

STAND UP AND CHEER: Plenary Power Rules!!

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Ok, maybe not cheer but at least understand the latest dagger in the constitutional challenges of the state's Independent Medical Review (IMR) process. California's constitutional "plenary power" is a power that has been granted to a body, or person, in absolute terms, with no review of, or limitations upon the exercise of that power.

The workers' compensation reforms for 2013 included a method of allowing the injured worker, not the defendant, to challenge a determination of medical treatment from Utilization Review (Labor Code 4610). The determination denying medical treatment may be reviewed at the request of the injured worker (Labor Code 4610.5(d)) by the IMR organization (currently Maximus). Pursuant to the 2013 legislation, the IMR organization is regulated by the Division of Workers' Compensation (DWC) of the Department of Industrial Relations. The reforms were intended to change the previous extremely slow and ineffective system in which each side attempted to obtain medical opinions favorable to its position, and then counsel for each side tried to convince a workers' compensation judge based on this evidence what the treatment should be.

Under Article XIV, Section 4 of the California Constitution, the Legislature vested "plenary power **unlimited by any provision of this Constitution**, to create, and enforce a complete system of workers' compensation by appropriate legislation." (Italics added). This plenary power includes the regulation of the IMR process by the DWC.

In the latest unpublished case, *Zuniga vs. WCAB, Interactive Trucking* (January 12, 2018, Court of Appeal, First Appellate District, A143290), the Court of Appeal rejected applicant's constitutional challenge citing the Legislature's broad constitutional "plenary powers". The Legislature, through the 2013 reforms, specifically granted control of the IMR process in our workers' compensation system to the DWC. The Court of Appeals held this plenary powers supersedes the Constitution's due process clause.

In *Zuniga*, the applicant argued that a failure to disclose the identity of the reviewing IMR physician rendered the IMR process "meaningless" and that it was a constitutional violation of due process of law (the right to notice and a meaningful opportunity to be heard). Applicant, ostensibly, desired to question or otherwise depose the IMR physician to verify his or her qualifications, potential for conflict of interest and bias. Identities of the IMR reviewers are kept confidential (Labor Code 4610.6(f)).

The Court of Appeal was not persuaded. The trial court and Board decision (on Reconsideration), rejecting the applicant's due process of law argument and prohibiting the disclosure of the IMR reviewers' identity, was affirmed.

The rationale is similar to what we have seen in other Court of Appeal cases, including *Stevens vs. Workers' Compensation Appeals Bd.* (2015) 241 Cal. App. 4th 1074. The *Zuniga* case was well briefed with amicus curiae (friend of the court) briefs from California Workers' Compensation Institute supporting respondent SCIF. Interestingly, there was no supporting brief from California Applicant Attorney Association (CAAA). Perhaps they have lost interest in the constitutional challenges of IMR.

Can you imagine what chaos would be created if the identity of the IMR reviewers and depositions were allowed in every UR/IMR denial?

Long live California's constitutional plenary powers. Big cheer now: Plenary Powers Rule!!

Should you have any questions concerning this or other UR/IMR issues, please do not hesitate to contact your local Laughlin, Falbo, Levy & Moresi office.

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