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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND PROPOSED AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER JOSE FACUNDO-GUERRERO

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To the Honorable Presiding and Associate Justices of the California Court of Appeal, First Appellate District:

I INTRODUCTION

Pursuant to California Rules of Court, Rules 8.200(c), the International Chiropractic Association of California (ICAC) respectfully seeks leave to file the attached brief of proposed *amicus curiae* in support of petitioner, Jose Facundo-Guerrero.

II THE AMICUS CURIAE

The International Chiropractic Association is the worlds oldest international chiropractic professional organization. It has a long distinguished history. It was established in 1926 in Davenport, Iowa in the United States by Dr. B. J. Palmer who served as its president until his death in 1961. The International Chiropractic Association of California (ICAC) is the California chapter of the International Chiropractic Association. The ICAC is made up of chiropractors statewide that provide medical treatment to applicants in the Workers' Compensation system. ICAC members specifically provide medical treatment to tens of thousands of patients nationwide, and to thousands of patients in California who have sustained a non-industrial injury or illness; sustained an industrial injury or illness; or, who have claimed to have sustained an industrial injury or illness. In regards to injured workers who have sustained, or claimed to have sustained an industrial injury or illness, ICAC members provide medical treatment when authorized by the employer or insurer, as well as on a lien basis. In the absence of medical providers, such as the members of ICAC, California's injured workers would not have adequate and sufficient access to treatment reasonably necessary to

cure and relieve them from the effects of industrial injuries. An adequate and sufficient number of medical providers willing to treat industrially injured workers is necessary to comport with the foundational underpinnings of California's Workers' Compensation Act.

III INTEREST OF THE AMICUS CURIAE

The issues, presented to this Honorable Court in the instant matter, involve the interests of not only petitioner and all injured workers similarly situated, but also ICAC members and physicians defined by Labor Code §3209.3 who have provided treatment to California's injured workers, are currently providing treatment to California's injured workers, or are considering providing treatment to California's injured workers in the future.

The issue presented in this case questions the constitutionality of Labor Code §4604.5(d)(1). Labor Code §4604.5(d) instituted a cap of twenty-four (24) chiropractic visits and twenty-four (24) physical therapy visits per industrial injury. ICAC considers this statute unconstitutional on its face and asserts it violates the procedural due process of the United States Constitution.

I am the attorney for proposed *amicus curiae* ICAC, and I am familiar with the factual and legal issues presented in this case, the scope of their presentation, as well as the application of Labor Code §4604.5(d).

Proposed *amicus curiae*, ICAC, humbly submits that further augmentation of legal analysis and argument is necessary to address matters not fully addressed by the parties, which may be helpful and assist this Honorable Court in achieving a fair, just, equitable, and

legally supportable outcome in the instant matter that is consistent and in complete harmony with the intent of the Constitution.

If leave is granted to submit an *amicus curiae* brief, ICAC believes the further briefing and argument by ICAC, necessary to properly frame and resolve the issues that have divided the parties, will result in assisting this Honorable Court in an appropriate resolution of the disputed questions of law and fact in regards to the following points:

1. IS THE STATUTORY TWENTY-FOUR (24) VISIT CAP FOR CHIROPRACTIC TREATMENT IN LABOR CODE §4604.5(D)(1) UNCONSTITUTIONAL ON ITS FACE?
2. IS THE COST FOR MEDICAL TREATMENT BETWEEN THE EMPLOYER AND THE EMPLOYEE APPORTIONABLE?
3. IS THE 24 VISIT MAXIMUM IN LABOR CODE §4604.5(D)(1) INVALID UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

WHEREFORE, ICAC. respectfully requests permission to file the proposed *amicus curiae* brief in support of petitioner, Jose Facundo-Guerrero.

Respectfully submitted,

_____

Jack Perko, Esq. SBN: 164529
Attorney for proposed *amicus*,
International Chiropractic Association of California.

INTRODUCTION

The issue presented in this case questions the constitutionality of Labor Code §4604.5(d)(1). Labor Code §4604.5(d) instituted a cap of twenty-four (24) chiropractic visits and twenty-four (24) physical therapy visits per industrial injury. This statute is unconstitutional on its face and violates procedural due process of the United States Constitution.

SUMMARY OF THE FACTS

Petitioner, Jose Facundo-Guerrero, sustained an industrial injury to his back and left leg, on February 24, 2005, while employed by Nurserymen's Exchange. The Workers' Compensation insurer is Argonaut Insurance Company (hereinafter collectively respondents).

On September 26, 2006, respondent accepted the claim as industrial.

Between April 1, 2005, and September 26, 2006, the respondent refused to provide any treatment and the petitioner was forced to self-procure treatment for the industrial injury.

Between June 21 and September 26, 2006, 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, the respondents objected to the treatment and demanded that the petitioner begin treatment with a physician within respondent's Medical Provider Network (MPN).

An expedited hearing was scheduled before Presiding Judge Susan Hamilton at the San Francisco District Office of the Workers' Compensation Appeals Board, that was held on February 16, 2007.

On March 9, 2007, Presiding Judge Hamilton issued a 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, that petitioner's treating doctor, Marijan Pevec, D.C., was a participating provider within respondent's MPN.

Presiding Judge Hamilton then rescinded and set aside her prior Findings and Order dated March 9, 2007.

On July 23, 2007, a status conference was held before Presiding Judge Hamilton, at that time petitioner raised the issue of the constitutionality of Labor Code §4604.5(d)(1). In addition, petitioner also sought to have respondent stipulate to Marijan Pevec, D.C. being allowed to continue to be petitioner's primary treating physician (PTP). Counsel for the respondent refused to 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.

On July 27, 2007, Presiding Judge Hamilton issued a new Findings and Order. Petitioner then 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" holding that petitioner's 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 declined to address the constitutionality of Labor Code §4604.5(d)(1).

The rescission by Presiding Judge Hamilton was untimely by one (1) day, so the Workers' Compensation Appeals Board granted reconsideration on their own motion.

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 petitioner timely filed a petition seeking a Writ of Review on the issue of whether Labor Code §4604.5(d)(1) is unconstitutional.

ISSUES PRESENTED

1. IS THE STATUTORY TWENTY-FOUR (24) VISIT CAP FOR CHIROPRACTIC TREATMENT IN LABOR CODE §4604.5(D)(1) UNCONSTITUTIONAL ON ITS FACE?

2. IS THE COST FOR MEDICAL TREATMENT BETWEEN THE EMPLOYER AND THE EMPLOYEE APPORTIONABLE?

3. IS THE 24 VISIT MAXIMUM IN LABOR CODE §4604.5(D)(1) INVALID UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION?

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 UNCONSTITUTIONAL ON ITS FACE

California's Constitution has been viewed as a restrictive grant of authority empowering the Legislature to exercise all powers not forbidden by this governing document. *City and County of San Francisco v. WCAB* (1978) 22 Cal.3d 103, 1 13, 148 Cal. Rptr. 626, 43 Cal. Comp. Cases 984. *See also*, *Collins v. Riley* (1944) 24 Cal.2d 912, 915-916, 152 P.2d 169. Constitutional restrictions and/or limitations are to be "construed strictly." *Id*.

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…
>
> 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 facial challenge to the constitutional validity of a statute or

ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. *Dillon v. Municipal Court*, (1971) 4 Cal.3d 860, 865, 94 Cal.Rptr. 777, 484 P.2d 945.

Arcadia Unified School Dist. v. State Dept. of Education, (1992) 2 Cal.4th 251, 267, 5 Cal.Rptr.2d 545, 825 P.2d 438, quoting *Pacific Legal Foundation v. Brown*, (1981) 29 Cal.3d 168, 180-181, 172 Cal.Rptr. 487, 624 P.2d 1215 stated:

> To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute .... Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.

In *City of Brentwood v. Central Valley Regional Water Quality Control Bd.*, (2004) 123 Cal.App.4th 714, 722, 20 Cal. Rptr. 3d 322. the Court stated:

> Statutory construction is a question of law we decide de novo. [Citation.] Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. [Citation.] Intent is determined foremost by the plain meaning of the statutory language. <u>If the language is clear and unambiguous, there is no need for judicial construction</u>. When the language is reasonably susceptible of more than one meaning, it is proper to examine a variety of extrinsic aids in an effort to discern the intended meaning. We may consider, for example, the statutory scheme, the apparent purposes underlying the statute and the presence (or absence) of instructive legislative history. [Citation.]
> (emphasis added)

Also, 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.

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, <u>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</u> and that substantial justice should be accomplished. (Also see Lab. Code, §4600.) (emphasis added)

In the current case, there is no need for the court to resort to Statutory construction because the language in Labor Code §4604.5(d)(1) is clear and unambiguous on its face.

The California Constitution states in clear language 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[.]" The words "Full Provision" are a restriction on the legislation. Under this restriction the legislation cannot enact a statute that provides anything less than "full provision" of medical care. The twenty-four (24) visit cap for chiropractic treatment, set forth in Labor Code §4604.5(d)(1) is an impermissible restriction on the medical

treatment provided to an injured worker and should be struck down as unconstitutional.

As a public policy, it makes absolute sense to provide "full Provision" of medical care to injured workers. One of the main purposes of the workers' compensation system is provide medical treatment for injured workers so that health insurers and state agencies will not be overburdened with treatment for injured workers. If only partial medical treatment is given, then other types of medical coverage must provide the remainder of the medical care. This will raise health insurance premiums, Medicare rates, hospital emergency room costs, as well as burden the injured worker who may forgo needed treatment for which he is unable to pay.

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 and that Labor Code §4604.5(d)(1) is unconstitutional on its face.

II

MEDICAL TREATMENT IS NOT APPORTIONABLE

Labor Code §3751 states:

> (b) If an employee has filed a claim form pursuant to Section 5401, a provider of medical services shall not, with actual knowledge that a claim is pending, collect money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee. Any medical provider who violates this subdivision shall be

> liable for three times the amount unlawfully collected, plus reasonable attorney's fees and costs.

Labor Code §4605 states that, " Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires."

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 stated:

> 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 current case, petitioner received more than twenty-four chiropractic treatment visits, and the petitioner is still in need of chiropractic treatment. Labor Code §4604.5(d)(1) only allows petitioner twenty-four (24) chiropractic treatments. How is the petitioner to proceed?

Under Labor Code §4605 the petitioner can get additional treatment. Under Labor Code §3751(b) a physician is not allowed to charge the petitioner for treatment. Under the current law the petitioner must forgo needed treatment unless he can find a physician

to treat him at no charge.

This is unacceptable. The *Granado* case was correct. Medical treatment must not be apportioned.

The 24 visit cap of Labor Code §4604.5(d)(1) forces an impermissible conflict between Labor Code §4605 and Labor Code §3751(b) because the petitioner in need of treatment is unable to get additional treatment.

III

THE 24 VISIT MAXIMUM IN LABOR CODE §4604.5(D)(1) IS INVALID UNDER THE DUE PROCESS CLAUSE OF THE FEDERAL CONSTITUTION

In *Heiner v. Donnan*, 285 U.S. 312 (1932), the United States Supreme court stated that they have held more than once that a statute "…which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Id.*, at 329, *See, Schlesinger v. Wisconsin*, 270 U.S. 230 (1926); *See, also, Hoeper v. Tax Comm'n*, 284 U.S. 206 (1931). *See also, Tot v. United States*, 319 U.S. 463, 468, 469 (1943) *See also, Leary v. United States*, 395 U.S. 6, 29, 53 (1969). *See also, Turner v. United States*, 396 U.S. 398, 418, 419 (1970).

In *Heiner v. Donnan*, 285 U.S. 312 (1932), the Court was faced with a constitutional challenge to a federal statute that gifts made within two years prior to the donor's death were made in contemplation of death, thus requiring payment by his estate of a higher tax. This statute had no mechanism for review. The Court held that this statute was without due process of law, *Id.*, at 329.

In the case of *Bell v. Burson*, 402 U.S. 535 (1971), a Georgia

statute was struck down that provided if an uninsured motorist was involved in an accident and could not post security for the amount of damages claimed, his driver's license must be suspended without any hearing on the question of fault or responsibility.

Also, in *Stanley v. Illinois*, 405 U.S. 645 (1972), the Court struck down an Illinois statute that stated all unmarried fathers are unqualified to raise their children. The statute required the State, upon the death of the mother, to take custody of all such illegitimate children, without providing any hearing on the father's parental fitness. It may be, the Court said, "that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children." *Id.*, at 654. The statute did not provide for a hearing to the father and was thus, a violation of the Due Process Clause.

In *Vlandis V. Kline*, 412 U.S. 441 (1973) Connecticut required nonresidents enrolled in the state university system to pay tuition and other fees at higher rates than state residents and provided that because the legal address of a student, if married, was outside the State at the time of application for admission or, if single, was outside the State at some point during the preceding year, they remained a nonresident as long as they were students in Connecticut. Appellant challenged the statute, claiming that they had a constitutional right to present evidence of residency in the State. The District Court upheld their claim and held that the Due Process Clause of the Fourteenth Amendment does not permit Connecticut to deny an individual the opportunity to present evidence that they are a resident entitled to in-state rates.

In the present case, Labor Code §4604.5(d)(1) did not allow for judicial review once petitioner had received 24 chiropractic treatment visits. Like the cases cited above, the 24 visit maximum on chiropractic treatment is a denial of medical benefits without the due process of a hearing.

In the present case, the appellant has evidence that additional chiropractic treatment is needed. However, no workers' compensation court has the authority to resolve a dispute regarding whether petitioner can avail himself of additional chiropractic treatment visits.

The only party that can authorize additional chiropractic visits is the apposing party, the employer. This effectively takes away any judicial review.

IV

CONCLUSION

Labor Code §4604.5(d)(1) is unconstitutional on its face 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, and Labor Code §4604.5(d)(1) impermissibly restricts the provision of medical treatment. Additionally, Labor Code §4604.5(d)(1) impermissibly apportions medical treatment costs to the applicant. Finally, Labor Code §4604.5(d)(1) violates due process of law by not allowing any type of review for medical treatment in excess of the 24 visit cap.

For each and every reason stated above, petitioner prays this honorable court strike Labor Code §4604.5(d)(1) down as unconstitutional, as well as any other relief considered just.

Respectfully submitted, Dated: March 12, 2008

_____

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VERIFICATION

I, Jack Perko, swear that I have read the within document titled Application For Leave To File Amicus Curiae Brief And Proposed Amicus Curiae Brief In Support Of Petitioner Jose Facundo-Guerrero and know the contents thereof; that the within brief contains less than 14,000 words, including footnotes, based on the word count of the computer program used to create this brief; and, that the within brief otherwise complies with the 2008 Rules of Court, Rule 8.204. The computer program used to create this brief is Microsoft Word, and there are 3,956 words.

I am informed and believe that the matters stated herein are true and correct, and on that ground allege that such matters are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Sworn and executed this 12th day of March, at Granada Hills, California.

_____

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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, I served the following:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER JOSE FACUNDO-GUERRERO AND AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONER JOSE FACUNDO-GUERRERO 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:

Workers' Compensation Appeals Board (***two copies***)
Appellate Unit
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Workers' Compensation Appeals Board
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I declare under penalty of perjury that the foregoing is true and correct. Executed at Mission Hills, CA on March 13, 2008

_____
Patricia Ceron