SUPREME COURT COPY

No. S232197

SUPREME COURT
FILED
FEB 9 2017
Jorge Navarrete Clerk
Deputy

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 an Opinion by the Court of Appeal
Fourth Appellate District, Division Two
Case No. E063527

Appeal from a Judgment of the
Riverside County Superior Court
Case no. RIC 1409797, Hon. Sharon J. Walters

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFFS KIRK KING ET AL.

Francisco J. Silva, SBN 214773
*Long X. Do, SBN 211439
Lisa Matsubara, SBN 264062
Stacey B. Wittorff, SBN 239210
CENTER FOR LEGAL AFFAIRS
CALIFORNIA MEDICAL ASSOCIATION
1201 J Street, Suite 200
Sacramento, California 95814
Telephone: (916) 444-5532
Facsimile: (916) 551-2885

Counsel for the California Medical Association

No. 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 an Opinion by the Court of Appeal
Fourth Appellate District, Division Two
Case No. E063527

Appeal from a Judgment of the
Riverside County Superior Court
Case no. RIC 1409797, Hon. Sharon J. Walters

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION IN SUPPORT OF PLAINTIFFS KIRK KING ET AL.

Francisco J. Silva, SBN 214773
*Long X. Do, SBN 211439
Lisa Matsubara, SBN 264062
Stacey B. Wittorff, SBN 239210
CENTER FOR LEGAL AFFAIRS
CALIFORNIA MEDICAL ASSOCIATION
1201 J Street, Suite 200
Sacramento, California 95814
Telephone: (916) 444-5532
Facsimile: (916) 551-2885

Counsel for the California Medical Association

Certificate of Interested Entities or Persons

Pursuant to California Rules of Court, rule 8.208, the undersigned, counsel for the California Medical Association, certifies that there are no disclosures to be made.

DATED: January 30, 2017.

By:
LONG X. DO

Attorney for the California Medical Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS KIRK KING ET AL. A1

I. INTERESTS OF THE AMICUS CURIAE APPLICANT A1

II. HOW THE PROPOSED AMICUS CURIAE BRIEF CAN HELP A2

III. CONCLUSION A4

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION 1

I. INTRODUCTION 1

II. PURPOSE 3

A. Interest of Amicus Curiae 3

B. Scope of the Amicus Curiae Brief 4

III. DISCUSSION 6

A. Utilization Review in Workers' Compensation Has Evolved to Limit and Displace Physicians' Independent Medical Judgment 6

1. Utilization Review in Workers' Compensation Increasingly Has Become More Central and Rigid. 7
2. Dispute Resolution Over Utilization Review Decisions Has Become More Narrow and Limited. 11
3. Physicians Continue to Experience Interference with Patient Care by Utilization Review. 13

B. Utilization Review is the Practice of Medicine 14

C. Utilization Review Physicians Owe the Same Duties as Any Other Physician Practicing Medicine. 22

1. Utilization Review Decisions Can and Do Cause Harm to Injured Workers. 22
   a. San Bernardino Shooting Survivors..................... 22
   b. San Jose Firefighters 24
   c. Lorrie Mays 25
2. Utilization Review Physicians Should be Held Accountable. 27

IV. CONCLUSION 32

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

California Const. art. XIV, §4 8

CASES

Biakanja v. Irving (1958) 49 Cal. 2d 647 4
Fouch v. Werner (1929) 99 Cal. App. 557 31
Lawless v. Calaway (1944) 24 Cal.2d 81 32
Murphy v. Board of Medical Examiners of State of Arizona (1997) 190 Ariz. 441 21
Palmer v. Superior Court (2002) 103 Cal. App. 4th 953 21
Wickline v. California (1986) 192 Cal. App. 3d 1630 .... 27, 28, 29, 30

STATUTES

Business & Professions Code §2038 15
Business & Professions Code §2052 15
Health & Safety Code §1367.01 .... 6, 15
Insurance Code §10123.135 .... 6, 15
Labor Code §4062.9 (repealed) 9
Labor Code §4600 .... 8, 9, 10, 15
Labor Code §4604.5 10
Labor Code §4610 .... passim

REGULATIONS

8 C.C.R. §§9792.10.1 through 9792.10.9 12
9 C.C.R. §9792.6(s) 10

RULES

California Rules of Court, rule 8.520 1

OTHER AUTHORITIES

AMA Code of Medical Ethics 10.1.1 19
SB 228 (Stats. 2004, ch. 639) 9
SB 863 (Stats. 2012, ch. 363) .... passim
SB 899 (Stats. 2004, ch. 34) 9

NEWS ARTICLES & REPORTS

Esola, Louise, "Workers comp treatment delays for San Bernardino victims under investigation," Business Insurance (Dec. 7, 2016) 2

Perez-Pena, Richard, "'Victimizing Me All Over Again': San Bernardino Victims Fight for Treatment," NY Times (Nov. 30, 2016) 2, 23, 24

Plevin, Rebecca, "San Bernardino survivors still face workers' comp delays, denials," SCPR (Jan. 26, 2017) 23

Rena David, Brenda Ramirez, and Alex Swedlow, "Medical Dispute Resolution: Utilization Review and Independent Medical Review In the California Workers' Compensation System," California Workers' Compensation Institute (Jan. 2014) 13

Ross, Brian et al., "San Bernardino Terror Victims Claim Medical Care Frustrations, 1 Year After Attack," ABC News (Dec. 2, 2016) 23

Saunier, Benjamin, *The Devil is in the Details: Managed Care and the Unforeseen Costs of Utilization Review as a Cost Containment Mechanism*, 27 Issues L. & Med. 21 (Summer 2011) 7

Wagner, Liz et al., "Dozens of Injured San Jose Firefighters Denied Workers' Compensation Treatment," NBC Bay Area News (Aug. 13, 2016) 25

Wagner, Liz, "Injured Workers Face Stacked Deck During Workers' Comp Appeals Process, Critics Say," NBC Bay Area News (Aug. 24, 2016) 26

Webb, Kerrie, "Reminder: Utilization Review is the Practice of Medicine," Medical Board of California Newsletter at 11 (Spring 2016) 17

No. 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.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS KIRK KING ET AL.

Pursuant to rule 8.520(f) of the California Rules of Court, the California Medical Association ("CMA") hereby requests leave to file the attached *amicus curiae* brief in support of Plaintiffs Kirk King and Sara King (collectively "King").

There are no persons or entities to be identified under rule 8.520(f)(4) of the California Rules of Court.

I. INTERESTS OF THE AMICUS CURIAE APPLICANT

CMA is a non-profit, incorporated professional physician association of approximately 45,000 members throughout the State of California. CMA's primary purposes are "to promote the science and art of medicine,

the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA's membership includes California physicians engaged in the private practice of medicine in all specialties and settings. Many CMA physicians provide care to injured workers through the workers' compensation system, as treating doctors and consulting specialists. CMA physicians also participate within the system as qualified medical evaluators or utilization reviewers. CMA has formed committees and subcommittees within its governance structure to investigate, research, and address workers' compensation issues.

II. HOW THE PROPOSED AMICUS CURIAE BRIEF CAN HELP

CMA's mission includes advocating for high quality care and fair access to care within California's workers' compensation system. Meeting these goals entails ensuring that physicians are fairly reimbursed as well as preventing bureaucratic interference with their medical judgment and the care they provide to injured workers. CMA was heavily engaged in the Legislature's efforts in 2012 through SB 863 to enact major reforms to the workers' compensation system. CMA supported the bill after the author accepted numerous amendments designed to improve care of injured workers and efficiency and fairness in resolving disputes over coverage, among other things.

The proposed amicus brief brings CMA's experiences and perspectives to bear upon the issue in this case whether a workers' compensation utilization review physician and company that performs medical utilization reviews on behalf of employers owes a duty of care to an injured worker.[1] In particular, CMA wishes to focus the Court's attention on an issue that has not been properly framed and adequately addressed in the parties' briefing – the nature of utilization review and the real-world impact it has on the medical care of injured workers. CMA's proposed amicus brief explains that utilization review is the practice of medicine, illustrates how utilization review decisions can disrupt and harm the care of workplace injuries, and argues that physicians who engage in utilization review must be held as accountable in the same manner as any other physician who practices medicine.

The discussions in CMA's proposed amicus brief can directly assist the Court in its application of the *Biakanja* factors to determine whether any duty of care exists to hold a third party utilization review company liable for injuries to workers caused by a utilization review decision. That is, a full understanding of utilization review taken from CMA's proposed amicus brief can inform the Court of "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the

---

[1]Unless specifically addressed in the proposed amicus brief, CMA takes no position on any other issue that is before the Court.

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, and the policy of preventing future harm." *Biakanja v. Irving* (1958) 49 Cal. 2d 647, 650.

III. CONCLUSION

For the foregoing reasons, CMA respectfully requests that the Court accept and file the attached amicus curiae brief.

DATED: January 30, 2017

Respectfully,

CENTER FOR LEGAL AFFAIRS
CALIFORNIA MEDICAL ASS'N

By:
LONG X. DO

Attorneys for the California Medical Association

No. 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.

AMICUS CURIAE BRIEF OF THE CALIFORNIA MEDICAL ASSOCIATION

I. INTRODUCTION

The harm suffered by Plaintiff Kirk King ("King") as a result of the abrupt termination of his anti-depressant drug due to Defendants CompPartners, Inc. and its utilization review physician's (collectively, "CompPartners") decision mirrors the plight of so many injured workers in California. King's case has not garnered mass media attention, but mainstream news outlets have reported on similar experiences suffered by survivors of the San Bernardino terrorist attack in 2015. *See, e.g.*, Perez-Pena, Richard, "'Victimizing Me All Over Again': San Bernardino Victims

Fight for Treatment," NY Times (Nov. 30, 2016).[1]

Survivors of the San Bernardino shooting are receiving treatment exclusively through California's workers' compensation system, and many have reported regular and repeated denials of care, termination of prescriptions, and Kafkaesque dealings with their employer's utilization review administrator. As a result, the California Department of Industrial Relations has opened an investigation. *See* Esola, Louise, "Workers comp treatment delays for San Bernardino victims under investigation," Business Insurance (Dec. 7, 2016).[2] Already, significant blame for the problems is being placed on the workers' compensation utilization review system. According to a San Bernardino County official, "[s]ome people think it's the county . . . . We are just here to administer the state program." *Id.* Another official explained, "it is not the county denying the treatment but a reviewing doctor working under the state-mandated utilization review process." *Id.*

By this amicus curiae brief, the California Medical Association ("CMA") urges the Court to facilitate increased responsibility in the workers' compensation system. As explained herein, so doing would not

---

[1]Online at https://www.nytimes.com/2016/11/30/us/victimizing-me-all-over-again-san-bernardino-victims-fight-for-treatment.html?_r=0.

[2]Online at http://www.businessinsurance.com/article/20161207/NEWS08/912310844/Workers-comp-treatment-delays-for-San-Bernardino-victims-under-investigation.

require a drastic or novel legal approach. Rather, the Court need only acknowledge that utilization review in the workers' compensation system is the practice of medicine. The Medical Board of California (which regulates the practice of medicine) and the American Medical Association (which promulgates rules of medical ethics) already have taken well-established positions favoring this approach. Utilization review physicians who practice medicine accordingly should be held to the same standards and obligations as any other physician who practices medicine. The court of appeal's decision finding that a duty of care exists in this case should be affirmed.

II. PURPOSE

A. Interest of Amicus Curiae

CMA is a non-profit, incorporated professional physician association of approximately 45,000 members throughout the State of California. CMA's primary purposes are "to promote the science and art of medicine, the care and well-being of patients, the protection of public health, and the betterment of the medical profession." CMA's membership includes California physicians engaged in the private practice of medicine in all specialties and settings. Many CMA physicians provide care to injured workers through the workers' compensation system, as treating doctors and consulting specialists. CMA physicians also participate within the system

as qualified medical evaluators or utilization reviewers. CMA has formed committees and subcommittees within its governance structure to investigate, research, and address workers' compensation issues.

CMA's mission includes advocating for high quality care and fair access to care within California's workers' compensation system. Meeting these goals entails ensuring that physicians are fairly reimbursed as well as preventing bureaucratic interference with their medical judgment and the care they provide to injured workers. CMA was heavily engaged in the Legislature's efforts in 2012 through SB 863 to enact major reforms to the workers' compensation system. CMA supported the bill after the author accepted numerous amendments designed to improve care of injured workers and efficiency and fairness in resolving disputes over coverage, among other things.

B. Scope of the Amicus Curiae Brief

This amicus curiae brief is directed to the issue in this case whether a workers' compensation utilization review physician who performs medical utilization reviews on behalf of employers owes a duty of care to an injured worker.[3] Although both CompPartners and its individual utilization review physician are named defendants, CMA's amicus brief focuses on the responsibilities of the individual physician reviewer. To the extent the

[3]Unless specifically addressed herein, CMA takes no position on any other issue in this case that is before the Court.

physician reviewer owes a duty of care and may be potentially liable for the decision to cut off Plaintiff King's anti-depressant medication, CompPartners may be equally liable under principles of agency and *respondeat superior*.

CMA wishes to focus the Court's attention on an issue that has not been properly framed and adequately addressed in the parties' briefing – the nature of utilization review itself and the real-world impact it has on the medical care of injured workers. None of the briefs filed by the parties delves into, as a practical matter, what utilization review is and how it can impact the care of injured workers. Defendant CompPartners too narrowly depicts utilization review as an administrative task to determine if certain recommended medical treatments are medically necessary because they fit within the workers' compensation systems' medical treatment utilization schedule ("MTUS"). *See* Appellants Opening Brief at 34-35. CMA's amicus brief explains that utilization review is the practice of medicine, as confirmed in relevant statutes and regulatory and ethical pronouncements of the Medical Board of California and the American Medical Association, respectively. The amicus brief goes further than any of the parties' briefs to additionally illustrate how utilization review decisions can disrupt and harm the care of workplace injuries, and it concludes that physicians who engage in utilization review must be held accountable in the same manner that physicians practicing medicine are held accountable.

III. DISCUSSION

A. Utilization Review in Workers' Compensation Has Evolved to Limit and Displace Physicians' Independent Medical Judgment.

California has long been a leader in health care delivery and management (e.g., the HMO model was started in Oakland). Most Californians are likely familiar with what it is like to receive health care in a managed care system. Whether through an HMO health plan or a health insurer's preferred provider organization ("PPO") plan, individuals pay plan premiums in exchange for access to health care providers and facilities along with an array of health care benefits. Not every treatment, drug, or test is covered under PPO and HMO plans. Health care plans necessarily have limits on coverage, and their ability to contain administrative costs and plan members' use of health care benefits is vital to the financial viability and survivability of the plans.

Utilization review is a fundamental component of managed care systems. It is the process by which a third party payor prospectively, retrospectively, or concurrently reviews and approves, modifies, delays, or denies coverage for medical care based in whole or in part on determinations of medical necessity. *See* Health & Safety Code §1367.01; Insurance Code §10123.135. Utilization review is intended to help payors to contain costs in a fair and predictable manner, and it can be used to

prevent unnecessary care.[4] For such reasons, California's workers' compensation system heavily relies on utilization review.

1. Utilization Review in Workers' Compensation Increasingly Has Become More Central and Rigid.

Because efficiency and cost are such important goals in California's workers' compensation system, the California Legislature has broadly adopted the use of utilization review and given it a central role in adjudication of coverage decisions. Like in commercial health plans, employers use third parties to conduct utilization review and approve, modify, delay, or deny medical care requested by an injured workers' treating physician prospectively, retrospectively, or concurrently. *See* Labor Code §4610.

In the nascent stage of California's workers' compensation system, which dates back to 1911, it was optional for employers to elect to be covered and, in return, receive immunity from lawsuits in tort for personal injuries sustained by workers while on the job. In 1913, workers' compensation coverage became mandatory and most negligence-based remedies previously available to workers for injuries sustained on the job were eliminated. In return for giving up the ability to sue employers for the monetary value of all damages resulting from a work injury, workers were

---

[4]*See generally* Saunier, Benjamin, *The Devil is in the Details: Managed Care and the Unforeseen Costs of Utilization Review as a Cost Containment Mechanism*, 27 Issues L. & Med. 21 (Summer 2011).

guaranteed adequate, albeit limited, benefits of disability payments and provision of medical care. *See* California Const. art. XIV, §4.

The California workers' compensation system is a no fault system in which benefits are automatically provided if certain conditions surrounding the injury are met. Under this system, employers are relieved from liability with very limited exceptions for serious and willful misconduct, fraud, or failure to be insured. *See* Labor Code §§3600-3605.

Labor Code section 4600 dictates the standard by which injured workers are entitled to medical treatment. It establishes a broad definition of medical treatment that must be covered:

> Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer.

Labor Code §4600(a). Prior to 2004, this simply was the language in section 4600 governing the standard for coverage of medical care in workers' compensation. In a workers' compensation claim, determining whether a treating physician's recommended treatment was covered involved medical judgments exercised by physicians.

The Legislature in 2004 enacted major reforms to the workers'

compensation laws that drastically impacted utilization review and the standard in section 4600. Until the mid-1990s, treatment disputes between an injured workers' treating physician and a utilization reviewer who denied recommended care were decided based on a preponderance of the evidence standard, and matters that could not be resolved were adjudicated by a workers' compensation judge and the Workers' Compensation Appeals Board ("WCAB"). In 1993, the Legislature added to the Labor Code a presumption that the determination of a treating physician as to the medical necessity of particular treatment is correct. *See* Labor Code §4062.9 (repealed, Stats. 2004, ch 34 §22 (SB 899) (2004)). That presumption was called into question in 2004 when the Legislature concluded it had caused an increase in medical treatment costs for injured workers.

Through SB 228 (Stats. 2004, ch. 639) and SB 899 (Stats. 2004, ch. 34), the Legislature eliminated the presumption of correctness as to the treating physician's determination of medical necessity and implemented a standard of care that was less flexible and supposedly more tethered to evidence-based medicine. The most impactful change to utilization review came with development of the Medical Treatment Utilization Schedule ("MTUS"), a set of medical treatment guidelines designed to serve as a standard by which recommended medical treatment is evaluated. The MTUS became the core of utilization review. Subdivision (b) was added to

Labor Code section 4600 to specify that medical treatment that is "reasonably required to cure or relieve" the injured worker means treatment based upon the MTUS. This new definition of reasonable care was a radical departure from the previous application of section 4600.

Under the reformed definition of section 4600, if a requested medical treatment is covered in the MTUS guidelines, which are presumptively correct as to scope and extent of treatment (*see* Labor Code §4604.5), a non-physician utilization reviewer may approve it. Decisions to modify or deny a request for treatment for reasons of medical necessity can only be made by reviewers who are physicians. *See* Labor Code §4610(e). Although such physicians need not be licensed in California, they must be "competent to evaluate the specific clinical issues involved in the medical treatment services [and] these services [must be] within the scope of the physicians' practice." *Id.*; *see also* 9 C.C.R. §9792.6(s). Only the medical director of a utilization review company needs to be a physician with an unrestricted license to practice medicine in California; the medical director is responsible for all decisions made in the utilization review system and must ensure that the process complies with applicable laws. Labor Code §4610(d); 9 C.C.R. §9792.6(m).

2. Dispute Resolution Over Utilization Review Decisions Has Become More Narrow and Limited.

Immediately following the creation of the MTUS in 2004, disputes over medical treatment between the treating physician and the utilization reviewer had been adjudicated through a medical-legal process, with the opportunity for a hearing before a workers' compensation appeals judge, an appeal to the WCAB, or an appeal to the Superior Court.

In 2012, the Legislature, believing that the medical-legal process was too costly and time-consuming, passed SB 863 (Stats. 2012, ch. 363) to establish the independent medical review (IMR) process. In so doing, the Legislature made IMR the sole appeals remedy for injured workers who receive utilization review decisions that modify, delay, or deny the medical treatment ordered by their treating physicians. IMR decisions may be appealed to the WCAB; however, the IMR decision as to medical necessity is presumed correct and the WCAB cannot make a finding of medical necessity contrary to the final determination. Labor Code §4610.6.

While IMR is generally faster and less costly than the medical-legal process it replaced, it achieves these efficiencies by employing a medical review process similar to utilization review. Prior to the adoption of IMR in SB 863, disputes between a treating physician and utilization reviewer as to medical necessity of a course of treatment were resolved with either side choosing a qualified medical evaluator who prepared a report and

presenting evidence at a trial before a workers' compensation judge, who issued a decision based on the entirety of the case. Decisions were issued by the WCAB and the parties had the right to appeal the WCAB ruling to the appropriate court of appeal.

Since the implementation of SB 863, IMR is used to adjudicate disputes that arise when a utilization reviewer denies, modifies, or delays the treatment recommendation of an injured workers' treating physician. Labor Code §4610. IMR decisions generally must be issued within thirty days (fewer if the request meets the requirements for an expedited decision) from the time the Administrative Director of the Division of Workers' Compensation sends a completed request and supporting documentation to the reviewer. IMR medical reviewers base their decisions on the medical records and documents submitted by the parties and must issue a written decision including references to the specific scientific and medical evidence applied and the clinical reasons for regarding the determination of medical necessity. Once the IMR decision is issued, it is binding and can be appealed to the WCAB; however, the WCAB may not make a finding of medical necessity contrary to the IMR determination. *See generally* 8 C.C.R. §§9792.10.1 through 9792.10.9.

According to a 2014 study conducted by the California Workers' Compensation Institute, IMR reviewers uphold the initial utilization review

decision in nearly eighty percent of cases.[5] Thus, while the IMR process may be efficient, it places even greater power in the hands of utilization reviewers to determine the course of an injured worker's care.

3. Physicians Continue to Experience Interference with Patient Care by Utilization Review.

CMA has compiled reliable evidence of the persistent problems physicians face with utilization review in the workers' compensation system. In December 2014, CMA conducted an anonymous electronic survey of California physicians, including both our members as well as members of county medical associations, in which it posed a series of close-ended questions regarding physician experience with the workers' compensation system following SB 863. Of the 231 physician practices that responded – representing 35 different specialties – two-thirds reported difficulties obtaining authorization for patient care through utilization review and more than half reported inappropriate denials of medically necessary tests, services, and procedures as the most significant problem with the utilization review process.[6]

---

[5] *See* Rena David, Brenda Ramirez, and Alex Swedlow, "Medical Dispute Resolution: Utilization Review and Independent Medical Review In the California Workers' Compensation System," California Workers' Compensation Institute (Jan. 2014), *online at* http://www.cwci.org/research.html.

[6] The survey methodology and its results are publicly available on CMA's website, at http://www.cmanet.org/files/assets/news/2015/02/cma-workers-compensation-survey-final.pdf.

In addition to problems with utilization review, of the nearly half of the respondents who reported using the IMR dispute resolution process, two thirds indicated a belief that it was unsuccessful in ensuring approval of medically necessary care, citing slow response times and inappropriate denials of treatment as the most problematic aspects.

In the aftermath of SB 863, which was arguably the biggest transformation of the workers' compensation system since its inception in 1911, CMA's member physicians overwhelmingly found that the absence of meaningful oversight of utilization review decisions led to an increase in inappropriate utilization review decisions, leading to delays and denials of medically necessary tests, procedures, and services. Physicians indicated a sense that reviewing physicians either do not read the records or do not get them and that many patients have been strained as a result of denials that clearly indicate that reviewers are not carefully reviewing the medical documentation supporting management/treatment.

B. Utilization Review is the Practice of Medicine.

As determined by the Medical Practice Act, the Medical Board of California, and cannons of medical ethics, physicians who engage in utilization review are engaging in the practice medicine. This characteristic of utilization review remains constant notwithstanding the other significant

transformations utilization review has undergone as a part of workers' compensation reform.

The practice of medicine is defined in the Medical Practice Act broadly to include "practicing[] any system or mode of treating the sick or afflicted in this state" and encompasses anyone "who diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person." Bus. & Prof. Code §2052. "Diagnosis" – one of the acts constituting the practice of medicine – is defined in the Medical Practice Act to include "any undertaking by any method . . . or procedure whatsoever . . . to ascertain or establish whether a person is suffering from any physical or mental disorder." Bus. & Prof. Code §2038.

A physician who engages in utilization review evaluates the medical necessity of a particular treatment, drug, or medical procedure. *See* Health & Safety Code §1367.01; Insurance Code §10123.135; Labor Code §4600(a) and (b). Determining "medical necessity" necessarily involves assessing the patient's medical conditions and determining whether and to what extent they suffer from such conditions. Utilization review accordingly meets the Medical Practice Act's definition of the practice of medicine.[7]

---

[7]Nowhere in the definitions of the practice of medicine or medical diagnosis is there a requirement that a physician examine or have direct