CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

September 12, 2006

Hon. Ronald M. George, Chief Justice
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: Amici Curiae Letter Brief Pursuant to CRC 28(g) Supporting Review of *Zurich U.S., et al. v. Workers' Compensation Appeals Board, et al. (Jack Hablian, et al., Plaintiffs and Real Parties in Interest)*, S145570.

Dear Chief Justice George and Associate Justices:

The Civil Justice Association of California (CJAC)[1], the California Chamber of Commerce (CCC)[2], and the Chamber of Commerce of the United States of America (the National Chamber)[3] urge the Court to grant review in this case and resolve the important

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[1] CJAC is a California non-profit corporation whose hundreds of members are individuals, businesses, professional associations and local governments. Our principal purpose is to educate the public about reforms that will improve California's civil liability laws in terms of fairness, efficiency, economy and certainty. Toward this end, we have petitioned this Court on numerous occasions for redress with respect to various laws that determine who gets paid, how much, and by whom when injured by the allegedly proscribed acts of others. Our efforts in this regard include addressing the scope and application of class action procedure and related practices. See, e.g., *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553; *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429 and *Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116.

[2] The CCC is the largest, voluntary business association within the state of California, with more than 15,000 members, both individual and corporate, representing virtually every economic interest in the state. While CCC represents several of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. The California Chamber acts on behalf of the business community to improve the state's economic climate by representing business on a broad range of legislative, regulatory and legal issues. The Chamber only participates as *amicus curiae* on matters that have a significant impact on California businesses, of which this case is an excellent example.

[3] The National Chamber is the world's largest business federation, and the leading representative of large and small businesses nationwide. It represents an underlying membership of more than three million businesses, state and local chambers of commerce, and professional organizations of every size, in every industry sector, and from every region of the country. The National Chamber regularly advocates the interests of its members in state and federal courts throughout the country on issues of national concern.

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question of law it presents—*viz.*,whether the Workers' Compensation Appeals Board (WCAB) may, absent express statutory authorization, entertain and decide class action claims.

This legal issue arises in the context of prosecution by applicants, on behalf of themselves and "others similarly situated," before the WCAB for *full* payment of workers' compensation benefits for which they were not properly paid in previous proceedings; but the factual context is less important than the unprecedented nature of relief sought: the *class action*. "Class actions" are significantly different from individual hearings, with profound implications for civil justice should class actions ever be grafted onto administrative proceedings. As a federal court has aptly stated about these differences:

> Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. . . . [C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.[4]

Until the WCAB opinion in this case and the appellate court's denial of petitioners' writ for relief from it, one would have thought the answer to the question of whether a class action could be maintained before the WCAB was "no." After all, there is no reference anywhere in the state constitution[5] or the statutory scheme establishing workers' compensation[6] to "class actions." This silence on the subject stands in sharp contrast to the detailed statutory procedures for the prosecution of

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[4] *Castano v. Am. Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746 (citations omitted).

[5] Cal. Const., art. XIV, § 4.

[6] Lab. C. § 3200 *et. seq.*

individual workers' compensation claims.[7] When, as here, individual claim procedures are specifically authorized but "class" or "representative" claims are not mentioned in the entire statutory scheme of workers' compensation, "*expressio unius est exclusio alterius*" springs to mind — "The expression of certain things in a statute necessarily involves exclusion of other things not expressed."[8]

Nor is there any reference in the statute authorizing class actions to the prosecution of same before administrative agencies in general or the WCAB in particular. Indeed, that statutory provision, C. of Civ. Proc. § 382, mentions *only* proceedings before *courts*, not administrative agencies.[9] Neither has the Legislature conferred jurisdiction upon any other administrative agency to entertain "class action" relief and, when administrative agencies have attempted to grab that power for themselves under the guise of "inherent" or "implied" authority, our courts have promptly squelched it.[10]

Recent attention to workers' compensation by the Governor and Legislature yielded major statutory reform intended to "lower costs" and improve the system's efficiency, which the Legislature recognized was at a "crisis" level that was "killing jobs for hard-working Californians."[11] Significantly, none of these reforms include authorization for "class actions" before the WCAB for the obvious reason that such a

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[7] See, e.g., Lab. C. §§ 3602(a), 3753 & 5303.

[8] *Dyna-Med, Inc. v. Fair Employment Housing Comm.* (1987) 43 Cal.3d 1379, 1391, fn. 13.

[9] *I.e.*, ". . . [W]hen the parties are numerous, and it is impracticable to bring them all before the *court*, one or more may sue or defend for the benefit of all." CCP § 382; emphasis added. Significantly, the WCAB order conferring upon itself the right to "entertain class action relief," does not reference or use § 382 as the guiding statute, but instead reaches out and borrows FRCP 23. This raises a significant issue of unconstitutional delegation: Can an administrative agency adopt another jurisdiction's rules to guide proceedings before it when neither the Legislature nor the People have any say about the content of that jurisdiction's rules? See, *e.g.*, *Kugler v. Yokum* (1968) 69 Cal.2d 371, 376-377.

[10] *Ramos v. County of Madera* (1971) 4 Cal.3d 685,691 ("It is clear that the hearing scheme contemplated by the Legislature [for welfare applicants and recipients] does not contemplate class actions."). See also *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 927, fn. 1 ("There is no language in . . . § 382 to suggest that it applies to any but judicial tribunals.").

[11] Assemb. Republican Caucus, analysis of SB 899 (2003-2004 Reg. sess.), April 15, 2004.

drastic change would be antithetical to "cost savings."[12] Absent any express statutory authorization – and faced with a recent flurry of reforms whose policy objective would be thwarted by the assertion of class actions before the WCAB – whence, then, derives that agency's authority to "entertain"such actions?

The WCAB states that its "jurisdiction to entertain class actions" was approved in *Addington v. Industrial Indemnity Co.* (1972) 24 Cal.App.3d 802,[13] an assertion presumably made with considerable dubiety given the board has never, until this case, "entertained" a class action, nor can it point to any procedures it has ever adopted concerning the maintenance of class actions. More importantly and contrary to the WCAB's characterization of *Addington*, the opinion makes clear that in the WCAB proceeding the court was reviewing, the board denied class action relief on the ground that the "enforcement remedies provided by board rule[s] and . . . the Labor Code are 'just as advantageous and of just as much benefit to each applicant, as any form of class litigation.' " (*Id.* at 810.) The appellate opinion in *Addington* did not disapprove of that ruling, which is an obvious rejection by the board of the appropriateness of class action relief, but characterized it as "peculiar to [the board's] own jurisdiction and not necessarily applicable to the superior court." (*Id.*) Indeed, the *Addington* judicial opinion was concerned with defendants' attempt to construe the board's disapproval of class action relief before it as *also* precluding *judicial* class action relief, which the appellate opinion stated was beyond the board's authority. *Addington* clarified that "the basic class action [in that case] was being pursued *in the superior court.* Before the board, plaintiffs

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[12] See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions* (1986) 86 COLUM. L. REV. 669, 671-72 (class actions create "misincentives that unnecessarily frustrate the utility of private enforcement," make the "incentive to litigate . . . inherently excessive, in large part because the parties to an action do not bear its public costs," leading to a "failure to internalize the full cost of litigation, including the costs of the judicial system," resulting in an artificial inflation in the demand for litigation as a "public subsidy equal to these costs, and the private incentive to litigate exceeds the social incentive," causing "an excessive reliance on law and lawyers;" and finally, "the social benefits of litigation brought . . . should be discounted" because "rational, well-informed plaintiffs might bring a [class action] that has no chance of success at trial in order to extort a recovery from the defendants.").

[13] Order denying petitioners' request for reconsideration and removal. (Hablian v. Zurich, U.S., WCAB, Case No. VNO 0425788.)

merely sought ancillary relief which, if granted, made it easier for them to obtain their superior court [class action] remedy." (*Id.*; emphasis added.)

Plaintiffs[14] attempt to extract from *Addington* an implicit authorization to allow class action relief due to the express rejection of same by the board (which the appellate court approved). Yet it does not follow in law or logic that denial of a procedural remedy for a specific reason implies a general authority to permit it for another reason that is neither raised nor discussed; rejection by the board of a class action claim on the ground that it is not superior to prosecution of individual claims does not, in other words, mean that the class action claim may proceed before the board should it sometime prove superior to the individual claim. "Language used in any opinion is . . . to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered."[15] The authority of the board to "entertain class action relief" was neither raised nor discussed in the *Addington* appellate opinion because the board had already rejected it and the court, in reviewing that decision, affirmed it. Accordingly, even the most tortured reasoning cannot tease from *Addington* any semblance of a holding that permits the WCAB to "entertain class action" relief.

Once *Addington* is dispensed with as authority for the WCAB to entertain class action relief, there is nothing by way of any other authority, public policy or common-sense that justifies the WCAB's arrogation to itself of this unprecedented power. Plaintiffs concede this when, in their answer to the petition, they cite *Addington* as their sole authority and then argue that petitioners' attempt to get it reconsidered and reversed should be rejected because the issue is not "ripe."[16] It is not ripe, they claim, because the WCAB could conceivably decide, as the board did in *Addington*, that the "class action"

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[14] Real Parties in Interest herein.

[15] *Ginns v. Savage* (1964) 61 Cal.2d 520, 524 fn. 2.

[16] Answer to Pet. for Rev., p. 1, 4.

procedure was not superior to individual actions and refuse to certify the class.[17] Perhaps, but since the Workers' Compensation Judge has already, in obvious reliance upon the board's decision in this case that it has jurisdiction to entertain class action relief, ordered the parties to come up with a discovery plan involving a scope of query appropriate to the class relief sought, the threshold issue of whether the WCAB has that authority seems *ripe* for decision. Granted, delay in litigation development – as with the effect of time's passage on fresh fruit – increases ripeness; but when, as here, the public interest is plainly implicated, review is warranted earlier, not after rot has set in.[18]

Other jurisdictions that have considered whether to allow administrative agencies to arrogate unto themselves class action relief have, like California, rejected the practice. In *Stevenson v. Pennsylvania* (1979) 41 Pa.Cmwlth. 618, 399 A.2d 1180, for example, plaintiffs sought class relief before that state's Board of Arbitration of Claims against the Department of Revenue on a claim that lottery winners had not received the particular motor home depicted on their lottery tickets. Petitioners sought review of the decision of the Board denying them to maintain a class action before it. The Pennsylvania court repelled petitioners' class action, explaining:

> [A] class action may not be maintained where there exists an adequate administrative remedy. If, in the face of an adequate administrative remedy for an individual, no class action may be maintained in a court, then there is no reason to believe that one may be maintained before an agency.[19]

That there is an adequate administrative remedy in this case is shown by plaintiffs' assertion in their second amended complaint that they "do not waive their individual

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[17] *Id.* at p. 5.

[18] "In considering whether issues are ripe for review, account should also be taken of the public interest in a prompt answer to a particular legal question and the relative hardship on the parties if a decision is deferred." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 171.)

[19] *Id.* at 623.

rights to such redress for their individual benefits due in the WCAB forum."[20] Confining them to pursuit of their individual claims before the WCAB, and leaving class action relief for the courts, is fair, sensible and comports with the legislative purpose of workers' compensation. To hold otherwise would wreak havoc upon a system designed to process individual actions by employees for each injury sustained, and do violence to the intent of workers' compensation.

For all these reasons, amici urge the Court to grant review in this case and decide whether the WCAB can, in the absence of express statutory authorization, entertain and grant class action relief.

Respectfully submitted,

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FJH:wp
(Proof of Service attached)

[20] Pet. for Rev., p. 9.

PROOF OF SERVICE

I, David Cooper, am employed in the city of Sacramento, Sacramento County, State of California. I am over the age of 18 years and not a party to the within action. My business address is The Senator Office Building, 1121 L Street, Suite 404, Sacramento, CA 95814.

On September 12, 2006, I served the foregoing document(s) described as: Amici Curiae Letter Brief of the Civil Justice Association of California, the California Chamber of Commerce and The Chamber of Commerce of the United States of America Supporting Review of *Zurich U.S., et al. v. Workers' Compensation Appeals Board, et al. (Hablian)*, S145570 on all interested parties in this action by placing a true copy thereof in a sealed envelope(s) addressed as follows:

See Attached Service List

[X](BY MAIL) I am readily familiar with the practice of the Senator Office Building for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope(s) was placed for collection and mailing on the above date according to the ordinary practice of the law firm of Fred J. Hiestand, A.P.C.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 12th day of September 2006 at Sacramento, California.

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