No. S232197

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KIRK KING, et al.,
Plaintiffs and Appellants,

vs.

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

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

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

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

CROWELL & MORING LLP
*David D. Johnson (SBN 204458)
Three Embarcadero Center, Suite 2600
San Francisco, California 94111
Telephone: (415) 986.2800
E-Mail: davidjohnson@crowell.com

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

LEWIS BRISBOIS BISGAARD & SMITH LLP
Raul L. Martinez (SBN 82465)
633 W. 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: (213) 250-1800
Raul.Martinez@lewisbrisbois.com

Attorneys for Amicus Curiae
National Association of Independent Review Organizations and ExamWorks, Inc.

No. S232197

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KIRK KING, et al.,
Plaintiffs and Appellants,

vs.

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

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

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

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

CROWELL & MORING LLP
*David D. Johnson (SBN 204458)
Three Embarcadero Center, Suite 2600
San Francisco, California 94111
Telephone: (415) 986.2800
E-Mail: davidjohnson@crowell.com

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

LEWIS BRISBOIS BISGAARD & SMITH LLP
Raul L. Martinez (SBN 82465)
633 W. 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: (213) 250-1800
Raul.Martinez@lewisbrisbois.com

Attorneys for Amicus Curiae
National Association of Independent Review Organizations and ExamWorks, Inc.

APPLICATION TO FILE AMICUS CURIAE BRIEF

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

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

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

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

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

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

will assist the Court in deciding the matter.

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

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

Respectfully submitted,

Dated: December 16, 2016

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

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

Dated: December 16, 2016

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

Attorneys for Amicus Curiae
National Association of Independent Review Organizations and ExamWorks, Inc.

No. S232197

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

KIRK KING, et al.,
Plaintiffs and Appellants,

vs.

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

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

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

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

CROWELL & MORING LLP
*David D. Johnson (SBN 204458)
Three Embarcadero Center, Suite 2600
San Francisco, California 94111
Telephone: (415) 986.2800
E-Mail: davidjohnson@crowell.com

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

LEWIS BRISBOIS BISGAARD & SMITH LLP
Raul L. Martinez (SBN 82465)
633 W. 5th Street, Suite 4000
Los Angeles, California 90071
Telephone: (213) 250-1800
Raul.Martinez@lewisbrisbois.com

Attorneys for Amicus Curiae **National Association of Independent Review Organizations and ExamWorks, Inc.**

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Regulations

Other Statutes

I. INTRODUCTION

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

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

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

---

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

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

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

---

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

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

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

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

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

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

---

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

[4] Lab. Code, § 3600 ("Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment . . .")

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

available in tort. [6]

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

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

---

[6] *Id.*

[7] Lab. Code, § 4600, subd. (a).

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

[9] Cal. Code Regs., tit. 8, § 9785.

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

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

---

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

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

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

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

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

[15] Lab. Code, § 4610, subd. (g)(3)

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

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

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

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

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

---

[16] Lab. Code, § 4610, subd. (a).

[17] *Id.*

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

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

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

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

---

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

[20] *Id.* at §§ 9792.23.1-9792.23.3.

[21] *Id.* at § 9792.23.2.

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

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

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

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

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

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

---

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

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

treatment recommendations.[27]

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

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

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

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

---

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

[28] Lab. Code, § 4610, subd. (d).

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

[38] *Id.*

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

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