Frances Stevens goes to Appellate Court

By Joe Capurro, CAAA Amicus Counsel

On September 30, 2015, a panel of justices from the California Court of Appeal, First Appellate District, consisting of Justice Hume, Margulies and Dandero heard oral argument in the matter of Stevens v. WCAB commonly referred to as the constitutional challenge to the IMR process. Some of the key elements to the challenge included the lack of due process present in the IMR process, the hidden identity of the IMR consultant, the infringement upon the role of the Courts under the separation of powers clause of the constitution, and that the Legislature exceeded its' grant of power under Article XIV section 4 of the California Constitution when it created a dispute resolution system other than the three mechanisms set forth in that article. Those mechanisms are arbitration, an industrial accident commission (now the WCAB), or the Courts, being the only specified three avenues for resolution of Workers' Compensation matters. In addition, Article XIV section 4 of the California Constitution provides that all decisions of any such tribunal shall be subject to review by the appellate courts of this State.

As applicant was the moving party in the matter, Applicant's Attorney Joseph Waxman, a CAAA member began oral argument. He was quickly confronted with questions from the panel and particularly Justices Hume and Margulies regarding the scope of plenary power of the Legislature granted under Article XIV section 4 of the California Constitution. Mr. Waxman did an excellent job highlighting significant issues with the process and responding to the difficult questions focusing particularly on the scope of plenary power and the apparent due process protections of the UR/IMR process. Mr. Waxman kindly agreed to share time with CAAA at the argument and I had the privilege of arguing on behalf of this organization.

It was clear that our arguments regarding the secretive nature of the IMR process had the greatest impact with the Court and the due process concerns possibly the least. The Court clearly lacked an understanding that the Utilization Review process was exclusively a claims process without any input from the injured worker.

Attorney Kim Card argued on behalf of the Administrative Director and presented their position in a clear and concise manner. However she deflected without a direct answer questioning from Justice Dondero regarding how one could obtain review on issues of fraud, conflict of interest and bias if the identity of the IMR consultant is unknown. Earlier in my remarks I had compared the IMR process to the Wizard of Oz with the cloaked man behind a screen pulling levers and issuing degrees. Justice Dandero reminded Ms Card that in the movie when revealed the wizard turned out to be a traveling medicine man who did not really have the answers to Dorothy's problems. There was significant discussion by the attorney for the Administrative Director of the importance of keeping the review away from all the influence of the various interest groups who currently unduly influence treating doctors, Qmes, Ames, workers' compensation judges and even the Courts. There were assertions that despite the adoption of evidence based medicine as the standard of care, all those participants have steadfastly refused to

enforce that standard. Attorney William Anderson argued for SCIF and Outspoken Enterprises focusing again on the purpose behind keeping the identity of the IMR reviewer secret.

It was clear that all of the Justices had concerns with the IMR process, some favoring some of our positions and some clearly in opposition. We should have an outcome before the end of the year. Whatever the result we can anticipate that these issues will be before the Courts again either on appeal of Stevens to the Supreme Court by whichever party is dissatisfied with the result or before other Appellate Court districts (such as Ramirez now pending before the 3rd Appellate District).