S232197

IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

KIRK KING, SARA KING,

Plaintiffs, Respondents

v.

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

Defendants, Petitioners.

Court of Appeal Fourth District, Division Two No. E063527

Riverside Superior Court No. RIC 1409797 (Hon. Sharon J. Waters)

RESPONSE TO AMICUS CURIAE BRIEFS

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Amicus curiae brief were filed by:

- The County of Los Angeles
- The National Association of Independent Review Organizations, Coventry Health Care Workers Compensation, Inc. and Examworks, Inc.
- Calchamber, the National Counsel of Self-Insurers, Property Casualty Insurers Association of America doing business as Association of California Insurance Companies and CAJPA
- Civil Justice Association of California
- California Medical Association
- California Applicants Attorneys Association
- California Society of Industrial Medicine and Surgery, Inc.

This brief responds to all of them collectively.[1]

I
SUMMARY OF ARGUMENT

Most of the amicus briefs in support of defendants repeat arguments made by defendants. Those arguments were already addressed in the answer brief on the merits and will not be repeated here.

The amicus briefs in support of defendants confuse the very different positions of *in house* medical review employees (who are covered by the exclusive remedy provisions) and *outside* medical review doctors and companies (who are not). The amicus briefs in support of defendants ask this Court to rewrite the express words of the statutes.

The amicus briefs in support of defendants falsely portray the issue as a choice between 100% of the duties of a treating doctor and no duties at

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[1]George Parisotto, the Acting Administrative Director of the Division of Workers' Compensation, applied for and was granted an extension to file by February 1, 2017, but never filed anything by the extended deadline.

all. They contend medical review doctors should have a license to harm employees and are not liable even for direct violations of statutory requirements or for intentional harm. All of those contentions are contrary to the plain terms of the statutes and contrary to settled public policy that people are liable for harm they cause to others absent an express statutory immunity or a sound public policy rule to the contrary.

II

AGREEMENT WITH THE BRIEFS FILED BY CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION AND CALIFORNIA SOCIETY OF INDUSTRIAL MEDICINE AND SURGERY, INC.

Plaintiffs agree with the briefs filed by California Medical Association, California Applicants' Attorneys Association, and California Society of Industrial Medicine and Surgery, Inc.

III

THE WORKERS' COMPENSATION EXCLUSIVE REMEDY PROVISIONS APPLY ONLY TO *IN HOUSE* UTILIZATION REVIEW AND NOT TO *OUTSIDE* COMPANIES

A. THE EXCLUSIVE REMEDY PROVISIONS ONLY APPLY TO THE EMPLOYER AND TO *IN HOUSE* UTILIZATION REVIEW

A repeated theme of the amicus briefs in support of Defendants is that *employers* face substantial exposure to liability if the exclusive remedy provisions do not apply to utilization review. That contention ignores the applicable statutes. The exclusive remedy provisions squarely prohibit suit against either the employer or an employee of the employer. Labor Code § 3601 and 3602. Employers are given the option of conducting utilization review either in house, using the employer's employees, *or* by contracting with an outside company.

> Each employer shall establish a utilization review process in compliance with this section, either directly or through its insurer or an entity with which an employer or insurer contracts for these services. Labor Code § 4610(b).[2]

An employer is liable in workers' compensation not only for the original injury, but also for additional injuries that occur during the treatment of the original injury. South Coast Framing, Inc. v. Workers' Comp. Appeals Bd. (2015) 61 Cal. 4th 291 (death caused by drugs prescribed by a treating workers' compensation doctor); Rodgers v. Workers' Comp. Appeals Bd. (1985) 168 Cal. App. 3d 567 (injury during rehabilitation treatment for a worker's compensation injury); Laines v. Workmen's Comp. Appeals Bd. (1975) 48 Cal.App.3d 872 (employee was injured while driving to a doctor for treatment of a workers' compensation injury); Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd. (1979) 23 Cal. 3d 158 (employee was injured while driving back from dropping off a medical release based on a previous workers' compensation injury).

If the employer elects to conduct utilization review in house, the exclusive remedy provisions apply. That is fair. If an employee of the employer does something to injure a co-employee, including making a utilization review decision that is erroneous, the employer pays through the workers compensation system for damages caused by the co-employee's actions. Labor Code § 3601 (exclusive remedy applies to co-employees); Hendy v. Losse (1991) 54 Cal. 3d 723 (employer is required to pay workers' compensation for an injury caused by a co-employee).

B. THE EXCLUSIVE REMEDY PROVISIONS DO NOT APPLY TO OUTSIDE COMPANIES

If an *outside* company contracts to perform utilization review, the

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[2]A revised version of section 4600 takes effect on January 1, 2018. The identical language in that statute is contained in subdivision g.

employer remains covered by the exclusive remedy provisions. Weber v. United Parcel Service, Inc. (2003) 107 Cal.App.4th 801 (employer who contracts with an outside company to administer hearing tests is covered by the exclusive remedy provisions if the tests are done negligently). However, the outside company is not the employer and is not covered by the exclusive remedy provisions. It is not a question of whether an "exception" applies, but rather whether the exclusive remedy provisions apply at all. They clearly do not. No statute extends the exclusive remedy provisions to an outside company, and Labor Code § 3852 expressly preserves the right to sue anyone other than the employer.

That is also fair. An outside company has no obligation to pay workers' compensation benefits to compensate for damage caused by an erroneous decision. The "compensation bargain" has no application to a person or entity who never pays workers' compensation benefits. The employer has the right to sue the outside company in subrogation for the additional workers' compensation costs caused by the erroneous utilization review decision. Labor Code § 3856. It is only fair that the injured employee has the same right, and the Legislature expressly provided for it. Labor Code § 3852, 3854. If the employee files suit, the employer has the right to file a lien on the employee's case. Labor Code § 3856, 3857, 3862.

This clear distinction in the statutes disposes of the "parade of horribles" contentions made in the amicus briefs in support of defendants. For example, the County of Los Angeles contends it could be sued for over 6,000 utilization decisions a year. In fact, it is not subject to suit for *any* of them. Whether the decisions are made in house or by an outside company, the exclusive remedy provisions apply to the employer. If the decisions are made by an outside company, only the outside company is liable and subject to suit.

C. THE EXCLUSIVE REMEDY PROVISIONS DO NOT APPLY TO "AGENTS"

The National Association of Independent Review Organizations et al. contend the exclusive remedy provisions apply to an employer's "agent." That argument is not supported by any citation to any statute or case because there is nothing to cite. In fact, as detailed in the answer brief on the merits, the Legislature enacted very specific definitions about who qualifies as the "employer" for purposes of the exclusive remedy provisions. No statute includes "agents" of the employer in the definition of employer. Rather, agents of an employer who are not within the careful definitions are outside the exclusive remedy provisions. Unruh v. Truck Ins. Exch. (1972) 7 Cal. 3d 616, 626 (independent investigators retained by a worker's compensation insurer).

That same brief asserts that the only relevant questions are whether the injury is collateral to or derivative of a compensable injury and whether it is outside the risks presented by the compensation bargain. For employers and co-employees, that is an accurate statement, but for anyone else the first question is whether that person or entity is covered by the definition of "employer" in the exclusive remedy statutes. If the answer is no, the other questions are irrelevant.

D. THIS COURT CANNOT REWRITE THE DEFINITION OF "EMPLOYER" IN LABOR CODE § 4610.5

The answer brief on the merits demonstrates the very limited scope and purpose of defining "employer" in Labor Code § 4610.5 to include utilization reviewers. Several of the amicus briefs in support of Defendants contend the narrow definition should be completely rewritten.

As the statute was drafted and signed into law, the definition of "employer" in § 4610.5 was carefully limited to § 4610.5 and 4610.6.

> (c) *For purposes of this section and Section 4610.6, the following definitions apply:*

. . .

(4) Unless otherwise indicated by context, "employer" means 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. Labor Code § 4610.5(c).

The amicus briefs in support of Defendants want to rewrite the statute to change a major cross-reference the Legislature carefully limited. They want to rewrite the statute to say (with additions in italics and deletions in strikeout type):

(c) For purposes of ~~this section and Section 4610.6~~ *all workers' compensation statutes*, the following definitions apply:

. . .

(4) Unless otherwise indicated by context, "employer" means 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.

A court construing a statute is always required to start with the language of the statute, and if the language is clear, a court is not at liberty to rewrite it. In particular, "[i]t is bedrock law that when '"the law-maker gives us an express definition, we must take it as we find it . . .' [Citation]" Delaney v. Superior Court (1990) 50 Cal. 3d 785, 804. See also Curle v. Superior Court (2001) 24 Cal. 4th 1057, 1063 ("If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts"); State ex rel. Dept. of California Highway Patrol v. Superior Court (2015) 60 Cal. 4th 1002, 1011 (quoting Curle); Bernard v. Foley (2006) 39 Cal. 4th 794, 808 ("we are bound to follow the definition the Legislature has supplied"); In re Marriage of Stephens (1984) 156 Cal. App. 3d 909, 913 ("The Legislature has power to prescribe legal definitions of its

own language, and when an act passed by the Legislature embodies a definition it is binding on the courts.").

The answer brief on the merits addresses the legislative history of § 4610.5 and the lack of even a mention of exclusive remedies. The amicus briefs in support of Defendants all ignore that inconvenient fact. A court cannot rewrite a statute to add terms the Legislature intentionally omitted. State Dept. of Public Health v. Superior Court (2015) 60 Cal. 4th 940, 956 ("This canon of construction, like all such canons, does not authorize courts to rewrite statutes"); Western/California, Ltd. v. Dry Creek Joint Elementary School Dist. (1996) 50 Cal. App. 4th 1461, 1488 ("Courts may not rewrite statutes to supply omitted terms or to conform to an assumed, unexpressed legislative intent. [Citation.] It is, of course, up to the Legislature, and not the courts, to rewrite statutes.").

The National Association of Independent Review Organizations et al. cites Marsh & McLennan, Inc. v. Superior Court (1989) 49 Cal. 3d 1, as holding that *any* dispute over payment of compensation is covered by the exclusive remedy provisions. That misstates the holding of Marsh. In Marsh this Court addressed an independent claims administrator for a self insured employer. This Court relied on a combination of Labor Code § 3602, 5300 and 5814 to find that an independent claims adjuster is part of the "employer" when sued for unreasonably delaying or refusing to pay workers' compensation benefits.

None of those statutes apply to outside utilization review doctors and companies. Rather, in § 4610.5 the Legislature expressly defined them as part of the employer *only* for "purposes of this section and Section 4610.6." When the Legislature has limited a definition to specific purposes, that is a clear intent not to apply it more broadly. California Forestry Assn. v. California Fish & Game Commission (2007) 156 Cal. App. 4th 1535, 1550. Again, when the Legislature has defined a term, courts are bound by that definition.

IV

OUTSIDE MEDICAL REVIEW COMPANIES OWE A DUTY TO PEOPLE WHOSE LIVES THEY AFFECT

A. THE AMICUS BRIEFS IN SUPPORT OF DEFENDANTS IGNORE VIOLATIONS OF EXPRESS STATUTORY DUTIES

The amicus briefs in support of Defendants are all limited to common law issues. But as pointed out in Plaintiffs' brief on the merits, Defendants violated two express statutory mandates:

1. An unqualified doctor made the decision in violation of Labor Code § 4610(e). The pending accusation against Dr. Sharma is based in part on that direct violation.

2. The decision to discontinue Klonopin was not communicated to the prescribing psychiatrist in violation of Labor Code § 4610(g)(3)(A).

None of the amicus briefs in support of Defendants mention these clear violations of statutory duties and none of them suggest any reason why the violations are not a basis for liability.

B. UTILIZATION REVIEW DOCTORS, LIKE EVERYONE ELSE, ARE LIABLE FOR THE HARM THEY CAUSE

The amicus briefs in support of Defendants contend doctors making utilization review decisions should have immunity even if their decisions are intentionally harmful. That "license to harm" argument, Scott v. County of Los Angeles (1994) 27 Cal. App. 4th 125, 144, is contrary to settled public policy that people are responsible for the harm their actions and decisions cause. (Answer brief on the merits, pages 15-20)

The answer brief on the merits cited this Court's statements in Cabral v. Ralphs Grocery Co. (2011) 51 Cal. 4th 764, that liability for harm caused to others is the rule, and is subject to exceptions only to the extent specified by statute or supported by public policy. This Court recently again stressed that when a person causes harm to another person, the rule is liability unless an immunity applies or there is a strong public policy reason

for an exception. In Kesner v. Superior Court (2016) 1 Cal.5th 1132, this Court addressed whether employers who require their employees to work with asbestos are liable when the employees bring the asbestos home on their clothing and cause injury to their family members. The defendants contended they owed no duties to the injured family members. This Court unanimously and emphatically disagreed. It began with the general rule stated by Civil Code § 1714. It held that unless either a statutory immunity applies or there is a clear public policy basis for an exception, everyone is liable for the harm caused to others.

> The conclusion that a defendant did not have a duty constitutes a determination by the court that public policy concerns outweigh, for a particular category of cases, the broad principle enacted by the Legislature that one's failure to exercise ordinary care incurs liability for all the harms that result. "The history of the concept of duty in itself discloses that it is not an old and deep-rooted doctrine but a legal device of the latter half of the nineteenth century designed to curtail the feared propensities of juries toward liberal awards." [Citation] As a result, "in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " [Citation] 1 Cal.5th at 1143.

This Court stressed that the factors addressed in Biakanja v. Irving (1958) 49 Cal.2d 647 and Rowland v. Christian (1968) 69 Cal.2d 108, are used, not to determine whether a new duty exists, but to determine whether an *exception* to the existing duty created by § 1714 should be created.

> Because Civil Code section 1714 establishes a general duty to exercise ordinary care in one's activities, which includes the use of asbestos in one's business or on one's premises, we rely on these factors not to determine "whether a

new duty should be created, but whether an *exception* to Civil Code section 1714 ... should be created." [Citation to Cabral] 1 Cal.5th at 1143, italics in original.

C. IT IS IRRELEVANT WHETHER UTILIZATION REVIEW DOCTORS ARE LIABLE FOR MEDICAL MALPRACTICE

A repeated theme in the amicus briefs in support of Defendants is that the only possible choices are (1) 100% of the duties of a treating doctor or (2) no duties at all. As detailed in Plaintiffs' answer brief on the merits at pages 15-27, that simply is not true. Rather, utilization review doctors, like everyone else, are liable for the harm they cause. The nature of the relationship affects the scope of the duty, but not whether a duty exists.

D. UTILIZATION REVIEW DOCTORS HAVE A DUTY TO COMPLY WITH STATUTORY MANDATES

The amicus briefs in support of Defendants stress the limited role utilization review doctors have in making treatment decisions and their limited access to records. All of those factors are relevant to the *scope* of the duty of utilization review doctors, but a limited role is a basis for limited duties, not *zero* duties.

The brief by the National Association of Independent Review Organizations et al. expresses outrage at the concept that utilization doctors have a duty to review sufficient records to make an informed decision and to possess or acquire sufficient information to make an informed decision. All of those duties are expressly provided by statute.

Labor Code § 4610(e) states: "No person other than a licensed physician *who is competent to evaluate the specific clinical issues involved in the medical treatment services*" may make a utilization review decision.[3] Competence inherently requires the doctor either to possess sufficient training, education and experience to make an informed decision or to

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[3]Slightly modified language appears in subsection (g)(3)(A) of the version in effect on January 1, 2018.

acquire sufficient education to make an informed decision. When the decision concerns a medication with which the doctor is not familiar, competence requires at least looking up the manufacturer's warnings about the medication.

The regulations expressly state that while non-physicians can *approve* requests for treatment, and can request additional information, only a competent physician can make a decision to *deny* treatment.

> (2) A reviewer *who is competent to evaluate* the specific clinical issues involved in the medical treatment services, and where these services are within the reviewer's scope of practice, may, except as indicated below, delay, modify or deny, requests for authorization of medical treatment for reasons of medical necessity to cure or relieve the effects of the industrial injury.
>
> (3) A non-physician reviewer may be used to initially apply specified criteria to requests for authorization for medical services. A non-physician reviewer may approve requests for authorization of medical services. A non-physician reviewer may discuss applicable criteria with the requesting physician, should the treatment for which authorization is sought appear to be inconsistent with the criteria. In such instances, the requesting physician may voluntarily withdraw a portion or all of the treatment in question and submit an amended request for treatment authorization, and the non-physician reviewer may approve the amended request for treatment authorization. Additionally, a non-physician reviewer may reasonably request appropriate additional information that is necessary to render a decision but in no event shall this exceed the time limitations imposed in section 9792.9(c)(1), (c)(2), or (d), or section 9792.9.1(c)

and (d). Any time beyond the time specified in these sections is subject to the provisions of section 9792.9(h) or section 9792.9.1(f). 8 Cal Code Regulations, Title 8, § 9792.7(b).

Labor Code § 4610(g)(4) requires any denial of requested treatment to be based on "clinical reasons."[4] Subdivision (g)(4) also states that if denial is based on lack of sufficient information, "the decision shall specify the reason for the decision and specify the information that is needed." Subdivision (g)(5) states that if a decision cannot be made within the specified timeframes because of lack of information, the medical review doctor is required to request the necessary additional information or to arrange to obtain it: "If the employer, insurer, or other entity cannot make a decision within the timeframes specified in paragraph (1) or (2) because the employer or other entity is not in receipt of all of the information reasonably necessary and requested, because the employer requires consultation by an expert reviewer, or because the employer has asked that an additional examination or test be performed upon the employee that is reasonable and consistent with good medical practice, the employer shall immediately notify the physician and the employee, in writing, that the employer cannot make a decision within the required timeframe, and specify the information requested but not received, the expert reviewer to be consulted, or the additional examinations or tests required."[5] Those provisions require the utilization review doctor to request additional records if they are necessary to make a decision.

None of the amicus briefs in support of Defendants suggest any

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[4]Identical language is contained in subdivision (h)(5) of the version in effect on January 1, 2018.

[5]For the version in effect on January 1, 2018, subdivision (h)(5) requires a notice of denial due to lack of information to specify the missing information, and subdivision (j)(2) requires a written notice of required additional information to make a decision.

reasons why utilization review doctors should not be required to comply with these express statutory mandates.

E. UTILIZATION REVIEW DOCTORS HAVE A DUTY NOT TO CAUSE HARM

The amicus briefs in support of Defendants cite cases which hold that doctors performing fitness examinations or independent medical examination owe no duty to the patient to do so accurately or to diagnose diseases. But the answer brief on the merits cites multiple cases from California and other states holding that doctors who perform examinations for others do have a duty not to injure the patient, and are liable in tort if they do. The difference is based on the familiar distinction between nonfeasance and misfeasance. Absent a duty to act, people generally are not liable for their inaction (nonfeasance) but they are liable for their affirmative actions which cause injury (misfeasance). See Weirum v. RKO General, Inc. (1975) 15 Cal. 3d 40, 49; Lugtu v. California Highway Patrol (2001) 26 Cal. 4th 703, 716-717.

Doctors performing examinations on behalf of someone else have no duty to affirmatively treat or diagnose diseases (nonfeasance) but do have a duty to avoid injury to the patient (misfeasance).

This case is based on misfeasance, not nonfeasance. Dr. Sharma affirmatively took actions to terminate a medication Mr. King was receiving, and then did not provide a warning of the known consequences of his affirmative decision or modify the decision to include a weaning regimen.

F. THE DUTIES OF THE TREATING PHYSICIAN DO NOT ELIMINATE ALL HARM CAUSED BY ERRONEOUS UTILIZATION REVIEW DECISIONS. ARGUMENTS OF AMICUS BRIEFS IN SUPPORT OF DEFENDANTS IGNORE THE FACTS OF THIS CASE.

The amicus briefs in support of Defendants contend treating

physicians should bear all liability for erroneous utilization review decisions. Notably absent is any amicus brief from treating physicians volunteering to accept the proposed expanded liability. Treating physicians do have an important role in correcting erroneous utilization review decisions. They are responsible for submitting support for the requested treatment, and they are responsible for initiating independent medical review, and submitting supporting documentation, if a utilization review decision is erroneous.

But treating physicians have no power to authorize medical treatment contrary to the decision of a utilization review doctor unless they provide it pro bono, and if the decision is made to cut off necessary medications, treating physicians have no power to provide the medications unless they affirmatively pay for them. Injuries that occur between the time of the erroneous utilization review decision and its correction on independent medical review or other available review procedures cannot be corrected by the treating physician. It is contrary to public policy, and simply unfair, to hold treating physicians liable for decisions over which they have no control.

The amicus briefs in support of Defendants contend Mr. King's treating doctor should have provided warnings of the risks of abrupt discontinuance of Klonopin. If proper notice of the decision had been given, the treating doctor would have had a duty to do so. But as detailed in the brief on the merits, Klonopin, a psychotropic drug, had been prescribed by a psychiatrist, but the utilization review decision was erroneously sent to Mr. King's general doctor and was not sent to Mr. King's psychiatrist at all. It is contrary to public policy, and patently unfair, to hold the psychiatrist liable for the effects of a decision about which he was given no notice. It is also contrary to public policy, and patently unfair, to hold the general doctor liable for not warning about the effects of discontinuance of a medication the doctor did not prescribe.

G. THE AVAILABILITY OF INDEPENDENT MEDICAL REVIEW DOES NOT ELIMINATE ALL INJURIES TO EMPLOYEES

The amicus briefs in support of Defendants stress that employees have the right to appeal utilization review decisions to an independent medical review. The answer brief on the merits agrees that this remedy, in many cases, will resolve disputes before there is any injury to the employee.

This right to appeal, or "dispute," a utilization review decision is found in Labor Code § 4610.5 and provides the avenue for an employee to seek approval for treatment after the treatment request is initially denied or modified by utilization review. It is in this context, and *only* this context, that a utilization review organization is defined as an "employer."

If that remedy resolves the dispute in time to prevent injury, there is no basis for a suit in tort, because proof of damages is always an essential element of any cause of action in tort. But the availability of review does not always prevent harm, and the fact that it sometimes will prevent harm is not a basis for denying recovery when harm does occur. Again, there is a critical distinction between a dispute over whether a utilization review doctor or organization caused injury, as in this case, and a dispute over whether medical treatment should be provided in the future that "shall be resolved only in accordance with the independent medical review process" under section 4610.5. Only one type of dispute is contemplated by § 4610.5, that is, whether a utilization review denial of or modification to future treatment should be upheld or reversed. The dispute in this case falls well outside the contemplation of § 4610.5 as it is a claim for *injuries* caused by a negligent utilization review decision. The amicus briefs in support of Defendants ignore this distinction.

H. EMPLOYEES AND THEIR TREATING PHYSICIANS ARE REQUIRED TO EXHAUST AVAILABLE REMEDIES

Some of the amicus briefs in support of Defendants contend employees might ignore independent medical review procedures and instead