IN THE COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

JOSE FACUNDO-GUERRERO Petitioner, v. NURSERYMEN'S EXCHANGE and ARGONAUT INSURANCE COMPANY Respondents.	)	1 Civil No: A119814 WCAB Case No: SFO 0489218

ANSWER TO PETITION
FOR WRIT OF REVIEW

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

Jose Facundo-Guerrero v. WCAB; Argonaut Insurance Co.

First Appellate District Civil Case No. A119814

WCAB Case No:

SFO 0489218

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
Argonaut Insurance Co.	xx		Insurance Company
Nurserymen's Exchange	xx		Employer
Argonaut Group		xx	Parent Company
Mark E. Watson		xx	Officer/Shareholder/AG
Gregory M. Vezzosi		xx	Shareholder/Officer/AG
Barbara C. Bufkin		xx	Officer/Shareholder/AG
Ronald B. Given		xx	Officer/Shareholder/AG
Mark W. Haushill		xx	Officer/Shareholder/AG
Robert C. Ingram III		xx	Officer/Shareholder/AG

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VERIFICATION

I am one of the attorneys for Respondents in this action. The facts alleged in the above document are within my knowledge, and I make this verification for that reason; the above document is true to my own knowledge, except as to the matters that are stated in it on information and belief, and as to those matters, I believe it to be true.

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

Executed this 19 day of December, 2007 at San Francisco, California.

BDEgan

Brian D. Egan

CERTIFICATE OF WORD COUNT

The undersigned certifies this brief, excluding, tables and attachments, contains approximately 4,630 words, based on the computerized word count of WordPerfect.

ANSWER TO PETITION FOR WRIT OF REVIEW

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

Petitioner, JOSE FACUNDO-GUERRERO ("Petitioner"), by Petition for Writ of Review, seeks review of the Order Denying Reconsideration which has been issued in the above-entitled case by the Workers' Compensation Appeals Board.

Respondent, NURSERYMEN'S EXCHANGE and ARGONAUT INSURANCE COMPANY ("Respondents"), by this Answer to the Petition for Writ of Review, alleges as follows:

1. On April 1, 2005, Petitioner claimed he sustained an injury to his back and left leg on February 24, 2005 while working for Respondent Nurserymen's Exchange, insured for purposes of workers' compensation by Argonaut Insurance Company.
2. On June 21, 2005, Respondent issued a timely denial letter, asserting Petitioner's injuries were non-industrial as they were not sustained arising out of or in the course of employment.
3. On September 26, 2006, Respondent admitted Petitioner's injuries to his back were industrial.
4. By September 26, 2006, Petitioner had visited his Primary Treating

Physician ("PTP"), Marijan Pevec, D.C. on a total of 76 occasions. As a result, Petitioner received well over the statutory maximum of twenty-four ("24") chiropractic treatment visits per industrial injury under Labor Code Section 4604.5(d)(1).

5. On the basis of a Declaration of Readiness to Proceed filed by Petitioner, an Expedited Hearing was held on February 6, 2007 before the Honorable Presiding Workers' Compensation Judge ("WCJ") Susan Hamilton at the San Francisco District Office of the Workers' Compensation Appeals Board.

6. On March 9, 2007, WCJ Hamilton issued a Findings and Order, whereby she concluded that: 1) California Labor Code Section 4604.5 precluded Petitioner from receiving any additional chiropractic treatment; and 2) Respondents may transfer Petitioner's medical care into its Medical Provider Network ("MPN"), with Petitioner directed to select a PTP therein.

7. Subsequently, it was discovered that PTP Pevec was a participating provider in Respondents' MPN.

8. After learning of PTP Pevec's inclusion in Respondents' MPN, WCJ Hamilton rescinded her March 9, 2007 Findings and Order on April 16, 2007, determining that Petitioner already treated with a physician

within Respondents' MPN.

9. Subsequently, the parties proceeded to a Status Conference held before WCJ Hamilton on July 23, 2007, where Petitioner challenged the constitutionality of Section 4604.5(d)(1), arguing that the section violated the language of the California Constitution and violated Petitioner's equal protection rights.

10. On July 27, 2007, WCJ Hamilton issued a new Findings and Order in which she determined that the 24 chiropractic treatment limitation set forth in Labor Code Section 4604.5 applied to the instant case and precluded Petitioner from receiving additional chiropractic treatment from Dr. Pevec because he has had in excess of 24 chiropractic visits since his date of injury on February 24, 2005. With regard to the constitutional issues raised by Petitioner, WCJ Hamilton properly found that she did not have the authority to rule on the questions of law.

11. On August 20, 2007, Petitioner's counsel filed a Petition for Reconsideration with the Workers' Compensation Appeals Board ("Appeals Board").

12. On September 5, 2007,WCJ Hamilton rescinded her July 27, 2007 decision and issued a new Findings and Order for purposes of

clarifying the previous July 27, 2007 Order. In the September 5, 2007 Order WCJ Hamilton determined that PTP Pevec could continue to serve as Petitioner's PTP, but that he could not provide Petitioner with additional chiropractic care as Petitioner had reached the 24 visit limitation under Section 4604.5(d)(1). Additionally, WCJ Hamilton also concluded that she could not rule on Petitioner's constitutional arguments.

13. On September 28, 2007, Petitioner filed another Petition for Reconsideration solely asserting his constitutional challenges to Section 4604.5(d)(1).

14. On October 11, 2007 the Appeals Board adopted and affirmed WCJ Hamilton's September 5, 2007 Findings and Order.

15. Petitioner filed a timely Petition for Writ of Review with the First Appellate District Court on November 26, 2007.

16. This Answer to Petitioner's Petition for Writ of Review was timely filed within 25 days of Petitioner's Petition for Writ of Review with the First District Court of Appeals.

RESPONDENTS respectfully request the Court of Appeal deny Petitioner's Petition for Writ of Review on the following grounds:

A. The Workers' Compensation Judge and the Workers'

Compensation Appeals Board acted within their powers;

B. The Findings of Fact and Order of the Workers' Compensation Appeals Board are supported by substantial evidence;

C. The Findings of Fact support the Order of the Workers' Compensation Appeals Board and;

D. The Order and Decision of the Workers' Compensation Appeals Board was reasonable.

Respectfully submitted under penalty of perjury this 19 day of December, 2007, in San Francisco, California.

DATED: 12/19/07

Respectfully submitted,

LAUGHLIN, FALBO, LEVY & MORESI LLP

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IN THE COURT OF APPEAL

STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION 4

JOSE FACUNDO-GUERRERO, Petitioner, v. NURSERYMEN'S EXCHANGE, Insured by ARGONAUT INSURANCE CO., Respondents.	)	1 Civil No: A119814 WCAB Case No: SFO 0489218 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF REVIEW**

QUESTIONS PRESENTED

1. Did the Legislature exceed its constitutional authority in enacting California Labor Code Section 4604.5(d)(1) ?

2. Does California Labor Code Section 4604.5(d)(1) violate the California Constitution on Equal Protection grounds?

STANDARD OF REVIEW

When considering a Petition for Writ of Review, "this Court must determine whether the evidence, when viewed in light of the entire record, supports the Award of the Workers' Compensation Appeals Board . . . questions of statutory interpretation are, of course, for this Court to decide." *Keulen v. WCAB* (1998) 66 Cal.App.4th 1089, 1995-96. While factual determinations of the Workers' Compensation Appeals Board are entitled to substantial deference, when the issue before the appellate court is one of law, the appellate court reviews it *de novo*. *Land v. WCAB* (2002) 102 Cal.App.4th 491, 494.

FACTUAL AND PROCEDURAL BACKGROUND

A. California Labor Code Section 4604.5(d)(1)

Effective January 1, 2004, Senate Bill 228 ("SB 228") was enacted. As part of SB 228, newly enacted Labor Code Section 4604.5(d) became law. Originally, Section 4604.5(d) created a limitation of 24 chiropractic visits and physical therapy visits per industrial injury.

Thereafter, pursuant to Senate Bill 899 ("SB 899"), Section 4604.5(d) was amended as Section 4604.5(d)(1) and created an additional limitation of 24 occupational therapy visits per industrial injury.

//

B. The Petitioner Jose Facundo-Guerrero

Petitioner Jose Facundo-Guerrero sustained a specific injury to his back and left leg arising out of and occurring in the course of his employment while employed as a laborer for Respondent Nurserymen's Exchange, insured for workers' compensation purposes by Respondent Argonaut Insurance Company. Respondents first learned of Petitioner's injury on April 1, 2005 and accepted the claim as an industrial injury on September 25, 2006.

On December 20, 2004 and May 2, 2005, Respondents provided Petitioner with notice, in both English and Spanish, of the approval of Respondents' MPN program and his coverage within that program. Regardless, Petitioner began self-procuring medical treatment.

On June 13, 2005, Petitioner began to treat with his PTP Pevec, a chiropractor. Between the dates of June 13, 2005 and September 25, 2006, Petitioner received 76 visits/chiropractic treatments with PTP Pevec. After accepting the injury on September 25, 2006, Respondents initiated procedures to transfer Petitioner's care to their MPN.

The matter proceeded to an Expedited Hearing on February 16, 2007, before the Honorable Presiding WCJ Susan Hamilton. On March 9, 2007, WCJ Hamilton issued a Findings and Order whereby she concluded

that: 1) Petitioner was not entitled to any additional chiropractic treatment and 2) Respondents may transfer Petitioner's medical care into its MPN and the Petitioner is directed to select a PTP therein.

Days after WCJ Hamilton issued her March 9, 2007 Findings and Order, Respondents learned that PTP Pevec was a participating provider within Respondents' MPN. In response, WCJ Hamilton rescinded her March 9, 2007 Findings and Order on April 16, 2007 on the basis that Petitioner already treated with a physician within Respondents' MPN.

Subsequently, the parties proceeded to a Status Conference held before WCJ Hamilton on July 23, 2007, where Petitioner argued that Marijan Pevec D.C. could remain Petitioner's PTP despite the 24 visit limitation for chiropractic treatment under Labor Code Section 4604.5(d)(1). Petitioner also challenged the constitutionality of Section 4604.5(d)(1), arguing that the limitation violated the language of the California Constitution and violated Petitioner's equal protection rights. Although Petitioner's counsel raised the constitutional issues, he noted that WCJ Hamilton did not have the authority to decide the issues.

In response to these arguments, Respondents' counsel stated on record that PTP Pevec could remain the primary treating physician for purposes of fulfilling the management duties under Section 3209.3 and that

no present dispute existed over that issue. With regard to the constitutional challenges, Respondents' counsel also agreed that they were improperly brought before WCJ Hamilton.

On July 27, 2007, WCJ Hamilton issued her Findings and Order in which she determined that the 24 chiropractic treatment limitation set forth in Labor Code Section 4604.5 applied to the instant case. With regard to the constitutional issues raised by Petitioner, WCJ Hamilton found that she did not have the authority to rule on the questions of law.

On August 20, 2007, Petitioner's counsel filed a Petition for Reconsideration to the Workers' Compensation Appeals Board ("Appeals Board").

Before the Appeals Board could rule on Petitioner's Petition, WCJ Hamilton rescinded her July 27, 2007 decision and issued a new Findings and Order, dated September 5, 2007. Clarifying her previous Order, WCJ Hamilton determined that PTP Pevec could continue to serve as Petitioner's primary treating physician, but that he could not provide Petitioner with additional chiropractic care as Petitioner had reached the 24 visit limitation under Section 4604.5(d)(1). Additionally, WCJ Hamilton reasserted her prior conclusions and held she could not rule on Petitioner's constitutional arguments.

On September 28, 2007, Petitioner filed another Petition for Reconsideration solely asserting his constitutional challenges to Section 4604.5(d)(1). Petitioner's Petition for Reconsideration was denied on October 11, 2007, as the Appeal Board agreed with WCJ Hamilton's September 5, 2007 Findings and Order.

ARGUMENTS

I. PETITIONER FAILS TO PROVE THAT THE LEGISLATURE EXCEEDED ITS CONSTITUTIONAL AUTHORITY IN ENACTING CALIFORNIA LABOR CODE SECTION 4604.5(d)(1).

In challenging the constitutionality of Section 4604.5(d)(1), Petitioner faces an insurmountable challenge. Indeed, a facial attack of the constitutionality of a legislative act is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." 7 Witkin Sum. Cal. Law Const. Law § 119; see also *In re Marriage of Siller* (1986) 187 Cal.App.3d 36, 48.

Here, Petitioner's constitutional challenge to Section 4604.5(d)(1) must fail because the statute is valid under all circumstances even as applied to the present case. Petitioner's assertion as to its unconstitutionality is gravely misplaced.

Furthermore, Petitioner's challenge must also fail because Petitioner

applies an inappropriate standard of review. On page 13 of his Memorandum of Points and Authorities, Petitioner applies a standard of review, relevant only in statutory interpretation cases, when the present case requires interpretation of the California Constitution. Constitutional provisions are analyzed separately and distinctly from statutes as constitutional amendments are not enacted by the Legislature. For this reason, looking to the "legislative intent" behind a constitutional provision is nonsensical. In effect, Petitioner, by and through his attorney, confuses a basic and fundamental legal concept and his error should be duly noted.

A. Because There Is No Absolute Right To Workers' Compensation Benefits, The Legislature Acted Within Its Power In Enacting Section 4604.5(d)(1).

The California Constitution does not make a workers' right to receive workers' compensation benefits an absolute. Cal. Const., art. XIV, § 4; see also *Wal-Mart Stores, Inc. v. WCAB (Garcia)* (2003) 112 Cal.App.4th 1435, 1442. In the present case, under the powers bestowed on it by the California Constitution, the Legislature has merely elected to limit the availability of certain types of treatment. In doing so, it validly exercises its broad power to shape and maintain a workers' compensation system as it deems appropriate.

Article XIV, section 4, of the California Constitution expressly

empowers the Legislature to create, maintain, and enforce a system of workers' compensation. *E. Clemens Horst Co. v. Industrial Acc. Comm.* (1920) 184 Cal.180. As a result of this constitutional grant of plenary power, and as an expression of its police powers, the Legislature is vested with broad authority to shape a complete and exclusive system of workers' compensation. See *Rio Linda Schools v. WCAB* (2005) 131 Cal.App.4th 517, 527; *Graczyk v. WCAB* (1986) 184 Cal.App.3d 997.

However, in analyzing the constitutionality of a Legislative act, "[the] Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the [federal] government, or prohibited by the Constitution of the United States." *City and County of San Francisco v. WCAB (Wiebe)* (1978) 22 Cal.3d 103, 113. As the California Supreme Court explained in *Wiebe*:

> '[The Court] does not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the Legislature is vested with the whole of the legislative power of the state.'

Id. (citing *Fitts v. Superior Court* (1936) 6 Cal.2d 230, 234). Moreover, "if there is any doubt as to the Legislature's power to act in any given case, the

doubt should be resolved in favor of the Legislature's action." *Wiebe, supra,* 22 Cal.3d 103, 113 (citing *Collins v. Riley* (1944) 24 Cal.2d 912, 916).

In looking to the language of the Constitution, Article XIV expressly vests the Legislature with "plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation." Cal.Const., art. XIV, § 4. There is no express language limiting the Legislature's ability to enact a 24 visit limitation on chiropractic care or physical and occupational therapy.

Petitioner, however, asserts that language in the California Constitution, stating that the Legislature is empowered to provide for "full provision for such medical, surgical, hospital and other remedial treatment as is requisite to cure and relieve from the effects of such injury," compels the conclusion that the Legislature is prohibited from limiting certain types of treatment available to injured workers. Cal.Const., art. XIV, § 4.

In contrast to Petitioner's assertions, the above language does not rise to the level of a constitutional command. While the provision clearly acknowledges and endorses the Legislature's authority to provide for "full provision" of medical treatment "as is requisite to cure and relieve," absolutely nothing in the Constitution purports to limit the Legislature's

authority to limit certain types of medical treatment. Indeed, it is well within the Legislature's "plenary power" to limit the amount of chiropractic and physical therapy an injured worker may receive.

Furthermore, if carried to its logical end, Petitioner's argument and interpretation of the Constitution establishes a workers' compensation system that provides injured workers unlimited types of treatment, including any treatment a physician recommends to "cure and relieve." The Legislature must have the discretion to regulate the types of medical treatment available to an injured worker or the system would be unworkable. The California Constitution is simply not a means to list out all appropriate forms of medical treatment.

Moreover, the history surrounding Article XIV, section 4, formerly Article XX, section 21, makes it clear that the purpose of the "full provision" language was simply to "remove all doubt as to the constitutionality of then existing workers' compensation legislation." *Mathews v. WCAB (Western Contractors)* (1972) 6 Cal.3d 719, 733 (the Court describes the history of the legislative power to create a workers' compensation system). Specifically, in 1918, the Legislature confronted significant constitutional challenges from many insurers and employers compelled into the new workers' compensation system. *Id.* at 733. The

survival of an exclusive workers' compensation system depended on the Legislature possessing full authority to create a complete system, including a system that could potentially provide for the "full provision" of medical treatment required to cure and relieve.

In short, by describing what could constitute a "complete workers' compensation system," the language of the Article, authorizing "full provision" of benefits, prevented successful challenges to the constitutionality of any new system and ensured the new system's survival. Therefore, in light of the history surrounding the workers' compensation system's implementation, the Constitution's "full provision" language must not be interpreted as a constitutional command. There is no constitutional mandate that the Legislature must implement a system of workers' compensation to the full extent of its authority.

In addition, while the present case presents a question of first impression, the Court of Appeals has specifically stated in a recent decision that there exists no constitutional right to workers' compensation benefits, determining that the "California Constitution does not make such a right absolute." *Wal-Mart Stores, supra,* 112 Cal.App.4th 1435, 1442.

Furthermore, because the Constitution affords the Legislature a wide spectrum of authority in creating and enforcing a workers' compensation

system, the Legislature may properly choose to refrain from exercising its full power when it deems appropriate. Illustrative of this point, is the Court of Appeal's decision in *Wal-Mart* where it upheld the constitutionality of California Labor Code Section 3208.3, which denies all injured workers any compensation benefits for psyche injuries if they worked for their employers for less than six months. Because "Article 14, section 4 gives the Legislature 'plenary power' to establish a system of workers' compensation for 'any or all' workers" the Court of Appeals determined that the Legislature could "merely **elect**[] to exercise its power to exclude certain workers." *Id.* (Emphasis added).

Additionally, there are other examples in which the Legislature has limited certain types of medical treatment without constitutional challenge. For instance, with the enactment of Labor Code Section 4604.5(c), the Legislature implemented the American College of Occupational and Environmental Medicine ("ACOEM") Guidelines as the legal standard for authorizing medical treatment. Under Section 4604.5(c), the ACOEM Guidelines are presumptively correct on the issue of extent and scope of medical treatment. As a result, if recommended treatment is not consistent with ACOEM, it may be properly denied by the employer assuming the injured worker is unable to rebut the ACOEM Guideline's presumption of

correctness.

Consequently, if the Legislature can elect to bar benefits to a certain class of workers, or deny certain treatments based on medical-legal guidelines, it also may certainly limit the type of medical treatment provided within the system–specifically the amount of chiropractic care or physical therapy an injured worker may receive in certain cases.

Thus, there is no indication from established case law, the state Constitution, or the Constitution's history, suggesting that the Legislature exceeded its constitutional power in enacting a 24 visit limit on chiropractic care or physical therapy. There is no limiting language in the Constitution that prevents the Legislature from electing not to exercise its full power in providing workers' compensation benefits. Petitioner, in this case, simply misreads the Constitution and provides no basis for determining Section 4604.5(d)(1) unconstitutional on its face.

B. Petitioner's Reliance on *Six Flags* is Misplaced Because the Legislature has the Authority to Make Administrative Decisions.

In his Petition for Writ of Review, Petitioner relies on the Court of Appeal's decision in *Six Flags, Inc. v. WCAB (Bunyanuda)* (2006) 145 Cal.App.4th 91, as authority to find Section 4604.5(d)(1) unconstitutional. However, *Six Flags* is completely distinguishable from the present case and

fails to support Petitioner's position.

In *Six Flags*, the Court struck down a workers' compensation statute as unconstitutional because it contradicted the enabling provision of Article 14, section 4. Specifically, the constitutional enabling provision expressly provided that the Legislature could only compensate either "any and all workers" or "their dependents." Cal.Const. art XIV., § 4. Because the statute in *Six Flags* provided compensation to "estates," rather than to "workers," the Court of Appeal found that the Legislature had over-stepped its constitutional power to create and enforce a workers' compensation system. The *Six Flags* court also noted that the Supreme Court had, on separate occasions, previously struck down similar statutes expanding the class of beneficiaries beyond workers and their dependents. *Id.* (Citing *Yosemite Lumbar Co. v. Industrial Acc. Com.* (1922) 187 Cal.774 and *Commercial Cas. Ins. Co. v. Industrial Acc. Com.* (1930) 211 Cal.210).

Petitioner mistakenly attempts to use the case of *Six Flags* to suggest that the Legislature is expanding on the California Constitution by limiting the number of chiropractic visits available to an injured worker. The present case is distinguishable from *Six Flags* because the Constitution does not require the Legislature to fully provide medical treatment to workers. In contrast, the Constitution specifically requires the system to only

compensate workers and their dependents. Here, unlike in *Six Flags*, the Legislature has not acted beyond its authorization.

It is the Legislature's place to create and amend the system. In fact, it is not unusual for the Legislature to limit benefits to workers in some way. For instance, the Legislature decides temporary disability maximums and minimums, the percentage of a worker's wages he will receive as temporary disability, the number of days a claim may be investigated, etc. While a number of these hard choices may seem arbitrary, it does not make them unconstitutional.

In short, this case does not rise to the level of a constitutional violation. The Legislature has not over-stepped its constitutional authority. Therefore, Petitioner's constitutional challenge is erroneously asserted under the present circumstances.

C. There is No Evidence That the 24 Visit Limitation of Section 4604.5(d)(1) Prevents Full Provision of Medical Treatment to "Cure and Relieve" an Injured Worker From the Effects of an Industrial Injury.

As argued above, the California Constitution does not require the Legislature to create a workers' compensation system that always operates to provide "provision of medical treatment" as is necessary to fully "cure and relieve" the effects of all industrial injuries. Even assuming, however, that there is merit to Petitioner's facial challenge, Petitioner's challenge still

must fail. This is so because Petitioner never introduced any evidence at Trial that proves that 24 chiropractic or physical therapy visits do not constitute "full provision of medical treatment requisite to cure or relieve."

Recall, it is Petitioner's burden to carry when asserting a facial constitutional challenge; not Respondents'. To meet his burden, Petitioner must prove that 24 visits, plus an employer option to authorize more visits, under any circumstances, does not equate to "full provision" of medical treatment under the California Constitution.

Petitioner, however, would have this Court rule in his favor based on an opinion without evidentiary support. Petitioner clearly fails to meet his burden as he never introduced any evidence that proves that either he, or any other injured worker, requires more than 24 chiropractic visits to cure or relieve his condition. Additionally, he has failed to note specific cases where an injured worker reached the 24 limit and an employer refused authorization to provide more visits when proven medically necessary. Further, Petitioner also fails to cite any cases or studies suggesting that Section 4604.5(d)(1), with its option for authorization of additional visits by the employer, does not meet the constitutional requirements for "full provision" of reasonable medical care. Moreover, Section 4604.5(d)(1) is only a limitation on chiropractic or physical therapy. Currently, there is no

limitation on other types of medical treatment an injured worker may receive.

Instead of providing hard data to support his contentions, Petitioner attempts to "hypothetically" characterize Section 4604.5(d)(1) as a rigid statute that is incapable of meeting the needs of injured workers. As such, based on his lack of evidence, Petitioner's challenge does not provide a basis for declaring Section 4604.5(d)(1) unconstitutional.

II. ADDITIONALLY, PETITIONER'S EQUAL PROTECTION CHALLENGE MUST FAIL BECAUSE INJURED WORKERS DO NOT CONSTITUTE A SUSPECT CLASS AND THE GOAL OF SECTION 4604.5(d)(1) IS RELATED TO A LEGITIMATE GOVERNMENT PURPOSE.

Petitioner's second constitutional argument also does not withstand constitutional scrutiny. To establish an equal protection challenge, Petitioner must first show that injured workers are included in a suspect class. As established in *Sakotas v. WCAB* (2000) 80 Cal.App.4th 262, 271, injured workers do not qualify as a suspect class. Additionally, there is no fundamental right involved in this case, because there is no fundamental right to workers' compensation benefits. *Id.*; see also *Wal-Mart, supra*, 112 Cal.App.4th 1435, 1442.

Therefore, as Section 4604.5(d)(1) does not infringe upon a suspect class nor impinge on a fundamental right, strict scrutiny review is not

required.

Rather, Section 4604.5(d)(1) will be upheld under rational basis review because it has a legitimate government purpose. As passed as part of SB 228, and amended by SB 899 to also include a cap on occupational therapy, the measure was designed to combat skyrocketing workers' compensation costs and to return businesses to the state of California, while still providing mechanisms to provide reasonable treatment to all injured workers where appropriate. See *Brodie v. WCAB* (2007) 40 Cal.4th 1313, 1329-1330; see also Stats.2004, ch.34, § 49.

Certainly, reducing costs and the opportunity for fraud is a legitimate state purpose. Equally certain, is the fact that Petitioner has failed to meet his burden of proving that Section 4604.5(d)(1) is not related to a legitimate state purpose. As such, Petitioner's equal protection challenge must fail because Section 4604.5(d)(1) does not violate Petitioner's equal protection rights.

CONCLUSION

WHEREFORE, because Petitioner's constitutional challenges lack merit, there is no basis for disturbing WCJ Hamilton's September 5, 2007 Findings and Order. Accordingly, Respondents respectfully request that Petitioner's Petition for Writ of Review be denied.

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DATED: 12/19/07

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE BY MAIL

JOSE FACUNDO-GUERRERO v. NURSERYMEN'S EXCHANGE and ARGONAUT INSURANCE COMPANY
WCAB Case No: SFO 0489218

I am over 18 years of age and not a party to the within-entitled action. I am employed at and my business address is LAUGHLIN, FALBO, LEVY & MORESI LLP, 255 California Street, Suite 600, San Francisco, California, 94111-4912. On this date, I served the following:

ANSWER TO PETITION FOR WRIT OF REVIEW

by placing a true copy thereof enclosed in a sealed envelope with postage prepaid in the United States mail at San Francisco, California, addressed as shown below.

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I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on December 19, 2007.

Kate Kroeger