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' REPLY BRIEF ON THE MERITS

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INTRODUCTION

The "compensation bargain" is the foundation of the workers' compensation system. Under this statutory tradeoff, 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." (*Charles J. Vacanti, M.D. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811.)

The Respondents' Brief proceeds from the premise that the claimant here, Kirk King, is entitled to the benefits of the workers' compensation bargain, but is not bound to the bargain's remedial tradeoff. Plaintiffs do not dispute that King is entitled to receive coverage under the WCA for the seizure-related injuries grounding his tort suit. In taking as a given that King is entitled to coverage, Plaintiffs necessarily concede that his injuries are "collateral to or derivative of" his underlying workplace injury. (See *id.*) Absent such a nexus between the injuries and King's employment, the "conditions of compensation" would not "concur," and he could receive no benefits. (See Labor Code, § 3600.)[1]

That concession only makes sense. As Defendants have explained, injuries stemming from the workers' compensation claims process have been consistently held to arise out of employment, and are therefore compensable through workers' compensation. (See PB 24-30.)[2] The courts have recognized that injuries significantly more remote from the workplace

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

[2] "RB" refers to Respondents' Answer Brief on the Merits. "PB" refers to Petitioners' Opening Brief on the Merits. "App." refers to Appellants' Appendix, and "AOB" refers to Appellants' Opening Brief in the Court of Appeal.

than King's seizure-related injuries, which allegedly flowed from the utilization review process, fall within the statutory scheme. (E.g., *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872 [injuries suffered while traveling to receive treatment for industrial injury].) In this respect, Plaintiffs impliedly concede that the Court of Appeal erred in holding that King's seizures were not "collateral to or derivative of" his compensable workplace injury because their cause lay "beyond the 'medical necessity' determination." (Op. 13.)

Plaintiffs insist, however, that they may proceed in tort on the basis of the same seizure-related injuries for which King is entitled to receive workers' compensation benefits. That cake-and-eat-it-too position is at odds with the compensation bargain and the statutory scheme implementing it. As Plaintiffs' own brief explains, the WCA gives injured workers "the certainty of compensation from the employer through the workers' compensation system in exchange for giving up the right to sue for damages." (RB 35 [citing *Vacanti*, *supra*, 24 Cal.4th at p. 811].) But an important corollary of this point is that injuries "arising out of and in the course of the workers' compensation claims process" are barred; such claims "fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (*Vacanti*, at p. 815.) The Legislature made the same tradeoff, and invoked the same exclusivity, in establishing the statutory scheme covering medical treatment for injured workers. In order to provide "quality, standardized medical care" for workers while controlling "skyrocketing workers' compensation costs," the Legislature established the utilization review process and an independent medical review (IMR) to resolve disputes over review decisions. (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 279.)

To circumvent this basic bargain, Plaintiffs elide both the statutory text and controlling canons of statutory construction. Despite clear language requiring "[a]ny dispute" over utilization review decisions to be resolved "only" through the IMR process (§§ 4610.5, subd. (b), (e)), Plaintiffs maintain that the statute must make express "mention of an exclusive remedy or a preclusion" to carry preemptive force. (RB 40.) But Section 4610.5's use of language like "any," "only," and "shall" connotes exclusivity. This Court has rejected any wooden language requirement in construing the WCA's exclusivity, reasoning, instead, that the WCA's remedial provisions must be read together with its broad exclusivity provisions. Nor can Plaintiffs avoid the remedies attending coverage on the ground that the WCA's exclusivity provisions are limited to "employer[s]." (RB 35.) The WCA specifically allows employers to contract with third parties to handle utilization review, and both the statutory structure and this Court's precedents confirm that exclusivity protections apply where employers make this statutory election.

Whether styled as a negligence or failure-to-warn theory, Plaintiffs' claims against utilization reviewers are preempted. That result cannot be changed by Plaintiffs' attempt to proffer a *second* set of new allegations on appeal. Plaintiffs assert, for the first time in this Court, that Dr. Sharma did not review medical records, and sent his utilization review decision to King's primary care physician rather than his psychiatrist. Because those allegations were not made below, Plaintiffs have forfeited them. But even if the allegations are considered, the fundamental defect with Plaintiffs' claims remains: They seek a remedy for work-related injuries covered by the WCA's exclusive remedies.

Even if the WCA permitted Plaintiffs to sue a statutorily-recognized utilization review provider for covered injuries—and it does not—Plaintiffs

have identified no cognizable tort duty. On the question whether Dr. Sharma owed King a duty, Plaintiffs again attempt to abandon the Court of Appeal's reasoning, but shift to a position that is equally erroneous and more incoherent.

The Court of Appeal held that Dr. Sharma has a "doctor-patient relationship" with King, such that Dr. Sharma may have had a duty in tort to render medical advice. (Op.14.) As Defendants have shown, this holding cannot be squared with the Legislature's comprehensive scheme for utilization review. The reviewer's sole job is to review the medical necessity of the treating physician's recommendation based on a statutorily-mandated treatment schedule. (PB 34-36.) The reviewer does not examine the injured worker, does not provide medical treatment, and may not review all pertinent medical records. (*Ibid*.)

Plaintiffs do not dispute that there is no physician-patient relationship in this context, and acknowledge that a utilization reviewer does not have a treating physician's duties. (RB 29.) Plaintiffs instead maintain that such reviewers have their own special tort duties to workers' compensation claimants. On Plaintiffs' own account, however, those duties would require utilization reviewers to provide medical advice, and even care. A reviewer would be required to serve as a back-up physician for a claimant's treating physician, giving them "notice of the need to take action" for their own patients. (RB 33.) Plaintiffs frankly admit that a reviewer's advice could include "seeking treatment or medication *outside of the workers' compensation setting*." (RB 30, italics added.)

If adopted, this tort duty would distort the Legislature's policy choices. The WCA fixes a clear role for utilization review providers: they use statutory criteria to review treatment recommendations. It is the

physicians making those recommendations who provide the medical care and advice. While Plaintiffs insist a duty should lie to remedy harms flowing from the review process, the Legislature has already fixed the remedies by weighing the need for effective medical treatment against cost and efficiency considerations. Those careful judgments cannot be second-guessed by litigants or the courts.

ARGUMENT

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

A. The WCA Preempts Both Plaintiffs' Challenges To The Medical Necessity Determination And Plaintiffs' Failure-To-Warn Claims

In its preemption analysis, the Court of Appeal distinguished between a claim that challenged Dr. Sharma's medical necessity determination, alleging that he "harmed Kirk by incorrectly determining Klonopin was medically unnecessary," and one alleging a failure to warn: "[Dr.] Sharma determines the drug is medically unnecessary and then must warn Kirk of the possible consequences of that decision." (Op. 13.) The Court reasoned that the former claim would be preempted, but a claim "faulting Sharma for not communicating a warning to Kirk" would not. (*Ibid.*) Despite previously acknowledging that "challenging or appealing the decision to de-certify Klonopin … would absolutely be limited to the [WCA's] redress procedures" (App. 48), Plaintiffs now insist that *both* their failure-to-warn theory and their claim challenging Dr. Sharma's decision fall outside the WCA's exclusive proceedings (RB 40).

The WCA provisions establishing utilization review are broad in scope and clear in exclusivity. They provide that "[a] utilization review decision may be reviewed or appealed *only* by [IMR] pursuant to this

section" (§ 4610.5, subd. (e)), and direct that an "objection" to such a decision "*shall be resolved only in accordance* with the independent medical review process established in Section 4610.5" (§ 4062, subd. (b), italics added). That language reinforces the IMR's application to "[a]ny dispute over a utilization review decision." (§ 4610.5, subd. (a)(2).)

Both of Plaintiffs' potential tort theories impinge upon Section 4610.5's exclusive review scheme. As even the Court of Appeal recognized, any claim "challenging [Dr.] Sharma's medical necessity determination" is "preempted by the WCA." (Op. 13.) That is just the type of challenge Plaintiffs mount by averring, on appeal, that Dr. Sharma's decision was negligent. Plaintiffs assert frankly that they "want tort damages for the harm *the decision* … caused" (RB 40), including "the erroneous denial of tapering" (RB 43). These allegations plainly state a "dispute over a utilization review decision." (§ 4610.5, subd. (a)(2).)

The same is true of Plaintiffs' potential failure-to-warn theory. To begin with, any claim that Dr. Sharma failed to "communicat[e] a warning to Kirk" (Op. 13) would necessarily challenge the decision finding Klonopin medically unnecessary, because it asserts that Dr. Sharma should have included specific medical advice along with his determination. And if Plaintiffs were correct in alleging that Dr. Sharma knew the coverage denial would lead to a denial of treatment, it would merely underscore that Plaintiffs' theory really rests on "the failure to provide tapering" (RB 43).

In any case, by challenging the utilization review process, Plaintiffs' failure-to-warn claim would impermissibly circumvent the IMR's exclusive review scheme. The WCA sets out detailed requirements not only for the content of utilization review decisions, but also for the process of communicating them. These include a "clear and concise explanation of

the reasons for the employer's decision" and "clinical reasons" (§ 4610, subd. (g)(4)), explanations that Plaintiffs' claim seeks to supplement. The statute also sets out specific timeframes and means for communicating the decision to physicians and employees (*id.*, subd. (g)(3)(A)), and notice requirements about the right to IMR review (§4610.5, subd. (f)). Because these provisions address the "decisions" that are the subject of IMR's review, they directly inform the scope of its exclusive reach and must be read together with Section 4610.5.

Plaintiffs counter by attempting to cast Section 4610.5 as a provision that addresses only "procedures" for utilization review, without any exclusive force. (RB 40.) Because, Plaintiffs reason, "there is no mention of an exclusive remedy or a preclusion of civil lawsuits or monetary remedies," the IMR process is permissive, and utilization review decisions may be challenged in tort. (*Ibid.*) This argument is wrong on both scores.

First, the statute *does* contain language connoting that the IMR process is exclusive. Subdivision (a) states that utilization review disputes "*shall* be resolved *only in accordance with this section*," language that is echoed in subdivision (e)'s mandate that such decisions "be reviewed or appealed *only* by [IMR]." The word "only" has a clear meaning: "exclusively, solely." (Webster's Third New Int'l Dict. (1968) 1557.) Second, even apart from this language, this Court's decision in *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, refutes the notion that the Legislature must use magic words like "exclusive remedy" or "precludes civil lawsuits" to make WCA remedies exclusive. There, the plaintiff sought to bring civil claims against the third-party administrator of the employer's workers' compensation plan. (*Id.* at pp. 4-5.) In holding the claims preempted, the Court construed the WCA as a whole to determine the scope of its exclusivity. Because the plaintiff's claims

centered on compensation benefits, the court looked to the statutory provisions "which refer to the 'recovery of compensation' and the 'payment of compensation.'" (*Id.* at pp. 7-8 [quoting §§ 5300, 5814].) Even though neither of these provisions expressly makes the scheme's compensation the "exclusive remedy" or "precludes civil suits," as Plaintiffs demand here, the Court had no trouble holding that "[t]he exclusive remedy doctrine stems also from [those provisions]." (*Ibid.*) The statutory references to compensation, the Court explained, "imply that the workers' compensation system encompasses all disputes over coverage and payment." (*Ibid.*; see also *Vacanti*, *supra*, 24 Cal.4th at p. 815 [preemption encompasses claims about "mishandling of a workers' compensation claim"].)

This reasoning applies with equal force here. The WCA establishes a utilization review process to govern medical coverage for work-related injuries, and the IMR process is the "only" statutory avenue for appeal or review. Plaintiffs insist that the IMR could provide no relief "from the erroneous denial of tapering or the erroneous failure to warn" (RB 43), but that contention is wrong and beside the point. It is wrong because Section 4610.5 plainly permits King to "dispute," "review[] or appeal[]" Dr. Sharma's determination that Klonopin treatment was medically unnecessary, whether in whole or partially, by arguing that it should have approved a weaning regimen. The statute also allows a physician to seek expedited treatment for an "imminent and serious threat" to the claimant's health. (*Id.* subd. (h)(4).)

Indeed, Plaintiffs now acknowledge that King in fact filed a request for IMR review of the decision to decertify Klonopin. (RB 8.) And while Plaintiffs fail to inform the Court of the outcome, the IMR panel upheld Dr. Sharma's utilization review decision that Klonopin was not medically necessary. By their lawsuit, Plaintiffs seek to avoid this result and

collaterally attack the decision before a different forum—the very forum arbitrage barred by the WCA's exclusivity.

Plaintiffs maintain that King could not have asserted his failure to warn theory because he was "not aware of the [decision's] potential consequences" until "after he already suffered the seizures" (RB 33-34). But because Plaintiffs themselves contend that "[a]ny competent physician would have known that the abrupt cessation of Klonopin was strongly discouraged" (AOB 4), King's treating physician should, on King's own theory, have given him that information.

Nor is King left without "any relief for [his] injury," as he suggests. (RB 44.) Nothing in the statute prevents King from suing his *treating physician* for his alleged injuries from Klonopin withdrawal. King can receive workers' compensation coverage for those injuries because they satisfy the conditions of compensation, and are at least "collateral to or derivative of" his original workplace injury. (*Vacanti*, *supra*, 24 Cal.4th at p. 811.) That is a point Plaintiffs do not dispute (*ante*, 1), and it forecloses their claims whether they sound in negligence or a duty to warn. *Marsh* makes clear that the utilization review provisions, like the provisions addressing "compensation" there, inform "[t]he exclusive remedy doctrine," and must be read together with the WCA provisions making workers' compensation "the sole and exclusive remedy" for work-related injuries. (See §§ 3600, 3602.) Construed as a whole, as it must be, the WCA embraces claims growing out of the utilization review process itself.

That Section 4610.5 does not provide a specific remedy against a *reviewing physician* for a failure to warn is beside the point. In establishing the IMR process, the Legislature made a conscious decision to allow only "limited appeal of decisions" while ensuring that medical care coverage

decisions were made by physicians. (Stats. 2012, ch. 363, § 1, subd. (f).) That legislative judgment coheres with the broader workers' compensation tradeoff of providing workers with assured, efficient benefits and compensation in exchange for forgoing the full range of tort remedies. Despite their attempts to artfully reframe their claims, Plaintiffs are not entitled to a remedy beyond those provided by the WCA: an opportunity to challenge the utilization review decision through the IMR process, and the availability of WCA benefits for injuries arising out of the utilization review process. If a plaintiff were allowed to graft a tort suit against the employer or its provider on top of the WCA's remedies, it would eviscerate the compensation bargain. And, as this case shows, it would invite the "cumbersome, lengthy, and potentially costly [dispute resolution] process" that the IMR is designed to avoid. (*State Comp. Ins. Fund v. Workers' Comp. Appeal Bd.* (2008) 44 Cal.4th 230, 238 ("*Sandhagen*").)[3]

Plaintiffs rely on two lines of cases, which do not involve preemption at all, to argue that even if the negligence claims are preempted,

[3] In September 2016, the Legislature enacted amendments to Sections 4610 and 4610.5. (See 2016 Cal. Legis. Serv. Ch. 868 (S.B. 1160); 2016 Cal. Legis. Serv. Ch. 885 (A.B. 2503).) These amendments were not in effect at the time of King's utilization review and, in any event, none of them changes the WCA's preemptive scope here. The amendments taking effect prior to 2018 are minor, and include removing the word "delay" from the provisions defining utilization review to "approve, modify, delay or deny" treatment recommendations. (See §§ 4610 subds. (a), (d)-(g); §§ 4610.5, subds. (c)-(f), (k); S.B. 1160 § 3.) The amendments taking effect in 2018 are more substantive, including, *inter alia*, requiring accreditation for utilization review processes, exempting certain treatments from prospective review, and providing expedited IMR review of prescription drug requests. (See S.B. 1160 §§ 4-5.) By expanding regulation over utilization review organizations and specifically establishing expedited IMR for prescription drugs, these amendments merely underscore the review scheme's comprehensive scope and tailored remedies.

the failure to warn claims are not. (RB 44-46.) These public entity immunity and strict liability product cases are inapposite. Plaintiffs' public entity immunity cases involve statutes providing immunity from liability, with specific statutory carve-outs for failure-to-warn claims. (RB 45.) Here, by contrast, the WCA provides a comprehensive administrative remedial scheme for injuries arising from the utilization review process, including Plaintiffs' injuries, and "the workers' compensation system subsumes all statutory and tort remedies otherwise available for such injuries." (*Vacanti*, *supra*, 24 Cal.4th at p. 814.) Similarly, it is beside the point that failure-to-warn claims can sometimes go forward in the products liability context, even if the underlying product was not defective. (RB 44.) Because, as noted, the WCA prescribes not only the method of making a decision but also the content and process for communicating that decision, it encompasses any failure-to-warn claim, not just claims challenging the decision itself. (*Ante*, 6-7.)

If Plaintiffs could proceed on a failure-to-warn claim, a workers' compensation claimant could simultaneously challenge an adverse utilization review decision in two ways. First, the employee could follow the exclusive statutory IMR process. (§ 4610.5(e).) Second, the employee could also decide to sue the utilization review organization in tort for failure to include medical advice in its decision. Even if the utilization reviewer correctly applied the statutory medical treatment utilization schedule (MTUS), plaintiffs could seek tort damages against the provider and hope a jury would reach a different determination. All the while, the claimant could claim eligibility for, and receive, workers' compensation benefits for the same injuries. The result would be a dual track system for challenging utilization review decisions, undermining the Legislature's goal by making the system more costly, and more cumbersome—not less so.

B. The WCA Preempts Tort Suits Against Utilization Review Organizations Retained By Employers Or Insurers To Administer The Utilization Review Process

Plaintiffs' second ground for evading the exclusive IMR remedy rests on a construction that is belied by the statutory text, and that already has been rejected by this Court. According to Plaintiffs, the WCA's exclusivity does not apply, even though the conditions of compensation obtain, because CompPartners is not an "employer" for purposes of "the sole and exclusive remedy" referenced in Sections 3600 and 3602. (RB 35-40.) Under Plaintiffs' construction, this exclusivity is limited to the "employer," and does not extend to third-party utilization reviewers. (*Ibid.*)

This is pure casuistry. As we have noted (PB 28), the WCA authorizes employers to contract with a third-party provider like CompPartners to provide utilization review services. (§ 4610, subd. (b).) Section 4610.5 expressly defines "employer" to include "the insurer of an insured employer, a claims administrator, or a utilization review organization, or other entity acting on behalf of any of them." (§ 4610.5, subd. (c)(4).) Because these provisions must be construed together with the surrounding IMR provisions and the WCA's exclusivity provisions (Sections 3600 and 3602), the WCA's exclusive remedy clearly applies to utilization review providers.

The point is underscored by *Marsh*. Like Plaintiffs here, the *Marsh* plaintiffs argued that their compensation claims were not preempted because the defendant claims administrator was neither an "employer" or "insurer" for purposes of Sections 3600 and 3602, but was instead "any person other than the employer" (under Section 3852). (See 49 Cal.3d at p. 6.) This Court rejected the approach of focusing exclusively on the provisions' "literal meaning" and, as noted above, recognized that these

statutes must instead be read together with other sections of the WCA. (*Id.* at p. 7.) These included the provisions addressing "the 'recovery of compensation' and the 'payment of compensation.'" (*Id.* at pp. 8-9 (citing §§ 5300, 5814.) Reading these provisions together, this Court concluded that "the workers' compensation system encompasses all disputes over coverage and payment, whether they result from actions taken by the employer, by the employer's insurance carrier or, as occurred in this case, by an independent claims administrator hired by the employer to handle the worker's claim." (*Id.* at p. 8.) In arriving at this holding, the Court rejected the dissent's suggestion that "relegat[ing] [the plaintiff] to the workers' compensation system … does not prevent the filing of an action for damages at common law against a defendant who is not an 'employer.'" (*Id.* at p. 12 [dis. opn.].)

The grounds for applying the WCA's exclusive remedies to a third-party administrator retained by an "employer" are even stronger here than in *Marsh*. The utilization review provisions specifically define "employer" to include "a utilization review organization." (§ 4610.5, subd. (c)(4).) Even if they did not, *Marsh* confirms that the overall operation of the utilization review scheme would require that third-party review providers receive the same exclusivity protections as the employers retaining them. (See also *Santiago v. Employee Benefits Servs.* (1985) 168 Cal.App.3d 898, 901 [rejecting argument that claims against adjusting agencies are non-preempted because they "are not specifically included in the workers' compensation act as an 'employer' or 'insurer'"].) The WCA contemplates that employers will draw on the resources of third-party administrators. As with the defendant employers in *Marsh*, who "lack[ed] the expertise to themselves handle the workers' compensation claims of their employees" (49 Cal.3d at p. 8.), employers routinely hire utilization review

organizations with expertise in the field. This is why the Legislature specifically authorized employers to establish the utilization review process directly or through third-party providers. (§ 4610, subd. (b).)

It would makes no sense for the Legislature to extend the WCA's exclusivity protections to employers who conduct their own utilization reviews, only to deny them to employers who hire specialized utilization review organizations. Limiting the WCA's exclusivity to employers themselves would leave utilization review providers vulnerable to tort suits, creating a strong disincentive for such providers to work with California employers. "Accepting the [Plaintiffs'] distinction" between employers and utilization review organizations thus "would vitiate the very purpose of the exclusive remedy provisions of the Act." (Cf. *Marsh*, *supra*, 49 Cal.3d at p. 8.) It also would set the statute's provisions at war with each other, rather than harmonizing them. (E.g., *People v. Jenkins* (1995) 10 Cal.4th 234, 246.) Those utilization review providers willing to assume the risk of tort liability would, of course, pass the costs of such liability on to the employers. This would increase the cost of retaining specialized utilization review organizations, defeating the Legislature's intent to address "skyrocketing workers' compensation costs" (*Smith*, *supra*, 46 Cal.4th at p. 279) and "ensure quality, standardized medical care for workers in a prompt and expeditious manner" (*Sandhagen*, *supra*, 44 Cal.4th. at p. 241).

None of Plaintiffs' cases are to the contrary. Plaintiffs rely on two cases in which workers' compensation beneficiaries injured or killed in work-related car accidents were permitted to sue third-party drivers. (RB 36 [citing *Phelps v. Stostad* (1997) 16 Cal.4th 23, 30 and *Eli v. Travelers Indem. Co.* (1987) 190 Cal.App.3d 901].) These independent tortfeasors had no relationship to the employer or to the workers' compensation process. Nor can Plaintiffs' lawsuit, which asserts benefits-related injuries

against a statutorily-authorized workers' compensation provider, be compared to a suit against an employer's parent company for independent acts of negligence. (RB 37 [citing *Waste Management Inc. v. Superior Court* (2004) 119 Cal.App.4th 105, 110].)

Unruh v. Trucking Insurance Exchange (1972) 7 Cal.3d 616, is still further off the mark, for it was expressly distinguished in *Marsh*. That decision permitted workers' compensation claimants to sue private investigators retained by an insurer. But as *Marsh* explained, it would be "incorrect[] [to] equate[] private investigators and independent claims administrators," given that claims administrators play an essential, and statutorily recognized, role in the workers' compensation system. (49 Cal.3d at p. 8.) The same is true of utilization review providers.

C. The Court Should Not Consider Allegations Raised For The First Time In The Respondents' Brief, But These Allegations Cannot Avoid Preemption in Any Event

In their Respondents' Brief, Plaintiffs assert several new allegations and issues that were not raised in their complaint, before the trial court, before the Court of Appeal, or in an answer to a petition for review. This Court should deem these belated allegations and issues forfeited. Even if it considered them, however, Plaintiffs' claims would still fall clearly within the WCA's exclusivity.

Plaintiffs now speculate that Dr. Sharma did not review King's medical records, and simply rubber-stamped a decision drafted by a nurse without contacting the prescribing doctor. (RB 6.) But Plaintiffs acknowledge they have no information about whether Dr. Sharma actually failed to review King's medical records. (RB 6 n.3 ["[w]hether Dr. Sharma reviewed any records … will be addressed in discovery"].) Plaintiffs also allege for the first time that Dr. Sharma and CompPartners did not notify

the psychiatrist who prescribed Klonopin of the decertification decision, but instead mistakenly listed King's "general treating doctor" as the prescribing physician and sent him the notice. (RB 7.) They further aver that the "general treating doctor" was not familiar with the risks of abrupt withdrawal (*ibid.*), which directly contradicts their assertion that "[a]ny competent physician would have known that the abrupt cessation of Klonopin was strongly discouraged and that it would put the patient at significant risk for grand mal seizures." (AOB 4; see also RB 6-7.)

On the basis of these new allegations, Plaintiffs ask the Court to address the following as part of their "Real Statement of Issues":

> 1. Are a doctor and the employing utilization review company who make medical decisions despite lack of competence to do so, and who then fail to notify the prescribing doctor of the decision, liable pursuant to Labor Code § 4610 and Evidence Code § 669? A subsidiary issue is whether there is liability if the doctor merely signs a decision made by an unqualified nurse without reviewing the relevant medical records.

(RB 3). This eleventh-hour attempt to change the subject fails on multiple grounds.

First, the new allegations should not be considered because they were never raised below. Where, as here, the Court did not issue an order specifying the issues to be briefed and Plaintiffs did not file an answer to the petition for review, briefs on the merits must be limited to issues stated in the petition for review and any issues fairly included in them. (Cal. Rules Ct. 8.520(b)(3); *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481 ["We do not consider this argument because defendants did not raise it in the trial court, in the Court of Appeal, or in their petitions for review."].) Because they were never raised before, this Court does not have the benefit of lower-court decisions, or even full briefing, analyzing them. Nor do the

new factual allegations raise "extremely significant issues of public policy and public interest such as may have caused [the Court] on infrequent prior occasions to depart from [the general policy]." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 591.)

The policy calculus does not change merely because one of the issues on appeal is whether the trial court abused its discretion in denying Plaintiffs leave to amend the complaint. Indeed, Plaintiffs cite no authority for the proposition that they may assert additional facts or theories for the first time to *this Court*, when they did not raise those facts or theories in the lower courts. To the contrary, in *Reynolds v. Bement* (2005) 36 Cal.4th 1075, as modified (Sept. 7, 2005), abrogated on other grounds by *Martinez v. Combs* (2010) 49 Cal.4th 35, this Court held that leave to amend was properly denied where Plaintiffs first raised additional facts in a petition for rehearing before the Court of Appeal, much less in merits briefing before this Court. In the initial demurrer hearing here, Plaintiffs summarized the additional facts they could allege in an amended complaint, and after consideration of those facts, the court denied leave to amend. (AA 108-109, 111.) Then before the Court of Appeal, Plaintiffs' opening brief interjected yet more "additional facts." But even those "additional facts" did not include the allegations Plaintiffs are now raising for the first time.

Second, Plaintiffs' claim could not clear the preemption hurdle even if this Court were to consider the new allegations. The new allegations that Dr. Sharma rubber-stamped a nurse's decision and did not review the medical records simply provide the reason *why* Defendants reached the utilization review decision. As explained above, and as the Court of Appeal correctly held, the IMR process is the exclusive method of resolving challenges to utilization review decisions; the particular reason a utilization

review physician reached a decision does not make a difference. (*Ante*, 5-6.)

The other new allegations, asserting that Defendants sent the decertification decision to King's primary care physician rather than the psychiatrist, are likewise unavailing. Plaintiffs do not suggest that this alleged procedural defect caused any harm apart from the denial of Klonopin itself or the alleged failure to provide a warning. In any event, any injuries that flow from the workers' compensation process for a prior industrial injury are "tethered to a compensable injury" (*Vacanti*, *supra*, 24 Cal.4th at p. 815) and entitle the worker to benefits within the workers' compensation system. Accordingly, King can receive no-fault benefits for any injuries arising from Defendants' alleged mistakes in delivering the decertification decision, but cannot pursue a parallel tort remedy. Just as "all disputes over coverage and payment" are preempted by the WCA's exclusive remedies (*Marsh*, 49 Cal.3d at p. 8), no matter the particular theory pressed, so too are all disputes over utilization review decisions. (See *ante*, 5-11.) That the Legislature expressly accounted for the possibility of communication mishap in designing the IMR process, and created administrative penalties for violations of utilization review procedure, is further evidence that Plaintiffs' claim is encompassed within the scope of WCA preemption. (See § 4610.5, subd. (h)(3) ["time limitations for the employee to submit a request for independent medical review shall not begin to run until the employer provides the required notice to the employee"]; § 4610, subd. (i) [authorizing administrative penalties for violations of utilization review requirements]; *Vacanti*, *supra*, 24 Cal.4th at p. 819 [noting that existence of administrative penalty "equally suggests" legislative intent to preempt tort remedy].)

Moreover, allegedly mishandling the delivery of a decertification decision does not fall within the "narrow exception" for conduct "so extreme and outrageous" that an entity has "in effect stepped out of its role … and could therefore be held liable as 'any person other than the employer.'" (*Marsh, supra*, 49 Cal.3d at p. 6 [quoting *Unruh, supra*, 7 Cal.3d at pp. 630-631].) "Where the acts are a normal part of the employment relationship, or workers' compensation claims process, or where the motive behind these acts does not violate a fundamental policy of this state, then the cause of action is barred." (*Vacanti, supra*, 24 Cal.4th at p. 812 [internal quotation marks and citations omitted].) Plaintiffs' new allegations, regarding defective notice, at most establish errors in the conduct of the utilization review process. Even if the allegations were true, such mistakes would not constitute conduct so extreme that Dr. Sharma and CompPartners "had in effect stepped out of [their] role[s]" as utilization reviewers. (*Marsh, supra*, at p. 6.)

II. A UTILIZATION REVIEW PROVIDER DOES NOT OWE A DUTY OF CARE TO RENDER MEDICAL ADVICE

A. Plaintiffs' Proposed Duty Is At Odds With The Role Of The Utilization Reviewer

The WCA makes the role of the utilization reviewer completely different from that of the treating physician. (See PB 34-36.) Plaintiffs acknowledge that the utilization reviewer's duties "are not the same as those of treating doctor[s]" (RB 29), and appear to concede there is no physician-patient relationship between a utilization reviewer and a claimant. Plaintiffs instead attempt to carve out a distinct duty on the part of utilization review physicians to warn claimants about medical risks. Their own arguments show, however, that this duty is tantamount to a duty

to provide medical advice and even care, abrogating the WCA's clear limitations on the reviewer's role.

Plaintiffs analogize the utilization reviewer's duty to warn to that of the treating physician, arguing that "[i]f Mr. King's treating workers' compensation physician had ordered the exact same abrupt cessation of Klonopin *without any warnings*, there is no question that the doctor would be liable." (RB 15, italics added.) If the reviewing physician deems drug treatment medically unnecessary, Plaintiffs maintain that he "must provide a warning to the injured worker of the need to take alternative measures to protect against the risks posed by the abrupt termination"—"such as seeking treatment or medication *outside of the workers' compensation setting*." (RB 30, italics added.) The upshot is that the reviewing physician must render advice beyond the statutory charge of "approv[ing], modify[ing], or deny[ing]" the treating physician's recommendation. (Cf. § 4610, subd. (g)(3)(A).)

There are yet more anomalies. Under Plaintiffs' approach, a reviewing physician would be obligated to help shoulder the workload of busy treating physicians. Plaintiffs contend that "[u]nless the prescribing psychiatrist was hyper vigilant," a utilization review decision "would not prompt the prescribing psychiatrist to interrupt his regular schedule of patient visits and look up manufacturer's warnings about abrupt termination of the prescriptions." (RB 33.) In their view, "a warning [from the utilization reviewer] was necessary to put the prescribing psychiatrist on notice of the need to take action." (*Ibid*.) In other words, because treating physicians are busy and may not carefully discharge their duties, reviewing physicians should help them by providing independent medical advice.

What Plaintiffs demand, then, is nothing short of a new tort duty requiring utilization reviewers to act as supplemental or substitute treating physicians. Where, as here, the reviewing physician issues an adverse medical necessity determination, he would be required to provide warnings and medical advice about alternatives. But Plaintiffs offer no workable limits on this duty. Even where reviewing physicians *approve* a request, the tort duty Plaintiffs urge could potentially obligate them to make their own medical judgments and give "notice of the need to take action." (Cf. RB 33.) These duties would attach even if, as in this case, the claimant does not challenge medical necessity decisions under MTUS standards.

This is at odds with the role carefully created by the Legislature for utilization reviewers. As noted, the Legislature adopted the utilization review scheme to balance the objectives of containing costs and delivering high-quality, efficient medical care for workers. (*Smith*, *supra*, 46 Cal.4th at p. 279.) Recognizing a special tort duty for reviewers would upset this balance in multiple ways:

First, the statutory scheme makes clear that the utilization reviewer is not a supplemental treating physician. (PB 34-36; see generally § 4610.) Whereas the treating physician provides medical treatment and advice, the Legislature requires the reviewing physician to carry out a single task: review "treatment recommendations" made by the treating physician for medical necessity under the MTUS. (§ 4610, subd. (a) & (c).) Nothing in the statutory scheme suggests the utilization reviewer would himself ever provide "treatment recommendations" or otherwise advise claimants or treating physicians. Indeed, consistent with the treating physician's role in providing care and advice to the patient, the statutory scheme contemplates that utilization review decisions would be communicated primarily to the treating physician. (§ 4610, subd. (g)(3)(A).)

Second, requiring utilization reviewers to build medical advice into their review decisions again expands their role beyond what the WCA contemplates. The Legislature has specified the content of utilization review decisions: they are to 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 decision regarding medical necessity." (§ 4610, subd. (g)(4).) That content does not include any medical advice and, as Plaintiffs concede, "[n]othing in § 4610 requires warnings of risks of discontinuation of treatment or medications." (RB 33.) The decision's prescribed content reflects the utilization reviewer's limited role, which is not to advise the patient, but simply to review treatment recommendations for coverage purposes under the statute's "uniform guidelines." (*Sandhagen*, *supra*, 44 Cal.4th at p. 240.)

Third, requiring utilization reviewers to render medical advice would upend how utilization review is conducted, subjecting the reviewer to additional standards and duties that conflict with the statutory scheme. By statutory design, utilization reviewers, unlike treating physicians, do their work based on limited information. The information an employer or insurer may request for utilization reviews is restricted to "*only* the information reasonably necessary to make the determination" of medical necessity under the MTUS. (§ 4610, subd. (d), italics added.) "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 v. State, Dept. of Mental Health* (2005 Cal. W.C.A.B.) 70 Cal. Comp. Cases 866, 2005 WL 1489616, at *7.) These limitations are part and parcel of the "prompt and expeditious" review, as well as the cost containment, contemplated by the WCA. (*Smith*, *supra*, 46 Cal.4th at p. 279.) Under the tort duty regime

advocated by Plaintiffs, however, reviewers would be required to obtain sufficient information not just to apply the MTUS, but also to render medical advice—including advice on treatments *outside* of the MTUS. (RB 30.)

Plaintiffs' approach would put utilization reviewers in a no-win situation. On the one hand, a utilization reviewer who renders medical advice based on the limited information contemplated by section 4610 might be accused of negligence if he did not request and consider additional information. Indeed, Plaintiffs have complained that Dr. Sharma did not "evaluate[] Mr. King face-to-face" (App. 4), even though physician examinations are not part of the review process the Legislature created. Even apart from face-to-face evaluation, reviewers may still feel the need to obtain medical histories and information beyond what is necessary to apply MTUS criteria, lest they expose themselves to what are, in substance, malpractice suits. On the other hand, collecting information to that extent would contravene the Legislature's mandate to request and consider "only the information reasonably necessary to make the determination" of medical necessity under the MTUS. (§ 4610, sub. (d).)

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

When the question of tort duty is properly considered in the context of the utilization review scheme and its underlying compensation bargain, the *Rowland* tort duty factors weigh decisively against recognizing a special utilization review duty. (PB 41-47.) Plaintiffs repeatedly stress that "people are liable for harm they cause to others …." (RB 25.) That truism does not mean a tort duty exists in every situation. "[W]hether a duty of care exists in a given circumstance[] 'is a question of law to be determined on a case-by-case basis'" (*Parson v. Crown Disposal Co*. (1997) 15 Cal.4th

456, 472), and is "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 n.6.) Plaintiffs' arguments for a duty to warn flout the WCA's comprehensive scheme and the important policies it serves.

1. The Public Policy Factors Weigh Strongly Against A Duty To Warn

The *Rowland* public policy factors must be applied in light of California's comprehensive workers' compensation scheme. The duty Plaintiffs seek to impose runs from a physician carrying out a job created by the WCA to a WCA claimant. Plaintiffs do not dispute that point, but insist reviewers must carry a sweeping tort duty or else "[t]he public will be at great risk." (RB 27-28.) At the outset, the concern is overwrought given the remedies available to a workers' compensation claimant. The same negligence allegations Plaintiffs make against the utilization reviewer about medical advice may already be leveled against King's treating physician—the party responsible for King's medical care. (See *Cobbs v. Grant* (1972) 8 Cal.3d 229, 243 [treating physician has "duty of reasonable disclosure [to the patient] of the available choices with respect to proposed therapy and of the dangers inherently and potentially involved in each"].)

More fundamentally, Plaintiffs' approach impermissibly draws the courts into second guessing the Legislature's balance of the many competing concerns here. This is well illustrated by the way Plaintiffs propose to resolve disputes over utilization reviews:

> Expert testimony would be necessary to address … the types of records which need to be reviewed before making a decision, the types of information a reviewing doctor must know or obtain to make an informed decision, and the types of information available to a reviewing doctor, such as a manufacturer's warnings.

(RB 31.) Such expert battles are precisely what the Legislature aimed to avoid in creating the utilization review system and requiring "[e]very employer" to participate in it. (§ 4610, subd. (b).) Before utilization review was adopted, workers and employers litigated medical necessity determinations before workers' compensation judges, and "the criteria by which those determinations were evaluated depended on the quantity and quality of the expert evidence presented by the parties." (*Stevens v. Workers' Compensation Appeals Bd*. (2015) 241 Cal.App.4th 1074, 1088.) The Legislature found this process to be "costly, time consuming, and [did] not uniformly result in the provision of treatment that adhere[d] to the highest standards of evidence-based medicine …." (*Id.* at p. 1089.) That is why the Legislature replaced it.

The court litigation and battle of the experts that Plaintiffs openly invite cannot but frustrate the Legislature's twin objectives of cost containment and ensuring standardized, quality care. Utilization review costs would undoubtedly rise due to litigation in the courts, which may run parallel to utilization review, as well as the additional work, advice, and information-gathering Plaintiffs would require of utilization reviewers. Utilization review would become less standardized, as reviewers are forced to venture outside of the medical necessity criteria of the MTUS and satisfy judge-made standards in rendering medical advice to patients.

Plaintiffs suggest that new tort duties should raise no concerns because "[a]lmost all doctors have medical malpractice insurance." (RB 28.) But grafting onto the WCA an unprecedented duty to warn would ultimately raise the cost of no-fault coverage for workers under the WCA, including for injuries such as King's seizures. More importantly, the new duty could potentially erode the quality of health care. By forcing utilization review physicians to render advice based on incomplete

information, the duty would increase the risk of mistake, invite conflicting recommendations, and potentially undermine the role of the treating physician. (*Ante*, 19-23; PB 45.)

While Plaintiffs would have the court treat utilization reviewers like "any other doctor" (RB 27-28), they are a creature of statute and carry out a limited role prescribed by the Legislature. Because that role reflects legislative judgments, it cannot be cast aside because Plaintiffs or the courts would structure remedies or weigh the competing policies differently.

2. Other Factors Also Weight Against A Duty To Warn

The other *Rowland* factors likewise weigh against recognizing a special reviewer duty.

First, Plaintiffs claim that harm is foreseeable if the reviewer does not issue medical advice in connection with a utilization review decision. Not so, because the treating physician is much better positioned to give any appropriate advice, given his greater access to patient information and relationship with the patient. Plaintiffs note that treating physicians may fail to advise patients in connection with adverse medical necessity determinations. (RB 33.) But as Plaintiffs acknowledge, it is the treating physician's responsibility to advise the patient about the potential effects of medication. (RB 20 [citing cases concerning treating physicians' failure to warn].) That some treating physicians may sometimes fall short in their jobs does not mean it is sound policy to upend the Legislature's comprehensive scheme and turn utilization reviewers, as a class, into supplemental treating physicians or insurers for treating physicians.

Nor does it make a difference that Plaintiffs now claim, for the first time, that the utilization review decision was sent to King's primary care

physician and not his psychiatrist. Even if that new assertion is not forfeited and preempted (and it is, *ante*, 16-19), Plaintiffs' primary care physician should have been well-placed to render any appropriate advice given Plaintiffs' claim that "[a]ny competent physician would have known" about the risks of cessation of Klonopin (AOB 4).

Second, assuming King suffered harm, Plaintiffs' argument about the connection between Defendants and King's injury merely repackages their contention that Dr. Sharma "gave no warning of the known consequences of his decision." (RB 26.) Because Plaintiffs do not dispute that Klonopin was properly discontinued under the MTUS, and because they maintain that the discontinuance caused the seizures, any connection between the injury and the lack of warning is indirect and remote. That is especially so given that King should be looking to his treating physicians for advice.

Third, there is nothing morally blameworthy about Defendants' alleged conduct. Dr. Sharma rendered a medical necessity decision, which IMR review affirmed, and the decision was communicated to one of King's treating physicians. Nothing in the statutory scheme requires Dr. Sharma to give medical advice to King. Plaintiffs identify nothing culpable about "defendant's state of mind," and there is nothing "inherently harmful" about a reviewer not volunteering medical advice. (Cf. *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243, 270.) After all, as Plaintiffs do not dispute, the reviewer is not in a physician-patient relationship with the injured worker.

3. Plaintiffs' Cases Do Not Establish A Duty To Warn For Utilization Reviewers

None of the cases cited by Plaintiffs compel a different conclusion or require a utilization reviewer to provide medical advice to workers with whom they have no physician-patient relationship, and whom they have never met, examined, or treated.

Plaintiffs miss the mark with cases that address tort liability for negligent decision-making in utilization reviews by insurers outside of the workers' compensation system, as none imposed on the reviewing physician a duty to advise the patient. (Cf. RB 21-23 [citing *Mintz v. Blue Cross of Cal*. (2009) 172 Cal.App.4th 1594 and *Wilson v. Blue Cross of Cal*. (1990) 222 Cal.App.3d 660].) Nor can Plaintiffs find support in cases requiring a duty to warn in the context of a physician-patient relationship, since no such relationship existed between Dr. Sharma and King. For example, in *Myers v. Quesenberry* (1983) 144 Cal.App.3d 888, the court held that the defendant physician had a duty to warn a driver, who later injured the plaintiff, not to drive in her condition. (*Id*. at p. 894.) The court reasoned that given the defendant's physician/patient relationship with the driver, its "holding does not require the physician to do anything other than what he was already obligated to do for the protection of the patient." (*Ibid.*) Other failure-to-warn cases Plaintiffs cite are similarly distinguishable. (See, e.g., *Reisner v. Regents of Univ. of Cal.* (1995) 31 Cal.App.4th 1195 [physician who performed blood transfusion learned patient had HIV but did not inform her]; *Bragg v. Valdez* (2003) 111 Cal.App.4th 421 [physicians failed to warn patient and his family that cessation of medication posed danger]; see also other cases cited at RB 20.)

Plaintiffs cannot get around the lack of a physician-patient relationship by relying on cases where a physician actually *injured* a

plaintiff during a medical examination conducted for the benefit of third parties, such as an employer or insurer. (See RB 18 [arguing that "a doctor who examines a person only for evaluation is liable for injuries caused during the examination, even though there is no treating doctor-patient relationship"] and cases cited therein; see, e.g., *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [holding that "even in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself"].) None of these cases imposed on the non-treating physician a duty to render medical advice to the patient. To the contrary, these cases make clear that an examinee may *not* rely on the non-treating physician's analysis as medical advice, explaining that "[a]ny duty to use the proper professional skills in preparing a report based on the examination runs to the person employing the physician to prepare the report, not the person being examined." (*Id.* at p. 1471; see also *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 314 [patient cannot rely on medical report prepared for workers' compensation insurer "where the examining physician is not the treating physician"]; *Hafner v. Beck* (Ariz. Ct. App. 1995) 916 P.2d 1105 [similar].) As the Court of Appeal has noted, there is "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 v. Schaeffer* (1991) 229 Cal.App.3d 229, 235.) This applies with even greater force to this case, as Dr. Sharma did not examine King, and did only exactly what the WCA required: prepare a medical necessity determination that undisputedly accords with statutorily-prescribed MTUS criteria.

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: November 17, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, Petitioners' Reply Brief On The Merits is produced using 13-point Roman type and, including footnotes, contains 8,370 words, which is less than the 8,400 words permitted by this rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 17, 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 November 17, 2016, I served true copies of the following document(s) described as **PETITIONERS' REPLY 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 November 17, 2016 at San Francisco, California.

Mark Roberts

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