In the

Court of Appeal

of the

State of California

FIRST APPELLATE DISTRICT
DIVISION ONE

A143043

FRANCES STEVENS,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD,
OUTSPOKEN ENTERPRISES/STATE COMPENSATION INSURANCE FUND and
THE ACTING ADMINISTRATIVE DIRECTOR DIVISION OF WOKERS' COMPENSATION,

Respondents.

FROM A DECISION OF THE WORKERS' COMPENSATION APPEALS BOARD
HON. FRANCIE LEHMER · NO. ADJ1526353

SUPPLEMENTAL BRIEF OF AMICUS CURIAE VOTERS INJURED AT WORK IN SUPPORT OF PETITIONER FRANCES STEVENS

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QUESTIONS ASKED BY THE COURT ON JANUARY 26, 2015

1. Is the plenary power to enact workers compensation statutes limited by the Separation of Powers Clause of the California Constitution?

2. Does the plenary power to enact workers compensation statutes affect the Court's analysis in evaluating petitioner's claims under the California Constitution's Due Process Clause?

ARGUMENT

I. IN ENACTING §4610.6, THE LEGISLATURE VIOLATED ARTICLE III §1 BY DELEGATING JUDICIAL REVIEW TO NON-JUDGES

a. IMPROPER DELEGATION

§4610.6 violates separation of powers as follows:

1. Delegation to a private profit making company whose function is performed by a concealed medical doctor (IMR[1]) usurps true judicial review which is required in the second paragraph of Article XIV §4;

2. Delegation to the administrative director of a judicial function violates this doctrine as declared in the second paragraph of Article XIV §4.

The answer to the Court's question is that the Legislature does not have absolute, unfettered, usurping power to eliminate separation of powers and due process. This is stopped by the second paragraph of Article XIV §4[2] and by Constitutional law which do not permit the delegation created by

[1] Independent Medical Reviewer

[2] The second paragraph modifies the first one in §4 under last antecedent rule of statutory construction; see *Genlyte Group LLC v WCAB* 158 Cal. App. 4th 705 at 717.

§4610.6.

The second paragraph of Article XIV §4 provides:

"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 courts of this State…."

The Legislature's delegating a judicial function to a private profit making outside vendor and to the administrative director, non-judges, is not expressly authorized nor is it "inferentially" allowed in §4 as limited by its second paragraph.

Starting with the rationale of this doctrine, in *Bixby v Pierno* 4 Cal. 3d 130 (1971), the California Supreme Court set forth the policy behind Article III Section 1 at 141: "…checks and balances against … overreaching of any other branch…."

There are exceptions to this doctrine, but §4610.6, in delegating a judicial function to non-judges, one of whom is concealed, does not fall within them. These exceptions have been described in Witkin at 7 Witkin, Summary 10th (2005) Const. Law, §138 p. 250. There is one which bears

on the question asked by the Court which is "(5) *Authorization by California Constitution.* In rare instances, the California Constitution has expressly authorized a delegation that might otherwise be subject to challenge. (See *In re Phyle* (1947) 30 C.2d 838, 850, 186 P.2d 134 [former delegation of quasi-judicial power to prison warden to make final determination of sanity of convicted prisoner].)"

In re Phyle supra at 850, the Court explained the basis of this exception as one which is permitted if authorized by express provisions in the Constitution: "Even if the warden's power in this regard is judicial, there is no violation of section 1 of Article 3 of the California Constitution, for section 7 of Article 10 specifically provides that 'Notwithstanding anything contained elsewhere in this Constitution, the Legislature may provide for the establishment, government, charge and *superintendence* of all institutions for all persons convicted of felonies. For this purpose, the Legislature may delegate the government, charge and *superintendence* of such institutions to any public governmental agency or agencies, *officers*, or board or boards, whether now existing or hereafter created by it. Any of such agencies, *officers*, or boards shall have such powers, perform such duties and exercise such functions in respect to other reformatory or penal matters, as the Legislature may prescribe.' (Italics added.)" The warden is a state officer charged with superintendence and this delegation was thus expressly allowed by the Constitution.

The specific words in the second paragraph of §4 demonstrate what delegations are allowed in Workers Compensation law and §4610.6 is not one of them. In this section, there are three such delegations. In the first one, the Legislature has the plenary power to settle disputes but only "by arbitration, or an industrial accident commission, by the courts, or by either, any, or all of these agencies…." In *In re Phyle* supra, the delegation was upheld because there was specific delegation in the Constitution which expressly provided for delegation of "superintendence" and to an "officer" which of course included the warden who was a governmental official. However, Article XIV §4 by omission in either the first paragraph or second paragraph or otherwise does not permit delegation to a private profiting making company with a concealed medical doctor performing a judicial function by a non-judge. In *In re Phyle* supra in contrast, the warden was a state employee and officer and not an outside vendor. Nor does it permit delegation to an "officer" who is not identified in any part of Article XIV §4 as one to whom delegation is proper and which term includes the administrative director whose function is passive and is only to adopt the findings of the private profiting making company. "Arbitration," "industrial accident commission," and the "courts," the other words in this section, are conducted by either retired judges or lawyers or commissioners who are judges or lawyers, and it is implausible to claim that they imply

authority to delegate to such non-judges as the private profitmaking company or the administrative director are.

The next delegation is part of the first sentence of the second paragraph with these words which all relate to trial and the decisions of the tribunal, again for which there is no legitimate authority to delegate to non-judges: "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…." By the specific terms of §4610.6, there is no trial, and this phrase does not allow by omission officers or outside private vendors to perform judicial functions. It is impossible for the private profitmaking company or the administrative director to rule on the admissibility of the evidence as they are not judges or even lawyers. Under the plain meaning rule of statutory construction[3] and by the holding in *In re Phyle* supra, if the Legislature had intended any of these delegations it would have inserted that authorization in the Constitution as it did in *In re Phyle* supra. The intent to do so is clearly not there.

In the next part of the sentence of the second paragraph of Article XIV §4, it states "provided, that all decisions of any such tribunal shall be subject to review by the appellate courts of this State…." Indisputably, the Constitution intended to provide for judicial and appellate review. It used

[3] See *California Insurance Guarantee Association v WCAB (Oracle Imaging)* 203 Cal. App. 4th 1328 (2012)

the word "tribunal," as it employed this word in the prior part of the sentence, to resolve disputed matters which is intended to mean a trial conducted by a judge with appellate review by the WCAB and in no place is it authorized that the judicial determination and function be delegated to a non-judge, non-tribunal or non-WCAB agency such as a private profitmaking company or a non-judge such as an officer like the administrative director.

These three delegations must be read in relation to the objective stated in the first paragraph Article XIV §4 to promote "substantial justice" and the mandate in Labor Code §3202 to deliver industrial benefits to injured workers by means of liberal construction.

Delegation is not implied either by Labor Code §133 or by the wording of the first paragraph of Article XIV §4. In *Hustedt v WCAB* 30 Cal. 3d 329 (1981), the California Supreme Court, in ruling that a statute granting the WCAB the power to suspend or revoke an attorney's license to practice law violated separation of powers, rejected the WCAB's contention that this was not a violation because the Legislature "inferentially" authorized it. (see at 343 beginning with "on its face….") The same restrictions are true in this case against outside profitmaking vendors and officers.

On top of this, it is not a logical supposition to use the words in the second paragraph of Article XIV §4 to imply proper delegation. These words-"arbitration," "industrial accident commission", and "courts;" "trial"

and "tribunal;" "review by appellate courts"- are necessarily conducted at the very least by judges, or retired judges, or lawyers. These persons have the skill and training to rule on the admissibility of the evidence in general or specifically as required in *Allison v WCAB* 72 Cal. App. 4th 654 (1999) (impermissible discovery of overbroad medical history; necessity for court rulings on objections). It is impossible for the profitmaking vendor's medical doctor or the administrative director as non-judges to rule on the admissibility of what medical evidence should be considered for the decision. This is worsened by the failure of the Legislature to define the essential terms "pertinent medical records" and "relevant information" in §4610.6 (b) of the matters to be reviewed by the IMR. They as non-judges cannot decide this.

To respond, Respondents and their Amici may allege §4610.6 conforms to the objectives of §4 by reference to *Hustedt* supra, to claim that it accomplishes the mandate of the Legislature under its plenary power to move cases "expeditiously" and "inexpensively," as provided in the first paragraph of Article XIV §4, in which the Court stated at 343 that the improper delegation contradicts the objectives of §4 because in none of the objectives is it provided that it includes the suspension of a lawyer's license to practice law. The Court again rejected the contention by the WCAB regarding the first paragraph of Article XIV §4 that that was necessary to expeditiously resolve claims (see also FN 12).

Overall, the California Supreme Court has established the restraints on such administrative adjudication in the landmark case of *McHugh v Santa Monica Rent Control Bd*. 49 Cal. 3d 348 (1989) in which *Hustedt* supra is discussed. First, there must be "true" judicial review which the Court called the "principle of check" at 365. Second, at 372, the Court also held that "(t)he agency may exercise *only those powers that are reasonably necessary to effectuate the agency's primary, legitimate regulatory purposes.*" Both are necessary; not one without the other.

With an IMR whose identity is concealed[4], without the right of cross-examination, with essential terms left undefined to the caprice of non-judges to determine, and without the right to secure rulings from judges on objections to the evidence, there is no "true" "check" or meaningful judicial review.

Moreover, to claim that the phrase "unlimited by any provision in this Constitution" in the first paragraph of this section permits the Legislature to severely impair as it chooses judicial review irrespective of the separation of powers and due process provisions in the Constitution and the second paragraph violates the principle of check from the *McHugh* doctrine and

[4] SCIF's RRB to Amicus Voters Injured At Work cites *Hess v Agricultural Labor Relations Board* 140 Cal. App. 4th 1584 (2006) to claim by analogy to another statute that §4610.6 is valid. However, in *Hess* there was a mediator whose identity was not concealed, who is performing the function of a judicial officer and is a lawyer, and is subject to either the Cannons of Judicial Ethics or other such rules. The IMR is not.

Aristole's fallacy of contradiction; these paragraphs cannot contradict each other. See also the last antecedent rule of statutory construction in FN 2.

Like *Hustedt* supra, none of the objectives of Article XIV §4 provide that non-judges such as outside profitmaking vendors or the administrative director may perform judicial functions. If anything, the opposite is true because of the vagueness of §4610.6 (b) which makes it impossible for non-judges to deal with. Using non-judges actually increases costs because of their inability to handle judicial functions.

b. DELEGATION WITHOUT STANDARDS IS VOID

In *Bolger v City of San Diego* 239 Cal. App. 2d 888 (1966) at 894, the Court held that there must be standards so it is not "left to the caprice of enforcement officers" without which it is "void."

§4610.6 (b) is also fatally flawed because it fails to define the terms "pertinent medical records" and "relevant information" and who and how this is decided, and in failing to do so it leaves this to the caprice of non-judges. This is explained in Amicus Voters Injured At Work's ACB on pages 21-22.

II. §4610.6 VIOLATES DUE PROCESS

a. IN DENYING THE RIGHT TO CROSS EXAMINE THE MEDICAL EXPERT, §4610.6 VIOLATES DUE PROCESS

In *Ogden Entertainment Services v WCAB (von Ritzhoff)* Cal.App. 2 Dist. December 31, 2014--- Cal.Rptr.3d ----(B254082), the Court of

Appeals held that because the right of cross examination in Workers Compensation matters is a fundamental element of a fair hearing, to deny this right due process is violated relying on *Pacific Employers Ins. Co. v. Industrial Accident Com.* (1941) 47 Cal.App.2d 713, 715.) and the Administrative Procedure Act's subdivision (b) of Government Code section 11513.

See Amicus Curiae Voters Injured At Work's ACB on pages 4, 5, 7, 9, 10, 11, 14, 18, 21, and 22 and *Beverly Hills Multispecialty Group Inc. v WCAB* 26 Cal. App. 4th 789 (1994).

§4610.6 IS IN VIOLATION OF PROCEDURAL DUE PROCESS

The failure to define "relevant information" and "all pertinent medical records" on which the determination is based in §4610.6 (b) violates procedural due process. This is explained in Amicus Voters Injured at Work's ACB on page 21-22.

Dated: February 20, 2015 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.504(d)(1) of the California Rules of Court, the enclosed Supplemental Brief of Amicus's Curiae Voters Injured at Work in Support of Petitioner Frances Stevens is produced using 13-point or greater Roman type, including footnotes, and contains 2,320 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: February 20, 2015 Respectfully submitted,

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