No. _____

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

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

PETITION FOR WRIT OF REVIEW AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

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Attorney for Petitioner

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____ Division _____

Case Name: Jose Facundo-Guerrero v. WCAB, Nurseryman's Exchange, Argonaut Ins. Co.

Please check the applicable box:

☑ There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Daniel J. Smith
Address: 1012 Page Street, Unit 4
San Francisco, CA 94117
State Bar No: 122516
Party Represented: Petitioner

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

TOPICAL INDEX

Page

TABLE OF AUTHORITIES

CASES **Page**

CODES

REGULATIONS

STATUTES

CONSTITUTIONAL

TABLE OF EXHIBITS

VERIFICATION

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

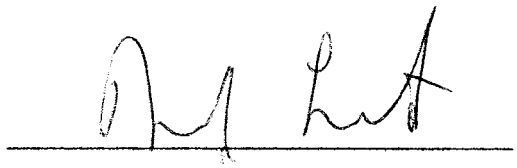
I am the attorney for Jose Facundo-Guerrero and I am authorized to make this verification for and on his behalf, and I am making this verification for that reason.

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 November 21, 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 6,866 words, based on the computerized word count of Microsoft Word.



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INTRODUCTION

This case presents an issue, of first impression, with questions yet to be answered by any court regarding the implementation of Labor Code §4604.5(d) enacted in 2003 by Senate Bill 228[1], subsequently renumbered, by enactment of Senate Bill 899[2] as Labor Code §4604.5(d)(1). This Petition for writ of Review asks this Court to answer a question of pure law addressing the constitutionality of Labor Code §4604.5(d)(1), an issue the Workers' Compensation Appeals Board cannot address in the first instance.[3]

WHY THE WRIT SHOULD ISSUE

Effective January 1, 2004, Senate Bill 228 (SB 228) was implemented. As part of SB 228, newly enacted Labor Code §4604.5(d) became law. Labor Code §4604.5(d) instituted a cap of twenty-four (24) chiropractic visits and twenty-four (24) physical therapy visits per industrial injury.

Subsequently, pursuant to Senate Bill 899 (SB 899), Labor Code §4604.5(d) was amended and renumbered as Labor Code §4604.5(d)(1) to reflect that occupational therapy visits were also limited to a cap of twenty-four (24) visits per industrial injury.

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[1] Senate Bill 228, Chapter 639, Statutes of 2003, Chaptered October 1, 2003, effective January 1, 2004 as non-urgency legislation: http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0201-0250/sb_228_bill_20031001_history.html

[2] Senate Bill 899, Chapter 34, Statutes of 2004, Chaptered April 19, 2004, effective April 19, 2004 as urgency legislation: http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0851-0900/sb_899_bill_20040419_history.html

[3] California Constitution, Article III, Section 3.5; *Greener v. WCAB*, (1993) 6 Cal 4th 1028, 58 CCC 793.

Historically, this is the first time the Legislature has limited an employee, as defined, who has sustained an industrial injury, as defined, from receiving medically necessary treatment provided by a physician, as defined, requisite to cure and relieve the employee from the effects of the industrial injury.

The petitioner, an employee who was injured in the course and scope of employment for which the employer has admitted industrial causation, is aggrieved by the arbitrary cap on reasonable treatment necessary to cure and relieve. The petitioner was receiving treatment, beneficially necessary to cure and relieve from his primary treating physician, a chiropractor.

Although petitioner has sought additional chiropractic treatment visits with his chiropractic primary treating physician, his employer by and through the employer's workers' compensation insurance carrier, has refused to authorize additional treatment visits with his chiropractor based on the twenty-four (24) visit cap outlined in Labor Code §4604.5(d)(1).

The petitioner asserts he is entitled, by the California Constitution, to "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury[,]"[4] and that Labor Code §4604.5(d)(1), as enacted by the Legislature, impermissibly infringes both facially and as applied, to this constitutional entitlement.

[4] California Constitution, Article 14, Section 4

PETITION FOR WRIT OF REVIEW

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

Jose Facundo-Guerrero hereby petitions this Court for a writ of review to issue a determination as to whether the twenty-four (24) visit cap on chiropractic treatment found in Labor Code §4604.5(d)(1) is in contravention of the California Constitution, Article XIV §4, that the Legislature create a "complete system of workers' compensation" which shall ensure an injured employee receives "full provision" of medical treatment "necessary to cure and relieve." By this verified petition, petitioner alleges:

1. Petitioner claimed to have sustained injury to his back and left leg arising out of and in the course of employment on February 24, 2005, while employed by Nurserymen's Exchange insured for workers' compensation by Argonaut Insurance Company, and petitioner reported the claim for injury on April 1, 2005.

2. Respondent employer and the employer's workers' compensation insurance carrier did not timely offer to provide petitioner treatment after being notified of the industrial injury on April 1, 2005, and on May 9, 2005, respondent issued a delay letter to petitioner indicating respondent was investigating the claim.

3. On June 13, 2005, petitioner selected Marijan Pevec, D.C. to be his primary treating physician (PTP).

4. Petitioner self-procured chiropractic treatment necessary to cure and relieve him from the effects of the industrial injury with Marijan Pevec, D.C.

5. On June 21, 2005, respondent timely denied petitioner sustained any industrial injury on the basis that any claimed injuries were not sustained arising out of or in the course of employment (AOE/COE).

6. On September 26, 2006, the respondent conceded the injury was industrial, and thus sustained AOE/COE.

7. Between June 13, 2005, the date petitioner initiated treatment with Marijan Pevec, D.C., and September 26, 2006, more than fifteen (15) months later, the date respondent consequently admitted the injury was caused on an industrial basis, Marijan Pevec, D.C. provided petitioner with more than twenty-four (24) chiropractic treatment visits.

8. Subsequent to September 26, 2006, a dispute arose between petitioner and respondent over the need for additional chiropractic treatment, and petitioner filed a Declaration of Readiness to Proceed to an Expedited Hearing on the need for additional chiropractic treatment, as well as to resist petitioner being transferred into the employer's Medical Provider Network. (Exhibit 'A')

9. An expedited hearing was held on February 6, 2007 before the Honorable Presiding Judge Susan Hamilton at the San Francisco District Office of the Workers' Compensation Appeals Board.

10. On March 9, 2007, the Honorable Presiding Judge Susan Hamilton issued her Findings and Order, as well as her Opinion on Decision determining petitioner has had in excess of twenty-four (24) chiropractic visits; pursuant to Labor Code §4604.5(d)(1), petitioner is not entitled to additional chiropractic visits as a matter of law; and,

petitioner's treatment is to be provided by a physician within respondent's Medical Provider Network.

11. Petitioner timely petitioned for reconsideration on the basis of newly discovered evidence, specifically, that petitioner's PTP, Marijan Pevec, D.C., is a participating provider within respondent's MPN. Due to the fact Dr. Pevec is a participating provider within defendant's MPN, Presiding Judge Hamilton rescinded and set aside her prior Findings and Order dated March 9, 2007.

12. Subsequently, at a status conference held before Presiding Judge Hamilton on July 23, 2007, counsel for the petitioner also raised the issue of the constitutionality of Labor Code §4604.5(d)(1).

13. On July 27, 2007, Presiding Judge Hamilton issued a new Findings and Order, again determining as a matter of law, that petitioner is not entitled to additional chiropractic treatment visits due to the limitation outlined in Labor Code §4604.5(d)(1). Presiding Judge Hamilton noted that as an administrative law judge, she could not address or resolve questions challenging the constitutionality of Labor Code §4604.5(d)(1).

14. Petitioner subsequently petitioned for reconsideration seeking (1) clarification as to whether PTP Dr. Pevec, a chiropractor, can remain the PTP for the purpose of managing petitioner's care, submitting treatment requests, and issuing mandated reports – without providing chiropractic treatment, and (2) challenging the legality of Labor Code §4604.5(d)(1).

15. On September 5, 2007, Presiding Judge Hamilton granted

reconsideration, rescinded her Findings and Order dated July 27, 2007, and issued an Order Rescinding Decision and reissuing Findings and Order. In the September 5, 2007 Order Rescinding Decision and reissuing Findings and Order, Presiding Judge Hamilton agreed with petitioner that PTP Dr. Pevec can remain the PTP for the purpose of managing petitioner's care, submitting treatment requests, and issuing mandated reports. In addition, Presiding Judge Hamilton properly declined to address the constitutionality of Labor Code §4604.5(d)(1). (Exhibit 'B')

16. Presiding Judge Hamilton granted reconsideration, rescinded her Findings and Order dated July 27, 2007, and issued an "Order Rescinding Decision and reissuing Findings and Order" on September 5, 2007, untimely, pursuant to California Code of Regulations, Title 8, §10859. Accordingly, the Workers' Compensation Appeals Board granted reconsideration on their own motion. Because the Workers' Compensation Appeals Board agreed with the decision from Presiding Judge Hamilton, on October 11, 2007, it adopted and affirmed the September 5, 2007 findings and order issued by Presiding Judge Hamilton. (Exhibit 'C')

17. The chief issues raised herein are ones of first impression.

18. Petitioner has exhausted all available administrative remedies available to it. Petitioner has no right of appeal from the Order of the Workers' Compensation Appeals Board and has no plain, speedy, or adequate remedy other than by Petition for Writ of Review as provided by Labor Code §5950.

19. This Petition has been filed within the statutory period of

45 days in accordance with Labor Code §5950 and after issuance of the Order by the Respondent Workers' Compensation Appeals Board denying the petition for reconsideration.

20. Petitioner respectfully requests the issuance of a Writ of Review pursuant to Labor Code §5952 on the grounds that:

a. The Workers' Compensation Appeals Board acted without and/or in excess of its power;

b. The Order of the Workers' Compensation Appeals Board was unreasonable;

c. The Order of the Workers' Compensation Appeals Board was not supported by substantial evidence;

d. The Findings of Fact do not support the Order of which review is requested.

PRAYER

WHEREFORE, petitioner respectfully prays that this Court:

a. Issue a Writ of Review, Mandate, Prohibition, or other appropriate relief, under seal of the District Court of Appeal commanding the Workers' Compensation Appeals Board to certify to this Court, at a specific time and place, the records and proceedings and the cause, in order that the records and proceedings may be inquired into and determined by the Court;

b. That the matters and record be fully heard and considered by this Court;

c. Order the Petition for Writ of Review be granted; and,

d. Award petitioner its costs in the proceeding; and grant such other and further relief as the Court deems just and proper.

SUMMARY OF THE FACTS

Petitioner sustained injury to his back and left leg, arising out of and in the course of employment on February 24, 2005, while employed by Nurserymen's Exchange, insured for workers' compensation by Argonaut Insurance Company. Petitioner reported the claim for injury on April 1, 2005.

As of the date the claim for benefits was tendered by petitioner, respondent did not timely offer to provide petitioner treatment after being notified of the industrial injury on April 1, 2005.

On May 9, 2005, respondent issued a delay letter to petitioner indicating it was investigating the claim. On June 21, 2005, respondent denied the claim AOE/COE. Subsequently, respondent accepted the claim as industrial on September 26, 2006.

Between April 1, 2005, and September 26, 2006, more than seventeen (17) months later, the petitioner was forced to self-procure treatment, to cure and/or relieve him from the industrial injury – as the respondent refused to provide any treatment whatsoever.

On June 13, 2005, petitioner selected Marijan Pevec, D.C. to be his primary treating physician (PTP). Prior to the claim being denied AOE/COE by respondent on June 21, 2005, Dr. Pevec provided petitioner three (3) treatment visits. Between June 21, 2005, the date petitioner's claim was denied AOE/COE, and September 26, 2006, the date respondent subsequently admitted the injury was caused on an industrial basis, Dr. Pevec provided petitioner with more than twenty-four (24) chiropractic treatment visits.

After September 26, 2006, the date respondent admitted the injury was sustained AOE/COE, a dispute arose between petitioner

and respondent as to whether petitioner was to stop self-procuring treatment with Dr. Pevec and instead begin treatment with a physician within respondent's MPN.

As a result of this dispute, an expedited hearing was scheduled before Presiding Judge Susan Hamilton at the San Francisco District Office of the Workers' Compensation Appeals Board, which was held on February 16, 2007.

On March 9, 2007, Presiding Judge Hamilton issued her Findings and Order determining "that applicant is not entitled to additional chiropractic treatment in this case"; and, "defendant may transfer applicant's medical care into its Medical Provider Network, and applicant is directed to select a treating physician from the Medical Provider Network."

Petitioner timely petitioned for reconsideration on the basis of newly discovered evidence, specifically, that petitioner's PTP, Marijan Pevec, D.C., is a participating provider within respondent's MPN. Due to the fact Dr. Pevec is a participating provider within respondent's MPN, Presiding Judge Hamilton rescinded and set aside her prior Findings and Order dated March 9, 2007 on the basis this fact is "directly relevant to the disputed issues in this case."

Subsequently, at a status conference held before Presiding Judge Hamilton on July 23, 2007, petitioner raised the issue of the constitutionality of Labor Code §4604.5(d)(1). In addition, petitioner also sought to have respondent stipulate in open court to Marijan Pevec, D.C. being allowed to continue to be respondent's PTP. Counsel for the respondent refused to so stipulate, but did informally agree to allow Dr. Pevec to continue to be petitioner's PTP.

Neither respondent, nor counsel for the respondent, agreed in writing to allow further "visits" with PTP Dr. Pevec for the sole purpose of directing the course of treatment until such time as petitioner is permanent and stationary (P&S), at which time the PTP is required to issue a permanent and stationary report (PR-4).

On July 27, 2007, Presiding Judge Hamilton issued a new Findings and Order. Petitioner subsequently petitioned for reconsideration seeking (1) clarification as to whether PTP Dr. Pevec, a chiropractor, can remain the PTP for the purpose of managing petitioner's care, submitting treatment requests, and issuing mandated reports – without providing chiropractic treatment, and (2) challenging the constitutionality of Labor Code §4604.5(d)(1).

On September 5, 2007, Presiding Judge Hamilton granted reconsideration, rescinded her Findings and Order dated July 27, 2007, and issued an "Order Rescinding Decision and reissuing Findings and Order."

In the September 5, 2007 "Order Rescinding Decision and reissuing Findings and Order" Presiding Judge Hamilton agreed with petitioner that PTP Dr. Pevec can remain the PTP for the purpose of managing petitioner's care, submitting treatment requests, and issuing mandated reports. In addition, Presiding Judge Hamilton properly declined to address the constitutionality of Labor Code §4604.5(d)(1).

Presiding Judge Hamilton untimely granted reconsideration, rescinded her Findings and Order dated July 27, 2007, and issued an "Order Rescinding Decision and reissuing Findings and Order" on September 5, 2007, pursuant to California Code of Regulations, Title 8, §10859.

Accordingly, due to the fact the rescission by Presiding Judge Hamilton was untimely by one (1) day, the Workers' Compensation Appeals Board granted reconsideration on their own motion. Because the Workers' Compensation Appeals Board agreed with the decision from Presiding Judge Hamilton, on October 11, 2007, it adopted and affirmed the September 5, 2007 findings and order issued by Presiding Judge Hamilton.

The issues presented to this Court, in this Petition for Review, is whether Labor Code §4604.5(d)(1) is unconstitutional, in that it is in contravention of the California Constitution.

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MEMORANDUM OF POINTS AND AUTHORITIES

LEGAL DISCUSSION

I

THE STATUTORY TWENTY-FOUR (24) VISIT CAP FOR CHIROPRACTIC TREATMENT IN LABOR CODE §4604.5(D)(1) IS IN CONTRAVENTION OF THE CALIFORNIA CONSTITUTIONAL MANDATE FOR "FULL PROVISION" OF MEDICAL TREATMENT "NECESSARY TO CURE AND RELIEVE" AN EMPLOYEE FROM AN INDUSTRIAL INJURY, AND RUNS AFOUL OF THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES CONSTITUTION AS WELL AS THE CALIFORNIA CONSTITUTION.

A

California Constitution, Article XIV, § 4 Requires The Legislature To Create A Complete System Of Workers' Compensation With Full Provision Of Medical Treatment Necessary To Cure And Relieve The Employee From The Effects Of An Industrial Injury.

The California Constitution, Article XIV, Section 4 provides in pertinent 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**, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party. **A complete system of workers' compensation includes** adequate provisions for the comfort, health and safety and general welfare of any and all workers and those dependent upon them for support to the extent of relieving from the consequences of any

> injury or death incurred or sustained by workers in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; **full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury**... (emphasis added)

A fundamental role of the Court, when ascertaining the intent of the Legislature in order to effectuate the purpose of the law is to first look to the words of the Statute and try to give effect to the usual, ordinary import of the language. This interpretation must, at the same time, not render any language mere surplusage. The words must be construed in context and in light of the nature and obvious purpose of the statute where they appear. Thus, the Statute "must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intention of the Legislature, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity..." *Klajic v. Castic Lake Water Agency*, (2001) 90 Cal. App. 4th 987, 997

When looking at the California Constitution, article XIV, section 4, concerning medical treatment, it is obvious that the plain meaning of the text is to require the legislature to provide an injured employee with all necessary treatment to cure and relieve the industrial injury. The Constitution states that the legislature is vested with the power to create and enforce a complete workers' compensation system. The Constitution then defines what is contemplated as being a complete workers' compensation system. One of the enumerated requirements for the workers' compensation system is for full provision of medical treatment. This is clear

unambiguous language that requires the legislature to provide injured workers with all necessary medical treatment.

In the instant matter before the Court, petitioner asserts the cap of twenty-four (24) visits for chiropractic treatment, set forth in Labor Code §4604.5(d)(1) as enacted by the Legislature, impermissibly conflicts with the mandate in the Constitution that "a complete system of workers' compensation" shall consist of "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury[.]"

A California Appellate court has agreed with this interpretation. In *Gould v. Workers' Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1059, 1069, the court states:

> Although California Constitution, article XIV, section 4, states that workers' compensation matters should be resolved expeditiously, it also states that the industrially injured worker should be provided all medical treatment necessary to cure and relieve the worker from the effects of the injury and that substantial justice should be accomplished. (Also see Lab. Code, §4600.)

Therefore, this court should find that the California Constitution, Article XIV, § 4 requires the Legislature to fully provide a Workers' Compensation applicant with all medical treatment necessary to cure and relieve the effects of an industrial injury.

B

Medical Treatment Cannot Be Apportioned

It has long been the law that medical treatment cannot be apportioned between an employer and an employee. In the case of *Granado v. WCAB* (*Haslett Warehouse*), (1968) 69 Cal. 2d 399, our

Supreme Court opined as follows:

> There can be no doubt that medical expense is not apportionable. *Section 4600 of the Labor Code* states that the employer shall provide such treatment which is reasonably required to cure or relieve from the effects of the injury...
>
> If medical expense reasonably necessary to relieve from the industrial injury were apportionable, a workingman, who is disabled, may not be able to pay his share of the expenses and thus forego treatment.
> (*Ibid*, at pages 405, 406)

In the instant case, as applied, Labor Code §4604.5(d)(1) only allows petitioner twenty-four (24) chiropractic treatment visits – but during the time-frame in which the respondent denied the injury as being caused industrially, petitioner received in excess of twenty-four chiropractic treatment visits, and the petitioner is presently still in need of chiropractic treatment reasonably necessary to cure and relieve.

In the case at bar, either "the employee has to pay or the medical provider is out of luck."[5] If *Granado* is controlling, the past medical treatment costs, and the future medical costs of treatment necessary to cure and relieve cannot be apportioned to the petitioner.

On the other hand, if the opinion of the Third District Court of Appeal in *Sierra Pacific* is controlling, the cost of medical treatment reasonably necessary to cure and relieve can be apportioned to the petitioner. This is impermissible.

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[5] *Sierra Pacific v. WCAB*, (*Chatham*) (2006) 140 Cal. App. 4th 1498, 1509.

C

Labor Code §4604.5(d)(1) Is Facially Unconstitutional

As an employee, so defined, who sustained an industrial injury, so defined, the petitioner is constitutionally entitled to "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury..." The promulgation of Labor Code §4604.5(d)(1) limiting treatment is in facial contravention of the California Constitution, in the same way as a different Statute was found unconstitutional because the Statue required a teacher to pay for one half of the cost of administrative proceedings addressing suspension or dismissal when the teacher was not the prevailing party.[6]

D

Labor Code §4604.5(d)(1), "As Applied" is Unconstitutional

Petitioner, Jose Facundo-Guerrero, is aggrieved by Labor Code §4604.5(d)(1), as applied to his claim for workers' compensation benefits. Petitioner has benefited from the chiropractic treatment provided by PTP Dr. Pevec, and believes that with further chiropractic treatment, he can obtain full function necessary to return to work without modifications or work restrictions.

The Workers' Compensation Judge has issued a ruling, as she must, conforming with Labor Code §4604.5(d)(1), that petitioner is not entitled to additional chiropractic treatment on a legal basis, as Labor Code §4604.5(d)(1) only allows a maximum of twenty-four

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[6] *California Teachers Association v. The State of California*, 20 Cal. 4th 327 (1999)

(24) treatment visits. By limiting petitioner to no more than twenty-four (24) treatment visits with a chiropractor, Labor Code §4604.5(d)(1) undermines and violates the mandated guarantee of the California Constitution for "full provision" of medical treatment.

E

The Plenary Power Clause of the California Constitution Limits the Legislature.

The California Constitution has granted the Legislature with plenary authority to create and enforce a "complete system of workers' compensation," and defines a "complete system of workers' compensation," in pertinent part, as mandating "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury..."[7] (emphasis added)

The plenary power clause of the *Caifornia Constitution, Article XIV, § 4*, cannot be used to expand the Legislature's power beyond the purposes set forth in the other sections of art. XIV, § 4. In the case of *Six Flags, Inc., v. WCAB*, 145 Cal. App. 4th 91; 71 CCC 1759 (2006), the appellate court annulled a decision from the WCAB awarding death benefits to an "estate" because the Legislature improperly, and without any Constitutional foundation, chose to define an "estate" as a "dependant" beneficiary when an "estate" is not defined as a "dependant" by the California Constitution.

The Six Flags Appellate Court held as follows:

The constitutional enabling provision establishing the

[7] California Constitution, Article XIV, §4

> workers' compensation scheme has remained the same since 1918 with two exceptions: (1) a 1972 amendment adding the State of California as a beneficiary entitled to workers' compensation benefits in some cases; and (2) a 1974 amendment making the provision gender neutral, changing "workmen" to "workers."
> Article XIV, section 4, provides in pertinent 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, by appropriate legislation, and in that behalf to create and enforce a liability on the part of any or all persons to compensate any or all of their workers for injury or disability, and their dependents for death incurred or sustained by the said workers in the course of their employment, irrespective of the fault of any party." (Italics added.)
>
> Thus, at present, article XIV, section 4, does not include estates as a class of beneficiaries entitled to workers' compensation death benefits.
> (*Ibid*, at pages 95 – 96)

The Legislature is prohibited from enacting a Labor Code that expands the definition of dependant beneficiaries to include estates, where the California Constitution is silent in regards to an estate being a dependant. In much the same way, the Legislature is prohibited from enacting a Labor Code that limits "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury..." to only twenty-four (24) visits with a chiropractic physician. Any legislatively created statutory cap on medical treatment visits, reasonably necessary to cure and relieve an injured employee from the effects of the industrial injury, stands in stark conflict with the directive in the California Constitution for "full provision for such medical, surgical

hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury..."

Article XIV, Section 4, of the California Constitution clearly acknowledges and endorses the Legislature's authority to provide for employer-financed compensation of injuries sustained by workers, but this authority only extends to enacting legislation for the protection of employees.[8]

Labor Code §4604.5(d)(1), which first introduced the twenty-four (24) visit cap for "chiropractic and physical therapy visits" into the California workers' compensation system, was enacted by SB 228 and subsequently renumbered by SB 899. As is pertinent to this matter, Labor Code §4604.5(d)(1) states: "for injuries occurring on and after January 1, 2004, an employee shall be entitled to no more than 24 chiropractic, 24 occupational therapy, and 24 physical therapy visits per industrial injury."

Petitioner takes the position that any statue that places a limitation on any type of physician "visits" for an admitted industrial injury runs afoul of the California Constitution's mandate that "A complete system of workers' compensation includes..." "full provision for such medical, surgical hospital and other remedical treatment as is requisite to cure and relieve from the effects of such injury..."

Simply put, Labor Code §4604.5(d)(1) impermissibly infringes

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[8] *City and County of San Francisco v. WCAB*, (1978) 22 Cal 3d 103; *Western Indemnity Co. v. Pillsbury* (1915) 170 Cal. 686, 694-701, 151 P.398, *In re Twing* (1922) 188 Cal. 261, 262-263, 204 P. 1082, *Cal. Drive-In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 295-299, 398

on the California Constitution's directive that an injured worker is to be allowed "full provision for such medical...treatment as is requisite to cure and relieve" the injured worker "from the effects of such injury." The 24-visit cap in Labor Code §4604.5(d)(1) is arbitrary and capricious, and should not withstand critical analysis when compared to the Constitution's crystal-clear requirement for full provision of medical treatment.

If the Legislature crafted a new and novel Labor Code today, that stated "for injuries occurring on and after January 1, 2010, an employee shall be entitled to no more than 1 visit to a medical doctor, osteopathic doctor, psychologist, acupuncturist, optometrist, dentist, or podiatrist, per industrial injury," or even 5 visits, or 55 visits, it too would violate the California Constitution's mandate for "full provision for such medical...treatment as is requisite to cure and relieve" the injured worker "from the effects of such injury."

Each injured worker is a unique individual, and the rigid 24-visit cap on chiropractic denies that injured worker the constitutional guarantee of "full provision for such medical...treatment as is requisite to cure and relieve" the injured worker "from the effects of such injury."

Full provision of medical treatment equates to reasonable treatment as defined by Labor Code §4600(b). Petitioner is not suggesting that full provision of medical treatment includes unreasonable treatment, such as 'aura shaping' or 'voodoo.' Instead, petitioner posits that any cap on reasonable medical treatment, as defined by Labor Code §4600(b), provided by a physician, as defined in Labor Code §3209.3, impermissibly conflicts with the California

Constitution's mandate for full provision of medical treatment.

F

The Promulgation Of Labor Code §4604.5(d)(1) and (2) Impermissibly Deprives Petitioner Of Access To The Courts and Solely Grants the Employer Authority To Authorize Additional Chiropractic Treatment.

This is a classic example of the Legislature allowing the fox to guard the henhouse: A Workers' Compensation Judge, as well as the Workers' Compensation Appeals Board, is without authority to issue an Order allowing additional chiropractic treatment beyond the 24-visit maximum set forth in Labor Code §4604.5(d)(1) – even if more than 24 visits is recommended by an agreed medical evaluator (AME) or qualified medical evaluator (QME) in a well reasoned, sound, and substantial medical-legal report. Only the employer can authorize additional chiropractic visits.

The legislatively mandated abdication of power from the administrative law court to the employer, a party with a financial interest, is inappropriate, unprecedented, and is in contravention of substantive and procedural due process.

The second paragraph of the California Constitution, Article XIV, §4, is crystal-clear:

> 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. The Legislature may combine in one statute all the provisions for a complete system of workers' compensation, as herein defined.

In the instant matter, there is no judicial remedy to resolve a dispute over provision of chiropractic treatment, once the cap of twenty-four (24) visits has been met, regardless of whether additional chiropractic treatment is found to be medically necessary. Injured worker Jose Facundo-Guerrero has been deprived of access to the courts, in this instance the WCAB, for the purposes of resolving the dispute over whether the injured worker can avail himself of chiropractic treatment, over and above 24 visits, "as is requisite to cure and relieve from the effects of such injury..."[9]

Even if the Workers' Compensation Judge was presented with a substantial medical report, issued by an Agreed Medical Evaluator (AME) or a Qualified Medical Evaluator (QME), which finds additional chiropractic treatment over and above 24 visits is necessary to cure and relieve, the Workers' Compensation Judge is estopped from ordering additional chiropractic treatment be furnished, because the hands of the judge are tied by Labor Code §4604.5(d)(1). Only the employer can authorize additional chiropractic treatment beyond 24 visits.[10]

This is an impermissible delegation of power, as the Legislature

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[9] California Constitution, Article XIV, §4

[10] Labor Code §4604.5(d)(2): "This subdivision [Labor Code §4604.5(d)(1)] shall not apply when an employer authorizes, in writing, additional visits to a health care practitioner for physical medicine services

has conferred upon the employer the sole authority to authorize "additional visits to a health care practitioner for physical medicine services" and deprived the court of competent jurisdiction, with subject matter jurisdiction, the WCAB, from resolving a dispute as to whether an injured worker can be furnished with chiropractic visits in excess of 24.

The California Supreme Court, in *People v. Lockheed Shipbuilding and Construction Company*, (1973) 35 Cal. App. 3rd 776 addressed an impermissible abdication or delegation of power:

> To constitute due process of law, the statute itself must provide for notice and hearing. The essential validity of a law is tested, not by what has been done under it in a particular case, but by what may be done. For example, where a statute authorizes the taking of private property but makes no provision for hearing or notice, it is not valid. (Merco Constr. Engineers, Inc. v. Los Angeles Unified Sch. Dist. (1969) 274 Cal.App.2d 154, 167 [79 Cal.Rptr. 23];
>
> In addition to reasonable notice, the parties must have an opportunity for a hearing to satisfy the requirements of due process. (H. Moffat Co. v. Hecke, supra, 68 Cal.App. 35; see People v. Thompson (1935) 5 Cal.App.2d 655, 659-660 [43 P.2d 600].) Administrative proceedings which deny notice or hearing, or which provide inadequate methods, are lacking in due process. (See Morgan v. United States (1936) 298 U.S. 468 [80 L.Ed. 1288, 56 S.Ct. 906]; Morgan v. United States (1938) 304 U.S.1 [82 L.Ed. 1129, 58 S.Ct. 773].) <u>In the case at bench the statutes involved have no provision for a hearing.</u>
> (Ibid, at pages 780 – 781) (emphasis added)

The deprivation of access to the courts, to resolve a dispute between an employee and his employer over chiropractic treatment above and beyond 24 visits, for an admitted industrial injury, is

constitutionally repugnant.

In *Bayscene Resident Negotiators v. Bayscene Mobilehome Park*, 15 Cal. App. 4th 119 (1993) the Court of Appeal found an ordinance requiring arbitration to be Constitutionally infirm on the basis that it was not subject to judicial review.

In the case of *Costa v. WCAB (California Casualty Indemnity Exchange)*, (1998) 65 Cal. App. 4th 1177, an injured worker whose union and employer had agreed to alternative dispute resolution (ADR) pursuant to Labor Code §3201.5 attempted to have his case heard at an expedited hearing before the Workers' Compensation Appeals Board, without first seeking resolution of his claim through ADR. The WCAB determined it had no jurisdiction, and the appellate court affirmed.

As noted by the Court:

> Article XIV, section 4 vests in the Legislature "plenary power . . . to create, and enforce a complete system of workers' compensation . . . ." This clause declares the term "complete system of workers' compensation" includes "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 incumbrance of any character . . . ." The section also states, "[t]he 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 . . . ."

> The foregoing language grants the Legislature broad authority concerning the means used to resolve disputes in workers' compensation cases, and specifically authorizes the use of arbitration.
> (*Ibid*, at pages 1184 – 1185)

In the instant matter, as compared to the injured worker in *Costa*, plaintiff Jose Facundo-Guerrero is precluded from seeking any type of mediation, arbitration, or judicial intervention, to resolve any disputes whatsoever, regarding the limitations imposed by Labor Code §4604.5(d)(1) – which only allows the employer to authorize "additional visits to a health care practitioner for physical medicine services" pursuant to Labor Code §4604.5(d)(2). Simply put, judicial review by the WCAB of any dispute over "additional visits" for the aggrieved injured worker is precluded entirely. This is unlawful and offends notions of due process.

G

Labor Code §4604.5(d)(1) Offends The Equal Protection Clauses Of The California Constitution and The United States Constitution.

In addition, Labor Code §4604.5(d)(1) offends the equal protection clauses of the United States Constitution, as well as the California Constitution, in that it creates a separate and distinct class of injured workers who are prohibited from receiving "full provision for such medical...treatment as is requisite to cure and relieve" the injured worker "from the effects of such injury."

The different class suffering from invidious discrimination consists of injured workers who have been unfortunate in that they

sustained a compensable industrial injury on or after January 1, 2004, as opposed to an injured worker who sustained a compensable industrial injury prior to January 1, 2004.

The injured worker who sustained a compensable industrial injury on December 31, 2003, may be allowed chiropractic, physical therapy, and occupational therapy, without the number of "visits" being limited per industrial injury, other than the constraints of reasonableness and necessity for the treatment as outlined in Labor Code §4600(b).

On the other hand, the injured worker who sustained a compensable industrial injury the very next day, on January 1, 2004, is limited to a total of 24 chiropractic, physical therapy, and occupational therapy visits, "per industrial injury."

The disparity in allowed chiropractic, physical therapy, and occupational therapy treatment, to each distinct class of injured workers – those injured on or after January 1, 2004, as opposed to those injured prior to January 1, 2004 – offends the equal protection clauses of both the United States Constitution as well as the California Constitution.

In *Brown v. Merlo*, 8 Cal. 3^{d} 855, (1973), a case addressing the automobile guest statutes, our Supreme Court elaborated on the equal protection clauses of the California Constitution and the United States Constitution:

> Article I, sections 11 and 21 of the California Constitution guarantee to every person that "[all] laws of a general nature shall have a uniform operation" and that "[no] citizen, or class of citizens, [shall] be granted privileges or immunities which, upon the same terms,

shall not be granted to all citizens"; the Fourteenth Amendment of the United States Constitution frames a similar commitment, mandating that no state may "deny to any person within its jurisdiction the equal protection of the laws."

This principle of "equal protection" preserved by both state and federal Constitutions, of course, "does not preclude the state from drawing any distinctions between different groups of individuals" (In re King (1970) 3 Cal.3d 226, 232 [90 Cal. Rptr. 15, 474 P.2d 983]), but it does require that, at a minimum, "persons similarly situated with respect to the legitimate purpose of the law receive like treatment.
(Purdy & Fitzpatrick v. State of California (1969) 71 Cal.2d 566, 578 [79 Cal. Rptr. 77,456 P.2d 645, 38 A.L.R.3d 1194]; Darcy v. Mayor etc. of San Jose (1894) 104 Cal. 642, 645-646 [38 P. 500].)

As the United States Supreme Court recently phrased the federal constitutional standard: "The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (Reed v. Reed (1971) 404 U.S. 71, 75-76 [30 L.Ed. 2d 225, 229, 92 S. Ct. 251], quoting Royster Guano Co. v. Virginia (1920) 253 U.S. 412, 415 [64 L. Ed. 989, 990-991, 40 S. Ct. 560] (italics added); see also Eisenstadt v. Baird (1972) 405 U.S. 438, 446-447 [31 L. Ed. 2d 349, 358-359, 92 S. Ct. 1029]; Weber v. Aetna Casualty & Surety Co. (1972) 406 U.S. 164, 173 [31 L. Ed. 2d 768, 777, 92 S. Ct. 1400].)

In the instant matter, there is no rational or reasonable basis for

distinguishing an employee who sustains injury prior to January 1, 2004 from an employee who sustains injury on or after January 1, 2004, when it comes to providing treatment necessary to cure and relieve.

SB 228, which was not enacted as a result of urgency legislation, provides no basis for depriving employees who sustain injury on or after January 1, 2004 from equal treatment as those employees who sustained injury prior to January 1, 2004.

In the matter of *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, (1997), the California Supreme Court reaffirmed the fact that the California Constitution provides more protection to its citizens than does the United States Constitution. In addition, the *American Academy of Pediatrics* Court held that generally, deference is to be given the Legislature, unless there is intrusion upon a Constitutional right:

> As a general rule, "[i]t is not the judiciary's function . . . to reweigh the 'legislative facts' underlying a legislative enactment." (American Bank & Trust Co. v. Community Hospital (1984) 36 Cal. 3d 359, 372 [204 Cal. Rptr. 671, 683 P.2d 670, 41 A.L.R.4th 233].) When an enactment intrudes upon a constitutional right, however, greater judicial scrutiny is required. (See, e.g., Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 514 [217 Cal. Rptr. 225, 703 P.2d 1119] ["[T]he ordinary deference a court owes to any legislative action vanishes when constitutionally protected rights are threatened. 'The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice.
> (*Ibid*, at pages 348 – 349)

The 24 visit cap on chiropractic treatment as set forth in Labor Code §4604.5(d)(1) has created disparate classes of injured workers, in violation of the equal protection clauses of the California Constitution and the United States Constitution.

CONCLUSION

Labor Code §4604.5(d)(1) is constitutionally infirm in that the California Constitution requires full provision of such medical treatment as is reasonably necessary to cure and relieve petitioner from the effects of the industrial injury. Additionally, Labor Code §4604.5(d)(1) violates the equal protection clauses of the United States Constitution as well as the California Constitution.

For each and every reason stated in this Petition for Review, Petitioner prays this honorable court grant the relief sought, as well as any other relief considered just.

Dated: November 21, 2007

Daniel Joseph Smith
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(State Bar No. 122516)

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, I served the following:

PETITION FOR WRIT OF REVIEW AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

by placing a true copy thereof enclosed in a sealed envelope with postage prepaid in the United States mail, first class, at Mission Hills, California, addressed as follows:

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Nurserymen's Exchange, Inc.
Andres Trillo
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Workers' Compensation Appeals Board (*two copies*)
Writ Section
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Workers' Compensation Appeals Board
Honorable Presiding Judge Susan Hamilton
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State of California
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Earl Warren Building ***Exhibits = one copy,***
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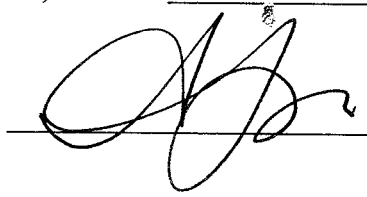
I declare under penalty of perjury that the foregoing is true and correct. Executed at Mission Hills, CA on November 21, 2007.



Alma Amaya