

1 ADAM M. COLE, Bar No. 145344
General Counsel
2 REID A. MCCLARAN, Bar No. 095755
Assistant Chief Counsel
3 CHRISTOPHER A. CITKO, Bar No. 166388
Senior Staff Counsel
4 300 Capitol Mall, Suite 1700
Sacramento, CA 94814
5 Telephone: (916) 492-3187
Facsimile: (916) 324-1883
6 E-mail: citkoc@insurance.ca.gov

7 *Attorneys for Amicus Curiae the Insurance*
Commissioner of the State of California

8
9 **WORKERS' COMPENSATION APPEALS BOARD**

10 **STATE OF CALIFORNIA**

11 WANDA OGILVIE,

12 Applicant,

13 vs.

14 CITY AND COUNTY OF SAN
15 FRANCISCO, Permissibly Self-Insured,

16 Defendant.

Case No. ADJ1177048 (SFO 0487779)

AMICUS CURIAE BRIEF

17
18 Amicus Curiae Steve Poizner, Insurance Commissioner of the State of California
19 (hereinafter "Insurance Commissioner") hereby submits his brief pursuant to the ORDER
20 GRANTING RECONSIDERATION AND ORDER ALLOWING AMICUS BRIEFS (EN
21 BANC) issued herein on April 6, 2009 by the Workers' Compensation Appeals Board
22 (hereinafter "Appeals Board") in the above entitled matter.

23
24 **INTRODUCTION**

25
26 The Insurance Commissioner files this Amicus Curiae Brief to provide information to
27 assist the Appeals Board in assessing the effect its decisions have upon injured workers as well as
28 the employers that pay premiums for workers' compensation insurance and the insurance

1 companies that are necessary to insure the risk and pay the losses resulting from work injuries. It
2 can be recalled only a short time ago that insurance rates for workers' compensation were rising
3 rapidly to pay for increasing and unpredictable costs; that over 20 insurance companies handling
4 California workers' compensation insurance became insolvent; and many other insurance
5 companies left California, only to see State Compensation Insurance Fund, as California's
6 workers' compensation insurer of last resort (see Ins. Code, § 11784(c)), become the largest
7 writer of workers' compensation insurance in the country, writing the majority of insured
8 employers in the state and running the risk of becoming insolvent itself. It is within this context
9 that the Insurance Commissioner urges and requests the decisions of the Appeals Board be
10 measured in a way so as to allow for adequate and reasonable benefits for injured workers that are
11 stable and predictable in their cost to the workers' compensation system as mandated by the
12 Legislature so as to provide for insurance rate adequacy to avoid insurance company insolvency.

14 INSURANCE COMMISSIONER'S INTEREST IN THESE MATTERS

15
16 The Insurance Commissioner is the independently elected official responsible for
17 regulating the business of insurance in the state and enforcing the execution of the California
18 Insurance Code. (Ins. Code § 12921.) Those Insurance Code provisions include *inter alia* the
19 regulation of the business of workers' compensation insurance, supervision of state workers'
20 compensation insurance rates, and the determination of advisory pure premium rates. (See
21 Chapter 3 of Part 3 of Division 2 of the Insurance Code (Ins. Code §§ 11690, *et seq.*)) This
22 authority emanates from the Constitutional requirement that the Legislature establish through its
23 plenary power "full provision for adequate insurance coverage against liability to pay or furnish
24 compensation; full provision for regulating such insurance coverage in all its aspects...." (Cal.
25 Constitution, Art. XIV, § 4.)

26 The advisory pure premium rates are the cost of insurance per exposure base unit that
27 represents the loss cost per unit of exposure including loss adjustment expense. (Ins. Code, §
28 11730.) The overall change to the pure premium rates, which is the percentage change to the

1 entire costs in the workers' compensation system, is now designated by the Insurance
2 Commissioner as the Workers' Compensation Claims Cost Benchmark. (See Ins. Code, §§
3 11730, *et seq.* See also Ins. Code, §11750 (b).) In determining the Claims Cost Benchmark, the
4 Workers' Compensation Insurance Rating Bureau (hereinafter "WCIRB"), the only licensed
5 rating organization that reviews loss data on behalf of all insurance companies in the state of
6 California, including State Compensation Insurance Fund, analyzes how loss costs and expenses
7 are changing and recommends for the Insurance Commissioner's approval an adjustment to the
8 Claims Cost Benchmark for the purposes of workers' compensation insurance rate making for the
9 next insurance policy period and to allow the Insurance Commissioner to assess whether the rates
10 filed by insurance companies are adequate for solvency. (See Ins. Code, § 11732.)

11
12 **THE EFFECT OF THE APPEALS BOARD'S DECISION UPON**
13 **WORKERS' COMPENSATION INSURANCE RATES**

14 Insurance pure premium rates are established based upon loss costs and the loss
15 adjustment expenses, as noted above. Once those rates are approved by the Insurance
16 Commissioner as the Claims Cost Benchmark, workers' compensation insurance companies file
17 their own rates with the commissioner and, based upon those rates and the insurer's underwriting
18 guidelines, a premium is charged to its insured employers. Since those rates, and in turn the
19 premiums, are based upon the estimate of costs to be incurred in the future, any changes to those
20 future loss costs or loss adjustment expenses that create additional unpredicted costs may result in
21 inadequate monies to pay claims, even after taking into account amounts loaded into the rates for
22 profit, contingencies and investment income.

23 Insurance companies are in the business of dealing with risk. In workers' compensation,
24 this risk is primarily of an injury occurring to a worker in the employer's workplace. Included in
25 that is typically the nature and extent of the injury, the associated need for medical treatment and
26 the cost of resulting indemnity, and the hazards of litigation and determinations of the Appeals
27 Board in administering the benefit entitlements of the injured worker according to the California
28 Labor Code. When the limits of the Labor Code, particularly Division 4, become unknown,

1 insurance rate adequacy can be placed at risk, and insurance company insolvency can develop.

2 The California Legislature has plenary power to establish California's workers'
3 compensation no-fault system and the benefits to which injured workers are entitled. (Cal.
4 Constitution, Art. XIV, § 4.) In particular, the Legislature has defined how permanent disability
5 from a work injury is determined and established the benefits to which injured workers' are
6 entitled for the permanent disability they may incur resulting from their work injury as set forth in
7 Labor Code Section 4660.

8 The risk of work injuries and the costs associated with them in the state of California have
9 been thoroughly analyzed by many experts for insurance companies, the WCIRB, and research
10 entities such as the Commission on Health Safety and Workers' Compensation [see Labor Code,
11 § 75 et seq.]. These analyses have resulted in the rates filed by the WCIRB and approved by the
12 Insurance Commissioner, which include the costs of permanent disability set forth in the Labor
13 Code and Permanent Disability Rating Schedule (hereinafter "PDRS"). The formal process of
14 reviewing and allowing public comment on these rates was conducted by the Insurance
15 Commissioner through a number of hearings, since the time the current PDRS went into effect in
16 July of 2005.

17 There has been general agreement as to the effect of the PDRS on its cost to the workers'
18 compensation system. This has been supported through data from the Department of Industrial
19 Relations, WCIRB, CHSWC, and other organizations, and provided to the Insurance
20 Commissioner in his rate hearings. The result has been a steady decrease in costs to the workers'
21 compensation system and dramatically declining premiums for employers. Additionally, when
22 the Administrative Director of the Division of Workers' Compensation reviewed the PDRS and
23 proposed changes thorough the rule-making process in 2008, the proposed changes were
24 evaluated by the WCIRB and were quantifiable as to their effect on costs in the worker's
25 compensation system. In other words, the costs in the workers' compensation system pertaining
26 to permanent disability benefits were determinable, predictable, and quantifiable.

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1 **THE APPEALS BOARD DETERMINATION ESTABLISHES AN**
2 **UNPREDICTABLE AND POTENTIALLY COSTLY SYSTEM FOR**
3 **PERMANENT DISABILITY BENEFITS**

4 The decision of the Appeals Board in this matter relies upon holdings pertaining to the
5 permanent disability system prior to the reforms established in SB 899. In particular, the Appeals
6 Board has determined that an injured worker may go outside the PDRS when a rating based upon
7 the diminished future earning capacity (hereinafter "DFEC") would result in a permanent
8 disability award to an individual that is greater than what the PDRS allows. This determination is
9 a rejection of the Legislatures mandate that the PDRS promote "consistency, uniformity, and
10 objectivity," (Lab. Code, §4660(d)) and will, instead, promote unpredictability and additional
11 costs and expenses to the workers' compensation system. It also circumvents the regulatory
12 authority of the Administrative Director of the Division of Workers' Compensation without any
13 determination that the Administrative Director exceeded his or her authority or discretion
14 following the statutorily required promulgation of regulations and approval by the Office of
15 Administrative Law, pursuant to California's Administrative Procedure Act, Cal. Gov't Code,
16 §11340 et seq.

17 When the Legislature established the requirements for determining permanent disability
18 percentages and for the PDRS, it stated that the PDRS is prima facie evidence of the percentage
19 of permanent disability. (Lab. Code, § 4660(c).) This language was similar to language before
20 the SB 899 reforms. The Appeals Board, therefore, determined that evidence to rebut the
21 percentage of permanent disability established by the PDRS would be allowed. However, in
22 establishing the requirements for permanent disability under the reforms, the Legislature gave a
23 specific mandate in how the percentage of permanent disability should be determined. The
24 argument presented by Defendant City and County of San Francisco (hereinafter "City") directly
25 and adequately addresses the problems the Appeals Boards discussion contains, and, therefore,
26 there is no additional benefit in reiterating those within this brief. However, City's argument is
27 supported and supplemented by the fact that the Legislature clearly and directly stated that the
28 schedule shall promote consistency, uniformity, and objectivity in Lab. Code § 4660(d). This is

1 in complete alignment with the requirements of the Insurance Commissioner in carrying out his
2 obligation in determining the costs in the system to approve rates for the purposes of adequacy
3 and solvency and to avoid an out of control and costly system that California experienced just a
4 few years ago.

5
6 **THE APPEALS BOARD IS REQUIRED TO PROMOTE**
7 **CONSISTENCY, UNIFORMITY, AND OBJECTIVITY IN**
8 **MAKING DETERMINATIONS OF PERMANENT**
9 **DISABILITY**

10 The Legislature clearly set forth the requirement that the new PDRS shall promote
11 consistency, uniformity, and objectivity. (Lab. Code, § 4660(d).) Again, City has substantially
12 addressed the problems with the Appeal Board's analysis in this matter. In addition, the Appeals
13 Board's use of individual standards for DFEC conflicts with the Legislature's mandate, and
14 allows the Appeals Board to substitute its standards for that of the Legislature and those
15 established by the Administrative Director within the Administrative Director's authority.
16 Contrary to the Appeals Board's analysis, this is in fact demonstrated by the Legislature's use of
17 clear and unambiguous language in Labor Code § 4660(d) clearly discarding the prior system of
18 rating permanent disability. (See *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313,
19 1325 [72 Cal.Comp.Cases 42, 45].) As the Appeals Board is aware, the prior system of
20 permanent disability contained not just a schedule but an entire additional system of analogous
21 work preclusions, subjective complaints, and lengthy case law to establish permanent disability.
22 The Appeals Board's current holding effectively asks for a return to that system, where the parties
23 dispute the percentage of permanent disability with the use of individualized formulas, expert
24 reports, and litigation by challenging the PDRS and attempt to find an increase for each
25 individual by rebutting the DFEC, and, thereby, move farther away from the consistency,
26 uniformity, and objectivity that the current PDRS provides for and the Legislature demanded.

27 This is not to say that limited exceptions are not allowed. Based upon the language of
28 Labor Code § 4660(d), and as discussed by the Appeals Board, the PDRS is only prima facie
evidence of the percentage of permanent disability. However, the standards established by the

1 Appeals Board for parties to rebut and then establish a different percentage of permanent
2 disability need to be thoughtfully and incrementally established and be supported by reference to
3 the requirements of Labor Code § 4660 and the PDRS so as to establish consistency, uniformity,
4 and objectivity. This approach provides for the benefits that injured workers are entitled to and
5 promotes predictability of the costs in the workers' compensation system.

6
7 **THE DETERMINATIONS OF THE APPEALS BOARD ON**
8 **THE METHODS OF DETERMINING PERMANENT**
9 **DISABILITY SHOULD ONLY BE EFFECTIVE**
10 **PROSPECTIVELY**

11 If the Appeals Board finds on reconsideration and in future proceedings that any part of
12 the PDRS is revised or modified in an incremental and predictable way, such modification should
13 only apply prospectively from the Appeals Board's determination and not to cases previously
14 resolved or subject to being reopened. Labor Code Section 4660(d) states in part:

15 The schedule and any amendment thereto or revision thereof shall
16 apply prospectively and shall apply to and govern only those
17 permanent disabilities that result from compensable injuries
18 received or occurring on and after the effective date of the
19 adoption of the schedule, amendment or revision, as the fact may
20 be.

21 The Legislature recognized the need for prospective application of changes to the
22 permanent disability system to promote consistency, uniformity and objectivity. (Labor Code, §
23 4660(c).) This also leads to predictability and avoids the unintended consequence of imposing
24 unforeseen and uncalculated risk on an entire insurance system.

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3 **CONCLUSION**

4 The Insurance Commissioner urges the Appeals Board to reevaluate its determinations in
5 this matter in line with the arguments set forth by City in its Answer to Applicant's Petition for
6 Reconsideration and Petition for Reconsideration filed in this matter and as provided in this brief
7 and to address the Legislature's clear intent that the PDRS and determinations of permanent
8 disability be consistent, uniform, and objective. In addition, any determinations of the Appeals
9 Board whereby the PDRS or methods of determining permanent disability are revised or altered
10 should be applied prospectively. This approach promotes the public policy of a predictable and
11 equitable workers' compensation insurance system for both injured workers and their employers;
12 insurance rate adequacy; and insurance company solvency.

13 Dated: 5/1/2009

14 ADAM M. COLE, Bar No. 145344
15 General Counsel
16 REID A. MCCLARAN, Bar No. 095755
17 Assistant Chief Counsel
18 CHRISTOPHER A. CITKO, Bar No. 166388
19 Senior Staff Counsel

20 By 

21 CHRISTOPHER A. CITKO

22 *Attorneys for Amicus Curiae the Insurance*
23 *Commissioner of the State of California*
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1 VERIFICATION – CCP 446, 2015.5

2
3 I am the attorney for AMICUS CURIAE STEVE POIZNER, INSURANCE
4 COMMISSIONER OF THE STATE OF CALIFORNIA in the above-entitled action or
5 proceeding. I have read the foregoing AMICUS CURIAE BRIEF and know the content thereof.
6 I certify that the same is true of my own knowledge, except as to those matters which are therein
7 stated upon my information or belief, and as to those matters I believe them to be true.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed on May 1, 2009 at Sacramento, California.

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12 CHRISTOPHER A. CITKO
13 Senior Staff Counsel

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PROOF OF SERVICE BY MAIL – CCP 1031a, 2015.5

I declare that I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within entitled cause. On May 1, 2009, I served the attached **AMICUS CURIAE BRIEF OF STEVE POIZNER, INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA** on the interested parties in said cause, by placing a true copy thereof, enclosed in an envelope addressed as follows:

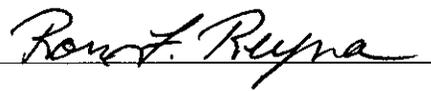
Workers' Compensation Appeals Board (HAND DELIVERED)
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Law Offices of Joseph C. Waxman
114 Sansome Street, Ste. 1205
San Francisco, CA 94104

Office of the City Attorney
Fox Plaza
1390 Market Street 7th Floor
San Francisco, CA 94102-5408

I am readily familiar with the Department of Insurance's practice of collection and processing correspondence for mailing. Under that practice such envelope would be sealed and deposited with U.S. postal service on that same day with postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 1, 2009, at Sacramento, California.


RON REYNA

Ogilvie vs. City and County of San Francisco
Case No. ADJ1177048 (SFO 0487779)