUSLY AND WITHOUT ENCUMBRANCE.**

For the reasons set forth in this Memorandum of Points and Authorities, Labor Code § 4610.6, which provides for medical determination of the independent medical reviewing organization, "Maximus," by employing (in accord with the statute), an anonymous, non-treating, non-examining physician who has issued a non-appealable decision denying Petitioner the necessary medications and Home Health Care, which have been the only treatment modalities that have afforded her any relief, does not and cannot meet the constitutional standards of a statute that provides substantial justice expeditiously and without encumbrance.

It is difficult to conceive of a statute-mandated system that is more encumbering and less expeditious, and that provides no justice, let alone substantial justice, than the statutory scheme set out in Labor Code §§ 4610.5 and 4610.6.

Utilization Review denials pursuant to Labor Code § 4610 were issued on July 25, 2013 [Petitioner's Exhibit 9]. The Petitioner's request for Independent Medical Review was filed on August 14, 2013 [Petitioner's Exhibit 10].

The "Maximus" denial of treatment upholding the Utilization Review decision issued on February 20, 2014 [Petitioner's Exhibit 4], some seven months later, is not in compliance with Labor Code § 4610 (d). No

judicial review and no scrutiny of the medical necessity denial is available to the injured worker.

Even though the reviewing organization, at least on its face, did not meet the deadlines prescribed by Labor Code § 4610.6 (d), even that failure is not subject to any appeal before the WCAB or judicial review pursuant to Labor Code § 4610.6 (h).

Based on the facts in Petitioner Stevens' case, and the judicial Findings of Fact and Opinion on Decision, the reports of the treating physician, as well as the AME and QMEs, and the report from Rehab Without Walls (SCIF's obtained evaluation), substantial evidence has been presented as to the medical necessity of medications and home health services.

Ms. Stevens is excruciatingly aware that Labor Code § 4610.6 has denied her her rights under the California Constitution to an expeditious resolution of the denial of her medical treatment without encumbrance. She has been denied substantial justice by a statutory system that has facilitated SCIF's unconscionable denials and delays in providing her medical care, and by the statutory denial of her constitutional right to due process in presenting a rebuttal to the denial of treatment.

V.

CONCLUSION

Petitioner, Frances Stevens, requests that the Court of Appeal:

1. Issue a Writ of Mandate in this case, since Ms. Stevens has no plain, adequate and speedy remedy other than this writ, consistent with *Greener, supra*.

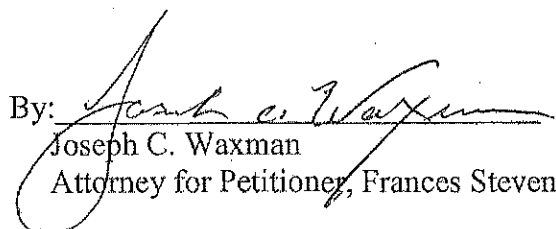
2. Hold Labor Code § 4610.6 to be in violation of California Constitution XIV, Section 4, that mandates that the Legislature enact workers' compensation laws that provide substantial justice in all cases, expeditiously and without encumbrance.
3. Hold that Labor Code § 4610.6 violates Petitioner's right to due process of the law, by prohibiting cross-examination of the anonymous, non-treating, non-examining reviewer and that Labor Code § 4610.6 violates the California Constitution by prohibiting judicial review of the denials of medical treatment.
4. That Petitioner either be allowed to receive the medical treatment recommended by her treating physician, including the medications and Home Health Care or, in the alternative, that Petitioner be afforded an opportunity to present her case as to medical necessity before a WCJ, with all due process rights to appeal to the WCAB and, if necessary, judicial review.

For all of the above reasons, Petitioner requests that the Petitioner's Petition for Writ of Mandate and Writ of Review be granted and costs be awarded.

Dated: April 2, 2014

Respectfully submitted,

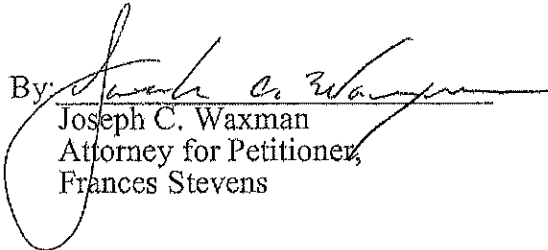
LAW OFFICE OF JOSEPH C. WAXMAN

By: 
Joseph C. Waxman
Attorney for Petitioner, Frances Stevens

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using 13 point Times New Roman typeface. According to the Word Count in my Microsoft Word for Windows software, this brief contains 8,068 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 1, 2014.

By: 
Joseph C. Waxman
Attorney for Petitioner,
Frances Stevens

CERTIFICATE OF SERVICE BY MAIL

I am a citizen of the United States and employed in the County of San Francisco, State of California. I am over the age of eighteen years. My business address is 220 Montgomery Street, Suite 905, San Francisco, California.

I served the within:

PETITION FOR WRIT OF MANDATE AND WRIT OF REVIEW; AND MEMORANDUM OF POINTS AND AUTHORITIES

On the parties in said action, by mailing a true copy thereof to the parties as follows:

State of California (*Original + four copies via hand delivery*)
Court of Appeal, First Appellate District
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102

Workers' Compensation Appeals Board (*two copies via hand delivery*)
ATT: WRIT SECTION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94142-9459

The Honorable Francie Lehmer (*via hand delivery*)
Workers' Compensation Appeals Board
455 Golden Gate Avenue, 2nd Fl.
San Francisco, CA 94102

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I declare under penalty of perjury that the foregoing is true and correct.
Executed at San Francisco, California on April 3, 2014.

Marianne M. O'Hara
Marianne M. O'Hara