S232197

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KIRK KING, et al.

Plaintiffs, Appellants and Respondents

vs.

COMPPARTNERS, INC., et al.

Defendants, Respondents and Petitioners.

After a Decision by the Court of Appeal,
Fourth Appellate District, Division Two (No. E063527)

Superior Court, County of Riverside (No. RIC 1409797)
Honorable Sharon J. Waters

PETITIONERS' OPENING BRIEF ON THE MERITS

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CONSTITUTIONAL PROVISIONS

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?

INTRODUCTION

This case centers on the core "compensation bargain" that grounds California's statutory system for compensating and treating workers injured on the job. (Cf. *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) Under that bargain, "the employer assumes liability for industrial personal injury or death without regard to fault" (*ibid.*), including the costs of medical treatment reasonably necessary to address the worker's injury (Labor Code, § 400, subd. (a)).[1] In exchange, the injured employee is limited to the remedies available through the workers' compensation system, and "gives up the wider range of damages potentially available in tort." (*Shoemaker*, *supra*, at p. 16.)

Over the past two decades, the Legislature has worked to hone this tradeoff in the context of medical treatment requests, adopting reforms aimed at "ensur[ing] quality, standardized medical care for workers in a prompt and expeditious manner" while avoiding "costly and time-consuming" litigation. (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1079, 1089.) A critical aspect of these reforms is that a dispute over a treating physician's request for medical treatment is resolved by medical professionals and not by the courts. Under the scheme established by Section 4610 *et seq.*, a disputed treatment request is first subject to "utilization review" to determine whether it is medically necessary. If the request is denied by a reviewing physician, the claimant may appeal to an Independent Medical Review ("IMR") panel, which is, by statute, the exclusive mechanism to resolve a utilization review dispute. The Court of Appeal's decision, however, allows plaintiffs to side-step this scheme and litigate a dispute over the denial of a treatment request through

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

a tort lawsuit. This result would undermine the Legislature's carefully-balanced scheme for workers' compensation and create a novel class of remedial tort claims. This Court should reverse.

Plaintiff Kirk King suffered a workplace injury, and his treating physician prescribed a psychotropic drug, Klonopin, to ease depression and anxiety accompanying the injury. Defendant CompPartners, the utilization review provider retained on behalf of King's employer, found Klonopin to be medically unnecessary. King then allegedly suffered seizures as a result of withdrawal from Klonopin.

King and his spouse filed this action against, among others, CompPartners and its utilization review physicians, asserting causes of action for general and professional negligence, infliction of emotional distress, and loss of consortium. The gravamen of the complaint is that the reviewing physicians were negligent in denying the treating physician's request for Klonopin because they failed to permit a gradual reduction in dosage or warn about the consequences of withdrawal. (App. 4.)[2] The trial court sustained Defendants' demurrer without leave to amend, finding that Plaintiffs' lawsuit was preempted by the Workers' Compensation Act ("WCA")'s exclusive remedies. (App. 84.) Alternatively, the court concluded that Plaintiffs' negligence claims failed as a matter of law because there was no doctor-patient relationship, and hence no duty of care, between the reviewing physicians and King.

The Court of Appeal reversed the denial of leave to amend on both grounds. The court recognized that the WCA preempted Plaintiffs' tort

[2] "App." refers to Appellants' Appendix, and "AOB" to Appellants' Opening Brief in the Court of Appeal.

claims to the extent they asserted the reviewing physician was negligent because Klonopin "was medically necessary until Kirk was properly weaned. " (Op., 13.) The court believed, however, Plaintiffs had a potential theory that would bring their tort claims outside of the workers' compensation system: that the reviewing physician "harmed Kirk by *not informing* Kirk of the possible consequences of abruptly ceasing Klonopin." (*Id.* at 12-13, italics added.) While the former claim would challenge a medical necessity decision that "is directly part of the claims process," the court reasoned that a failure-to-warn theory "would be beyond the 'medical necessity' determination." (*Id.* at 13.) The court also reversed the trial court's alternative tort ruling, holding that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed." (*Id.* at 14.) Although Plaintiffs' allegations were inadequate to determine the "scope or discharge of that duty," the court concluded that leave to amend was warranted because Plaintiffs indicated they could allege additional facts. (*Id.* at 18.)

On each of these points, the Court of Appeal erred as a matter of law. *First*, Plaintiffs' failure-to-warn theory falls within the scope of the broad exclusivity provisions governing the IMR process. In establishing that process, the Legislature sought to ensure that "[a]ny dispute over a utilization review decision" would ultimately be resolved by a physician, administratively, and based on "medical records, provider reports, and other [submitted] information." (*Stevens*, *supra*, 241 Cal.App.4th at p. 1090.) The whole point of this process was to avoid the previous "costly and time-consuming process" of using dueling medical evaluators to litigate treatment before a workers' compensation judge, a *de novo* Appeals Board hearing, and, ultimately, the Court of Appeal. (*Id.* at pp. 1088-1089.) The narrow grounds fixed by the Legislature for reviewing an IMR decision—

fraud, bias, and clear error—underscore that the IMR process provides the sole means of challenging a utilization review decision.

Because the WCA requires reviewing physicians to explain their decisions in writing (§ 4610, subd. (g)(4)), the warning Plaintiffs demand here is clearly encompassed by the utilization review process. Indeed, any claim asserting that a reviewing physician failed adequately to warn the claimant about the *medical* consequences of an adverse utilization review decision is just a restyled challenged to the decision itself. In alleging that the reviewing physician here should have warned King about the need for a Klonopin weaning regimen, Plaintiffs are effectively asserting that the reviewing physician should have modified, rather than denied, the recommendation or qualified the denial. If a claimant could sidestep the IMR process merely by alleging that the reviewing physician failed to provide an adequately detailed or qualified explanation, the exclusivity provisions would be set at naught.

Second, Plaintiffs' failure-to-warn theory is independently preempted because this Court has broadly construed the workers' compensation exclusivity provisions to apply where "the alleged injury is '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, 811.) Courts have repeatedly invoked this principle in holding that injuries flowing from the workers' compensation process are subject to the scheme's remedies and limitations. Because King's injuries here are, on Plaintiffs' own theory, derivative of the utilization review process, they have a direct factual nexus to the workplace injury King suffered.

In suggesting that a failure-to-warn theory would place Plaintiffs' clams "beyond" the scope of preempted workers' compensation claims, the Court of Appeal fundamentally misconstrued *Vacanti*. The court read that decision to hold that "if a new injury arises or the prior workplace injury is aggravated, then the exclusivity provisions do not apply." (Op., 12, citing *Vacanti*, *supra*, 24 Cal.4th at pp. 813-814.) But *Vacanti* did not say that; it noted, rather, that a plaintiff could proceed in tort if "the alleged injury—the aggravation of an existing workplace injury—did not occur in the course of an employment relationship." (*Vacanti*, *supra*, at p. 814.) That manifestly is not the situation here, for the sole injuries Plaintiffs have pled are the result of the workers' compensation process covering the treatment for King's original injury.

Third, even if Plaintiffs' tort claims somehow fall outside the scope of the exclusivity provisions for the IMR and workers' compensation remedies, the Court of Appeal erred in allowing Plaintiffs to proceed because CompPartners and its reviewing physicians owed no duty to render medical advice to King. In holding that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed" (Op., 14), the Opinion below collapses the statutory distinction between reviewing and treating physicians, and threatens to distort the policies underlying the utilization review process.

The WCA draws a clear distinction between the roles of treating physician and reviewing physician. A treating physician examines the claimant and recommends a course of care for the claimant's malady; a reviewing physician evaluates and makes a judgment about the treating physician's *recommendation*, testing it against a treatment schedule mandated by statute. A treating physician examines the claimant as a patient; a "utilization review physician does not physically examine the

[employee]" or even necessarily "review all pertinent medical records." (*Simmons v. State Dept. of Mental Health* (2005 Cal. W.C.A.B.) 70 Cal. Comp. Cases 866, 2005 WL 1489616, at *7.) Whereas a treating physician deals directly with the claimant, a reviewing physician communicates her decision primarily to the treating physician.

These structural distinctions foreclose any suggestion that a reviewing physician "has a doctor-patient relationship" with the workers' compensation claimant such that he or she owes the claimant the same duty of care as a *treating* physician. Nor do general tort principles alter that result, for the factors recognized by the courts weigh decisively against recognizing such a duty. It is not reasonably foreseeable that a *reviewing* physician's purportedly deficient explanation would harm the patient, given that the treating physician is ultimately responsible for giving care and advice. This is doubly so because any adverse utilization review decision may be challenged, on an expedited basis if necessary, by way of an IMR. For the same reasons, there is no direct causal link between the disputed decision here and the alleged injuries suffered by King. Under Plaintiffs' own theory, the direct cause of the injury was the immediate cessation of Klonopin, and it was King's treating physician—the physician who prescribed the drug—who had the duty to oversee his care.

If upheld, the Opinion below would portend expanded liability for utilization review providers and undercut the Legislature's purpose in establishing the utilization review and IMR processes. Faced with the tort duties of a treating physician, reviewing physicians would need to go beyond evaluating a treatment recommendation and *provide medical treatment*. This case highlights the point, for Plaintiffs' core contention is that the reviewing physician should have rendered medical advice alongside the decision to deny Klonopin. The upshot is that utilization review

providers would become care partners and *insurers* for treating physicians, a role completely at odds with the limited duties set out in the WCA.

The expanded medical duties borne by utilization review physicians could not but slow that process and the delivery of care. That would defeat the "quick resolution of treatment requests" that utilization review was intended to further. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 241 (*Sandhagen*).) The availability of tort remedies would drive disputes over utilization review decisions out of the IMR system and into the courts. That would defeat the Legislature's goal of avoiding "costly and time consuming" disputes. (*Ibid.*) And because this litigation would drive up workers' compensation costs, it would upset the "compensation bargain" between employers and employees that lies at the heart of the workers' compensation system.

This Court should reverse.

STATEMENT OF THE CASE

A. Statement of Facts

The facts, as pled in the complaint and supplemented in Plaintiffs' arguments for leave to amend, are these:

In February 2008, Kirk King sustained a back injury during the course of his employment. (App. 3.) Chronic back pain from this injury led King to experience anxiety and depression. (*Ibid.*) King sought medical care, and a physician prescribed him psychotropic medications, including Klonopin, in July 2011. (*Ibid.*) Because King's anxiety and depression arose out of his workplace injury, the prescription for Klonopin was covered by his employer through workers' compensation. (Op., 3.) Although King was prescribed Klonopin to treat his anxiety, Klonopin is

also commonly used as an anti-seizure medication. (AOB 4.) King did not suffer any seizures while taking Klonopin. (*Ibid.*)

Under Section 4610, subdivisions (a) and (b), King's employer was required to set up a "utilization review process" to "prospectively, retrospectively, or concurrently review and approve, modify, delay or deny ... treatment recommendations by physicians." An employer can set up a utilization review process "either directly or through its insurer or an entity with which an employer or insurer contracts for these services." (§ 4610, subd. (b).) Consistent with this statute, CompPartners, a company licensed in California as a utilization review management company, was retained to manage utilization review for King's employer. (App. 2.) Defendants Dr. Naresh Sharma and Dr. Mohammed Ashraf Ali were alleged to be licensed physicians employed by CompPartners to conduct utilization reviews. (*Ibid.*)

In July 2013, Dr. Sharma performed a utilization review of King's psychotropic medication regimen. (App. 3.) In determining whether to "approve, modify, delay, or deny medical treatment services," a utilization review must follow detailed criteria established by the Labor Code. (§ 4610, subd. (f).) One of these criteria is that the decision must be consistent with the medical treatment utilization schedule ("MTUS"), which incorporates "evidence-based, peer-reviewed, nationally recognized standards of care" and addresses the "appropriateness of all treatment procedures ... commonly performed in workers' compensation cases." (§ 5307.27, subd. (a).) Plaintiffs do not allege that Dr. Sharma or CompPartners acted contrary to the MTUS or to any statutory or regulatory requirements in conducting the utilization review.

As a result of the utilization review, Dr. Sharma "de-certified" King's prescription for Klonopin. (App. 3.) The Labor Code requires that utilization review decisions be promptly communicated to an employee's treating physician:

> Decisions to approve, modify, delay, or deny requests by physicians for authorization prior to, or concurrent with, the provision of medical treatment services to employees shall be communicated to the requesting physician within 24 hours of the decision. Decisions resulting in modification, delay, or denial of all or part of the requested health care service shall be communicated to physicians initially by telephone or facsimile, and to the physician and employee in writing within 24 hours for concurrent review, or within two business days of the decision for prospective review.

(§ 4610, subd. (g)(3)(A).) Plaintiffs do not allege that Dr. Sharma failed to provide the required notice to King's treating physician. According to Plaintiffs' proffered allegations, however, Dr. Sharma "knew that his decision to 'de-certify' the drug would lead to the immediate denial of Klonopin to Mr. King, without any further review by any of his treating physicians or any psychiatric care provider." (AOB 4.)

Section 4610.5, subdivision (d), provides: "If a utilization review decision denies, modifies, or delays a treatment recommendation, the employee may request an independent medical review as provided by this section." When notifying an employee of the denial, modification or delay of a treatment recommendation, the employer is required to provide the employee with a form and addressed envelope with which the employee can initiate the IMR process. (§ 4610.5, subd. (f).) Plaintiffs do not allege in their complaint or briefs whether King sought an IMR to contest the utilization review decision decertifying Klonopin.

Plaintiffs allege that as a result of Dr. Sharma's decision to decertify Klonopin, King was "forced to undergo an abrupt withdrawal from the

Klonopin." (App. 4.) They further allege that Dr. Sharma "failed to provide any warnings concerning a gradual reduction of the dosage or continue Mr. King on the Klonopin until the step-down process of such medication was completed." (*Ibid.*) Without a weaning regimen, Plaintiffs aver, King suffered four seizures resulting in additional physical injury. (*Ibid.*)

According to the complaint, King sought to return to his Klonopin regimen in September 2013, and Dr. Mohammed Ashraf Ali, an alleged CompPartners employee, performed another utilization review and denied the request for Klonopin. (App. 4.) Plaintiffs allege that, like Dr. Sharma, Dr. Ali did not authorize a step-down regimen of Klonopin or warn of the risks of abrupt withdrawal of Klonopin. (*Ibid.*)

B. The Trial Court Proceedings

Kirk King and his wife Sara King filed a complaint in California Superior Court against CompPartners, Dr. Sharma, Dr. Ali, Whittier Drugs, and a number of unnamed defendants.[3] Plaintiffs assert that the physician who conducted the initial utilization review, Dr. Sharma, was negligent because he failed to note the need for a "step-down" or weaning regimen in his decision. (App. 4.) According to Plaintiffs, Dr. Sharma failed to evaluate King in person and, as an anaesthesiologist, lacked the necessary training to perform the utilization review for Klonopin. (*Ibid.*) In their proffered facts, Plaintiffs contend that Dr. Sharma should have known that abrupt cessation of Klonopin entailed a risk of seizures. (AOB 4.) King asserts causes of action for negligence, professional negligence, intentional

[3] CompPartners and Dr. Sharma are the only defendants that are parties to this appeal.

and negligent infliction of emotional distress, and Ms. King alleges loss of consortium.

Defendants CompPartners and Dr. Sharma demurred to the complaint. Defendants argued, among other things, that Plaintiffs' claims were preempted by the Labor Code, and that their negligence claims failed because there was no doctor-patient relationship between Dr. Sharma and King. (App. 23-40.) In response, Plaintiffs acknowledged that any claims challenging the result of the utilization review decision to decertify Klonopin would be preempted by the WCA. (*Id.* at 48.) Plaintiffs argued, however, that by challenging Defendants' "immediate refusal to approve a Klonopin weaning regimen," they alleged a negligent "treatment decision[] affecting patients" that was not preempted. (*Id.* at 48-49.) They also argued that the utilization review was a professional service provided in the health care context, thus creating a duty of care to King. (*Id.* at 51.)

On February 24, 2015, the trial court issued a tentative ruling sustaining the demurrer without leave to amend based upon the workers' compensation exclusivity doctrine. (App. 71.) At the demurrer hearing, Plaintiffs acknowledged that injuries "collateral or derivative of the workplace injury" would be preempted, but argued that King's injury was a "wholly separate injury" arising from the utilization review process. (*Id.* at 101.) Plaintiffs also argued they could amend their complaint to allege additional facts to establish the existence of a physician-patient relationship. (*Id.* at 108-109.) The trial court sustained the demurrer, both on the ground that the claims were preempted and that Defendants did not owe a duty to King, and denied leave to amend. (*Id.* at 84, 111-112).

C. The Court of Appeal Decision

Plaintiffs appealed the trial court decision sustaining the demurrer, identifying additional facts they would plead in an amended complaint. (AOB 4; *ante*, 8-11.)

In a published opinion, the Court of Appeal affirmed the order sustaining the demurrer, but reversed the trial court's denial of leave to amend. The court recognized that the WCA provides the exclusive remedy not only for injuries sustained in the workplace, but also for "'certain ... claims deemed collateral to or derivative of the employees' injury.'" (Op.10, citation omitted.) In the court's view, however, the conditions of compensation for workers' compensation were not met because "there are no allegations Kirk was working at the time of the seizures," and "[t]he seizure injury was not proximately caused by Kirk's job because the cause of the seizures is alleged to be Sharma's failure to provide appropriate information or a weaning regime—nothing about Kirk's job is alleged to be the cause of the seizures." (*Id.* at 11.)

The court noted that in *Vacanti*, *supra*, 24 Cal.4th 800, this Court explained that "injuries arising out of and in the course of the workers' compensation claims process fall within the scope of the exclusive remedy provisions because this process is tethered to a compensable injury." (Op., 11, quoting *Vacanti*, *supra*, at p. 815.) But the court "interpret[ed] *Vacanti* to mean that if something goes wrong in the claims process for the work place injury, such as collecting the money for the workplace injury, then that collateral claim must stay within the exclusive province of workers' compensation." (*Id.* at 12.) The court distinguished such payment-related claims from circumstances where "a new injury arises or the prior

workplace injury is aggravated," in which case it concluded that the "exclusivity provisions do not necessarily apply." (*Ibid.*)

The court determined that Plaintiffs' claims would meet *Vacanti*'s test, "arising out of and in the course of the workers' compensation claims process," only to the extent that the claim was based on Dr. Sharma's "medical necessity determination." (Op., 13.) The court characterized Plaintiffs as making two possible claims. One claim would be that Dr. Sharma harmed King by "incorrectly determining Klonopin was medically unnecessary, because the drug was medically necessary until Kirk was properly weaned from it." (*Ibid.*) This type of claim, the court noted, would be preempted by the WCA "because the Kings are directly challenging Sharma's medical necessity determination." (*Ibid.*) The court contrasted this with a claim that "Sharma harmed Kirk by not informing Kirk of the possible consequences of abruptly ceasing Klonopin," characterizing this as a "second step in the utilization review process: Sharma determines the drug is medically unnecessary and must warn Kirk of the possible consequences of that decision." (*Id.* at 12-13.) The court held that such a failure-to-warn claim would not be "preempted by the WCA because that warning would be beyond the 'medical necessity' determination made by Sharma." (*Id.* at 13.) Because of the "uncertainty of the allegations in the complaint," the court affirmed the order sustaining the demurrer, but held that the trial court erred by denying Plaintiffs leave to amend. (*Ibid.*)

Citing to *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953, the court held further that "a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed." (Op., 14.) On that basis, the court held that Dr. Sharma owed King a duty of care. (*Id.* at 17.) Because the complaint alleged insufficient facts to

determine the "scope or discharge of that duty," the court affirmed the trial court's order sustaining the demurrer as to the duty. (*Id.* at 18-19.) Again, however, the court determined the trial court erred in denying Plaintiffs leave to amend. (*Ibid.*)

Defendants filed a petition for review on February 16, 2016, and this Court granted the petition on April 13, 2016.

ARGUMENT

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

A. The Legislature Created A Comprehensive Workers' Compensation System Designed To Efficiently And Fairly Compensate Employees Outside The Tort System For Injuries Arising Out Of Employment

The State Constitution gives the Legislature plenary power "to create[] and enforce a complete system of workers' compensation." (Cal. Const., art. XIV, § 4.) Pursuant to this authority, the Legislature enacted the WCA, a comprehensive workers' compensation system. (Labor Code § 3201 *et seq.*) The foundation of the WCA is the "compensation bargain," under which the employee benefits from "relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort." (*Vacanti*, *supra*, 24 Cal.4th at p. 811, quoting *Shoemaker*, *supra*, 52 Cal.3d at p. 16.)

Over time, the Legislature has modified the WCA to better effectuate its purpose. Most recently, in 2004 and again in 2013, the Legislature implemented significant changes to the system for reviewing requests for medical treatment under workers' compensation. Until 2004, there had been a rebuttable presumption that the treating physician's