CAN THE LEGISLATURE LIMIT AN APPEAL OF THE INDEPENDENT MEDICAL REVIEW (IMR) TO ONLY A SHOWING OF BIAS OR FRAUD?

1. The Legislature may limit recovery of medical treatment

Article XIV, section 4 defines the necessary provisions for a complete workers' compensation system, and leaves it up to the Legislature to enact laws to give effect to each provision, including "securing safety in ... employment." (See *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th 640, 651 [77 Cal. Rptr. 3d 731] [Legislature may limit employees' chiropractic treatments*]; Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd., supra*, 131 Cal.App.4th at p. 526 [Legislature may limit employees' statutory right to benefits.]) The Legislature must act to fulfill its constitutional mandate to create the workers' compensation system, and the judicially enforceable rights are the laws it enacts. . *Bautista v. Cal. (2011)201 Cal. App. 4th 716*

In *Sakotas v. Workers' Comp. Appeals Bd.,(2000) 80 Cal. App. 4th 262,* the court allowed a limit on stress claims and noted that the Legislature enacted section 3208.3, subdivision (b)(l) to combat the proliferation of fraudulent psychiatric claims and reduce the costs of workers' compensation coverage, and that the limitation has a legitimate government purpose and therefore Constitutional. Section 3208.3, subdivision (b)(l) only requires an employee suffering a psychiatric injury to satisfy a higher threshold of compensability (for entitlement). The court explained we "do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited. In other words, unless restrained by constitutional provision, the legislature is vested with the whole of the legislative power of the state." (*Fitts* v. *Superior Court* (1936) 6 Cal.2d 230, 234 [57 P.2d 510].) Moreover, the governing authorities additionally establish that "[if] there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*Collins* v. *Riley, supra*, 24 Cal.2d at p. 916.)

In *Facundo-Guerrero v. Workers' Comp. Appeals Bd. (2008) 163 Cal. App. 4th 640*, the court upheld the limitation of the number of chiropractic treatments allowed. The court stated that the California Constitution does not make a worker's right to benefits absolute and the courts are not allowed to second-guess the apparent policy decision of the Legislature, in addressing the workers' compensation crisis.

As a matter of law, article XIV, section 4 neither restricts the Legislature's ability to limit the number of chiropractic treatments for which the workers' compensation system must be financially responsible, nor does it expand an injured worker's constitutional rights to

include an entitlement to receive unlimited treatments. The *Facundo-Guerrero* court refused to second-guess the wisdom of the Legislature in meeting the workers' compensation crisis in this state by, among other things, specifying the maximum amount of chiropractic care an injured worker may receive for a single industrial accident and stated that the Legislature clearly has the constitutional authority to make that determination.

Petitioner alternatively claimed that the statutory exception allowing an employer to authorize chiropractic services in excess of 24 treatments constitutes an unconstitutional delegation of legislative power, or otherwise constitutes a deprivation of due process. As to the unlawful delegation of power prong of this claim, petitioner argued that giving the employer the right to approve visits in excess of those allowed by the statute conflicts with the second paragraph of article XIV, section 4. That paragraph vests the Legislature with plenary power 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 ... ." (Art. XIV, § 4.)

Even if this could be read as *requiring* the Legislature to build a dispute adjudication or resolution procedure into the workers' compensation system, a disagreement with an employer's refusal to approve excess treatments does not give rise to a legally cognizable "dispute." The statute limits chiropractic visits even if the chiropractor, or any other practitioner of the healing arts, expresses the view that the claimant would benefit from further treatments. The employer has the sole discretion as to whether to approve payment for more than 24 visits. The decision does not turn on the worker's need for the treatment, or any other factual determination. *Therefore, because there is no legal or factual disagreement, or "dispute," arising from the decision to approve or disapprove more treatments, no adjudication by a neutral party is necessary.*

Thus, one could argue that the IMR determination can be binding (or only reviewable is there is a showing of fraud or bias) as the decision to review would not be based on the worker's need for treatment, but instead a clear rule that the IMR decision is the final rule.

2. The limitation of benefits must be subject to judicial review

However, the *Facundo-Guerrero* court went on to also distinguished the cases of *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 [18 Cal. Rptr. 2d 626] (*Bayscene*) and *Costa v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1177 [77 Cal. Rptr. 2d 289] (*Costa*). In *Bayscene*, the Court of Appeal struck down on due process grounds a city ordinance which required binding arbitration

for mobilehome park rent disputes. The court stressed that the primary failing of the ordinance was that **it did not provide for judicial review** of the evidence; instead, the issues on appeal were "**essentially limited to fraud, corruption, or other misconduct of a party or the arbitrator.**" (*Bayscene, supra*, 15 Cal.App.4th at p. 134.) Therefore, the Facundo-Guerrero court stated that the Bayscene case is inapposite, involving a local ordinance compelling private parties to submit their rent control disputes to binding arbitration without any right of judicial review for errors of fact or law.

In *Costa,* an electrician filed a claim for benefits with the WCAB and requested an expedited hearing because he was in "'dire need of medical treatment including home care.'" (*Costa, supra*, 65 Cal.App.4th at p. 1181.) There, the court considered the constitutionality of provisions in a collective bargaining agreement that required employees to exhaust contractual grievance and arbitration procedures before exercising their constitutional right of review by the WCAB. Because the applicable constitutional provision specifically authorized the use of arbitration to resolve workers' compensation claims and **the arbitration decisions were subject to review by the WCAB and the Courts of Appeal**, the court held that the provisions were lawful. ***Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal. App. 4th 640**

Thus, the limitations on workers' compensation benefits have only been allowed when they are subject to review in the court of appeal.

CAN ARBITRATION BE COMPULSORY?

Compulsory, binding arbitration still remains limited in large measure to situations in which the parties have agreed to arbitration as an alternative form of dispute resolution; however a growing number of statutory schemes whereby either one or both parties are compelled to submit to binding arbitration do exist. Statutory schemes requiring binding arbitration are normally found valid in limited contexts including resolving disputes in contracts with government agencies (see, e.g., *Hjelle v. Sornsin Construction Company* (N.D. 1969) 173 N.W.2d 431), resolving labor disputes with public employees such as police and fire fighters (see, e.g., *Buffalo v. New York State Public Employment Relations Board* (1975) 80 Misc.2d 741 [363 N.Y.S.2d 896], affd. (1975) 37 N.Y.2d 19 [371 N.Y.S.2d 404, 332 N.E.2d 290, 293]) and where the rights to be arbitrated have been created by federal statute (see, e.g., *Thomas v. Union Carbide Agric. Products Co.* (1985) 473 U.S. 568, 593-594 [87 L.Ed.2d 409, 427-428, 105 S.Ct. 3325]; see generally Allison, *The Context, Properties, and Constitutionality of Nonconsensual Arbitration: A Study of Four Systems,* J. of Dispute Resolution (Vol. 1990) No. 1, 1.)

Statutory schemes requiring binding arbitration have also been found valid when applied to highly regulated industries such as insurance or licensed professionals such

as attorneys. (See, e.g., *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., supra,* 284 U.S. 151 [binding arbitration clause to determine amount of loss required in every fire insurance policy]; *Guralnick v. Supreme Court of New Jersey* (D.C.N.J. 1990) 747 F.Supp. 1109, affd. (3d Cir. 1992) 961 F.2d 209 [compulsory binding arbitration of attorney/client fee disputes].) While states have broad power to regulate housing conditions and landlord- tenant relations (see *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 440 [73 L.Ed.2d 868, 885, 102 S.Ct. 3164]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465, 550 P.2d 1001]), our research has not found rent disputes typically to be an area subject to compulsory binding arbitration.

Even in areas where statutory schemes requiring compulsory arbitration have been upheld, constitutionality often depends upon whether meaningful judicial review of the arbitrator's decision is provided. (See *Peick v. Pension Ben. Guar. Corp.* (7th Cir. 1983) 724 F.2d 1247, 1277 [compulsory arbitration constitutional where it is "merely the first step" in dispute resolution with subsequent court review]; *Mount St. Mary's Hospital v. Catherwood* (1970) 26 N.Y.2d 493 [311 N.Y.S.2d 863, 260 N.E.2d 508] [for compulsory arbitration due process requires judicial review of whether the award was supported by the evidence in record].)

In *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal. App. 4th 119, the court reviewed California statutes requiring compulsory arbitration. The review demonstrates the Legislature has provided for substantive judicial review in almost all instances. Of the nine compulsory arbitration statutes located, six are subject to trial de novo or other evidentiary review. (Bus. & Prof. Code, § 6200, subd. (c), 6204, subd. (a), [arbitration of attorney fee disputes provides for trial de novo]; § 1141.11, 1141.20 [judicially ordered arbitration in superior courts with 10 or more judges for civil disputes where the amount in controversy does not exceed $ 50,000 provides for trial de novo]; Civ. Code, § 4800.9; § 1141.20 [value and division of community property subject to court ordered arbitration if total value does not exceed $ 50,000 provides for trial de novo]; Lab. Code, § 2685, 2691 [arbitration of pricing and product quality disputes arising out of contracts between garment manufacturers and contractors provides for trial de novo]; Civ. Code, § 845 [arbitration of costs of maintaining right-of-way of easement provides for court determination which is construed by *Healy v. Onstott, supra,* 192 Cal.App.3d at p. 616 to require trial de novo]; Lab. Code, § 5270, 5275, 5277 [certain workers' compensation disputes involving claimants represented by an attorney may be submitted to arbitration but arbitration decision has the same force and effect as that of a workers' compensation judge which is subject to review by the Workers' Compensation Appeals Board (Lab. Code, § 5900) and the Court of Appeal (Lab. Code, § 5950)].)

Additionally, consent to arbitration may be implied in two of the nine statutory schemes. Public Contract Code section 10240 provides for arbitration of disputes arising out of certain contracts with state agencies. However, by electing to enter into the specified contracts with the state, the contracting party in effect agrees to arbitration. Under Civil Code section 1793.22, commonly known as the "Lemon Law," an automobile manufacturer may be bound by the decision reached under a qualified third party dispute resolution process. (Civ. Code, § 1793.22, subd. (c).) Agreement to arbitrate however may be implied because it is the manufacturer who elects to set up the third party dispute resolution process. (Bus. & Prof. Code, § 472.2, subd. (a).)

In only one circumstance, disputes between insurers and insureds with respect to recovery of damages under uninsured motorist coverage, has the Legislature imposed compulsory binding arbitration on nonconsenting parties. (Ins. Code, § 11580.2, subd. (f); *United Services Automobile Assn. v. Superior Court* (1990) 221 Cal.App.3d 79, 83-84 [270 Cal.Rptr. 376].) The Legislature's failure to impose binding arbitration on nonconsenting parties evidences a valid concern for preserving a party's right to due process through access to the courts.

In *Bayscene*, the court found that the ordinance deprived respondents of property without due process of law in violation of U.S. Const. amend. XIV and Cal. Const. art. I, §7(a) because the ordinance made an award final and failed to provide for judicial review in the event a party rejected an arbitration award. **Bayscene Resident Negotiators v. Bayscene Mobilehome Park, (1993) 15 Cal. App. 4th 119**

WOULD RQUIRING THE INJURED WORKER TO PAY FOR ALL OR PART OF THE ARBITRATION COSTS IN REOSLVING AN IMR DISPUTE BE AN "ENCUMBERENCE" IN VIOLATION OF THE WOKERS' COMPENSACTION ACT

The Workers' Compensations Act, codified in the Labor Code, with other related laws, has its jurisdictional basis in the California Constitution, Article XIV, sec. 4, which provides in part as follows:

> 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...to compensate...workers for injury or disability, and...for death...irrespective of the fault of any party...to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character...

Labor Code section 3751 states that "[n]o employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of an

employee, either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this subdivision is a misdemeanor."

In an Independent Medical Review (IMR) System, if an injured worker disputes a Utilization Review decision, it would seek review of the decision within the IMR system. If the injured worker is dissatisfied with the IMR decision, it would then seek review through mandatory arbitration paid by the losing party (or injured worker in this case.)

An employer is responsible for providing an injured employee with any medical treatment or related care that is reasonably required to cure or relieve the effects of the injury. L.C. section 4600. Medical treatment comes within that statutory definition of "compensation." L.C. section 3209.5. If a dispute arises regarding reasonableness of medical treatment and the injured worker is required to go through mandatory arbitration and to pay for the cost of obtaining this "compensation" it would appear to violate the Workers' Compensation Act because the process is neither expeditious nor without encumbrance. At present, an expedited hearing process is in place so that compensation issues, specifically temporary disability and medical treatment issues can be dealt with more quickly than other issues at the Board. However, it would appear that by requiring the parties to arbitrate an IMR decision would increase the costs of litigation for both parties as it adds another layer to the process for obtaining and denying medical treatment.

In *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119 (*Bayscene*), the Fourth District Court of Appeal struck down on due process grounds a city ordinance which required binding arbitration for mobile home park rent disputes. The court stressed that the primary failing of the ordinance was that it did not provide for judicial review of the evidence; instead, the issues on appeal were "essentially limited to fraud, corruption, or other misconduct of a party or the arbitrator." (*Bayscene*, *supra*, 15 Cal.App.4th at p. 134.) The ordinance compelled private parties to submit their rent control disputes to binding arbitration without any right of judicial review for errors of fact or law.

It would appear that for due process reasons, after arbitration, the losing party would have to be afforded the right of judicial review of the arbitration decision. In order for collective bargaining agreements that required mandated arbitration to resolve workers' compensation disputes to remain constitutional the arbitration decisions had to be subject to review by the WCAB and the Courts of Appeal. *Costa* v. *WCAB* (1998) 65 Cal.App.4th 1177.

As such, requiring mandatory arbitration simply appears to add another layer to the process for obtaining medical treatment. However, in order to avoid the higher costs of litigation, it may force parties to resolve minor medical disputes quickly and independently outside the system.

APPEAL COULD BE MADE TO WCAB UNDER A CLEAR AND CONVINCING STANDARD

"Clear and convincing" is the highest civil standard of proof. The phrase has been defined as "clear, explicit and unequivocal," "so clear as to leave no substantial doubt," and "sufficiently strong to command the unhesitating assent of every reasonable mind." Preponderance calls for probability, while clear and convincing proof demands a *high probability.*

IN WORKERS' COMPENSATION, APPEALS MUST BE MADE TO COURT OF APPEAL OR SUPREME COURT

Labor Code §5955 provides that "No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties but a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases."

In *Greener v. Workers' Compensation Appeals Board* (1993) 6 Cal.4th 1028, the court held that the Court of Appeals and the Supreme Court have exclusive jurisdiction to entertain challenges to the constitutional validity of provisions of the workers' compensation law. The *Greener* case involved an action for declaratory and injunctive relief brought in the superior court challenging the constitutional amendments that precluded the WCAB from awarding attorney fees to persons who were not licensed attorneys. The Supreme Court held that the superior court did not have subject matter jurisdiction over awards of the WCAB or over any matter where resolution of the matter would interfere with the WCAB's exercise of its jurisdiction.

The *Greener* court explained that the California Constitution confers upon the Legislature "plenary power, unlimited by any provision of this Constitution," to establish a system of workers' compensation. (Cal. Const., art. XIV, § 4.) That power includes the power 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 [the Legislature] 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." (Ibid.) Thus, Labor Code §129.5 and §5955 confer exclusive jurisdiction over challenges concerning Labor Code §129.5 to the Court of Appeal and Supreme Court.

Labor Code section 3201.5, which allows alternative dispute resolutions still provides review by the Court of Appeal

The constitutionality of Labor Code section 3201.5 was discussed in *Costa v. Workers' Compensation Appeals Board* (1998) 65. Cal.App. 1177. The *Costa* court stated any party dissatisfied with outcome of the mediation may file a request for arbitration within 30 calendar days after the completion of the mediation process. The matter is then immediately referred to an arbitrator who "shall have experience and be knowledgeable in the workers' compensation dispute process and shall have been at one time a certified specialist in workers' compensation law or a California Workers' Compensation judge." Unless the parties otherwise agree, the arbitration "shall be completed within 30 days after referral, and an arbitration decision rendered with in [*sic*] 10 working days of the completion of the proceedings." "[T]he Arbitrator shall have full power, jurisdiction and authority to hear and determine all issues of fact and law presented and to issue interim, interlocutory and final orders, findings, decisions and awards as may be necessary to the full adjudication of the case. The decision of the Arbitrator is subject to review by the Workers' Compensation Appeals Board . . . and shall have the same force and effect as an award, order, or decision of a workers' compensation judge."