S232197

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIRK KING, et al.

Plaintiffs, Appellants and Respondents

vs.

COMPPARTNERS, INC., et al.

Defendants, Respondents and Petitioners.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two (No. E063527)

Superior Court, County of Riverside (No. RIC 1409797)
Honorable Sharon J. Waters

PETITIONERS' OPENING BRIEF ON THE MERITS

MUNGER, TOLLES & OLSON LLP
*Fred A. Rowley, Jr. (SBN 192298)
Jeffrey Y. Wu (SBN 248784)
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Fred.Rowley@mto.com
Jeffrey.Wu@mto.com

Joshua S. Meltzer (SBN 291641)
560 Mission Street, Twenty-Seventh Floor
San Francisco, CA 94105
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Joshua.Meltzer@mto.com

Attorneys for Defendant, Respondent and Petitioner
COMPPARTNERS, INC.

MURCHISON & CUMMING, LLP
William D. Naeve (SBN 92270)
Terry L. Kesinger (SBN 158576)
David A. Winkle (SBN 123441)
18201 Von Karman Avenue
Irvine, California 92612-1077
Telephone: (714) 972-9977
Facsimile: (714) 972-1404
wnaeve@murchisonlaw.com
tkesinger@murchisonlaw.com
dwinkle@murchisonlaw.com

Attorneys for Defendants, Respondents and Petitioners
COMPPARTNERS, INC. and NARESH SHARMA, M.D.

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ISSUES PRESENTED

1. Is a civil claim by an injured worker who challenges a decision made by a Workers' Compensation Utilization Review Organization which performed Utilization Review of recommendations made by the injured worker's treating physician preempted by the exclusive remedy provisions of the Labor Code?

2. Does a Workers' Compensation Utilization Review Organization which conducts a Utilization Review of recommendations made by the injured worker's treating physician pursuant to Labor Code section 4610(b) owe a common law duty of care to the injured worker?

3. Did the Court of Appeal err when it reversed the trial court's refusal to grant plaintiffs leave to amend because plaintiffs' claims were preempted as a matter of California law and because defendants owed no common law duty of care to plaintiffs?

INTRODUCTION

This case centers on the core "compensation bargain" that grounds California's statutory system for compensating and treating workers injured on the job. (Cf. *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) Under that bargain, "the employer assumes liability for industrial personal injury or death without regard to fault" (*ibid.*), including the costs of medical treatment reasonably necessary to address the worker's injury (Labor Code, § 400, subd. (a)).[1] In exchange, the injured employee is limited to the remedies available through the workers' compensation system, and "gives up the wider range of damages potentially available in tort." (*Shoemaker*, *supra*, at p. 16.)

Over the past two decades, the Legislature has worked to hone this tradeoff in the context of medical treatment requests, adopting reforms aimed at "ensur[ing] quality, standardized medical care for workers in a prompt and expeditious manner" while avoiding "costly and time-consuming" litigation. (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1079, 1089.) A critical aspect of these reforms is that a dispute over a treating physician's request for medical treatment is resolved by medical professionals and not by the courts. Under the scheme established by Section 4610 *et seq.*, a disputed treatment request is first subject to "utilization review" to determine whether it is medically necessary. If the request is denied by a reviewing physician, the claimant may appeal to an Independent Medical Review ("IMR") panel, which is, by statute, the exclusive mechanism to resolve a utilization review dispute. The Court of Appeal's decision, however, allows plaintiffs to side-step this scheme and litigate a dispute over the denial of a treatment request through

[1] All statutory references are to the Labor Code unless otherwise indicated.

a tort lawsuit. This result would undermine the Legislature's carefully-balanced scheme for workers' compensation and create a novel class of remedial tort claims. This Court should reverse.

Plaintiff Kirk King suffered a workplace injury, and his treating physician prescribed a psychotropic drug, Klonopin, to ease depression and anxiety accompanying the injury. Defendant CompPartners, the utilization review provider retained on behalf of King's employer, found Klonopin to be medically unnecessary. King then allegedly suffered seizures as a result of withdrawal from Klonopin.

King and his spouse filed this action against, among others, CompPartners and its utilization review physicians, asserting causes of action for general and professional negligence, infliction of emotional distress, and loss of consortium. The gravamen of the complaint is that the reviewing physicians were negligent in denying the treating physician's request for Klonopin because they failed to permit a gradual reduction in dosage or warn about the consequences of withdrawal. (App. 4.)[2] The trial court sustained Defendants' demurrer without leave to amend, finding that Plaintiffs' lawsuit was preempted by the Workers' Compensation Act ("WCA")'s exclusive remedies. (App. 84.) Alternatively, the court concluded that Plaintiffs' negligence claims failed as a matter of law because there was no doctor-patient relationship, and hence no duty of care, between the reviewing physicians and King.

The Court of Appeal reversed the denial of leave to amend on both grounds. The court recognized that the WCA preempted Plaintiffs' tort

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[2] "App." refers to Appellants' Appendix, and "AOB" to Appellants' Opening Brief in the Court of Appeal.

claims to the extent they asserted the reviewing physician was negligent because Klonopin "was medically necessary until Kirk was properly weaned. " (Op., 13.) The court believed, however, Plaintiffs had a potential theory that would bring their tort claims outside of the workers' compensation system: that the reviewing physician "harmed Kirk by *not informing* Kirk of the possible consequences of abruptly ceasing Klonopin." (*Id.* at 12-13, italics added.) While the former claim would challenge a medical necessity decision that "is directly part of the claims process," the court reasoned that a failure-to-warn theory "would be beyond the 'medical necessity' determination." (*Id.* at 13.) The court also reversed the trial court's alternative tort ruling, holding that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed." (*Id*. at 14.) Although Plaintiffs' allegations were inadequate to determine the "scope or discharge of that duty," the court concluded that leave to amend was warranted because Plaintiffs indicated they could allege additional facts. (*Id.* at 18.)

On each of these points, the Court of Appeal erred as a matter of law. *First*, Plaintiffs' failure-to-warn theory falls within the scope of the broad exclusivity provisions governing the IMR process. In establishing that process, the Legislature sought to ensure that "[a]ny dispute over a utilization review decision" would ultimately be resolved by a physician, administratively, and based on "medical records, provider reports, and other [submitted] information." (*Stevens*, *supra*, 241 Cal.App.4th at p. 1090.) The whole point of this process was to avoid the previous "costly and time-consuming process" of using dueling medical evaluators to litigate treatment before a workers' compensation judge, a *de novo* Appeals Board hearing, and, ultimately, the Court of Appeal. (*Id.* at pp. 1088-1089.) The narrow grounds fixed by the Legislature for reviewing an IMR decision—

fraud, bias, and clear error—underscore that the IMR process provides the sole means of challenging a utilization review decision.

Because the WCA requires reviewing physicians to explain their decisions in writing (§ 4610, subd. (g)(4)), the warning Plaintiffs demand here is clearly encompassed by the utilization review process. Indeed, any claim asserting that a reviewing physician failed adequately to warn the claimant about the *medical* consequences of an adverse utilization review decision is just a restyled challenged to the decision itself. In alleging that the reviewing physician here should have warned King about the need for a Klonopin weaning regimen, Plaintiffs are effectively asserting that the reviewing physician should have modified, rather than denied, the recommendation or qualified the denial. If a claimant could sidestep the IMR process merely by alleging that the reviewing physician failed to provide an adequately detailed or qualified explanation, the exclusivity provisions would be set at naught.

Second, Plaintiffs' failure-to-warn theory is independently preempted because this Court has broadly construed the workers' compensation exclusivity provisions to apply where "the alleged injury is 'collateral to or derivative of' an injury compensable by the exclusive remedies of the WCA." (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811.) Courts have repeatedly invoked this principle in holding that injuries flowing from the workers' compensation process are subject to the scheme's remedies and limitations. Because King's injuries here are, on Plaintiffs' own theory, derivative of the utilization review process, they have a direct factual nexus to the workplace injury King suffered.

In suggesting that a failure-to-warn theory would place Plaintiffs' clams "beyond" the scope of preempted workers' compensation claims, the Court of Appeal fundamentally misconstrued *Vacanti*. The court read that decision to hold that "if a new injury arises or the prior workplace injury is aggravated, then the exclusivity provisions do not apply." (Op., 12, citing *Vacanti*, *supra*, 24 Cal.4th at pp. 813-814.) But *Vacanti* did not say that; it noted, rather, that a plaintiff could proceed in tort if "the alleged injury—the aggravation of an existing workplace injury—did not occur in the course of an employment relationship." (*Vacanti*, *supra*, at p. 814.) That manifestly is not the situation here, for the sole injuries Plaintiffs have pled are the result of the workers' compensation process covering the treatment for King's original injury.

Third, even if Plaintiffs' tort claims somehow fall outside the scope of the exclusivity provisions for the IMR and workers' compensation remedies, the Court of Appeal erred in allowing Plaintiffs to proceed because CompPartners and its reviewing physicians owed no duty to render medical advice to King. In holding that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed" (Op., 14), the Opinion below collapses the statutory distinction between reviewing and treating physicians, and threatens to distort the policies underlying the utilization review process.

The WCA draws a clear distinction between the roles of treating physician and reviewing physician. A treating physician examines the claimant and recommends a course of care for the claimant's malady; a reviewing physician evaluates and makes a judgment about the treating physician's *recommendation*, testing it against a treatment schedule mandated by statute. A treating physician examines the claimant as a patient; a "utilization review physician does not physically examine the

[employee]" or even necessarily "review all pertinent medical records." (*Simmons v. State Dept. of Mental Health* (2005 Cal. W.C.A.B.) 70 Cal. Comp. Cases 866, 2005 WL 1489616, at *7.) Whereas a treating physician deals directly with the claimant, a reviewing physician communicates her decision primarily to the treating physician.

These structural distinctions foreclose any suggestion that a reviewing physician "has a doctor-patient relationship" with the workers' compensation claimant such that he or she owes the claimant the same duty of care as a *treating* physician. Nor do general tort principles alter that result, for the factors recognized by the courts weigh decisively against recognizing such a duty. It is not reasonably foreseeable that a *reviewing* physician's purportedly deficient explanation would harm the patient, given that the treating physician is ultimately responsible for giving care and advice. This is doubly so because any adverse utilization review decision may be challenged, on an expedited basis if necessary, by way of an IMR. For the same reasons, there is no direct causal link between the disputed decision here and the alleged injuries suffered by King. Under Plaintiffs' own theory, the direct cause of the injury was the immediate cessation of Klonopin, and it was King's treating physician—the physician who prescribed the drug—who had the duty to oversee his care.

If upheld, the Opinion below would portend expanded liability for utilization review providers and undercut the Legislature's purpose in establishing the utilization review and IMR processes. Faced with the tort duties of a treating physician, reviewing physicians would need to go beyond evaluating a treatment recommendation and *provide medical treatment*. This case highlights the point, for Plaintiffs' core contention is that the reviewing physician should have rendered medical advice alongside the decision to deny Klonopin. The upshot is that utilization review

providers would become care partners and *insurers* for treating physicians, a role completely at odds with the limited duties set out in the WCA.

The expanded medical duties borne by utilization review physicians could not but slow that process and the delivery of care. That would defeat the "quick resolution of treatment requests" that utilization review was intended to further. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 241 (*Sandhagen*).) The availability of tort remedies would drive disputes over utilization review decisions out of the IMR system and into the courts. That would defeat the Legislature's goal of avoiding "costly and time consuming" disputes. (*Ibid.*) And because this litigation would drive up workers' compensation costs, it would upset the "compensation bargain" between employers and employees that lies at the heart of the workers' compensation system.

This Court should reverse.

STATEMENT OF THE CASE

A. Statement of Facts

The facts, as pled in the complaint and supplemented in Plaintiffs' arguments for leave to amend, are these:

In February 2008, Kirk King sustained a back injury during the course of his employment. (App. 3.) Chronic back pain from this injury led King to experience anxiety and depression. (*Ibid.*) King sought medical care, and a physician prescribed him psychotropic medications, including Klonopin, in July 2011. (*Ibid.*) Because King's anxiety and depression arose out of his workplace injury, the prescription for Klonopin was covered by his employer through workers' compensation. (Op., 3.) Although King was prescribed Klonopin to treat his anxiety, Klonopin is

also commonly used as an anti-seizure medication. (AOB 4.) King did not suffer any seizures while taking Klonopin. (*Ibid.*)

Under Section 4610, subdivisions (a) and (b), King's employer was required to set up a "utilization review process" to "prospectively, retrospectively, or concurrently review and approve, modify, delay or deny ... treatment recommendations by physicians." An employer can set up a utilization review process "either directly or through its insurer or an entity with which an employer or insurer contracts for these services." (§ 4610, subd. (b).) Consistent with this statute, CompPartners, a company licensed in California as a utilization review management company, was retained to manage utilization review for King's employer. (App. 2.) Defendants Dr. Naresh Sharma and Dr. Mohammed Ashraf Ali were alleged to be licensed physicians employed by CompPartners to conduct utilization reviews. (*Ibid.*)

In July 2013, Dr. Sharma performed a utilization review of King's psychotropic medication regimen. (App. 3.) In determining whether to "approve, modify, delay, or deny medical treatment services," a utilization review must follow detailed criteria established by the Labor Code. (§ 4610, subd. (f).) One of these criteria is that the decision must be consistent with the medical treatment utilization schedule ("MTUS"), which incorporates "evidence-based, peer-reviewed, nationally recognized standards of care" and addresses the "appropriateness of all treatment procedures ... commonly performed in workers' compensation cases." (§ 5307.27, subd. (a).) Plaintiffs do not allege that Dr. Sharma or CompPartners acted contrary to the MTUS or to any statutory or regulatory requirements in conducting the utilization review.

As a result of the utilization review, Dr. Sharma "de-certified" King's prescription for Klonopin. (App. 3.) The Labor Code requires that utilization review decisions be promptly communicated to an employee's treating physician:

> Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review.

(§ 4610, subd. (g)(3)(A).) Plaintiffs do not allege that Dr. Sharma failed to provide the required notice to King's treating physician. According to Plaintiffs' proffered allegations, however, Dr. Sharma "knew that his decision to 'de-certify' the drug would lead to the immediate denial of Klonopin to Mr. King, without any further review by any of his treating physicians or any psychiatric care provider." (AOB 4.)

Section 4610.5, subdivision (d), provides: "If a utilization review decision denies, modifies, or delays a treatment recommendation, the employee may request an independent medical review as provided by this section." When notifying an employee of the denial, modification or delay of a treatment recommendation, the employer is required to provide the employee with a form and addressed envelope with which the employee can initiate the IMR process. (§ 4610.5, subd. (f).) Plaintiffs do not allege in their complaint or briefs whether King sought an IMR to contest the utilization review decision decertifying Klonopin.

Plaintiffs allege that as a result of Dr. Sharma's decision to decertify Klonopin, King was "forced to undergo an abrupt withdrawal from the

Klonopin." (App. 4.) They further allege that Dr. Sharma "failed to provide any warnings concerning a gradual reduction of the dosage or continue Mr. King on the Klonopin until the step-down process of such medication was completed." (*Ibid.*) Without a weaning regimen, Plaintiffs aver, King suffered four seizures resulting in additional physical injury. (*Ibid.*)

According to the complaint, King sought to return to his Klonopin regimen in September 2013, and Dr. Mohammed Ashraf Ali, an alleged CompPartners employee, performed another utilization review and denied the request for Klonopin. (App. 4.) Plaintiffs allege that, like Dr. Sharma, Dr. Ali did not authorize a step-down regimen of Klonopin or warn of the risks of abrupt withdrawal of Klonopin. (*Ibid.*)

B. The Trial Court Proceedings

Kirk King and his wife Sara King filed a complaint in California Superior Court against CompPartners, Dr. Sharma, Dr. Ali, Whittier Drugs, and a number of unnamed defendants.[3] Plaintiffs assert that the physician who conducted the initial utilization review, Dr. Sharma, was negligent because he failed to note the need for a "step-down" or weaning regimen in his decision. (App. 4.) According to Plaintiffs, Dr. Sharma failed to evaluate King in person and, as an anaesthesiologist, lacked the necessary training to perform the utilization review for Klonopin. (*Ibid.*) In their proffered facts, Plaintiffs contend that Dr. Sharma should have known that abrupt cessation of Klonopin entailed a risk of seizures. (AOB 4.) King asserts causes of action for negligence, professional negligence, intentional

[3] CompPartners and Dr. Sharma are the only defendants that are parties to this appeal.

and negligent infliction of emotional distress, and Ms. King alleges loss of consortium.

Defendants CompPartners and Dr. Sharma demurred to the complaint. Defendants argued, among other things, that Plaintiffs' claims were preempted by the Labor Code, and that their negligence claims failed because there was no doctor-patient relationship between Dr. Sharma and King. (App. 23-40.) In response, Plaintiffs acknowledged that any claims challenging the result of the utilization review decision to decertify Klonopin would be preempted by the WCA. (*Id.* at 48.) Plaintiffs argued, however, that by challenging Defendants' "immediate refusal to approve a Klonopin weaning regimen," they alleged a negligent "treatment decision[] affecting patients" that was not preempted. (*Id.* at 48-49.) They also argued that the utilization review was a professional service provided in the health care context, thus creating a duty of care to King. (*Id.* at 51.)

On February 24, 2015, the trial court issued a tentative ruling sustaining the demurrer without leave to amend based upon the workers' compensation exclusivity doctrine. (App. 71.) At the demurrer hearing, Plaintiffs acknowledged that injuries "collateral or derivative of the workplace injury" would be preempted, but argued that King's injury was a "wholly separate injury" arising from the utilization review process. (*Id.* at 101.) Plaintiffs also argued they could amend their complaint to allege additional facts to establish the existence of a physician-patient relationship. (*Id.* at 108-109.) The trial court sustained the demurrer, both on the ground that the claims were preempted and that Defendants did not owe a duty to King, and denied leave to amend. (*Id.* at 84, 111-112).

C. The Court of Appeal Decision

Plaintiffs appealed the trial court decision sustaining the demurrer, identifying additional facts they would plead in an amended complaint. (AOB 4; *ante*, 8-11.)

In a published opinion, the Court of Appeal affirmed the order sustaining the demurrer, but reversed the trial court's denial of leave to amend. The court recognized that the WCA provides the exclusive remedy not only for injuries sustained in the workplace, but also for "'certain ... claims deemed collateral to or derivative of the employees' injury.'" (Op.10, citation omitted.) In the court's view, however, the conditions of compensation for workers' compensation were not met because "there are no allegations Kirk was working at the time of the seizures," and "[t]he seizure injury was not proximately caused by Kirk's job because the cause of the seizures is alleged to be Sharma's failure to provide appropriate information or a weaning regime—nothing about Kirk's job is alleged to be the cause of the seizures." (*Id.* at 11.)

The court noted that in *Vacanti*, *supra*, 24 Cal.4th 800, this Court explained that "injuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (Op., 11, quoting *Vacanti*, *supra*, at p. 815.) But the court "interpret[ed] *Vacanti* to mean that if something goes wrong in the claims process for the work place injury, such as collecting the money for the workplace injury, then that collateral claim must stay within the exclusive province of workers' compensation." (*Id.* at 12.) The court distinguished such payment-related claims from circumstances where "a new injury arises or the prior

workplace injury is aggravated," in which case it concluded that the "exclusivity provisions do not necessarily apply." (*Ibid.*)

The court determined that Plaintiffs' claims would meet *Vacanti*'s test, "arising out of and in the course of the workers' compensation claims process," only to the extent that the claim was based on Dr. Sharma's "medical necessity determination." (Op., 13.) The court characterized Plaintiffs as making two possible claims. One claim would be that Dr. Sharma harmed King by "incorrectly determining Klonopin was medically unnecessary, because the drug was medically necessary until Kirk was properly weaned from it." (*Ibid.*) This type of claim, the court noted, would be preempted by the WCA "because the Kings are directly challenging Sharma's medical necessity determination." (*Ibid.*) The court contrasted this with a claim that "Sharma harmed Kirk by not informing Kirk of the possible consequences of abruptly ceasing Klonopin," characterizing this as a "second step in the utilization review process: Sharma determines the drug is medically unnecessary and must warn Kirk of the possible consequences of that decision." (*Id.* at 12-13.) The court held that such a failure-to-warn claim would not be "preempted by the WCA because that warning would be beyond the 'medical necessity' determination made by Sharma." (*Id.* at 13.) Because of the "uncertainty of the allegations in the complaint," the court affirmed the order sustaining the demurrer, but held that the trial court erred by denying Plaintiffs leave to amend. (*Ibid.*)

Citing to *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, the court held further that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed." (Op., 14.) On that basis, the court held that Dr. Sharma owed King a duty of care. (*Id.* at 17.) Because the complaint alleged insufficient facts to

determine the "scope or discharge of that duty," the court affirmed the trial court's order sustaining the demurrer as to the duty. (*Id.* at 18-19.) Again, however, the court determined the trial court erred in denying Plaintiffs leave to amend. (*Ibid.*)

Defendants filed a petition for review on February 16, 2016, and this Court granted the petition on April 13, 2016.

ARGUMENT

I. PLAINTIFFS' CIVIL CLAIMS ARE PREEMPTED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WCA

A. The Legislature Created A Comprehensive Workers' Compensation System Designed To Efficiently And Fairly Compensate Employees Outside The Tort System For Injuries Arising Out Of Employment

The State Constitution gives the Legislature plenary power "to create[] and enforce a complete system of workers' compensation." (Cal. Const., art. XIV, § 4.) Pursuant to this authority, the Legislature enacted the WCA, a comprehensive workers' compensation system. (Labor Code § 3201 *et seq*.) The foundation of the WCA is the "compensation bargain," under which the employee benefits from "relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." (*Vacanti*, *supra*, 24 Cal.4th at p. 811, quoting *Shoemaker*, *supra*, 52 Cal.3d at p. 16.)

Over time, the Legislature has modified the WCA to better effectuate its purpose. Most recently, in 2004 and again in 2013, the Legislature implemented significant changes to the system for reviewing requests for medical treatment under workers' compensation. Until 2004, there had been a rebuttable presumption that the treating physician's

medical necessity determinations were correct. (*Stevens, supra*, 241 Cal.App.4th at p. 1088.) To challenge the treating physician's recommendation, the employer needed to resort to a "cumbersome, lengthy, and potentially costly [dispute resolution] process." (*Sandhagen, supra*, 44 Cal.4th at p. 238.) Unless they stipulated to the same medical evaluator, the employer and employee would each retain an evaluator to determine a treatment's medical necessity. (*Stevens*, *supra*, at p. 1088.) Either party could challenge an adverse medical-necessity determination, leading to a hearing, with dueling experts, before a workers' compensation judge and plenary review by the Appeals Board. (*Ibid.*)

In response to "skyrocketing workers' compensation costs" (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 279), the Legislature enacted new provisions, taking effect in 2004, aimed at "controlling ... costs while simultaneously ensuring workers' access to prompt, quality, standardized medical care." (*Sandhagen, supra*, 44 Cal.4th at p. 243.) The Legislature instituted the utilization review process "to ensure quality, standardized medical care for workers in a prompt and expeditious manner," and to "balance[] the dual interests of speed and accuracy." (*Id.* at p. 241.) Through the utilization review process, employers "prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure and relieve, treatment recommendations by physicians." (§ 4610, subd. (a).) Every employer is required to establish a utilization review process, "either directly or through its insurer or an entity with which an employer or insurer contracts for these services." (*Id.*, subd. (b).) The legislation also called for a "medical treatment utilization schedule [MTUS] to establish uniform guidelines for evaluating treatment requests." (*Sandhagen*, *supra*, at p. 240.) These uniform guidelines incorporate

"'evidence-based, peer-reviewed, nationally recognized standards of care' and address the 'appropriateness of all treatment procedures ... commonly performed in workers' compensation cases.'" (*Ibid.*, quoting § 5307.27.) The statute created a "rebuttable presumption that the treatment guidelines in the utilization schedule were correct on the issue of extent and scope of medical treatment." (*Ibid.*)

Still concerned with the cost and uncertainty of the medical claims process, the Legislature implemented further reforms in 2013. The Legislature found that "the current system of resolving disputes over the medical necessity of requested treatment is costly, time consuming, and does not uniformly result in the provision of treatment that adheres to the highest standards of evidence-based medicine, adversely affecting the health and safety of workers injured in the course of employment." (Stats. 2012, ch. 363, § 1, subd. (d).) The Legislature further found that "having medical professionals ultimately determine the necessity of requested treatment furthers the social policy of this state in reference to using evidence-based medicine to provide injured workers with the highest quality of medical care and that the provision of the act establishing independent medical review are necessary to implement that policy." (*Id.*, subd. (e).) This legislation created the IMR process for review of utilization review decisions.

The present system, in effect at the time of King's utilization review, operates as follows. A worker's treating physician recommends a treatment, which is then reviewed through the employer's utilization review process. This process is regulated by statute and must conform to the MTUS. (§ 4610.) If the utilization reviewer agrees with the treating physician's recommendation, the decision is final and the employer cannot appeal. (*Stevens*, *supra*, 241 Cal.App.4th at p. 1090; § 4610.5, subds. (d),

(e).) If the utilization review "denies, modifies, or delays a treatment recommendation, the employee may request an independent medical review." (§ 4610.5, subd. (d).) An employee may in turn appeal an adverse IMR, on limited grounds, to the Workers' Compensation Appeals Board, and eventually to the Court of Appeal. (*Stevens*, *supra*, at p. 1091; §§ 4610.6, subd. (h), 5950.)

B. Plaintiffs' Claims Are Preempted By Labor Code Section 4610.5, Which Provides The Exclusive Method For Challenging Utilization Review Decisions

Section 4610.5 provides the exclusive avenue for reviewing or appealing utilization review decisions: "A utilization review decision may be reviewed or appealed *only by independent medical review pursuant to this section*." (§ 4610.5, subd. (e), italics added.) Section 4062, subdivision (b), likewise provides: "If the employee objects to a decision made pursuant to Section 4610 to modify, delay, or deny a request for authorization of a medical treatment recommendation made by a treating physician, *the objection shall be resolved only in accordance with the independent medical review process established in Section 4610.5*." (Italics added.) "[U]tilization review decision" means "a decision pursuant to Section 4610 to modify, delay, or deny, based in whole or in part on medical necessity to cure or relieve, a treatment recommendation or recommendations by a physician ... ." (§ 4610.5, subd. (c)(3).)

At their core, Plaintiffs' claims challenge a utilization review decision, and are therefore preempted by Section 4610.5. Plaintiffs do not dispute that any challenge to Dr. Sharma's decision to de-certify Klonopin would be preempted by the Labor Code's exclusivity provisions. (App. 48 ["challenging or appealing the decision to de-certify Klonopin ... would absolutely be limited to the redress procedures set forth in the WCA"].)

Plaintiffs argue the exclusivity provisions do not cover two theories that that they allege, or could allege in an amended complaint: that Dr. Sharma failed (1) to provide a weaning regimen rather than an abrupt withdrawal of Klonopin, and (2) to warn King of the potential dangers of abrupt withdrawal.

The Court of Appeal correctly recognized that the first of these claims, regarding the weaning regimen, is preempted because it challenges Dr. Sharma's utilization review decision. Just as Plaintiffs concededly cannot bring a civil claim asserting that the decision should have maintained King's Klonopin treatment, so too are they barred from bringing a civil claim asserting that decision should have maintained King's Klonopin treatment for a limited period of time. In either case, Plaintiffs are challenging the utilization review decision to "modify, delay, or deny ... a treatment recommendation or recommendations by a physician." (§ 4610.5, subd. (c)(3).)

The Court of Appeal erred, however, in treating Plaintiffs' potential failure-to-warn claim as exempted from the exclusivity provision on the ground that it involved a "second step in the utilization review process." (Op., 13.) The Court's artificial distinction between the reviewer's decision about whether Klonopin was medically necessary and the adequacy of his communications about the decision is at odds with both the statutory language and the underlying purpose and structure of the workers' compensation regime.

The workers' compensation system is designed to funnel all disputes over utilization review decisions through the IMR process. Section 4610.5, subdivision (a), states that the resolution procedures outlined in Section 4610.5 apply to "[a]ny dispute over a utilization review decision" within

specified time frames. And Section 4610.5, subdivision (b), specifies that a "dispute described in subdivision (a) shall be resolved only in accordance with this section." Section 4610.5, subdivision (e), further provides that utilization review decisions may be reviewed "only" by the IMR process. Taken together, these provisions mean that *any dispute over a utilization review decision* shall be resolved according to the procedures set out in Section 4610.5. The language of Section 4610, subdivision (g)(3)(A), points to the same conclusion. After providing detailed requirements for notification of the treating physician of the utilization review decision, the statute reads: "If the request is not approved in full, *disputes shall be resolved* in accordance with Section 4610.5, if applicable, or otherwise in accordance with Section 4062." (§ 4610, subd. (g)(3)(A), italics added.) Nothing in the statutory language suggests the Legislature intended the IMR process to cover only a subset of disputes that could arise over utilization review decisions; rather, the statute expressly encompasses "[a]ny dispute over" those decisions.

The Court of Appeal's view that the IMR process applies strictly to the determination of medical necessity, and not to other aspects of the utilization review decision, is unsupported by the statutory text and unworkable in practice. The Labor Code sets forth detailed requirements not just for the standards of medical necessity, but also the content and means of communicating utilization review decisions. Section 4610, subdivision (g)(4), provides that unless it simply approves the treatment, a utilization review response "shall include a clear and concise explanation of the reasons for the employer's decision, a description of the criteria or guidelines used, and the clinical reasons for the decisions regarding medical necessity." The term "decision," as used in the statute, encompasses the written explanation: "If a utilization review decision to deny or delay a

medical service is due to incomplete or insufficient information, the *decision* shall specify the reason for the decision and specify the information that is needed." (*Ibid*., italics added.)

Given the statutory requirements for utilization review, there is no principled dividing line between the medical necessity determination and a discussion of risks or alternatives that are encompassed in, or flow from, such a decision. The point is illustrated by the utilization review decision at issue in *Stevens*, a recent case upholding the constitutionality of the IMR system. (*See supra,* 241 Cal.App.4th at p.1083.) The utilization review decision included an "extensive, nine-page rationale for [the reviewer's] decision" regarding requested drug treatment. (*Ibid.*) The decision weighed the efficacy and risk for the requested treatments, assessing the "risk of dependence" of one, and determining that the benefits of another were outweighed by its "significant risk." (*Ibid.*)

In establishing these requirements and requiring "any dispute over" utilization review decisions to be resolved through the IMR process, the Legislature clearly intended for the IMR process to encompass claims challenging the content of or communications regarding utilization review decisions. Plaintiffs' failure-to-warn theory is essentially that the utilization review decision failed to include medical information that Plaintiffs believe should have been included. That is plainly a "dispute over a utilization review decision" that must be resolved through the IMR process. (§ 4610.5, subds. (a), (e).)

Indeed, even under the Court of Appeal's narrow construction of "decision," any failure-to-warn claim would *still* be preempted because it would merely reformulate the theory that Klonopin was "medically necessary until Kirk was properly weaned from it." (Op., 13.) Any claim

that Dr. Sharma was required to "warn Kirk of the possible consequences of [his] decision" (*ibid.*) rests on the notion that the decision was wrong unless accompanied by additional advice regarding a weaning regimen. That is no different from alleging that the decision should have "modified," rather than denying outright, the request for Klonopin treatment.

Whether framed as a misreading or misapplication of Section 4610, the Court of Appeal's reasoning cannot be squared with the purpose and "intent of the Legislature" in adopting the utilization review and IMR process. (Cf. *People v. Superior Court* (1969) 70 Cal.2d 123, 132.) As noted, the Legislature instituted the utilization review process in order to promote the speedy resolution of disputes and ensure the uniform application of medical expertise. (*Ante*, Section I.A.) The Legislature sought to further these same goals when it created the IMR process less than four years ago. First, the Legislature designed the IMR process to be "more expeditious" than the preexisting system, which was "costly and time-consuming, and ... prolong[ed] disputes." (Stats. 2012, ch. 363, § 1, subd. (f).) Second, the IMR process was designed to be "more scientifically sound" by relying on "the independent and unbiased medical expertise of specialists" to make "[t]imely and medically sound determinations of disputes over appropriate medical treatment." (*Ibid.*) Third, the Legislature recognized that it was creating a separate IMR process, outside the courts, for resolving disputes over the utilization review process, including "limited appeal of decisions," which was a "necessary exercise of the Legislature's plenary power to provide for the settlement of any disputes arising under the workers' compensation laws of this state and to control the manner of review of such decisions." (*Id.*, subd. (g).) That is why the Legislature eliminated plenary review by the Appeals Board and fixed narrow grounds for review of IMR decisions.

Reading the WCA's exclusivity provisions to exempt failure-to-warn claims would defeat these purposes. It would allow employees to circumvent the Legislature's limited review process and collaterally attack utilization review decisions through civil litigation. This civil litigation would be slower and more expensive than the IMR process, and would be resolved by jurors, contrary to the Legislature's finding that "specialists" with "medical expertise" should adjudicate disputes over utilization review. Jurors might also apply localized standards of care, contravening the goal of reforming a system that "[did] not uniformly result in the provision of treatment that adhere[d] to the highest standards of evidence-based medicine." (*Stevens*, *supra*, 241 Cal.App.4th at p. 1089.) Permitting such civil claims would undo one of the central promises of the reforms that created the utilization review and IMR processes: "reduc[ing] insurance costs by creating *uniform medical standards and reducing litigation.*" (*Id.* at p. 1091, italics added.)

The impact of permitting a failure-to-warn exception to preemption would be serious. Virtually *any* case where the employee alleges harm due to denial of treatment could be re-fashioned as a claim against the review provider for failure-to-warn about the consequences of the denial. Suppose an employee receives a treatment recommendation from her treating physician, and the employer's utilization review provider issues a decision denying or modifying the treatment. Under the Court of Appeal's interpretation, the employee would now have multiple ways of attacking the decision. She could challenge the adverse decision through an IMR. Or, if she suffers any adverse consequences from the denial, she could also sue the utilization review provider in tort for inadequate warnings about the consequences of denial.

The availability of tort remedies for utilization review challenges would drastically undermine the Legislature's carefully-designed IMR system for resolving disputes about utilization review. (Cf. *Noe v. Travelers Ins. Co.* (1959) 172 Cal.App.2d 731, 737-738 [warning that permitting civil tort claims against a workers' compensation insurer based on plaintiffs' "thin distinction" could "partially nullif[y]" the "objective of the Legislature and the whole pattern of workmen's compensation"].) By recognizing an exception for putative failure-to-warn theories, the Court of Appeal's exception would swallow that rule that the IMR process covers "[a]ny dispute" over utilization review decisions.

C. Plaintiffs' Claims Are Also Preempted Because They Arise Out Of The Workers' Compensation Process

Plaintiffs' claims are preempted for an additional, independently sufficient reason. Because King's alleged injury from the withdrawal of Klonopin is "collateral to or derivative of" his original workplace injury, it is compensable through the workers' compensation system. (*Vacanti*, *supra*, 24 Cal.4th at pp. 811-813, 815.) Because King could receive no-fault workers' compensation coverage for the injury, his exclusive remedy against the employer lies in the workers' compensation system.

1. The Labor Code Provides The Exclusive Remedy For Injuries That Are Collateral To Or Derivative Of Workplace Injuries

Sections 3600 and 3602 establish the basic principle that the WCA provides the employee's exclusive remedy against the employer for injuries arising out of employment. Section 3600, subdivision (a), provides:

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided …, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees

> arising out of and in the course of the employment ... in those cases where the following conditions of compensation concur ... .

Section 3602, subdivision (a), further provides: "Where the conditions of compensation set forth in Section 3600 concur, the right to recover compensation is, except as specifically provided …, the sole and exclusive remedy of the employee or his or her dependents against the employer."[4]

The Legislature has directed that WCA provisions "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (§ 3202; see also Cal. Const., art. XIV, § 4.) "'[I]f a provision in the [WCA] may be reasonably construed to provide coverage or payments, that construction should usually be adopted even if another reasonable construction is possible.'" (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1065, citation omitted.) This rule "'is not altered because a plaintiff believes that [she] can establish negligence on the part of [her] employer and brings a civil suit for damages.'" (*Ibid.*, citation omitted.) Instead, the Act must be liberally construed "'in favor of *awarding* work[ers'] compensation, not in permitting civil litigation,'" even where a particular plaintiff might benefit from seeking a remedy at law. (*Ibid.,* citation omitted.) This liberal construction applies to both factual as well as statutory construction. (*Ibid.*)

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[4] The conditions of compensation, as relevant here, are as follows:

(1) Where at the time of the injury, both the employer and employee are subject to the compensation provisions of this division.

(2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment.

(3) Where the injury is proximately cause by the employment, either with or without negligence.

(§ 3600, subd. (a).)

Consistent with these principles, this Court has explained that the exclusivity provisions encompass any injury "'collateral to or derivative of' an injury compensable by the exclusive remedies of the WCA." (*Vacanti*, *supra*, 24 Cal.4th at p. 811, citation omitted.) In other words, if there is an original workplace injury that meets the conditions of compensation, then workers' compensation provides the exclusive remedy against the employer for a subsequent injury that is "tethered to a compensable injury." (*Id.* at p. 815.) Injuries that flow from the workers' compensation process for a prior industrial injury fall comfortably within this definition.

Indeed, courts have consistently held that injuries arising from the workers' compensation process are compensable by the employer under the WCA. "An employee is entitled to compensation if a new or aggravated injury results from medical or surgical treatment for an industrial injury." (*South Coast Framing, Inc. v. WCAB* (2015) 61 Cal.4th 291, 300 [citing cases].) For example, in *Cooper v. Workers' Comp. Appeals Bd.* (1985) 173 Cal.App.3d 44, an employee exposed to asbestos at work was mistakenly diagnosed with asbestosis. Due to the mistaken diagnosis, he suffered psychiatric injuries. The court held that the employee's psychiatric injuries caused by the incorrect diagnosis met the conditions of compensation, explaining that "but for the employment related diagnoses of asbestosis, applicant's psychiatric disability would not have occurred." (*Id.* at p. 49.) Similarly, in *Ballard v. Workmen's Comp. Appeal Bd.* (1971) 3 Cal.3d 832, an employee suffered a workplace injury and was prescribed pain medication. She became addicted to the pain medication, necessitating additional medical treatment, for which she sought workers' compensation coverage. This Court concluded that "if the addiction would not have materialized but for the injury she is entitled to full recovery

notwithstanding the fact that her personality problems also were contributing factors." (*Id.* at p. 839.)

Even injuries where the employer played *no role* can be compensable so long as they arise out of efforts to seek medical treatment for an industrial injury. In *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872, an employee who had previously suffered a compensable industrial injury was injured in a motorcycle accident on the way to receive medical treatment. His industrial injury was not itself a factor contributing to the motorcycle accident, and he was not traveling from work to his medical appointment. (*Id.* at p. 874.) Nevertheless, the court reasoned that "[w]hen an employee suffers additional injuries because of an accident in the course of a journey to a doctor's office occasioned by a compensable injury, the additional injuries are generally held compensable." (*Id.* at pp. 878-879, quoting 1 Larson, The Law of Workmen's Compensation (1972) § 13.13, ch. 3.)

The availability of workers' compensation for collateral injuries means, of course, that claimants cannot pursue civil tort remedies for those injuries against the employer or those acting on its behalf. Notably, courts have consistently barred claims for injuries "arising out of and in the course of the workers' compensation claims process"; those injuries "fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (*Vacanti*, *supra*, 24 Cal.4th at p. 815; see also *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 10-11 [barring claim against independent claims administrator for discontinuance of workers' compensation benefits]; *Stoddard v. Western Employers Ins. Co.* (1988) 200 Cal.App.3d 165, 168-169 [barring claim for damages associated with delay in benefit payments]; *Mottola v. R.L. Kautz*

& Co. (1988) 199 Cal.App.3d 98, 109 [barring claim for contractual damages associated with refusal to pay benefits].)

There is no reason to treat injuries that arise from the utilization review process, which is required of all employers subject to the WCA (§ 4610, subd. (b)), any differently.

First, it makes no difference that the claims asserted here are against a utilization review provider rather than the company that employed King. The Legislature expressly provides that a "utilization review organization" is encompassed within the meaning of "employer" for purposes of utilization review. (§ 4160.5, subd. (c)(4).) This Court has applied preemption to claims against an independent claims administrator hired by an employer to handle its workers' compensation related tasks. (See *Marsh & McLennan*, *supra*, 49 Cal.3d at p. 8.) The Court explained that employers, "lacking the expertise to themselves handle the workers' compensation claims of their employees, contract with claims administrators to undertake all of their worker compensation related tasks," and that any distinction between employers/insurers and independent claims administrators would "vitiate the very purpose of the exclusive remedy provisions of the Act." (*Ibid.*) The same logic compels the conclusion that utilization review organizations in this context qualify as "employers" for purposes of the exclusivity provisions. Section 4610, subdivision (b), specifies that "[e]very employer shall establish a utilization review process ... either directly or through its insurer or an entity with which an employer or insurer contracts for these services."

Second, King's alleged seizures are clearly injuries that are "collateral to or derivative of a compensable workplace injury," and therefore encompassed within the WCA's exclusive remedy provisions.

(*Vacanti*, *supra*, 24 Cal.4th at pp. 814-815.) King's original back injury occurred "in the course of his employment" (App. 3) and therefore qualified for compensation under the WCA. Due to chronic back pain, he experienced anxiety and depression, and was prescribed Klonopin as part of workers' compensation coverage. (See *ibid.*) Subsequently, Klonopin was determined to be medically unnecessary by the utilization review provider, and King contends he suffered seizures caused by withdrawal from Klonopin. (*Id.* at 4.) The seizures are thus "tethered" to the original back injury (*Vacanti*, *supra*, 24 Cal.4th at pp. 814-815); indeed, courts have held that workers' compensation coverage applies to process-related injuries that are even more remote from the original workplace injury. (See, e.g., *Cooper*, *supra*, 173 Cal.App.3d at p. 49 [holding that workers' compensation coverage encompasses injuries from mistaken diagnosis for workplace condition]; *Laines*, *supra*, at pp. 878-879 [holding that additional injuries "occasioned by a compensable injury" are also compensable under the WCA].) As this Court has explained, "we have barred all claims based on 'disputes over the delay or discontinuance of workers' compensation benefits,' including those claims seeking to recover economic or contractual damages caused by mishandling of a workers' compensation claim." (*Vacanti*, *supra*, at p. 815, citation omitted.)

Like other employee injuries arising out of the workers' compensation claims process, King's alleged injuries stem from the employer-controlled process for seeking coverage for treatment for industrial injuries. And like employees injured in the course of attempting to receive medical treatment (*ante*, 26-27), King allegedly suffered his seizure injuries in the course of seeking medical treatment for a work-related back injury. At a minimum, then, King's alleged injuries are collateral to or derivative of his original workplace injury. He may seek

compensation from his employer on a no-fault basis, but as part of the compensation bargain he cannot sue his employer or its utilization review provider in tort.

2. The Court Of Appeal's Restrictive Interpretation Of Compensable Injuries Was Based On A Misreading Of *Vacanti* And Contravenes The Legislative Purpose And Prevailing Case Law

The Court of Appeal's refusal to apply the WCA's exclusive remedy provisions was error. Although the Court of Appeal recognized that the WCA provides the exclusive remedy for injuries related to the claims process, it mistakenly concluded that exclusivity applies to collateral and derivative injury only "if something goes wrong in the claims process for the work place injury, such as collecting money for the workplace injury." (Op., 12.)

First, the Court of Appeal concluded, without any reasoned analysis, that the "seizure injury did not occur in the course of Kirk's job because there are no allegations Kirk was working at the time of the seizures," and that the "seizure injury was not proximately caused by Kirk's job because ... nothing about Kirk's job is alleged to be the cause of the seizures." (Op., 11.) But "[t]ort law and the workers' compensation system are significantly different ... [in] the role and application of causation principles." (*South Coast Framing*, *supra*, 61 Cal.4th at p. 297.) In the workers' compensation context, "[a]ll that is required is that the employment be one of the contributing causes without which the injury would not have occurred." (*Id.* at pp. 297-298.) King's workplace injury is clearly a contributing cause to his alleged seizures, as injuries resulting from withdrawal of Klonopin would not have occurred if King had not been prescribed the drug. As noted (*ante*, 26-28), case law makes clear that the

conditions of compensation can still be met for collateral or derivative injuries even if the person was not "working at the time of" those injuries. If the Court of Appeal's contrary holding is upheld, many workers would be deprived of the benefits of no-fault compensation, in contravention of the law favoring construing the WCA "in favor of awarding work[ers'] compensation …." (*Arriaga*, *supra*, 9 Cal.4th at p. 1065.)

Second, the Court of Appeal was flatly wrong in reading *Vacanti* to hold that "if a new injury arises or the workplace injury is aggravated, then the exclusivity provisions do not necessarily apply." (Op., 12.) What the cited portion of *Vacanti* actually said, citing *Weinstein v. St. Mary's Medical Center* (1997) 58 Cal.App.4th 1223, 1235-1236, is that "courts have allowed tort claims in cases where the alleged injury—the aggravation of an existing workplace injury – *did not occur in the course of an employment relationship*." (*Vacanti*, *supra*, 24 Cal.4th at p. 814, italics added.)

Weinstein, in turn, addressed the "dual capacity" exception to exclusivity, which has no application in this case. Under the dual capacity doctrine, if the employer breaches a duty of care that "arise[s] independently of any employment relationship," it may still be liable in tort for breach of that duty, notwithstanding the WCA's general bar on civil liability for employers. (*Weinstein*, *supra*, 58 Cal.App.4th at p. 1230.) In *Weinstein*, a hospital employee was injured during the course of her employment. She then visited the hospital where she worked, in her capacity as a patient, to receive treatment for that injury. While at the hospital, she fell and aggravated her workplace injury. As the court explained, Weinstein sought treatment "from a medical provider *who also happened to be her employer*; and subsequently filed a civil action against the medical provider when the provider's negligence aggravated her

injury." (*Id.* at pp. 1233-1234, italics added.) In other words, Weinstein could have sought treatment at any hospital, and if the hospital were negligent, she could sue the hospital for negligence. The fact that the hospital also happened to be her employer in this case did not exempt the hospital from being sued in tort for negligence, because the hospital's duty of care to her as patient was independent of their employment relationship.

That is manifestly not the case here. Utilization review is an employer function under the statutory scheme; indeed, the Legislature has expressly deemed "utilization review organization" to be an "employer" for purposes of utilization review. (§ 4160.5, subd. (c)(4).) Dr. Sharma and CompPartners were acting in one capacity and one capacity alone: as the utilization review provider on behalf of King's employer. Dr. Sharma and CompPartners did not deal with King in any secondary capacity independent of the employment relationship. Consequently, the narrow, dual-capacity exception referenced in *Vacanti* is inapplicable.

This Court should decline the invitation to create a backdoor method for employees to bring their challenges to utilization review decisions in tort rather than through the IMR process. The Legislature carefully designed that process to control costs while ensuring greater reliability of outcomes. The interests of employers, employees, and the greater public are all well-served by the Legislature's chosen scheme for resolving disputes over utilization review decisions, which fulfills its constitutional mandate to "accomplish substantial justice in all cases *expeditiously, inexpensively, and without incumbrance of any character*." (Cal. Const., art. XIV, § 4, italics added.)

II. A UTILIZATION REVIEW PROVIDER DOES NOT OWE A DUTY OF CARE IN TORT TO WARN A WORKERS' COMPENSATION CLAIMANT

Even if a failure-to-warn claim against a utilization reviewer lies outside the WCA's exclusivity provisions, that theory fails as a matter of law under general tort principles. The Court of Appeal mistakenly held that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed," such that the utilization review provider may have a duty to warn the patient about the risks of discontinuing a treatment. (Op., 13-14, 18.) While deeming the complaint insufficient to state a duty to warn, the court held that such a duty might arise if the utilization reviewer knew "his decision to decertify the Klonopin would lead to the immediate denial of more Klonopin without any review by [King's] prescribing doctor." (*Id*. at 19.)

In fact, the utilization reviewer has no duty to provide medical advice to a workers' compensation claimant. As decades of case law in California and elsewhere has recognized, there is no physician-patient relationship and no concomitant duty of care where, as here, a physician applies medical expertise as part of a workers' compensation review process and does not purport to treat or advise the claimant. Application of settled tort principles also confirms that the utilization reviewer has no duty to render medical advice. The Court of Appeal's contrary holding threatens to convert utilization reviewers into treating physicians, in contravention of the WCA scheme prescribing a much more limited role for them. If upheld, the opinion below would distort the utilization review process, raise uncertainty and costs for the workers' compensation system, and defeat the Legislature's twin goals of efficiency and high-quality care.

A. There Is No Physician-Patient Relationship Between A Utilization Review Provider And A Workers' Compensation Claimant

As the Court of Appeal acknowledges, "[i]t long has been held that an essential element of a cause of action for medical malpractice is a physician-patient relationship." (Op., 14, quoting *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1471.)[5] "When the physician-patient relationship exists, either expressed or implied, the patient has a right to expect the physician will care for and treat him with proper professional skills and will exercise reasonable and ordinary care and diligence toward the patient." (*Ibid.*, quoting *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313.) In holding that the utilization reviewer has a physician-patient relationship with a claimant that may entail a duty to render medical advice, the Court of Appeal fundamentally misapprehended both the role of utilization review in the workers' compensation system and the law governing the physician-patient relationship.

1. A Utilization Reviewer, Unlike A Treating Physician, Does Not Provide Medical Treatment Or Advice To The Claimant

The utilization reviewer is *not* the claimant's treating physician. The utilization review system is mandated by statute, and serves the legislative goal of reducing medical costs and ensuring the speedy and efficient resolution of disputes between the worker and the employer. (*Ante*, Section I.A.) To accomplish those objectives, the Legislature clearly distinguished the role of utilization reviewer from that of treating physician. The treating physician makes treatment recommendations and provides medical care to

[5] In California, when a physician is sued in connection with the rendition of medical services, "there is no distinction between malpractice and negligence." (*Mero*, *supra*, 31 Cal.App.4th at pp. 1474-1475.)

the injured worker. (See § 4603.2 [providing payment "for medical treatment provided or authorized by the treating physician"].) The utilization reviewer, by contrast, is tasked solely with reviewing the medical necessity of the treating physician's "treatment recommendations." (§ 4610, subd. (a).)

The scope of the utilization reviewer's work is circumscribed by statute. Unlike the treating physician, who is free to recommend or administer treatments based on his or her training and knowledge, utilization reviewers must base their decisions on the MTUS. (See § 4610, subd. (c).) Further, the utilization review decision is necessarily based on a more limited set of information than that available to treating physicians. The information an employer or insurer may request for use in utilization review is statutorily limited to "only the information reasonably necessary to make the determination." (*Id.*, subd. (d).) As the Workers' Compensation Appeals Board has observed, "[a] utilization review physician does not physically examine the applicant, does not obtain a full history of the injury or a full medical history, and might not review all pertinent medical records." (*Simmons*, *supra*, 70 Cal. Comp. Cases 866, 2005 WL 1489616, at *7.)

Indeed, the WCA contemplates that prospective or concurrent utilization review decisions would be communicated primarily to the treating physician. (See § 4610, subd. (g)(3)(A) [utilization review decisions "prior to, or concurrent with, the provisions of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision"]; *Id.*, subd. (g)(3)(B) ["In the case of concurrent review, medical care shall not be discontinued until the employee's physician has been notified of the decision and a care plan has been agreed by the physician that is appropriate for the medical needs of the

employee.”].) Nothing in the statutes or regulations contemplates that the utilization reviewer would engage in a dialogue with the claimant directly to provide medical advice.

Further confirming the distinction between the *treating* physician and the utilization reviewer, the WCA contains multiple provisions concerning the claimant’s right to choose and change his or her treating physician, but does not provide for any choice of the utilization reviewer by the claimant. (See § 4600, subd. (c) [“employee may be treated by a physician of his or own choice” under certain conditions]; *id.*, subd. (d)(1) [“employee shall have the right to be treated by” his or her “personal physician” if certain conditions have been met]; § 4601, subd. (a) [“If the employee so requests, the employer shall tender the employee one change of physician.”]; § 4605 [“Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physician whom he or she desires.”].) Since the treating physician is responsible for providing medical care and advice, it makes sense that the claimant has certain rights to see his or her physician of choice. Conversely, the statutory scheme does not give the claimant rights with respect to the utilization reviewer, who, after all, has a role completely different from that of the treating physician.

2. There Was No Physician-Patient Relationship Giving Rise To A Duty Of Care

The physician-patient relationship “is basically one of contract.” (*Rainer v. Grossman* (1973) 31 Cal.App.3d 539, 543.) It is “created by agreement, express or implied, and which by its terms may be general or limited.” (*Agnew v. Parks* (1959) 172 Cal.App.2d 756, 764.) Courts have long recognized that a physician-patient relationship and the duties arising therefrom do not attach where the physician does not treat or offer to treat

the patient, even if the physician's work involves the application of medical expertise. That is precisely the situation here.

Keene, long the leading California case on this score, is directly on point. There, a physician was asked by a workers' compensation insurance carrier to examine a claimant "to verify the opinions of the other consulting doctors who had stated no operation or treatment was called for and to rate the disability." (69 Cal.App.3d at p. 316.) The physician prepared a report recommending no further treatment, and the claimant sued, alleging that he relied on the report to his detriment. (*Id*. at p. 311.) The court noted that "[h]ad [the physician] volunteered care or treatment or otherwise attempted to serve or benefit [plaintiff] in a direct manner, we would [have] undoubtedly [found] a duty running to [plaintiff]." (*Id*. at p. 316 n.4.) But summary judgment for the physician was affirmed because the report was prepared "for the carrier's benefit," and "[n]one of the declarations suggest [the physician's] examination was part of [plaintiff's] care or treatment; nor do they suggest [the physician] voluntarily offered [plaintiff] any advice and counsel or otherwise intended to benefit [plaintiff] personally." (*Id.* at p. 316.) Accordingly, there was "no physician-patient relationship, express or implied, of the sort giving rise to a duty of care owed to [plaintiff] in connection with the report." (*Id*. at p. 315.) Similarly, in *Harris v. King* (1998) 60 Cal.App.4th 1185, the court dismissed a negligence claim against a physician based on the physician's preparation of a medical report for the workers' compensation carrier. Given that "[t]he complaint does not allege [defendant] treated [plaintiff] ... ." (*id*. at p. 1187), "[a]s a matter of law, [the physician] owed no duty to [plaintiff] in that process and no claim can be stated based upon those facts." (*Id*. at p. 1188.)

Cases from outside of the workers' compensation context confirm this approach. In *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229, an

employer asked the defendant physician to examine a job applicant, whom the physician found to be unsuited for the job. The applicant then filed a complaint for damages on the theory that the physician acted negligently in his evaluation. (*Id*. at pp. 232-234.) But as the court observed in reversing judgment for plaintiff, the physician "evaluated [plaintiff] solely for purposes of a preemployment physical examination and … such examination was conducted at the request of the employer." (*Id*. at p. 234.) "[B]ecause the physician/patient relationship is absent here, any duty to use due care in evaluating [plaintiff's] medical condition was owed to the employer rather than [plaintiff]," and "appellants' conduct was not actionable either as medical malpractice or common law negligence." (*Ibid*.; see also *Rainer, supra,* 31 Cal.App.3d at p. 543 [no physician-patient relationship existed, and no duty of care was owed, where defendant physician did not treat plaintiff]; *Clarke v. Hoek* (1985) 174 Cal.App.3d 208, 217 [no physician-patient relationship where physician "was not employed or requested to render any care to appellant or act as a consultant in her care, and did not volunteer to do so"].) The *Felton* court emphasized that it "independently ha[s] reviewed out-of-state authorities and f[ound] overwhelming agreement that a physician has no liability to an examinee for negligence or professional malpractice absent a physician/patient relationship, except for injuries incurred during the examination itself." (*Felton, supra*, at p. 235 [collecting cases].)

The Colorado Supreme Court similarly held that a defendant physician's independent medical review for an insurer did not give rise to a physician-patient relationship or a duty of care, and observed: "this conclusion is in accord with virtually every other court to consider this issue." (*Martinez v. Lewis* (Colo. 1998) 969 P.2d 213, 219; see also, e.g., *Hafner v. Beck* (Ariz. Ct. App. 1995) 916 P.2d 1105, 1108 [noting

"majority view" that "workers' compensation claimants cannot maintain medical malpractice actions against physicians who perform IMEs [i.e., independent medical reviews] as part of the claims process, because there is no doctor/patient relationship and no concomitant duty"]; *Ramirez v. Carreras* (Tex. App. 2000) 10 S.W.3d 757, 761 [similar]; *LoDico v. Caputi* (N.Y. App. Div. 1987) 517 N.Y.S. 2d 640, 641 ["Ordinarily, recovery for malpractice or negligence against a doctor is allowed only where there is a relationship of doctor and patient as a result of a contract, express or implied, that the doctor will treat the patient with proper professional skill …."]; *Med. Ctr. of Cent. Ga. v. Landers* (Ga. Ct. App. 2005) 616 S.E.2d 808, 814 [holding that "a doctor-patient relationship did not arise as a matter of law," and directing summary judgment on plaintiff's malpractice claim, where physician examined plaintiff at employer's request and did not intend to 'treat, care for, or otherwise benefit" plaintiff]; *Eid v. Duke* (Md. 2003) 816 A.2d 844, 852 [similar]; *Canfield v. Grinnell Mut. Reinsurance Co*. (Minn. Ct. App. 2000) 610 N.W.2d 689, 692 [similar].)

Here, the basis for inferring a physician-patient relationship is even flimsier than in *Keene* or the other cases cited above. Unlike the physician in *Keene*, who at least examined the plaintiff, Dr. Sharma never examined King. (App. 4.) Nor was Dr. Sharma supposed to do so under the statutory scheme; his role was limited to determining, based on the information provided to him, whether Klonopin was medically necessary under the criteria set forth in the MTUS. (*Ante*, Section II.A.1.) Not surprisingly, plaintiffs do not allege that Dr. Sharma ever provided or offered any medical treatment or advice to King. As in *Keene*, there was no physician-patient relationship, and hence the physician's "alleged failure to advise [King] of some medical condition did not give rise to a cause of action under the circumstances of this case." (Cf. 69 Cal.App.3d at p. 316.)

Ignoring the overwhelming weight of the authority on this score, the Court of Appeal found a physician-patient relationship between King and Dr. Sharma solely on the basis of *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953. (Op., 14-17.) But *Palmer* addressed a completely different question: the satisfaction of a procedural pleading requirement for punitive damages claims against health care providers. *Palmer* involved the provision of services under an HMO plan, where the plaintiff's "primary health care provider" was a medical group called SRS, and SRS's "utilization review department" had denied plaintiff's request for new prostheses. (103 Cal.App.4th at pp. 957-960.) Plaintiff sued SRS claiming infliction of emotional distress, and SRS moved to strike plaintiffs' punitive damages claim for failure to comply with Code of Civil Procedure Section 425.13, which requires a plaintiff to demonstrate "substantial probability" of success before being pleading punitive damages in "an action for damages arising out of the professional negligence of a healthcare provider." (Code of Civil Procedure § 425.13, subd. (a).) The issue in *Palmer* was, thus, *not* whether a physician-patient relationship existed or whether a physician owed a duty of care to the plaintiff on the merits. The question was simply whether the plaintiff was required to satisfy the procedural requirement imposed by Section 425.13.

As this Court has observed, the Legislature enacted Section 425.13 out of "concern[] that unsubstantiated claims for punitive damages were being included in complaints against health care providers[.]" (*Cent. Pathology Serv. Med. Clinic, Inc. v. Superior Court* (1992) 3 Cal.4th 181, 189.) The heightened procedural requirements apply "whenever an injured party seeks punitive damages for an injury that is directly *related to the professional services provided by a health care provider acting in its capacity as such*." (*Id*. at pp. 191-192, italics added.) Section 425.13

accordingly encompasses a wide range of claims against physicians and other health care providers, including claims that *are not predicated on any physician-patient relationship with the plaintiff*. (See, e.g., *Williams v. Superior Court* (1994) 30 Cal.App.4th 318 [holding that Section 425.13 applies to claim that a medical institute failed to warn a phlebotomist, who was assaulted by a patient while working on site, about the patient's propensity for violence].) Consistent with this standard, *Palmer* held Section 425.13 applied to the allegation that an HMO medical group's utilization review department improperly denied a request for prostheses, because the review was "conducted by medical professionals" who must "exercis[e] medical judgment and apply[] clinical standards." (*Palmer, supra*, 103 Cal.App.4th at p. 972.) That did not depend on whether a physician-patient relationship was present. (*Id.* at p. 965 [noting Section 425.13 can apply "even absent a physician-patient relationship"].)

As *Keene*, *Felton*, and the other case discussed above amply demonstrate, physicians frequently are asked to apply medical expertise and render professional services without entering into a physician-patient relationship. That is precisely the situation here. By reviewing a treating physician's recommendation, for coverage purposes, in light of statutory-standards of care, Dr. Sharma triggered no duty to render medical advice to the treating physician's patient.

B. General Tort Duty Principles Do Not Require A Utilization Reviewer To Provide Medical Advice To A Workers' Compensation Claimant

Nor do general tort duty principles entitle workers' compensation claimants to medical advice from the utilization reviewer. Although "[a]s a general rule, each person has a duty to use ordinary care," "whether a duty of care exists in a given circumstance[] 'is a question of law to be

determined on a case-by-case basis.' [citation]" (*Parson v. Crown Disposal Co*. (1997) 15 Cal.4th 456, 472.) As this Court has explained, "'duty' is not an immutable fact of nature, 'but only an expression of the *sum total of those considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection.' [citations]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, italics added.) Determining the existence and scope of a duty of care requires "balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 113; accord *Tarasoff v. Regents of Univ. of Cal.* (1976) 17 Cal.3d 425, 435.) Consideration of these factors in the context of workers' compensation confirms that Dr. Sharma had no duty to warn King about the consequences of ceasing Klonopin.

First, it was not foreseeable that the absence of medical advice from a utilization reviewer would result in harm to a workers' compensation claimant. That is because the provision of medical care to the claimant does not depend on direct advice or communications from the utilization reviewer. As discussed above, the statutory scheme makes clear that the responsibility for providing medical care to the claimant lies with the treating physician. Indeed, the statutory scheme contemplates that utilization review decisions concerning prospective or concurrent treatment would be communicated to the treating physician within 24 hours. (§ 4610,

subd. (g)(3)(a).) To the extent that a warning about Klonopin was warranted, it is reasonable to expect that such a warning would have been delivered by the treating physician without the need for intervention by the utilization reviewer. (Cf. *Truman v. Thomas* (1980) 27 Cal.3d 285, 292-294 [noting that the relationship between treating physician and patient has "fiduciary qualities," such that "a physician has a duty to disclose all material information to a patient" including the risks associated with undergoing or not undergoing a treatment].) As a utilization reviewer, Dr. Sharma could not have reasonably expected King to look to him, rather than King's own treating physician, for medical advice. (See *Keene*, *supra*, 69 Cal.App.4th at p. 314 ["Measured against any standard of foreseeability, the physician, as here, hired solely to conduct an examination for purposes of rating disability compensation benefits, could not reasonably expect the claimant to rely on his opinion"].)

Harm was not foreseeable for the further reason that the IMR process provides an adequate and speedy way to correct any errors in the utilization review process. The IMR must be completed in 30 days, and the review time could be expedited to three days or less upon certification that "an imminent and serious threat to the health of the employee may exist." (§ 4610.6, subd. (d).) The review process within the workers' compensation system is capable of addressing any risks associated with abrupt withdrawal of medication.

Second, even assuming that King had suffered harm due to the cessation of Klonopin, there is no direct connection between the lack of warning from Dr. Sharma and King's injury. The complaint alleges that King's injury was "[d]ue to the improper withdrawal of the medication." (App. 4.) Plaintiffs are not challenging the determination that Klonopin was not medically necessary. (Appellant's Reply Brief, at p. 1 ["To be

clear, Appellant's Complaint does not allege that Mr. King should be provided with Klonopin, nor does the Complaint seek to have the fact finder review the utilization review decision …."].) Given that Plaintiffs do not dispute that Klonopin should have been discontinued, any tie between Dr. Sharma's alleged failure to warn and King's injury is indirect and remote. And, just as importantly, even *if* the absence of a warning directly contributed to King's injury, King should be looking to his treating physician for medical advice, rather than to a utilization reviewer who never examined him.

Third, there is no moral blame attached to Dr. Sharma's alleged failure to warn King about Klonopin. "[T]he moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability"; rather, "[m]oral blame has been applied to describe a defendant's culpability in terms of the defendant's state of mind and the inherently harmful nature of the defendant's acts." (*Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.) Here, Plaintiffs' allegations show nothing more than that Dr. Sharma did what was expected of a utilization reviewer under the applicable statutory scheme. He conducted the review and made a medical necessity determination. There is no allegation that the determination is inconsistent with the MTUS. Plaintiffs allege that he did not give medical advice to King, and proffer conclusorily that he knew his denial would lead to the cessation of Klonopin. But that conduct is perfectly consistent with the role of the utilization reviewer under the statutory scheme.

Fourth, and perhaps most importantly, the applicable public policy considerations—including the policy of preventing future harm, the burden to the defendant and the community, and the availability of insurance—weigh decisively against finding a duty to warn in these circumstances.

The utilization review process is governed by a comprehensive statutory and regulatory scheme. Injecting a new tort duty into the process threatens to undermine this carefully-calibrated system and frustrate legislative goals.

In establishing the utilization review process, the Legislature intended "to ensure quality, standardized medical care for workers in a prompt and expeditious manner" through "a comprehensive process that balances the dual interests of speed and accuracy." (*Sandhagen, supra,* 44 Cal.4th at p. 241.) To achieve these objectives, the role of the utilization reviewer is, by design, much narrower than that of the treating physician. (*Ante*, Section II.A.1.) What is more, the Legislature created an expeditious independent medical review process to correct any errors that may arise in the utilization review process. (*Ante*, Section I.A.)

Imposing a duty for utilization reviewers to provide direct medical advice to workers' compensation claimants would convert them into secondary treating physicians. Far from furthering the policy of preventing harm, which is already served by the IMR process, such a new duty would increase the risk of confusion and error. By statutory design, a typical utilization reviewer has never examined or even met the claimant, and is therefore not especially well-positioned to render direct medical advice to the claimant. Moreover, forcing the utilization reviewer into a direct treatment role could undermine the role of the actual treating physician, who often has a pre-existing relationship with the claimant and has a more comprehensive view of the claimant's medical needs. Worse, making utilization reviewers liable in tort would subject them to the potentially varying standards of care depending on the locality and the evidence in each case, undermining the Legislature's mandate that all utilization reviews be conducted according to the MTUS.

The duty Plaintiffs advocate would impose significant burdens on utilization review providers, and ultimately on the workers' compensation system as a whole. The cost of review would surely increase, particularly if utilization reviewers feel pressured to undertake actions, such as examining the claimant, that are not contemplated by the statutory scheme, but which may be necessary to guard against potential tort liability. The threat of tort liability may also make utilization review work less attractive to licensed physicians and thereby increase the cost of hiring them as qualified reviewers. Ultimately, this would raise the overall cost of the workers' compensation system, frustrating the Legislature's intent to use the utilization review process to reduce costs and increase efficiency. (Cf. *Stevens, supra*, 241 Cal.App.4th at p. 1089 [explaining that prior dispute resolution processes were "costly and time-consuming"].)

These costs would only rise as the imposition of tort duties led to new civil lawsuits arising out of the workers' compensation system. The County of Los Angeles noted in its Request for Depublication that it has 27,500 open workers' compensation claims and sends approximately 16,500 medical treatment requests annually through the utilization review process. (Letter from Mary C. Wickham, Mar. 7, 2016, at p. 1.) For California as a whole, nearly 189,000 IMR requests were made in a 20-month period between January 2013 and August 2014. (*Ibid.*) As the County pointed out, under the Court of Appeal's decision, "potentially all of these utilization review disputes could end up in civil court as an individual civil action." (*Ibid.*) A large volume of new lawsuits would surely be costly, but worse, the costs would be completely *unnecessary* because the workers' compensation system already provides ample remedies to correct potential errors in the utilization review process, as well as no-fault coverage for injured workers. Because imposing new tort duties

would lead to parallel litigation in the workers' compensation system and in civil courts, without any corresponding policy benefit, the Opinion below should be reversed on its alternative ground.

III. THE COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S DENIAL OF LEAVE TO AMEND

Although the Court of Appeal affirmed the dismissal of Plaintiffs' claims, the court erred in reversing the trial court's denial of leave to amend. A trial court's denial of leave to amend is reviewed for abuse of discretion. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 211.) It is the plaintiff's burden to demonstrate that "'there is any reasonable possibility that the defect can be cured by amendment.'" (*Ibid.,* citation omitted.) The plaintiff "'must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.'" (*Ibid.,* citation omitted.)

As addressed in the Statement of Facts, Plaintiffs indicated in their brief in the Court of Appeal that they could allege the following new facts if given leave to amend:

- While King was taking Klonopin, he did not suffer any seizures.
- Although King was taking Klonopin as an anti-anxiety medication, it is also commonly used as an anti-seizure medication.
- Dr. Sharma knew that his decision to decertify Klonopin would lead to the immediate denial of Klonopin without any further review by any of his treating physicians or any psychiatric care.

- Seizures are a known side effect of an abrupt withdrawal of Klonopin, and any competent physician would know that abrupt withdrawal would put a patient at significant risk of seizures.
- It is below the standard of care to abruptly discontinue Klonopin.

(AOB 4-5.)

Sections I and II, *ante*, assumed all of these additional facts to be included in the complaint. They change neither the conclusion that Plaintiffs' claims are preempted by the exclusive remedies of workers' compensation nor the conclusion that the utilization reviewer did not owe a duty of care in tort to King. Either conclusion is sufficient to determine that the Court of Appeals erred in reversing the trial court's denial of leave to amend.

Even if Plaintiffs could amend their complaint to more clearly state a failure-to-warn claim, the Court of Appeal erred in holding that Plaintiffs' claims would not be preempted. Characterizing Plaintiffs' challenge to the utilization review decision as a "failure to warn" cannot circumvent the Legislature's clear purpose to funnel all challenges to utilization reviews through the IMR process to ensure cost-effective, medically sound decision-making. (*Ante,* Section I.B.) Nor do Plaintiffs' proposed new allegations have any bearing on the conclusion that King's injuries are "collateral to or derivative of" his original workplace injury, and therefore covered by workers' compensation's exclusive remedy. (*Ante,* Section I.C.1) Plaintiffs still allege that King's original injury was sustained in the course of employment; that he was prescribed Klonopin as a result of anxiety and depression arising from his workplace injury; and that he was injured as a result of the utilization review process designed to treat his workplace injury. King's seizure-related injuries are thus "tethered to a

compensable injury," which allows him to seek no-fault compensation to the exclusion of any tort remedies. (*Vacanti*, *supra*, 24 Cal. 4th at 814-815.)

Finally, Plaintiffs' proposed new facts fail to establish the existence of a duty to warn between Dr. Sharma and King. Plaintiffs' allegations about Dr. Sharma's state of mind do not disturb the conclusion that there is no physician-patient relationship between a utilization reviewer and an employee seeking treatment. (*Ante*, Section II.A.) Nor do they affect the conclusion that a utilization reviewer does not have a duty to provide medical advice to a workers' compensation claimant. (*Ante*, Section II.B.) In light of the factors discussed above, which weigh decisively against finding such a duty here, Plaintiffs' proposed new facts at most tend to show that a duty, if it existed, was violated. But they cannot establish the existence of a duty in the first instance.

It is no accident that Plaintiffs cannot simply refashion their claims to plead around workers' compensation's exclusive remedy. The Legislature specifically designed a system that would remove challenges to utilization review decisions from the tort system and place them in the hands of medical experts who can efficiently resolve them, on a no-fault basis, consistent with the best practices in the field. Because none of the new facts that Plaintiffs propose to plead in an amended complaint would enable them to establish a valid tort claim, the Court of Appeal erred in reversing the trial court's order denying Plaintiffs leave to amend.

CONCLUSION

Petitioners respectfully request that this Court reverse the Court of Appeal's decision and reinstate the trial court's order sustaining the demurrer without leave to amend.

Dated: July 15, 2016

Respectfully submitted,

MURCHISON & CUMMING, LLP

/s/ William D. Naeve
William D. Naeve

Attorney for Defendants, Respondents and Petitioners

COMPPARTNERS, INC. and NARESH SHARMA, M.D.

MUNGER, TOLLES & OLSON LLP

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

Attorney for Defendant, Respondent and Petitioner

COMPPARTNERS, INC.

CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, Petitioners' Opening Brief On The Merits is produced using 13-point Roman type and, including footnotes, contains 13,624 words, which is less than the 14,000 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: July 15, 2016

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94015.

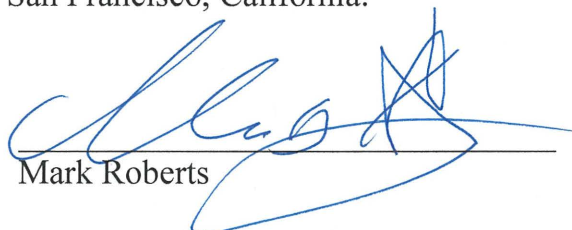
On July 15, 2016, I served true copies of the following document(s) described as **PETITIONERS' OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on July 15, 2016 at San Francisco, California.



Mark Roberts

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ATTORNEY/FIRM ADDRESS	PARTY
Jonathan A. Falcioni Law Offices of Patricia A. Law 19837 Laurel St. Ste 101 Rancho Cucamonga CA 91730 (951) 683-8320 Jon@patriciaalaw.com	Counsel for Plaintiffs, Appellants and Respondents KIRK KING and SARA KING
Clerk of the Court Riverside Superior Court Civil Courthouse 4050 Main Street – Dept 3 Riverside, CA 92501	
Clerk of the Court Court of Appeal – 4th Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501 Re: Case No. E0653527	