No. S S232197

IN THE SUPREME COURT 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 CASE NO. E063527

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

COME NOW, defendants and respondents COMPPARTNERS, INC., and NARESH SHARMA, M.D. (hereinafter referred to collectively, and in the singular, as "CompPartners"), and respectfully submit this petition for review.

1. ISSUES PRESENTED

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

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

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

2. INTRODUCTION

A. Why review should be granted

Hard cases make bad law.

What makes this case ***hard*** is its embryonic state – i.e., a published opinion based on an order sustaining a demurrer to an initial complaint without leave to amend. This forced the Court of Appeal to issue a literally unprecedented decision undermining the exclusive remedies of the *Labor Code* concerning Utilization Review decisions made under the auspices of the Workers' Compensation Act ("WCA") based on assumed or hypothetical facts, as the opinion itself acknowledges. Yet based on these assumed or hypothetical facts, the opinion effects a sea-change in the WCA by undermining the mechanism carefully crafted by the Legislature for resolving disputes that arise over utilization review decisions.[1]

What makes this law ***bad*** is that it blurs the roles and duties of treating physicians responsible for day-to-day care of injured workers with the roles and duties of physicians providing utilization review on behalf of a qualified WCA Utilization Review Organization ("URO") such as CompPartners.

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[1] For this reason, CompPartners has filed a separate letter requesting this Court order the Court of Appeal's opinion depublished.

CompPartners submits the Court of Appeal's opinion holding that in some cases, a WCA URO might owe duties to the injured workers similar to those owed by the treating physician is new to California law. The irony of this opinion is that the Court of Appeal had no trouble discerning that some WCA URO disputes ***are*** preempted by the *Labor Code*, and thus ***affirmed*** the trial court order sustaining the demurrer based on preemption.

Respectfully, the opinion goes wrong in two broad respects: (1) it erroneously holds preemption might not apply in some cases, based on purely hypothetical facts; and (2) it erroneously holds that a duty might be owed in some cases under those same hypothetical facts.

True, the opinion seeks to ameliorate its holding by acknowledging this new duty imposed on a WCA URO varies with the relationship of the parties and requires a case-by-case approach. (Opinion, p. 17.) But this does not cure the harm inflicted on the WCA. To the contrary, the Court of Appeal's opinion instructs workers and their attorneys just exactly how to avoid the inconvenient ramifications of California's exclusive remedy provisions with nothing more than a rote allegation that the WCA URO should have issued a warning directly to the worker about the consequences of its decision. This pronouncement wholly undermines the carefully-crafted legislative framework defining how WCA URO decisions are to be made and how disappointed workers can invoke a specific statutory administrative procedure to challenge and reverse those decisions.

As this Petition will demonstrate, the validity of the intricate statutory mandates which regulate WCA UROs, in general, and how these organizations are to make, announce and allow review of their decisions, in particular, is now in doubt because of the Court of Appeal's less than rigorous analysis of these statutes. If the Court of Appeal's opinion, based as it is on nothing more than speculative facts, is allowed to survive, Superior Courts throughout California will face a multiplicity of civil actions which the legislature clearly intended to be within the jurisdiction of the WCA.

Further, the opinion is not supported by the case law on which it relies and is contrary to the Legislature's plan for utilization review under both the *Labor Code* and the *California Code of Regulations.* The sweeping preemption of civil litigation by the exclusive remedies of the WCA indelibly brands this as a question of great importance on an issue affecting every California employer and employee subject to the WCA.

Accordingly, CompPartners requests that this Court grant review for the purpose of resolving the important questions presented and holding (a) that the claim alleged by the Kings is preempted, (b) that a WCA URO does not owe a duty of care to an injured worker, and (c) that the Court of Appeal erred in reversing the trial court's ruling sustaining the demurrer without leave to amend.

B. Background

(1) The Predicate Facts of Plaintiffs' Complaint

At issue in the Court of Appeal's opinion is a *Utilization Review* decision made by two URO physicians affiliated with defendant and respondent CompPartners in the context of a pending Workers' Compensation claim filed by plaintiff and appellant employee, Kirk King. CompPartners was retained by State Compensation Insurance for *Utilization Review* on behalf of Kirk King's employer as a URO under the statutory authority of *California Labor Code* section 4610(b).

During the *Utilization Review* process, the URO physicians are alleged to have decertified a medication being administered to Kirk King concluding it was not medically necessary. (*Labor Code* section 4610(b).) (AA 0003:23-0004:14.) It is important to note that a URO physician does not enjoy the far reaching discretion afforded to treating physicians. While treating physicians may have the entire *pharmacopeia* at their disposal, *Labor Code* section 4610(c) restricts URO physicians to specific and closely circumscribed schedules for medical treatment. In any case, Kirk King alleged in his complaint that the decertification of this medication caused him to experience four seizures. (AA 0004:6-7.)

Seeking damages as a result of the seizures, Kirk King filed the civil action, which is the subject of the Court of Appeal's opinion. (AA 0001-0009.) The complaint does not allege, nor do plaintiffs contend, that Kirk

King ever disputed the decertification via the statutorily created dispute resolution mechanisms set forth in *California Labor Code* section 4610.5 which provides all *Utilization Review* disputes, "*shall be resolved only in accordance with this section.*" (See, e.g., *State Compensation Ins. Fund vs. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 279-280.)

(2) CompPartners' General Demurrer

CompPartners filed a general demurrer in response to plaintiffs' original complaint (AA 0019-0043) arguing that the causes of action essayed in the Kings' complaint were wholly and inescapably preempted by the exclusivity provision of California's Workers' Compensation statutes. (*California Labor Code* section 3600, subd. (a.) (AA 0020:5-6; *Id.* 0028:15-0032:20.) As an adjunct to its principal preemption argument, CompPartners argued that *even if* preemption did not knock out plaintiffs' claims, plaintiffs' claims could not state any causes of action since a *Utilization Review* physician acting on behalf of a URO for an employer owed no duty of care to plaintiffs as a matter of California law. (See, e.g., *Keene vs. Wiggins* (1977) 69 Cal.App.3d. 308, 313.) (AA 0032:23-0034:24.)

(3) The Trial Court's Decision to Sustain CompPartners' General Demurrer Without Leave to Amend

The trial court sustained CompPartners' general demurrer without leave to amend. (AA 0072-0073.) The trial court's decision concluded that

the plaintiffs' claim was preempted and that the URO physicians who made the decertification recommendation did not owe plaintiff Kirk King a duty of care. Despite these rulings, the trial judge observed, "This needs to go to the court of appeals. There is really no good law, any law under utilization." (AA 0111:23-24.) After the demurrer was sustained without leave to amend, an Order of Dismissal was entered. (AA 0083-0084.)

(4) The Court of Appeal's Published Opinion[2]

The Court of Appeal's published opinion *affirmed* the trial court's decision to sustain CompPartners' general demurrer to plaintiffs' original complaint, but *reversed* the trial court's refusal to grant plaintiffs leave to file a first amended complaint. In its opinion, the Court of Appeal initially opined that while the URO physicians' decision to decertify Kirk King's medication could be subject to preemption, plaintiffs' complaint was unclear. The Court of Appeal indicated that ***if*** plaintiffs claimed their damages were caused as a result of the decision to decertify Kirk King's medication by the *Utilization Review* physicians, then their action was preempted. On the other hand, preemption would not apply if plaintiffs were really claiming that their damages were caused as a result the URO physicians' failure to "*communicat[e] a warning to Kirk, their claims are*

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[2] Pursuant to *California Rules of Court* rule 8.504(b)(4), a copy of the Court of Appeal's opinion is attached hereto as Exhibit "A"

not preempted . . . because that warning would be beyond the 'medical necessity' determination made by [Dr.] Sharma." (Opinion, p.13.)

The Court of Appeal didn't stop at preemption.

Citing *Palmer vs. Superior Court* (2002) 103 Cal.App.4th 953, the Court of appeal announced a blanket rule that, *"[c]ase law provides a Utilization Review doctor has a doctor-patient relationship with the person whose records are being reviewed[.]* (Opinion, p. 17.) Thereafter, and without acknowledging that the facts of this case are inextricably governed by the labyrinth of statutory law which makes up California's Workers' Compensation statutes, the court held that under the opinion in *Palmer*, *"there is a doctor-patient relationship between Kirk and [Dr.] Sharma. Because there is a doctor-patient relationship, Sharma owed a duty of care."* (Opinion, p.17.)

The trouble with this analysis is that the plaintiff in *Palmer* was challenging a *Utilization Review* decision made by, or on behalf of, his HMO. He was not an injured worker seeking review of a decision by a Workers' Compensation URO. There would have been no occasion to consider preemption. The court concluded its duty analysis by indicating there was a question concerning the scope of that duty. (Opinion, p. 18.)

(5) Statement re: Rehearing (*Cal. Rules Ct.* rule 8.504(b)(3)

No petition for rehearing was filed.

LEGAL DISCUSSION

1. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW HAVING WIDESPREAD INTEREST CONCERNING APPLICATION OF THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT TO DECISIONS BY UTILIZATION REVIEW ORGANIZATIONS.

This dispute raises questions of first impression concerning WCA *Utilization Review* whose vital importance is underscored by the fact that the resolution reached by the Court of Appeal undermines an elaborate hierarchy of review crafted by the legislature and codified in the *Labor Code*. As such, grounds for review exist under *California Rules of Court* Rule 8.500(b)(1)

As noted above, the Court of Appeal reversed the dismissal issued by the trial court. That dismissal came about after the trial court sustained CompPartners' demurrer without leave to amend on the grounds that the Kings' claim was preempted and that CompPartners did not owe the Kings any duty of care. Review is respectfully requested to reverse the Court of Appeal's opinion on issues of preemption and duty so that there is no basis for granting leave to amend and the dismissal should be affirmed insofar as the defects in the complaint were matters of law that could not be cured by amendment. (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.)

2. THE KINGS' CIVIL ACTION IS PREEMPTED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT

A. An overview of the utilization review process under the Workers' Compensation Act.

The Legislature has established a detailed mechanism for resolving disputes regarding the appropriate level of care that should be rendered to an injured employee. The mainspring of this mechanism can be found in *Labor Code* section 4610 which requires every employer to establish utilization review processes "that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure or relieve treatment recommendations by the physician." (*Labor Code* section 4610(a); see also, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 236.)

The Legislature has also crafted an equally detailed mechanism for resolving an injured employee's disputes over the treatment request. (*Labor Code* sections 4062, 4610.5; *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., (2000)* 80 Cal.App.4th 1041, 1048.)

Initially, *Labor Code* section 4062(b) provides a means for an employee to object to a utilization review decision, including a request for authorization of a particular treatment. In such cases, "the objection shall be resolved only in accordance with the independent medical review process established in section 4610.5." (*Labor Code* section 4062(b) [emphasis

added].) Here, of course, the complaint essentially objects to the utilization review decision to "decertify" Klonopin, meaning that plaintiffs' sole resort is to *Labor Code* section 4610.5. This section applies to "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury" and that such disputes "shall be resolved only in accordance with this section." (*Labor Code* section 4610.5 [emphasis added].) Such is the case here. Although Mr. KING's on-the-job injury alleged occurred in 2008, and Klonopin was first prescribed in 2011, Klonopin was not "decertified" by way of utilization review until "July of 2013" as confirmed by a second utilization review "[i]n October of 2013." (AA 0003:23-0004:14.)

In this regard, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th 230 is particularly instructive. There, an employee suffered a work-related accident. Two physicians sent the employer's insurer a request to authorize an MRI. In response, the employer referred the matter to utilization review. The doctor that performed the review denied the request based on new medical treatment guidelines. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 234.) In explaining the dispute process contemplated by *Labor Code* sections 4062 and 4610, court explained:

> (1) the Legislature intended for employers to use the utilization review process in section 4610 to review and resolve any and all requests for treatment, and (2) if dissatisfied with an employer's decision, an employee (and only an employee) may use section 4062's provisions to resolve the dispute over the treatment request.

(*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 237.) This ruling is reinforced in *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th 1041 which holds, in relevant part:

> When there are disputes about the appropriate medical treatment . . . or the need for continuing medical care, *Labor Code* section 4061 or 4062 applies. (Citation.) Sections 4061 and 4062 of the *Labor Code* establish the procedures for resolving such disagreements.

(*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th at p. 1048 [emphasis added].)

In summary, there can be no doubt that if Mr. King wished to challenge the utilization review decision by his employer (allegedly facilitated by CompPartners) he was required do so by way of the appropriate sections of the WCA that establish the procedures for resolving such disagreements. (*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th at p. 1048.) Not only does the WCA preclude a civil suit against his employer, it also precludes a civil suit against those involved in utilization review because "the exclusivity

provisions encompass all inquiries 'collateral to or derivative of' an injury compensable by the exclusive remedies of the WCA." (*Charles J. Vacanti, M.D. Inc. v. State Comp. Ins. Fund, (2001)* 24 Cal.4th 800, 813.)

By way of example, if a workplace accident contributes to a later injury outside the workplace, that latter injury is still deemed to be a "compensable consequence" of the original workplace injury even if the injured claimant was not working at the time of the subsequent accident. (*Beaty v. Workers' Comp. Appeals Bd.* (1978) 80 Cal.App.3d 397, 402.) in *Beaty,* the court reasoned that the work-related injury "need not be the exclusive cause of the Subsequent Accident but only a contributing factor to it. So long as the Industrial Injury was a contributing factor to the Subsequent Accident, liability is established on an industrial basis." (*Id.* at p. 402, citing *State Comp. Ins. Fund v. Ind. Acc. Com.* (1960) 176 Cal.App.2d 10 [worker suffered an eye injury and while suffering the effects of the eye injury, lost a finger while using an electric saw].)

Indeed, the Court of Appeal's opinion here acknowledges that preemption applies to disputes that are "deemed collateral to or derivative of the employee's injury." (Opinion, p. 10, citing *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997.) The opinion also acknowledges that *Vacanti* holds that the WCA exclusive remedy applies to "'injuries arising out of and in the course of the workers' compensation claims process . . . because this process is tethered to a compensable injury.'"

(Opinion, p. 11, citing *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund, supra*, 24 Cal.4th at p. 815.) Moreover, the opinion "interprets" *Vacanti* "to mean that if something goes wrong in the claims process for the workplace injury," then exclusivity applies. (Opinion, p. 12, citing *Charles J.Vacanti, M.D. v. State Comp. Ins. Fund, supra,* 24 Cal.4th at pp. 813-814.)

That is exactly what has been alleged here, under ***any*** interpretation of the complaint. Even if the Kings' complaint is construed as alleging the injury was caused by failure to warn of the effects of sudden Klonopin withdrawal, that failure to warn cannot logically be separated from the claims process because the failure to warn arose ***during*** the claims process. Mr. King alleges he suffered a work related injury, that he submitted a WCA claim, and that the claim was being handled by referral to a treating physician who had prescribed Klonopin. In the course of the claim, the recommendation for Klonopin was submitted to WCA URO at which time Klonopin was decertified.

The alleged failure to warn at issue herein is still an inherent incident of the claims process and as such Mr. King had an immediate and detailed review process under the *Labor Code* at his disposal. Thus, contrary to the opinion, the civil claim ***is*** preempted under *Vacanti.*

But the opinion goes on to read the complaint to allege two "options" for finding CompPartners harmed Mr. King – one subject to

preemption and another which now has a green light to proceed in civil court. Thus, this case has become a real-world manifestation of the threat of double tracked claims involving WCA URO decisions raised by the Kings' complaint. Briefly, as the opinion describes it, one option (which ***is*** preempted) is that CompPartners incorrectly decertified Klonopin without a weaning regimen. The second option (which in the Court of Appeal's view ***is not*** preempted) is that CompPartners simply failed to warn the Kings of the effect of quitting Klonopin cold turkey after it was decertified. The opinion draws the distinction on the grounds that warning about a sudden withdrawal was not part of the "medical necessity" analysis." (Opinion, p. 12-13.)

This is a distinction without a difference.

In the first place, if a weaning regimen is important enough to require a warning that sudden withdrawal could cause seizures, then the decision that any number (or no number) of extra doses is required becomes an inseparable component of medial necessity. Thus, both scenarios require – and can be resolved by – application of the WCA review provisions. It should be noted that the Kings' failure to state whether the MTUS vests the WCA URO with any discretion to order a weaning regimen deprives the Court of Appeal of any firm factual basis for its conclusion that a "failure to warn" decision is now preempted. This only serves to underscore the harm inherent in creating a new duty on speculative and incomplete facts.

Second, the Court of Appeal acknowledged that if CompPartners had simply failed to authorize a certain number of doses until weaning was complete, the weaning decision would have been part of the medical necessity determination. But that is exactly what the complaint alleges, at least by inference, and what the Court of Appeal assumes: that CompPartners' utilization review decision concluded, based on the appropriate guidelines, that weaning was not a matter of medical necessity.

Third, the utilization review provisions of the WCA are tailor made for either dispute. Once the utilization review decision was complete, it was the employer's duty to report that to Mr. King's treating physician so as to facilitate, if necessary, peer-to-peer discussion with the WCA URO pursuant to 8 CCR 9792.9.1E(5)(K). Assuming that CompPartners continued to maintain that the appropriate MTUS did not provide for a Klonopin regimen (or a Klonopin weaning regimen), the WCA provided an opportunity for review of that decision.

Thus, suppose that CompPartners ***did*** know cold turkey Klonopin withdrawal was dangerous, and simply failed to warn of that trap. If that were the case, then surely Mr. King's treating physician would have been under a duty to make such a contemporaneous warning to Mr. King at the time of the decertification, not months later after seizures had allegedly occurred as a result of the decertification. Then Mr. King's physician had every opportunity to challenge the URO decision under the *Labor Code*.

As a result, whether the Court of Appeal parses this out as a failure to warn or a failure to certify, either outcome is inseparable from a determination of medical necessity, meaning that by the court's own reasoning, the claim should be preempted.[3]

3. COMPPARTNERS DID NOT OWE THE KINGS A DUTY OF CARE THAT COULD GIVE RISE TO A CIVIL CAUSE OF ACTION

A. Introduction and context of the duty issue

By way of introduction, the principal argument on demurrer was that WCA preemption barred the Kings' civil lawsuit. Indeed, the trial court's tentative ruling only addressed the issue of preemption. (AA 0071.) Lack of duty was raised in the demurrer and addressed by the trial court as an alternative basis for dismissing the Kings' claims. (AA 0027:18-19; 0032:24-0034:24; *Id.,* 0101:28-0102:1) So far as it pertains to this petition, it will suffice to note that the Court of Appeal's opinion concludes that a WCA URO owes some duty of care to the injured claimant, although the extend of that duty will depend on the facts of the case.

This holding was wrong for the following reasons.

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[3] Of course, the Complaint does not reveal if Mr. King ever complained to his treating physician, if the treating physician sought a "peer-to-peer" review, or if the detailed appellate procedures set out in the *Labor Code* were followed.

B. CompPartners and Dr. Sharma owed no duty of care to the Kings

The opinion acknowledges that a claim for medical malpractice requires a patient-physician relationship. (Opinion, p. 14, citing *Keene v. Wiggins, supra,* 69 Cal.App.3d 308.) However, the opinion does not address the *Keene* analysis on analogous facts. In *Keene*, an injured employee's disability status was reviewed by the defendant, a doctor retained by the employer's workers' compensation carrier. Unhappy with the outcome of the report, plaintiff sued the doctor for medical malpractice. ***Unlike*** the present case, the injured employee was actually seen by the doctor. (*Id.* at pp. 310-311.) Nevertheless, the court still held the absence of a physician/patient relationship warranted dismissal of a medical malpractice claim by the injured employee against the examining doctor. This was because "the physician is liable for malpractice or negligence ***only*** where there is a relationship of a physician-patient as a result of contract, express or implied, that the doctor will ***treat*** the patient." (*Id.* at p. 313 [emphasis added].) The court explained:

> [I]t is apparent where a doctor conducts an examination of an injured employee solely for the purpose of rating the injury for the employer's insurance carrier in a workers' compensation proceeding, neither offers or intends to treat, care for or otherwise benefit the person examined, and has no reason to believe the person examined will rely on this report, the doctor is not liable to the person being examined for negligence in making that report.

(*Keene v. Wiggins, supra,* 69 Cal.App.3d at p. 313-314.) Thus, the court held the absence of a physician-patient relationship was fatal to the plaintiff's medical malpractice claim. (*Id.* at p. 315.)

The Kings' complaint does not allege the WCA URO doctors ever examined Mr. King face to face (AA 0004:1-2 [Dr. Sharma]; *Id.*, 0006:1-2 [Dr. Ali]) and there are no facts establishing a relationship of physician-patient as a result of contract, express or implied, that the URO doctors would ***treat*** Mr. King. Thus, CompPartners and Dr. Sharma owed no duty to the Kings.

The Court of Appeal's opinion did not address these factors. Instead of applying *Keene*, the opinion leapfrogs *Keene's* language regarding an express or implied relationship to treat the patient (*Id.* at p. 313) to reach *Palmer v. Superior* Court, *supra* 103 Cal.App.4th at p. 953 and to hold utilization review gives rise to a doctor-patient relationship so that a duty of care arises under *Keene.* (Opinion, p. 17.)

There are several errors in this analysis.

First, the opinion applies *Palmer* too broadly. As the opinion notes, what *Palmer* was addressing was the question of whether leave of court to allege punitive damages pursuant to *Code of Civil Procedure* section 425.13 was required where the claim arose from a dispute over utilization review outside of the WCA. Thus, the narrow question for the court was ***not*** whether a doctor-patient relationship existed between the patient and