No. S232197

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KIRK KING, et al.,
Plaintiffs and Appellants,

vs.

COMPPARTNERS, INC., et al.,
Defendants and Respondents.

After an opinion by the Court of Appeal
Fourth Appellate District, Division Two, No. E063527

Appeal from judgment of the Superior Court of Riverside County
(RIC1409797) Hon. Sharon J. Waters

APPLICATION TO FILE AN AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF INDEPENDENT REVIEW ORGANIZATIONS, COVENTRY HEALTH CARE WORKERS COMPENSATION, INC. AND EXAMWORKS, INC., IN SUPPORT OF DEFENDANT AND PETITIONER COMPPARTNERS, INC.

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APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), the National Association of Independent Review Organizations ("NAIRO"), Coventry Health Care Workers Compensation, Inc. ("Coventry"), and ExamWorks, Inc. ("ExamWorks") respectfully request permission to file the attached amicus curiae brief in support of Defendant and Petitioner CompPartners, Inc.

IDENTITY AND INTEREST OF AMICUS CURIAE NATIONAL ASSOCIATION OF INDEPENDENT REVIEW ORGANIZATIONS, COVENTRY HEALTH CARE WORKERS COMPENSATION, INC. AND EXAMWORKS, INC.

NAIRO is a collaborative group of leading independent review organizations dedicated to protecting the integrity of the independent medical peer review process. Independent review organizations provide independent clinical reviews to improve quality of care, medical utilization, and patient safety. An independent review organization acts as a third-party clinical review resource which provides objective, unbiased, advisory opinions to assist payors in making medical necessity determinations based only on medical evidence.

Coventry, an Aetna company, provides utilization review and cost containment services for employers and other workers' compensation payers. Coventry has a utilization review plan on file with the Division of Workers' Compensation. Coventry is one of the two largest utilization review organizations in California and its physicians and nurses conduct around 150,000 utilization reviews for workers' compensation claims each year.

ExamWorks is a leading provider of utilization reviews, independent medical assessments, bill reviews, Medicare compliance services, record retrieval services and related services.

Collectively, the foregoing amici have substantial knowledge and experience in the utilization review process and believe that the attached brief

will assist the Court in deciding the matter.

Pursuant to California Rules of Court, rule 8.520, amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici and their members, or their counsel made a monetary contribution to its preparation or submission.

For these reasons, NAIRO, Coventry and ExamWorks respectfully request that this Court accept and file the attached amicus curiae brief.

Respectfully submitted,

Dated: December 16, 2016

By: */s./ David D. Johnson*

Attorneys for Amicus Curiae
Coventry Health Care Workers Compensation, Inc.

Dated: December 16, 2016

By: */s./ Raul L. Martinez*

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I. INTRODUCTION

This case is of critical importance to California employers and the utilization review ("UR") organizations who service their workers compensation programs.[1] The Court of Appeal's decision that physicians who conduct utilization review for employers owe a duty of care to the employees whose claims they review would seriously undermine and defeat the purpose of California's utilization review system.

The Legislature has designed the utilization review system to be independent, with the employee represented by his/her treating physician who is responsible for arranging for his/her care, and the employer represented by the UR organization and its UR physician. The Legislature has also created a narrowly confined role for the UR physician, who is required to review and approve or deny requests for authorization in a tight timeframe, is only permitted to view medical information relating to the specific authorization request, and is instructed to merely determine whether the request fits within published medical guidelines. The UR physician reviews a request for medical treatment or services solely to determine its medical necessity, not for purposes of providing medical treatment to the worker. Such constraints make it impossible for a UR physician to diagnose or design treatment plans for an injured worker as does a treating physician.

The Plaintiffs seek to hold the UR physician liable for malpractice to the worker because he did not "order" weaning of a drug, Klonopin, did not order any replacement medication and did not warn Plaintiffs about the consequences of abrupt cessation. (Answer Brief at 12.) But California law

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[1] "Utilization review is the process physicians utilize to determine whether a particular service or treatment is medically necessary and therefore covered by the applicable health care service plan." (*Pacificare of California et al v. Bright Medical Associates, Inc.* (2011) 198 Cal.App.4th 1451, 1457.)

provides that a physician is not liable for malpractice absent a physician-patient relationship. A UR physician does not have a physician-patient relationship with the employee, and as such, does not have the authority to order any treatment for the employee. Indeed, the Labor Code makes clear that the UR physician role may be ***adverse*** to the injured worker with the treating physician acting as the workers' advocate. Moreover, the decision to approve or deny the requested medical treatment is communicated to the treating physician, not to the patient. The UR physician's role is further constrained by a lack of access to medical records and other clinical information about the worker which would prevent the UR physician from performing a competent diagnosis or preparing a treatment plan.

Imposing a duty to order treatment or provide treatment instructions would transform the UR physician into a treating physician by imposing on the reviewer the obligation in many cases to obtain a complete medical history from the patient, perform a physical exam, order tests and consult with specialists. Indeed, this is exactly what Plaintiffs ask this Court to require of UR physicians.[2] But this is contrary to the entire purpose of the UR system, which is designed to conduct a time-sensitive review of a limited set of medical records solely for the purpose of determining whether the requested services are medically necessary under statutory medical treatment utilization guidelines. Imposing a duty of care on UR physicians would cause the UR system to grind to a halt.

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[2] Plaintiffs unabashedly argue that the "utilization review doctor is obligated to review the injured workers' medical history and information in sufficient detail to make an informed decision, and it means the utilization review doctor is obligated to either possess or acquire sufficient information about the treatment and medications the injured worker is receiving (or which the treating doctor has requested) to be able to make an informed decision about the necessity of that specific treatment and potential alternatives." (Answer Brief at 30.)

Additionally, imposing a duty of care on UR physicians is contrary to the exclusive remedy provisions of the Workers' Compensation Act and the exclusive review procedures for challenging utilization review decisions contained in the Labor Code. Opening the door to medical malpractice claims undermines the entire utilization review system and the independent medical review appeal process.

For all these reasons, the Court is urged to reverse the Court of Appeal's decision.

II. HOW UTILIZATION REVIEW FUNCTIONS WITHIN THE WORKERS' COMPENSATION SYSTEM

A The Labor Code Creates an Independent System for Review of Requests for Treatment

The Workers' Compensation Act ("WCA") provides workers with the right to receive broad compensation for on-the-job injuries, including medical treatment and wage replacement.[3] Under the workers "compensation bargain", these benefits are paid without regard to the employer's fault and "in lieu of any other liability whatsoever to ***any*** person."[4] Under the "compensation bargain," the employer assumes liability for work-related personal injury claims without regard to fault in exchange for a limitation on tort liability.[5] The employee is afforded relatively swift and certain payment of benefits, but, in exchange, gives up the wider range of damages potentially

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[3]Lab. Code, § 4650 et seq. (governing disability payments); § 4600 et seq. (governing medical payments).

[4] Lab. Code, § 3600 ("Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, 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 . . .")

[5] Lab. Code, § 4602; *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16

available in tort. [6]

As such, the WCA counterbalances the rights of the employee and the employer. For the medical component of compensation, the WCA gives the worker strong rights by mandating coverage for all medical care "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury...."[7] The WCA further provides that the employee has the right to be treated by his/her own physician or by a physician that the employee chooses from the employer's medical network.[8] The employee's primary treating physician has the responsibility for managing the employee's medical care. The regulations define the "primary treating physician" as "the physician who is primarily responsible for managing the care of an employee...." [9]

But these rights are then counterbalanced. Labor Code Section 4600, subd. (a) provides that an employer is only required to provide medical treatment that is "medically necessary," which is defined to mean "medical treatment that is reasonably required to cure or relieve the employee of the effects of their injury" and based on the standards set forth in Labor Code sections 4610.5, subd. (c)(2) and 5307.27. Section 4600, subd. (d)(5) also provides that the workers' compensation insurer "may require prior authorization of any nonemergency treatment or diagnostic service and may conduct reasonably necessary utilization review. . . ."

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[6] *Id.*

[7] Lab. Code, § 4600, subd. (a).

[8] Lab. Code, §§ 4600, subd. (c); 4616.3, subd. (b). See also, *Id.,* Cal. Code Regs., tit. 8, § 9767.6, subd. (e) ("At any point in time after the initial medical evaluation with an MPN [medical provider network] physician, the covered employee may select a physician of his or her choice from within the MPN.").

[9] Cal. Code Regs., tit. 8, § 9785.

In response to skyrocketing workers' compensation medical costs, in 2003, the Legislature enacted S.B. 228.[10] Among the cost control reforms in S.B. 228 was the requirement that all employers establish utilization review systems.[11] This new mandate was codified in a new UR statute – at Labor Code Section 4610. Under this statute, the Legislature established a utilization review process for handling employee's medical treatment requests. The process was intended to provide "quality, standardized medical care for workers in a prompt and expeditious manner."[12] However, under the statutory scheme, "only an employer's utilization review physician applying approved criteria can modify, delay, or deny treatment requests."[13] Section 4610 recognizes the potential for adversity between the employer and employee by creating a two-party system for review of requests for authorization of coverage. The employee is represented by the treating physician whom he/she has selected. The employer is represented by its UR organization and its UR physicians.

Concomitantly, the legislation also provides for an independent medical review (IMR) appeal process.[14] If an employee disagrees with the utilization review physician's decision to modify, delay, or deny treatment, the employee can request review by an independent medical evaluator who, after evaluating the evidence, decides whether the sought treatment is necessary.[15]

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[10] Assembly Com. Rep. on Sen. Bill 228 (2003-2004, Reg. Session), July 9, 2003, pp. 4-6.

[11] See *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (2009) 44 Cal.4th 230, 239-40; S.B. 228 (Alarcon, 2003); Stat. 2003, ch. 639, § 28.

[12] *State Compensation Ins. Fund, supra,* 44 Cal.4th at p. 241.

[13] *Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 279.

[14] Lab. Code, § 4610.5, subds. (b), (e).

[15] Lab. Code, § 4610, subd. (g)(3)

Utilization review ("UR") thus occupies a carefully defined role within the California workers compensation system. Section 4610 provides that the purpose of UR is to "review" and then approve, modify, delay or deny treatment authorization requests by treating physicians for injured workers.[16] The purpose of this process is ***not*** to diagnose or prescribe treatment for workers.

B A UR Determination Must Be Made Based On Published Medical Practice Guidelines

The Labor Code states that an employer is responsible to provide an injured worker medical treatment that is "reasonably required to cure or relieve the injured worker from the effects of his or her injury."[17] The Code further states such treatment means "treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27" – also referred to as the medical treatment utilization schedule ("MTUS") which provides guidelines for utilization review.[18]

The Labor Code's utilization review provisions dovetail with these provisions. Section 4610, subd. (c) and (d) provide that the UR review for each employer is to be "governed by written policies and procedures" supervised by a medical director which ensure that decisions on the medical necessity of proposed treatment "are consistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27."

The MTUS is an encyclopedic-style regulation promulgated by the Director of the Division of Workers' Compensation, occupying 20-plus

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[16] Lab. Code, § 4610, subd. (a).

[17] *Id.*

[18] *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra,* 44 Cal.4th at p. 242.

sections of the California Code of Regulations.[19] It includes sections dealing with common categories of industrial injuries, such as neck and upper back complaints, shoulder complaints and elbow disorders.[20] Each section incorporates by reference one or more medical practice guideline documents published by medical societies. For example, the MTUS regulation for neck and upper back complaints incorporates by reference the "Neck and Upper Back Complaints Chapter" from the American College of Occupational and Environmental Medicine ("ACOEM") Practice Guidelines.[21]

Many of the guidelines are published by ACOEM – the medical specialty board that provides certifications to physicians in occupational and environmental medicine. According to ACOEM, the purpose of its guidelines is to "define evidence-based best practices for key areas of occupational medical care and disability management."[22] Its guidelines are developed by physicians, based on comprehensive reviews of the medical and scientific literature to date, physician input, and testing of the protocols themselves.[23] The MTUS regulations also incorporate guidelines from other organizations.[24]

The guidelines typically start by providing a general approach to treating the medical category at issue. They then list specific medical

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[19] Cal. Code Regs., tit. 8, §§ 9792.20-9792.26. The MTUS is described on the Department of Industrial Relations website at http://www.dir.ca.gov/dwc/MTUS/MTUS_RegulationsGuidelines.html.

[20] *Id.* at §§ 9792.23.1-9792.23.3.

[21] *Id.* at § 9792.23.2.

[22] ACOEM, Methodology for ACOEM's Occupational Medicine Practice Guidelines, 2016 Revision at 4 (available at https://www.acoem.org/uploadedFiles/Knowledge_Centers/Practice_Guidelines/ACOEM%20Practice%20Guidelines%20Methodology.pdf).

[23] *Id.* at 7-12.

[24] Cal. Code Regs., tit. 8, § 9792.8, subd. (a)(2).

conditions in the category, provide lists of specific treatments for each condition – i.e., medicines, therapies, surgeries, etc. – and state whether each treatment is recommended or not recommended (or whether no recommendation is available) for the condition.[25] According to Labor Code Section 4610, subd. (f), the criteria used in the UR process "to determine whether to approve, modify, delay or deny medical treatment services shall be . . . "[c]onsistent with the schedule for medical treatment utilization adopted pursuant to Section 5307.27." So the task of the UR physician is largely to determine whether a treatment for which a physician seeks authorization is recommended or considered appropriate under the relevant practice guideline.

C The UR Physician Is Only Authorized To Conduct A Limited File Review, Not To Examine, Diagnose Or Develop A Treatment Plan For The Patient

The UR process is designed by the Legislature and the California Division of Workers' Compensation system to be very limited. The treating physician for an injured worker initiates the UR process by sending a one-page "Request for Authorization" form to the UR organization for the employer. This form asks the treating physician to provide only abbreviated medical information: just the diagnosis and the identity of the service or good for which authorization is requested.[26] The treating physician is also required to send two other one-page forms which briefly summarize the accident, the workers' subjective complaint, any objective findings from physical examinations, x-rays and other tests, and the treating physician's diagnosis and

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[25] See, e.g., Chronic Pain Medical Treatment Guidelines (available at https://www.dir.ca.gov/dwc/DWCPropRegs/MTUS_Regulations/MTUS_ChronicPainMedicalTreatmentGuidelines.pdf.)

[26] DWC Form RFA (promulgated at Cal. Code Regs., tit. 8, § 9785.5). See also, Cal Code Regs., tit. 8, §§ 9792.6.1, subd. (t); 9792.9.1, subd. (c) (requiring use of form to initiate UR process).

treatment recommendations.[27]

While not required by DWC regulations, treating physicians often submit medical records relating to the treatment for which authorization is requested. Notably, the Labor Code states that the UR physician (on behalf of the employer) "shall request only the information reasonably necessary to make the determination."[28] The Labor Code does not authorize or require the UR physician to obtain the complete medical records of the employee, to physically examine the employee, to diagnose the employee's condition, or to develop a treatment plan for the employee.

D The UR process is designed to provide a quick, administrative check on a treating physician's request for services

The UR process is designed to operate in a relatively expeditious fashion. Department of Workers' Compensation regulations permit non-physicians, like nurses, to apply the specified criteria to requests for authorization and even to ***approve*** requests for authorization.[29] The fact that non-physicians are permitted to approve services of course shows that the Legislature did not intend the UR process to constitute the rendition of medical care to the employees.

Reviews of requests for authorization of prospective treatment (the vast majority of requests) or of concurrent treatment must be completed within five working days of the receipt of the information necessary to make the

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[27] *See* DWC Form DLSR 5021, Doctor's First Report of Occupational Injury or Illness (available at https://www.dir.ca.gov/OPRL/dlsrform5021.pdf), DWC Form PR-2, Treating Physician's Progress Report (available at http://www.dir.ca.gov/t8/FormPR-2.pdf).

[28] Lab. Code, § 4610, subd. (d).

[29] Cal. Code Regs., tit. 8, § 9792.7, subd. (b)(3).

determination.[30] A review within 72 hours is required where the employee faces an imminent and serious threat to his or her health.[31]

After reaching a determination, the UR physician is required to notify the treating physician within 24 hours.[32] The decision may be relayed via telephone, fax or email, with follow-up by mail to the treating physician and employee.[33] These short time frames do not contemplate that the UR physician is required to obtain the patient's medical history, conduct a physical exam, order diagnostic tests, or prepare an alternate treatment plan for the employee.

E The Patient's Remedy In Case Of Dispute Is Independent Medical Review

The statutory scheme discussed above demonstrates that the UR process was never designed for the UR physician to serve as a "surrogate" treating physician or to interfere with the physician-patient relationship between the treating physician and the employee. The treating physician remains the patient's advocate and may assist or join the patient in seeking an independent medical review challenging the UR medical necessity determination.[34] An IMR is conducted by one or more independent physicians.[35] An IMR reviewer is permitted to consider expert opinion and

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[30] Lab. Code, § 4610, subd. (g)(1) - or no more than 14 days from the medical treatment recommendation by the physician. See also Cal. Code Regs., tit. 8, § 9792.9.1, subd. (c) (providing rules for review timeframes).

[31] Lab. Code at § 4610, subd. (g)(2).

[32] *Id.* at § 4610, subd. (g)(3)(A).

[33] Cal. Code Regs., tit. 8, § 9792.9.1, subd. (d), (e).

[34] Lab. Code, § 4610, subd. (g)(3)(A).

[35] Cal Code Regs., tit. 8, § 9792.10.6, subd. (b)(1). The DWC contracts with the medical review firm Maximus to conduct IMRs.

other materials in addition to the MTUS standards.[36] However, the IMR panel also solely conducts a file review – referred to in the regulations as "an examination of the documents."[37] At the end of the review, the IMR physician issues a determination "as to whether the disputed medical treatment is medically necessary."[38] Like the UR physician, the IMR physician never physically examines the patient, performs a diagnosis or creates an alternate treatment plan.

III. BECAUSE OF THEIR LIMITED ROLE, IT IS INAPPROPRIATE TO IMPOSE TORT DUTIES ON UR PHYSICIANS

A The UR Physician's Role Fundamentally Differs from that of a Treating Physician and Does Not Involve a Physician-Patient Relationship

The UR physician's limited file review obligations differ substantially from the duties of a treating physician to his or her patient. In contrast to the UR physician, the duties of a treating physician often require tasks that are impossible for a UR physician to perform. For example, recognized professional standards of care requires treating physicians to perform physical examinations[39] and to take and consider complete medical histories.[40] These steps are simply not contemplated or provided for in the UR statutes or

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[36] Lab. Code, § 4610.5, subd. (c)(2)(A-F).

[37] Cal. Code Regs., tit. 8, § 9792.10.6, subd. (b)(1).

[38] *Id.*

[39] *Ayala v. Arroyo Vista Family Health Center* (2008)160 Cal.App.4th 1350, 1356 ("When presented with a history of headaches, one of which woke her up at night, and photophobia, a reasonable and prudent physician would perform a physical examination to determine whether there was an acute process. . .")

[40] *Coleman v. United States*, Case No. 1:14-CV-168 (WLS), __F.Supp.3d___, 2016 WL 4161106 at *5 (M.D. Ga. 2016).

regulations.

Nothing in the Labor Code provides that the UR process creates a physician-patient relationship between the UR physician and the employee. To the contrary, California law has long provided that a physician-patient relationship is a matter of contract and is only created if both parties consent. (*Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 940 "The physician-patient relationship is a contractual one."); *McNamara v. Emmons* (1939) 36 Cal.App.2d 199, 205 ("The relation of physician and patient is, in its inception, created by contract either express or implied.")) Far from involving a mutual agreement for the UR physician to provide medical services to the employee, the UR physician has an "adverse" relationship with the employee/patient when requested treatment is denied. (See *Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1472 ("Given the 'adverse' relationship between the physician as agent of the employer and/or carrier and the examinee [worker], the court could not find the physician's conduct morally blameworthy"); *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 314 (UR physician has no duty of care to the worker because "[t[he person [worker] under examination is seeking benefits from the employer's carrier and is pursuing a claim adverse to the interests of the employer"; *Felton v. Schaeffer* (1991) 229 Cal.App.3d 229, 234-235 (Physician's examination of employee during a pre-employment physical examination at the request of the employer did not establish physician-patient relationship or breach of duty of care for alleged misdiagnosis of plaintiff's medical condition)).

Indeed the structure of the UR process mandated by the Labor Code requires the UR physician make recommendations that may be adverse to the employee. For example, even though the patient's treating physician may recommend a line of treatment, the UR physician is required to deny services sought by a worker that are not supported by the medical protocols. As such, the Labor Code requires the UR physician to be ***independent*** of the worker.

B Because of their Limited Role, It Is Inappropriate to Impose Tort Duties on UR Physicians

It is well-established California law that "an essential element of a cause of action for medical malpractice is a patient-physician relationship giving rise to a duty of care." (*Mero v. Sadoff, supra,* 31 Cal.App.4th at p. 1471.) Here, because the UR physician has no physician-patient relationship with the employee, this forecloses the imposition of tort liability on the UR physician. (See *Keene v. Wiggins, supra,* 69 Cal.App.3d at p. 313 (physician who conducts independent medical examination of the plaintiff at the request of his workers' compensation carrier solely for purposes of rating the injury "is not liable to the person being examined for negligence in making that report")).

Under this Court's ruling in *Rowland v. Christian*, the existence and scope of a duty of care rests on considerations such as: 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, at p. 113.) These factors also show that it is inappropriate to impose tort duties of any kind in connection with a UR physician's denial of services.

First, it is not foreseeable that harm would result from a UR reviewer's denial or failure to provide information about a denial. Division of Workers Compensation regulations make the employee's treating physician – a physician the employee him/herself has selected – primarily responsible for

management of the employee's care.[41] By contrast, the Labor Code makes it clear that the UR physician represents the employer, whose interests are not necessarily aligned with the employee and the treating physician.[42] Because the UR physician's relationship with the employee is potentially adversarial, it would not be expected or foreseeable that the employee would rely on advice from the UR physician. (See *Mero v. Sadoff, supra,*, 31 Cal.App.4th at pp. 1471-72 (UR physician could not reasonably foresee that worker would reply on a report he prepared for the employer "inasmuch it is prepared for a person or persons with interest adverse to the examinee's own."))

Second, no moral blame can be attached to a UR physician's conduct in either approving or denying a request for services. The adversarial roles of the treating and UR physician are well laid-out in the Labor Code. The code makes it clear that it is the duty of the treating physician to manage the patient's treatment. And it is the duty of the treating physician to receive and respond to denials of care from the UR physician and to decide upon alternative treatment. Nothing in the Labor Code suggests that the UR physician has any role in diagnosing or planning treatment. (See *Keene v. Wiggins, supra,*, 69 Cal.App.3d at p. 314 ("In view of the adverse relationship with the person being examined, the [UR] doctor's conduct is not morally blameworthy").)

Third, the policy considerations of preventing future harm and avoiding negative consequences to the community would not be aided by imposing a duty of care on UR physicians. Under the Labor Code, the UR physician's role is to provide a quick check on requests for authorization of medical services from the treating physician. For this role to work, it necessarily must

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[41] Cal. Code Regs., tit. 8, § 9785, subd. (a).

[42] Lab. Code, § 4610, subd. (b) (stating that the UR process is established by the employer).

be based on limited review of documents and short timeframes – as the Labor Code provides. But these constraints are inconsistent with the role and responsibilities of a treating physician.

A UR physician is not in a position to prescribe a treatment plan or provide care instruction to an injured worker. For example, many patients take multiple medications, some of which interact with each other. But the UR physician is generally only being asked for an authorization for a single service, not for an entire plan of treatment for a patient. And the UR physician is not provided with all of the patient's medical records, but only that small subset of records that relates to the particular treatment at issue. To determine the proper drug regimen for a patient, the UR physician would need to obtain the patient's full medical history and in many cases conduct a physical examination, take or order tests, and consult with specialists. The file review alone in many cases would vastly increase the time required. While a UR physician can review the medical records for an individual request in a few minutes, performing a complete review of a medical file – which can run into hundreds or even thousands of pages – could take many hours or even days. To perform other steps, such as physically examining and interviewing the patient, requesting additional tests and specialist reports and developing a treatment plan would greatly expand the time and cost of the UR process. This is all far beyond the scope of the UR system as contemplated in the Labor Code, which merely provides for the UR physician to perform a time-sensitive review of limited documents based on the practice protocols.

C California Case Law Does Not Support Imposing A Duty of Care on UR Physicians

Plaintiffs contend that a physician for an employer can still be liable to the worker for injuries caused during a physical examination, even though there is no doctor-patient relationship. (Answer Brief at 18.) This contention is true, but it is also a red herring since this case is not based on injuries during

a physical exam. For example, In *Mero v. Sadoff*, the Court of Appeal indicated that a physician hired by an employer to perform a physical examination of an employee does not owe a duty of care to the worker "except for injuries incurred during the physical examination itself." (*Mero v. Sadoff, supra*, 31 Cal.App.4th at p. 1472 (citing *Felton v. Schaeffer, supra* 229 Cal.App.2d at pp. 234-35).) In *Mero*, the Court of Appeal stated that it would be foreseeable that "a negligently conducted physical examination, particularly one involving mechanical or invasive testing, may result in physical injury to the examinee." (*Id.* at p. 1477.) On the other hand, the *Mero* court also stated that it would not be foreseeable that the worker would rely on the ***report*** of the examination that the physician prepared for the employer. (*Id.* at p. 1472.) Because the acts for which Plaintiffs seek to hold the UR physicians liable all concern the contents and communication of their UR report, not injuries incurred during a physical examination of a Plaintiff, the *Mero* exception simply does not apply.

Plaintiffs also cite the *Tarasoff* line of cases for the contention that a doctor can be liable for negligent failure to warn. (Answer Brief at 19-20.) But in *Tarasoff*, this Court stated that it was only the "special relationship" that existed between a psychotherapist and the patient that warranted imposition of a duty to warn. (*Tarasoff v. Regents of University of California*, (1976) 17 Cal.3d 425, 437 ("by entering into a doctor-patient relationship the therapist becomes sufficiently involved to assume some responsibility for the safety, not only of the patient himself, but also of any third person whom the doctor knows to be threatened by the patient." (citing Fleming & Maximov, The Patient or His Victim: The Therapist's Dilemma (1974) 62 Cal.L.Rev. 1025, 1030)).) Because the UR physician does not have a physician-patient relationship with the worker, the *Tarasoff* line of cases is irrelevant.

Plaintiffs further cite two cases involving health plans for the proposition that utilization review companies and doctors are potentially liable

for their decisions. (Answer Brief at 21-22.) But neither of these cases held that a physician for a health plan owes a duty of care to a health plan member. *Palmer v. Superior Court* (2002), 103 Cal.App.4th 953, concerned the application of Code of Civil Procedure Section 425.13, which requires a plaintiff to obtain court approval before asserting a claim for punitive damages in a negligence suit against a health care provider. But the Court in *Palmer* nowhere stated that a UR physician owes a duty of care to the plan member. To the contrary, it assumed that a utilization review physician does ***not*** have a doctor-patient relationship with the plan member. (*Id.* at p. 964.) *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594 is even less relevant. The *Mintz* case was brought against administrator of a health plan, not a UR physician working for the administrator.

At bottom, California case law is clear and consistent. A UR physician works for the employer and can assume an adversarial relationship to the employee whose requests for services he/she reviews. Given this tension, the lack of a physician-patient relationship, and the nature of the UR system as defined by the Labor Code, no duty of care can run from the UR physician to the employee.

In sum, the Court Of Appeal's conclusion in this case that the UR physician's act of performing a workers' compensation utilization review establishes a doctor-patient relationship and a duty of care to the worker is simply inconsonant with established California precedent and the structure of utilization review under the Labor Code.

IV. TORT CLAIMS AGAINST UR PHYSICIANS ARE PREEMPTED BY THE EXCLUSIVE REMEDIES PROVIDED BY THE WORKERS' COMPENSATION ACT.

A The Approval And Denial Of Workers' Compensation Claims Is A Risk Contemplated By The "Compensation Bargain" and the Exclusive Review Statutes that Mandate Utilization Review.

Labor Code section 3602, subd. (a) provides that the right to recover workers' compensation benefits is the "sole and exclusive remedy" available to an injured employee against his or her employer. Section 3600, subd. (a) similarly makes workers' compensation the exclusive remedy without regard to negligence "in lieu of any other liability whatsoever."

Under the compensation bargain, in exchange for the employee foregoing traditional tort remedies, the employer accepts liability without fault and is assured of medical benefits and a limited liability for lost earnings. The employee "is afforded 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., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811 ("*Vacanti*").)

The Court of Appeal in this case failed to appreciate that the exclusivity of the workers' compensation remedy encompasses all disputes over coverage for benefits, including injuries resulting from the ***claims handling activities*** of the employer, the employer's insurer, and their agents. As this Court explained in *Vacanti*, "[i]nsurer activity intrinsic to the workers' compensation claims process is also a risk contemplated by the compensation bargain" and "insurer actions closely connected to the payment of benefits' fall within the scope of the exclusive remedy provisions" of the workers' compensation laws. (*Vacanti, supra*, 24 Cal.4th at p. 821; see also, *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 8 (the workers' compensation system

encompasses all disputes over coverage and payment, whether from actions taken by employer, by employer's insurance carrier, or by independent claims administrator hired by employer to handle workers' claim); *Mitchell v. Scott Wetzel Services, Inc.* (1991) 227 Cal.App.3d 1474, 1480-1481 (claims against self-insured employer's claims administrator alleging delays in payments and misrepresentations regarding benefits fell within exclusive jurisdiction of workers' compensation system).)

The first step in the exclusivity analysis is to determine whether the injury is "collateral to or derivative of" an injury compensable by the exclusive remedies of the WCA. (*Vacanti, supra,* 24 Cal.4th at p. 811.) If the injury meets that test, the second step is to determine whether the "alleged acts or motives that establish the elements of the cause of action fall outside the risks encompassed within the compensation bargain." (*Id.* at pp. 811-812.)

The claims handling and processing of workers' compensation claims falls within the exclusive remedy provisions because it is "tethered to a compensable injury." (*Id.* at p. 815.) The claims handling process is "collateral to or derivative of" a compensable injury. The exclusivity concept applies to "all claims based on 'disputes over the delay or discontinuance of benefits' including those claims seeking to recover economic or contractual damages caused by the mishandling of a workers' compensation claim." (*Ibid.* (citations omitted).) "Denying or objecting to claims for benefits is a normal part of the claims process, and misconduct stemming from the delay or discontinuance of payments or objection to treatment is properly addressed by the WCAB." (*Id.* at p. 821.)

In this case, Plaintiffs' tort claims based on the UR physician's decision to modify, delay, or deny treatment and failure to prescribe a weaning regimen for Klonopin fall squarely within the workers' compensation claims process and are preempted. Similarly, Plaintiffs' "failure to warn" claims are "collateral to or derivative of" a compensable injury and are preempted.

B The UR Physician Is An Integral Part Of The Claims Handling Process.

Plaintiffs do not question the foundational principle of exclusivity expressed in cases like *Vacanti* and *Marsh, supra.* However, they argue that under Labor Code section 3852 the exclusivity remedy only preempts claims against the employer, not against UR physicians. (Answer Brief p. 35.)[43]

Plaintiffs acknowledge that Labor Code section 4610.5, subd. (c)(4) defines "employer" to mean "the employer, the insurer of an insured employer, a claims administrator, or a *utilization review organization*, or other entity acting on behalf of any of them." (*Id.* at 37.) Nevertheless, they argue that section 4610.5, subd. (c)(4) applies only in the context of the utilization review statutes and has no bearing on exclusivity provisions like sections 3600 and 3602. (*Id.* at 38.)

There are several flaws in this argument. First, Plaintiffs ignore that the UR physician in performing utilization review services is acting as the agent of the employer. For the same reason that tort claims against adjusters and independent administrators are preempted, a UR physician is equally an integral part of the claims handling process on behalf of the employer or the insurer.

Second, Plaintiffs ignore this Court's analysis in *Marsh* that the exclusivity principle "covers all disputes over the payment of compensation to injured employees, regardless ***of what type of entity refused or delayed those payments***." (*Marsh & McLennan, Inc. v. Superior Court, supra,* 49 Cal.3d at p. 10 (emphasis added).) *Marsh* noted that the proper focus is on the nature of the defendant's actions, not the status of the defendant. (*Id.*; see also, *Santiago*

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[43] Labor Code Section 3852 provides in part: "The claim of an employee ... for compensation does not affect his or her claim or right of action for all damages proximately resulting from the injury or death against any person other than the employer...."

v. Employee Benefits Services (1985) 168 Cal.App.3d 898, 901 ("Proceedings which in any manner concern the recovery of compensation, or any right or liability 'arising out of or incidental thereto' are to be instituted solely before the Appeals Board."))

Third, Labor Code sections 3600 and 3602--from which the exclusivity rule derives--must be read in *pari materia* with the utilization review statutes, Labor Code sections 4610.5 and 4610.6. "It is an established rule of statutory construction that similar statutes should be construed in light of one another and that when statutes are in *pari materia* similar phrases appearing in each should be given like meanings." (*People v. Caudillo* (1978) 21 Cal.3d 562, 585 (citation omitted), *overruled on other grounds*, *People v. Martinez* (1977) 20 Cal. 225.) It is not possible to read sections 4610.5 and 4610.6 in isolation without concluding that the tort immunity available to employers under sections 3600 and 3602 extends to utilization review organizations and UR physicians acting on the employer's behalf.

C The Utilization Review Procedures In The Utilization Review Statute And Accompanying Regulations Preempt Tort Claims Against UR Physicians And UR Organizations.

The procedures outlined in Labor Code sections 4610 and 4610.5 were deliberately crafted to provide an exclusive vehicle to challenge utilization review decisions. The enabling statutes and their regulations provide a detailed and comprehensive scheme for resolving and challenging disputes over medical necessity determinations. Under the statutory scheme, the UR physician must follow detailed utilization review standards to determine whether to modify, delay, or deny treatment requests.[44] Section 4610.5, subd. (e) states: "A utilization review decision may be reviewed or appealed only by

[44] See Cal. Code Regs., tit. 8, §§ 9792.20-9792.26.

independent medical review pursuant to this section." The regulations provide further details on the appeal process.[45]

The UR process was designed so that the employee would not be required to retain to counsel and courts would not have to intervene. (*Smith v. Workers' Comp. Appeals Bd., supra,* 46 Cal.4th at p. 279.) The scheme "uses doctors, rather than judges, as the adjudicators." (*Id.* at p. 279.) The system "was intended to be expeditious, inexpensive, and driven by uniform standards and the recommendations of treating physicians. . . ." (*Id.* at p. 280.) Infusing tort concepts into the process is contrary to these objectives.

The detailed nature of the medical protocols that physicians must follow demonstrates that the UR review and IMR appeal procedures were intended by the Legislature to constitute the exclusive vehicle to challenge treatment decisions. Otherwise, employees could circumvent the entire UR process, the MTUS standards and the IMR appeal process entirely by bringing a civil action. Employees could simply by-pass these procedures and sue the UR physician directly for medical malpractice. For example, employees could disregard an adverse UR physician's determination, ignore any appeal rendered against the employee in the IMR process and bring suit recasting the denial of treatment as a claim for medical malpractice, as occurred here. The Legislature in enacting this scheme did not intend to open the door to medical malpractice claims against UR physicians and UR organizations as an alternative to an employee's challenge to the UR physician's review of a request for authorization via IMR review.

A contrary ruling would undermine the Workers' Compensation Appeals Board's exclusive jurisdiction. It is fundamental that a Workers' Compensation Appeals Board Proceeding is the exclusive remedy for an

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[45] See, e.g., Cal. Code Regs., tit. 8, §§ 9792.10.1- 9792.10.12.

employee seeking workers' compensation benefits. The WCAB has exclusive jurisdiction over proceedings "for the recovery of compensation, or concerning any right or liability arising out of or incidental thereto." (Labor Code § 5300, subd. (a); *Schlick v. Comco Management, Inc.* (1987) 196 Cal.App.3d 974, 981 (where the gravamen of the action is the wrongful withholding of compensation benefits, the matter is subject to the exclusive jurisdiction of the WCAB)). "[C]laims seeking compensation for services rendered to an employee in connection with his or her workers' compensation claim fall under the exclusive jurisdiction of the WCAB." (*Vacanti, supra*, 24 Cal.4th at p. 815.) "[E]very employee who suffers a workplace injury must go through the claims process in order to recover compensation." (*Id.*)

By analogy, California courts generally conclude that the Legislature intended an internal administrative remedy to be exclusive, unless the statutory language or legislative history clearly indicates an intent to allow a private remedy. (*Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, 1563-64 (A legislative choice to create a detailed "administrative enforcement" scheme in lieu of creating an express private right of action is a "strong indication the Legislature never intended to create such a right of action."); *Crusader Ins. Co. v. Scottsdale Ins. Co.* (1997) 54 Cal.App.4th 121, 138 (Where "[i]nstitutional systems are...in place to deal with the problem...[t]here is no need or justification for the courts to interfere with the Legislature's efforts to mold and implement public policy in this area by extrapolating the Legislature's enactments into areas beyond those specified by the Legislature itself."))

In a nutshell, utilization review was only intended to serve as a safeguard against unnecessary and inappropriate medical care, not to provide a vehicle for purported medical malpractice claims against UR physicians and UR organizations.

V. CONCLUSION

For all these reasons, amici the National Association of Independent Review Organizations, Coventry Health Care Workers Compensation, Inc., and ExamWorks, Inc. respectfully request that this Court reverse the Court of Appeal's decision.

Respectfully submitted,

Dated: December 16, 2016

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Dated: December 16, 2016

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court rules 8.520, subd. (c) and 8.630, I certify that this Brief of Amici Curiae in support of Defendant and Petitioner CompPartners, Inc., contains **6,767** words, not including the Table of Contents, Table of Authorities, this Certificate, the caption page, signature blocks, or any attachments.

Dated: December 16, 2016

Respectfully submitted,

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DECLARATION OF SERVICE

I, the undersigned, state as follows:

My business address is Three Embarcadero, Suite 2600, San Francisco, California 94111. I am over the age of eighteen years and not a party to this action.

On the date set forth below, I served the foregoing document described as:

APPLICATION TO FILE AN AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF INDEPENDENT REVIEW ORGANIZATIONS, COVENTRY HEALTH CARE WORKERS COMPENSATION, INC. AND EXAMWORKS, INC., IN SUPPORT OF DEFENDANT AND PETITIONER COMPPARTNERS, INC.; and

AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF INDEPENDENT REVIEW ORGANIZATIONS, COVENTRY HEALTH CARE WORKERS COMPENSATION, INC. AND EXAMWORKS, INC., IN SUPPORT OF DEFENDANT AND PETITIONER COMPPARTNERS, INC.,

on the following persons in this action:

See Service List Attached.

BY FIRST CLASS MAIL: I am employed in the City and County of San Francisco where the mailing occurred. I enclosed the document identified above in a sealed envelope or package addressed to the persons listed above, with postage fully paid. I placed the envelope or package for collection and mailing, following our ordinary business practice. I am readily familiar with this firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

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

Executed this 16th day of December 2016, at San Francisco, California.

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