

No. A119814

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

JOSE FACUNDO-GUERRERO,
Petitioner,

vs.

**THE WORKERS' COMPENSATION APPEALS BOARD
OF THE STATE OF CALIFORNIA; NURSERYMEN'S
EXCHANGE; ARGONAUT INSURANCE COMPANY;**
Respondents.

**WCAB Case No. : SFO 0489218
Honorable Presiding Judge Susan Hamilton
Workers' Compensation Appeals Board Commissioners
Honorable James C. Cuneo
Honorable Frank M. Brass
Honorable Janice Jamison Murray**

**PETITIONER'S REPLY TO RESPONDENT'S ANSWER
WITH MEMORANDUM OF POINTS AND AUTHORITIES**

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CONSTITUTIONAL

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VERIFICATION

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES) ss.

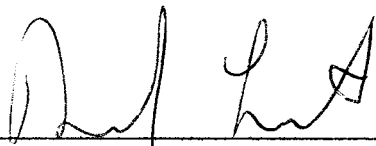
I am the attorney for Jose Facundo-Guerrero and I am authorized to make this verification for and on his behalf, and I am making this verification for that reason.

I have read the foregoing Petition for Writ of Review and Memorandum of Points and Authorities and know the contents thereof. I have personally reviewed and am familiar with the records, files and proceedings and exhibits described in and the subject of the present case and I know the facts stated in the Petition for Writ of Review and Memorandum of Points and Authorities are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

Executed on December 31, 2007, in the City of San Francisco, State of California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

CERTIFICATE OF LENGTH OF BRIEF

The undersigned appellate counsel certifies that this brief, excluding, tables and attachments, contains approximately 1,439 words, based on the computerized word count of Microsoft Word.



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INTRODUCTION

This is the quintessential case for appellate review, as this case presents an issue of first impression, questioning the constitutionality of Labor Code §4604.5(d)(1) and (d)(2), which fail to provide whatsoever for the settlement of any disputes regarding the need for treatment 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 ... provided, that all decisions of any such tribunal shall be subject to review by the appellate court of this State.”¹

As well, this case presents important issues that broadly affect the industrially injured public’s health and welfare in obtaining access to reasonable treatment, as so defined, from a physician, as so defined, necessary to cure and relieve an employee, as so defined, from the effects of an admitted industrial injury, as so defined.

I

LABOR CODE §4604.5(d)(1) AND (d)(2) ONLY ALLOWS A PARTY-IN-INTEREST TO AUTHORIZE REASONABLE TREATMENT AND FAILS TO PROVIDE FOR ANY FORM OF CONSTITUTIONALLY MANDATED DISPUTE RESOLUTION BETWEEN AN EMPLOYEE AND EMPLOYER

As enacted by Senate Bill 228 (SB 228), and subsequently amended by Senate Bill 899 (SB 899), Labor Code §4604.5(d)(1) absolutely limits chiropractic, physical therapy, and occupational therapy to a maximum of 24 treatment “visits per industrial injury.”

Labor Code §4604.5(d)(2), conditionally, allows additional treatment visits only when so authorized by the defendant employer, a

¹ *California Constitution*, Article XIV, Section 4

party with a financial interest, against whom the employee has tendered a claim for benefits.

In a single sentence, the second paragraph of the California Constitution, Article XIV, Section 4, compels the Legislature, when enacting statutory legislation, to establish a judicial or quasi-judicial mechanism for dispute resolution – that shall be subject to review by an appellate court:

The Legislature is vested with plenary powers, 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 court of this State.

(Ibid)

Conspicuously absent from Labor Code §4604.5(d)(1) and (d)(2), is any form of judicial or quasi-judicial mechanism by a neutral, detached, and impartial entity for resolving a dispute between an employee and his employer when there is a disagreement about the need for additional chiropractic, physical therapy, or occupational therapy treatment, once the employee has been provided twenty-four (24) treatment visits – as the only entity statutorily graced with authority to authorize more than twenty-four (24) treatment visits is the employer, who as noted previously is a party-in-interest, with a financial stake.

On a Constitutional due process basis, this is abhorrent.

In a situation where there is a dispute between an employee and an employer over provision of reasonable treatment, as defined, there is a dispute resolution mechanism and appellate review is available.²

In a situation where there is a dispute between an employee and an employer over the permanent impairment or permanent disability an employee has sustained, there is a dispute resolution mechanism and appellate review is available.³

In a situation where there is a dispute between an employee and an employer over whether the old 1997 permanent disability schedule applies, or the new 2005 permanent disability rating schedule applies, there is a dispute resolution mechanism and appellate review is available.⁴

In a situation where there is a dispute between an employee and an employer over apportionment or overlap of impairment or disability, there is a dispute resolution mechanism and appellate review is available.⁵

In a situation where there is a dispute between an employee and an employer over temporary disability payments, either partial or total, there is a dispute resolution mechanism and appellate review is available.⁶

² Labor Code §§ 4600(b), 4604.5(a),(b), (c), and/or (e), 4610, 4062, 5900, and 5950

³ Labor Code §§4061, 4062, 5900, and 5950

⁴ Labor Code §§4660, 4062, 5900, and 5950

⁵ Labor Code §§4663 – 4664, 4062, 5900, and 5950

⁶ Labor Code §§4650 – 4657, 4062, 5900, and 5950

In a situation where there is a dispute between an employee and an employer over the need for spinal surgery, there is a dispute resolution mechanism and appellate review is available.⁷

However, there is simply no dispute resolution mechanism or appellate review available when there is a dispute between an employee and employer, as in the instant matter, over the provision of chiropractic treatment once the injured employee has received the statutory cap of twenty-four (24) treatment visits. Only the employer is authorized by Statute to authorize additional chiropractic treatment visits. The employer's decision is final, and there is no type of judicial or quasi-judicial dispute mechanism available to the employee. Nor is the employer's determination, refusing additional chiropractic treatment, subject to appellate review.

This is true, regardless of whether the date of injury was at any time from January 1, 2004 through December 31, 2004 – where both the employee and employer could each obtain their own qualified medical evaluator (QME) reports, and both the employee's QME and the employer's QME recommended additional chiropractic treatment, or if the employee and employer instead availed themselves of having any medical disputes resolved by an agreed medical evaluator (AME), and the AME recommended additional chiropractic treatment.

This is also true if the employee's date of injury was on or after January 1, 2005 and the panel QME selection process is governed by Labor Code §4062.1 for an unrepresented employee, or governed by Labor Code §4062.2(b) and (c) for a represented employee.

⁷ Labor Code §§4610, 4062, 5900, and 5950

Respondent has inexplicitly failed, or purposely refused, to respond to this aspect of petitioner's arguments – implicitly conceding the absence of any compulsory judicial or quasi-judicial dispute resolution mechanism, as well as compulsory availability of appellate review, is in full-blown contravention of the explicit directive found in the second paragraph of the California Constitution, Article XIV, Section 4.

Petitioner acknowledges the California Constitution vests the Legislature with the plenary power to define, for example, an employment contract;⁸ to define industrial injury;⁹ to define the threshold of compensability for a psychiatric injury;¹⁰ to define the conditions of compensation;¹¹ to define various presumptions of injury or illness;¹² to define temporary disability, the amount paid as well as the duration of payments;¹³ to define the percentage of permanent disability or impairment schedule;¹⁴ to define a physician;¹⁵ and, to define reasonable treatment.¹⁶

However, once an employee, as defined, suffers an industrial injury, as defined, and the conditions of compensation exist, as defined, the employee is entitled to “full provision”¹⁷ of reasonable

⁸ Labor Code §2750

⁹ Labor Code §3208

¹⁰ Labor Code §3208.3

¹¹ Labor Code §3600, et seq

¹² Labor Code §§3212.1 – 8

¹³ Labor Code §§4650 – 4657

¹⁴ Labor Code §4660

¹⁵ Labor Code §3209.3

¹⁶ Labor Code §4600(b)

¹⁷ California Constitution, Article XIV, Section 4

treatment, as defined, from a physician, as defined, necessary to cure and relieve.

This is the bedrock principle upon which the Workers' Compensation Act is founded.

The petitioner, in the instant case, has sustained an injury, and his employer has conceded the injury was caused on an industrial basis. The question presented is whether Labor Code §4604.5(d)(1) impermissibly infringes upon the directive in the California Constitution that once industrially injured, whether an employee is entitled to "full provision" of all medical treatment reasonably required to cure and relieve, as defined by Labor Code §4600(b).

Petitioner and respondent part ways in regards to whether this constitutional language is a command to the Legislature.

Petitioner takes the position that an employee, as defined, who sustains an industrial injury, as defined, is constitutionally entitled to "full provision ... of remedial treatment as is requisite to cure and relieve[,]" from a physician, as defined.

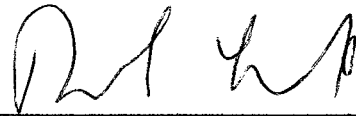
Respondent takes the position that the Legislature has the unfettered power to limit reasonable treatment, as defined, provided an employee, as defined, to cure and relieve the injured employee, as defined, from the effects of the injury, when defined as an industrial injury.

Taken to the extreme, this logic would allow the Legislature to create a new and novel Labor Code that limits an employee to no more than a single visit for treatment with any physician – and that single treatment visit with a physician would fulfill the mandate in the Constitution for "full provision." This is impermissible.

CONCLUSION

For each and every reason stated in the Petition for Review, and this Reply, Petitioner prays this honorable court grant the relief sought by granting review in order to allow the parties to fully brief and fully argue all facets of this matter, as well as any other relief considered just.

Dated: December 31, 2007



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PROOF OF SERVICE

*JOSE FACUNDO-GUERRERO v. WORKERS' COMPENSATION
APPEALS BOARD; NURSERYMEN'S EXCHANGE; and,
ARGONAUT INSURANCE COMPANY*

WCAB Case No.: SFO 0498218

I am over 18 years of age and not a party to the within-entitled action.

My business address is: 23852 Pacific Coast Highway, Suite 323,
Malibu, CA 90265. On this date, December 31, 2007, I served the
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**PETITIONER'S REPLY TO RESPONDENTS ANSWER
WITH MEMORANDUM OF POINTS AND AUTHORITIES**

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I declare under penalty of perjury that the foregoing is true and correct. Executed at Mission Hills, CA on December 31, 2007.


Patricia Ceron