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' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Plaintiffs' amici echo Plaintiffs in asking this Court to rewrite the workers' compensation scheme enacted by the Legislature for medical treatment claims. The Legislature adopted the utilization review scheme "to ensure quality, standardized medical care for workers in a prompt and expeditious manner," while "balanc[ing] the dual interests of speed and accuracy." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 241 (*Sandhagen*).) It later adopted the Independent Medical Review ("IMR") process as the "only" means of resolving—*viz.*, the exclusive appeal mechanism—for "[a]ny dispute over a utilization review decision." (Labor Code, § 4610.5.)[1] Like the utilization review process itself, this scheme for challenging utilization review decisions was aimed at avoiding "costly, time consuming" litigation while ensuring uniform treatment "that adheres to the highest standards of evidence-based medicine." (Stats. 2012, ch. 363, § 1, subd. (d).)

Plaintiffs' amici do not dispute that King and his physician invoked the IMR scheme to challenge Dr. Sharma's utilization review decision denying, as not medically necessary, a Klonopin regimen, and that this challenge was rejected. But like Plaintiffs, their amici offer no coherent explanation as to how the controlling WCA provisions permit King to sidestep the exclusive IMR review process in favor of a tort lawsuit against Dr. Sharma. What the amici seek, instead, is a new set of judicially crafted tort duties, enforceable in court actions running parallel to the IMR process. As Defendants have explained, however, foundational principles of statutory construction, the text and purpose of the WCA, and tort principles

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

themselves all foreclose such a judicial recrafting of the workers' compensation scheme. (See PB 15-18, 34-36.)[2]

First, the California Medical Association ("CMA") complains that utilization review inappropriately "[l]imit[s] and [d]isplace[s]" the medical judgment of treating physicians. (CMA Br. 6.) This challenge is nothing short of an effort to second-guess the Legislature's chosen scheme. The Legislature adopted the scheme for standardizing care and controlling costs in the workers' compensation system. As the WCA states on its face, the Legislature adopted the Medical Treatment Utilization Schedule ("MTUS") as part of a utilization review scheme aimed at implementing "evidence-based, peer-reviewed, nationally recognized standards of care." (§ 5307.27, subd. (a).) While the CMA may believe that the MTUS is not sufficiently "flexible" (CMA Br. 9), or suggest that reviewing physicians should be required to conduct physical examinations, render medical advice, or other services characteristic of treatment (*id.* at 26, 30), that is not the approach the WCA prescribes. Because the Legislature mandated reliance on the MTUS, and specifically limited the scope of the utilization review process and the role of the utilization review physician, the CMA's proper recourse is to the Legislature if it wants its preferred policy approach implemented. For it is blackletter law that "the legislative branch is entitled to deference from the courts because of the constitutional separation of powers," and that the Court may not rewrite the laws to advance a party's or the courts' policy objectives. (*Con. Indem. Co. v. Superior Court* (2000) 23 Cal.4th 807, 814, internal quotation marks and citation omitted.)

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[2] "PB" refers to Petitioners' Opening Brief on the Merits, "RB" refers to Respondents' Answer Brief on the Merits, "PRB" refers to Petitioners' Reply Brief on the Merits, and "RBAC" refers to Respondents' Response to Amicus Curiae Briefs.

Second, the CMA argues that the mere application of medical expertise and judgment, without more, suffices to subject utilization reviewers to tort liability. (CMA Br. 3.) In support of this theory the CMA invokes provisions of a *different* statute, the Medical Practice Act, that defines the "practice of medicine" for a *different* purpose: regulating unlicensed physicians. But whether a reviewing physician carrying out a statutorily prescribed role in the workers' compensation scheme practices medicine for purposes of licensing laws cannot override or expand the duties fixed by the Legislature in the WCA scheme codified in Labor Code Section 4610 *et seq.* It is those WCA provisions that control here, and they both carefully limit the duties of the utilization review physician and make the IMR process the exclusive forum for utilization review challenges.

Even apart from the detailed scheme adopted by the Legislature here, the CMA cites no authority grounding a tort duty solely in the application of medical expertise or actions that amount to the "practice of medicine" under the Medical Practice Act. Like Plaintiffs, the CMA carefully avoids arguing that utilization review physicians like Dr. Sharma have a physician/patient relationship with workers' compensation claimants. In the absence of such a relationship, and given the narrow duties that the WCA imposes on a reviewing physician, there is no basis in tort principles or policy for holding reviewing physicians liable in tort for not providing medical advice. The *Rowland* test instead weighs decisively against recognizing such a novel duty on the part of utilization review physicians.

The CMA's criticism of the utilization review process highlights the serious policy consequences that would flow from recognizing tort duties outside the IMR scheme. Instead of following clear standards, utilization reviewers would be subject to tort duties that vary from place to place,

indeed from case to case, depending on the vicissitudes of litigation and expert testimony. The reviewing physicians might need to go beyond applying MTUS principles, regardless of whether treating physicians met the burden of rebutting its presumptive accuracy. They might need to review patient histories, despite the contrary statutory language limiting the information they may consider. And they might need to conduct independent medical examinations, even though it has long been recognized that "[a] utilization review physician does not physically examine the applicant." (*Simmons v. State Dept. of Mental Health* (2005 Cal. W.C.A.B.) 70 Cal. Comp. Cases 866, 2005 WL 1489616, at * 7.) This could lead only to great uncertainty over just how far a reviewing physician must go in double-checking treatment recommendations, and threaten to collapse the statutory distinction between the reviewing and the treating physician. That manifestly is not what the Legislature intended; rather, it would *defeat* the legislative design.

Third, the California Applicants' Attorneys Association ("Applicants' Attorneys") and California Society of Industrial Medicine and Surgery, Inc. ("CSIMS") argue that King's seizures are not derivative of or collateral to an original workplace injury, such that tort claims arising from them are not preempted by the WCA. Even King himself does not make this argument, and for good reason: it would mean that he is not entitled to workers' compensation protections for his seizures. That would be an anomalous result, given that the Legislature and decades of case law command that WCA provisions be construed liberally in favor of coverage for injured workers. Applicants' Attorneys and CSIMS further argue that WCA preemption applies only to employers and insurers, not utilization review providers hired by them, but these contentions merely duplicate Plaintiffs' arguments and add little to the briefing.

This Court should decline *amici*'s invitation to unravel the policy balance the Legislature struck. It should apply the general WCA and specific IMR exclusivity provisions and reverse the Court of Appeal.

ARGUMENT

I. THE LEGISLATURE, NOT THIS COURT, IS THE PROPER FORUM FOR THE CMA TO RAISE ITS POLICY DISAGREEMENTS WITH UTILIZATION REVIEW

The CMA's brief directly challenges the design and effectiveness of California's utilization review system. The CMA is of course free to disagree with the Legislature's policy judgment, but its disagreement furnishes no basis for the courts to undo a comprehensive legislative scheme. (See *Los Angeles Cnty. Metro. Transp. Auth. v. Alameda Produce Mkt., LLC* (2011) 52 Cal.4th 1100, 1113 ["[O]ur role as a court is not to sit in judgment of the Legislature's wisdom in balancing . . . competing public policies."], internal quotation marks and citation omitted.)

The CMA argues that utilization review "[l]imit[s] and [d]isplace[s] [p]hysicians' [i]ndependent [m]edical [j]udgment" (CMA Br. 6) and "[i]nterfer[es] with [p]atient [c]are" (*id.* at 13). But neither utilization review nor the IMR process purports to directly regulate the judgment of a treating physician. They are, instead, part of California's workers' compensation scheme, and determine the medical treatment and procedures covered by that scheme. As Defendants have explained (PB 15-18; PRB 20-23), the Legislature adopted utilization review to "control[] ... costs while simultaneously ensuring workers' access to prompt, quality, standardized remedial care." (*Sandhagen*, *supra*, 44 Cal.4th at p. 243.) Instead of reviewing treatment recommendations through ad hoc litigation, the Legislature adopted statutory standards of care in the MTUS and presumed those standards "correct on the issue of extent and scope of

medical treatment" covered by workers' compensation. (*Id.* at p. 240.) While a treating physician may still "seek[] treatment outside of the MTUS" under the utilization review scheme, the treating physician "bears the burden of rebutting the MTUS' presumption of correctness by a preponderance of scientific medical evidence." (Cal. Code Regs., tit. 8, § 9792.21, subd. (d).)

To the extent this utilization review process "[l]imit[s]" a treating physician's "[m]edical [j]udgment" regarding treatment covered by workers' compensation (CMA Br. 6), those limitations are intrinsic to the Legislature's chosen scheme. Indeed, those limitations were the entire point of adopting, in the MTUS, carefully crafted medical care standards and establishing, in utilization review, an efficient and accurate process for "modify[ing], delay[ing], or deny[ing]" the recommendations of a treating physician. (§ 4610, subd. (a).) While the CMA may prefer the previous, ad hoc approach to reviewing treatment recommendations, "that argument is more properly addressed to the Legislature." (*Murillo v. Fleetwood Enters., Inc.* (1998) 17 Cal.4th 985, 994.) Nor can there be any question that the CMA is asking the Court to second-guess the Legislature, for it expressly criticizes the MTUS as "less flexible" than, and a "radical departure" from, the prior standard (CMA Br. 9-10), and even questions the MTUS's scientific soundness, (*id.* at p. 9 [characterizing the MTUS as "*supposedly* more tethered to evidence-based medicine"], italics added).

The Court's duty "to effectuate the purpose of the [WCA]" requires a construction that adheres strictly to the utilization review process, and forecloses the CMA's attempts to revert to the prior scheme or craft a new judicial one. (Cf. *Dyna-Med, Inc. v. Fair Emp't & Housing Comm'n* (1987) 43 Cal.3d 1379, 1386-87.) The point is underscored by the important policy concerns that drove the Legislature to adopt the MTUS

and utilization review. Before the 2004 reforms, "there were no uniform medical treatment guidelines in effect," and "[w]hether a medical treatment request was 'necessary' depended solely upon the opinion of the treating physician," which was measured against a general standard of reasonable necessity. (*Sandhagen*, *supra*, 44 Cal.4th at p. 238.) The Legislature made the MTUS the core review standard in order to "establish uniform guidelines for evaluating treatment requests." (*Id.* at p. 240.) The MTUS was formally adopted by the Division of Workers' Compensation only after public hearings, and incorporates "evidence-based, peer-reviewed, nationally recognized standards of care." (§ 5307.27, subd. (a).) And the Legislature opted for utilization review by physicians to address "skyrocketing workers' compensation costs" (*Smith v. Workers' Comp. Appeals Bd.* (2009) 46 Cal.4th 272, 279) and to replace the "cumbersome, lengthy, and potentially costly [dispute resolution] process"—a process that often led to contested hearings before an administrative judge (*Sandhagen*, *supra*, 44 Cal.4th at p. 238).

The CMA's challenge to California's utilization review scheme ultimately does not rest on the fact that it "[l]imit[s]" or "[d]isplace[s]" the judgment of the treating physician, for the prior, ad hoc review process did the same thing—only less consistently and efficiently. What the CMA really objects to is the approach adopted by the Legislature and written into law. If the CMA does not think that MTUS-based utilization review is the proper mechanism to achieve these objectives, it should voice its views to the Legislature. It is that body, and not the courts, that may properly consider whether the law should be based upon evidence like the anonymous surveys cited by the CMA, in which treating physicians expressed dissatisfaction with denial of tests and treatment requests in the

utilization review process (CMA Br. 13-14), and anecdotal media reports concerning rejected treatments (*id.* at 22-26).

The CMA's effort to rewrite the provisions governing the IMR process fails for the same reason. The CMA criticizes the circumscribed scope of the IMR process, pointing out that IMR doctors (unlike treating physicians) do not examine patients, receive only a portion of a worker's medical history, and make decisions based on the MTUS guidelines (CMA Br. 26). But, again, the review limitations that the CMA deems deficient are expressly set out in the statute, and are precisely the means the Legislature chose to carry out its objective. The IMR process is designed to ensure "[t]imely and medically sound determinations of disputes over appropriate medical treatment." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1089-1090, internal quotation marks and citation omitted.) The information an employer or insurer may request for use in utilization review is, by statute, limited to "only the information reasonably necessary to make the determination." (§ 4610, subd. (d).) Those medical records in the employer's possession, in turn, form the core of the information used in the IMR process. (See § 4610.5, subd. (l).) The IMR process's focus and reliance on the MTUS is statutorily mandated. (*Id.*, subd. (c)(2).) The Legislature found that the IMR process, including these features, was "necessary to implement" the "social policy of this state," which it clearly defined as follows: "using evidence-based medicine to provide injured workers with the highest quality of medical care." (Stats. 2012, ch. 363, § 1, subd. (e).)

Like Plaintiffs, the CMA is dissatisfied with the IMR process designed and enacted by the Legislature. Like Plaintiffs, the CMA urges the Court to establish a parallel system of tort remedies in civil courts, independent of and free from the constraints of the MTUS standard and

IMR review. But the Court can no more augment or displace the Legislature's IMR scheme for reviewing utilization review decisions than it can alter the statutory scheme for utilization review itself. Using the tort system to regulate utilization review decisions would not only undermine the IMR's detailed procedures and requirements, but also defeat the Legislature's clear intent to make the IMR process the exclusive means of challenging a utilization review decision. That exclusivity, Defendants have explained, is apparent from the face of the IMR provisions, which specify that utilization review decisions "may be reviewed or appealed only by [the IMR process]" (§ 4610.5, subd. (e)), and that any objections "shall be resolved only in accordance with the [IMR] process" (*id.* § 4062, subd. (b); see also § 4610.5, subd. (b)).

Indeed, a parallel set of tort-grounded duties would put utilization review physicians in an untenable position. If a utilization review physician modifies or denies treatment based on the MTUS, and an IMR affirms that decision (as is the case here), in the CMA's view the utilization review physician might *still* be liable in tort for running afoul of "varying standards of care depending on locality." (CMA Br. 31.) The result would be parallel litigation in the courts even when the utilization review system worked exactly as designed. That cannot possibly be what the Legislature intended. The legislative history establishes that the Legislature adopted IMR review to continue reforming a process that "ha[d] become excessively litigious, time consuming, procedurally burdensome and unpredictable," and that the revised scheme was designed to "produce the necessary uniformity, consistency, and objectivity of outcomes." (Stats. 2012, ch. 363, § 1, subd. (b).)

The question before this Court is not whether the Legislature struck the right balance between efficiency and affordable, quality treatment when

it initially adopted utilization review or added IMR review. The only questions of statutory construction here are whether Plaintiffs' claims raise a "dispute over a utilization review decision" (§ 4610.5, subd. (a)), thus bringing them within the scope of the IMR's exclusivity provisions, and whether King's alleged injury here 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, citation omitted.) Whether IMR review *should* involve an examination, or *should* demand a more comprehensive medical history review, or *should* be reviewable in the courts are all matters for the Legislature. Indeed, the Legislature has shown itself quite willing to reform the workers' compensation system, having enacted substantial reforms in 2004 and 2013, as well as additional reforms in 2016 designed, in part, to accelerate consideration of IMR appeals for prescription drug requests. (See 2016 Cal. Legis. Serv. Ch. 868 (S.B. 1160), §§ 4-5.) In that process, the Legislature can and does consider the competing interests of groups like the CMA and other entities like the County of Los Angeles. (See LA County Br. 16-17 [explaining that the 2004 and 2013 reforms curbed runaway spending on workers' compensation].)

This Court should decline the CMA's invitation to circumvent the Legislature's scheme.

II. WHETHER UTILIZATION REVIEW CONSTITUTES THE PRACTICE OF MEDICINE IS NOT THE RELEVANT INQUIRY

The CMA, like Plaintiffs, pointedly does *not* argue that there was a physician-patient relationship between King and Dr. Sharma—even though the purported existence of such a relationship was the Court of Appeal's basis for recognizing a potential duty to warn. Implicitly conceding that the

Court of Appeal erred on this score, the CMA offers a novel rationale for imposing tort duties on Dr. Sharma. The CMA argues that utilization review constitutes "the practice of medicine" under the Medical Practice Act, and concludes from this that utilization review physicians owe tort duties "in the same manner [as] all other physicians practicing medicine." (CMA Br. 14, 22.) But this argument is ultimately no different from Plaintiffs' effort to vest reviewing physicians with the duties of a treating physician despite the absence of a physician/patient relationship. (See RB 19-23.)[3] It must therefore fall alongside the unprecedented tort duties Plaintiffs urge the Court to adopt and graft onto the WCA. The role of reviewing physicians is a creature of statute, as an essential feature of the WCA's utilization review scheme. Regardless of whether that role involves work constituting the "practice of medicine" for *other* regulatory purposes, saddling reviewing physicians with the tort duties of a physician who sees and treats a claimant, and takes on the physician/patient relationship, would fundamentally distort both the Legislature's design and general tort principles.

The question of whether utilization review constitutes the "practice of medicine" is not relevant to any issue in this case. Neither party cited the Medical Practice Act or briefed its application here, and "an amicus curiae accepts a case as he or she finds it." (*Rental Housing Owners Ass'n of S. Alameda Cnty., Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 95, fn. 13, internal quotation marks and citation omitted.) And there is

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[3] CSIMS also argues for a tort duty on the ground that utilization review constitutes the practice of medicine, but its arguments echo those of the CMA and do not merit separate treatment. Similarly, CSIMS's discussion of the *Rowland* factors is similar to Plaintiffs' presentation, and Defendants respectfully refer the Court to their prior briefing on that issue.

good reason even Plaintiffs did not see fit to argue the Act's provisions defining "medical practice" here: they have nothing to do with the workers' compensation matters before this Court. The provisions cited by the CMA define "the practice of medicine" for purposes of penalizing people who practice medicine without a valid license, or to determine the jurisdiction of the Medical Board of California. (CMA Br. 15-19; Bus. & Prof. Code, § 2052.) Those provisions have no bearing on whether a workers' compensation claimant may bring a tort suit against a physician performing utilization review functions under the WCA, or whether a claimant challenging a utilization review decision is limited to the WCA's exclusive IMR process.

First, the statute that controls here is the WCA. As Defendants have explained, that statute both narrowly defines the role of a reviewing physician and provides an exclusive scheme for challenging their utilization review decisions. The WCA requires a reviewing physician to review "treatment recommendations" made by the physician actually caring for a patient—not to provide the care him- or herself. (§ 4610, subds. (a) & (c).) The statute recognizes a clear distinction between the roles of reviewing and treating physicians, a point underscored by the provisions limiting the information a reviewing physician considers in undertaking review (*id.*, subd. (d)) and prescribing the procedures and requirements for a utilization review decision (*id.*, subd. (a)). And far from envisioning that the physicians carrying out this reviewing role would be subject to tort duties "in the same manner [as] all other physicians" (CMA Br. 14, 22), the Legislature designed the IMR process to channel challenges to utilization review decisions *away* from ad hoc litigation.

Nothing in the Medical Practice Act purports to override these key features of the workers' compensation laws. Its purpose is to ensure that

doctors are licensed, not to regulate the workers' compensation process. And even though the Legislature adopted its detailed utilization review and IMR scheme after the Medical Practice Act, it did not see fit to draw on or reference the Act's definition of "medical practice" in any way.

Yet, if adopted, the ad hoc tort litigation the CMA seeks to ground in the Medical Practice Act threatens to collapse the WCA's clear division of responsibilities between a reviewing and treating physician. Such litigation would leave open the prospect that reviewing physicians may be required to examine claimants, render medical advice, or comprehensively assess their medical histories as part of the utilization review process—much like a treating physician. And the CMA's express view is that utilization review decisions ought to be subject to tort litigation in the courts—much like the medical malpractice litigation treating physicians face—and not just IMR review. (CMA Br. 5.)

Second, even assuming that utilization review qualifies as the "practice of medicine" under the Medical Practice Act,[4] that alone does not suffice to create a tort duty on the part of reviewing physicians. The CMA cites no case holding that the existence of tort duties depends on whether activity meets the Medical Practice Act's definition of the practice of medicine. And as discussed in Defendants' Opening Brief, courts have

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[4] It is by no means clear that this is the case. As the CMA recognizes, utilization review physicians need not be licensed to practice medicine in California. (CMA Br. 10; § 4610, subd. (e); Cal. Code Regs., tit. 8, § 9792.6, subd. (s).) This is contrary to the Medical Board of California's position, cited by the CMA, that a current valid California license is necessary to make any decisions regarding medical necessity. (CMA Br. 16.) Furthermore, a non-physician may approve a requested medical treatment after ensuring it is consistent with the MTUS. (Cal. Code Regs., tit. 8, § 9792.7, subd. (b)(3).)

long recognized that the application of medical expertise, without more, does not create a duty to provide medical advice. (PB 36-41.) In *Keene v. Wiggins* (1977) 69 Cal.App.3d 308, for example, the court held that a physician did not owe a duty of care to a claimant where the physician examined the claimant to prepare a report for the benefit of the workers' compensation insurance carrier. (See PB 37.) There was no question that the physician in *Keene* was applying medical expertise, and would surely qualify as engaging in the "practice of medicine" on the CMA's view. The exercise of medical expertise, in the absence of a physician-patient relationship, did not give rise to a duty of care to the worker. (*Id.* at 36-41.)

The existence of a tort duty depends on balancing myriad factors (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113), and is in the end "an expression of the sum total of considerations of policy which lead the law to say that the particular plaintiff is entitled to protection. [Citations]" (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 572, fn. 6, internal quotation marks omitted). The CMA recognizes that "[p]hysicians' duties and obligations are dependent on the circumstances in which they render professional services" and that the scope of any duties may depend on "the existence of a doctor-patient relationship, and the duties of care [a physician] assume[s]." (CMA Br. 22.) However, the CMA then simply assumes, without analysis, that because utilization review is the practice of medicine, utilization review physicians owe certain duties to workers' compensation claimants. (*Id.* at 31-32.) No precedent supports this leap. As illustrated by the many other cases where physicians applied medical expertise but were deemed not to incur a tort duty, the *Rowland* factors do not warrant the imposition of a tort duty to warn given the utilization reviewer's limited role within the WCA's comprehensive scheme. (PB 41-47; PRB 23-29.) Nor does the CMA even attempt to grapple with the WCA's detailed

provisions concerning utilization review, which reflect the controlling public policy of this state.

The novel duties urged by the CMA and Plaintiffs, if adopted, would lead to uncertainty and confusion in an area where the Legislature has sought to streamline and simplify proceedings. The CMA offers no explanation as to how courts would administer the line between the duties of a treating physician and those of a reviewing physician. There is none. Unmoored from the limited responsibilities and tasks prescribed by the statute, reviewing physicians' duties would inevitably leave them serving as back-up treating physicians. The upshot is that reviewing physicians could be held liable for treatment-related harms that they could not reasonably have foreseen or avoided given their limited roles and the statutory limitations on their decisions. All this despite the conceded absence of any physician/patient relationship.

On this score, the CMA's reliance on *Wickline v. State* (1986) 192 Cal.App.3d 1630, is misplaced. As an initial matter, *Wickline* did not involve workers' compensation, and therefore does not implicate the compensation bargain and preemption issues present in the workers' compensation context. But even in that different context, the Court of Appeal declined to hold a third-party reviewer (Medi-Cal) liable for denying the treating physician's request for an eight-day hospital stay. The Court of Appeal held that it was ultimately the treating physician's responsibility to manage the care of the patient, including the decision regarding discharge from the hospital. (*Id.* at p. 1645.)

The CMA attempts to distinguish *Wickline* by arguing that, unlike in *Wickline*, CompPartners and Dr. Sharma "are alleged to have directly caused harm to Plaintiff King, by failing to properly warn or advise about

the dangers of immediate cessation of Klonopin." (CMA Br. 30.) The harm in this case is no more "direct" that it was in *Wickline*. The CMA offers no reason why King's treating physician, who originally prescribed Klonopin and who had a doctor-patient relationship with King with all of its attendant duties, should not have been responsible for warning King about the risks of cessation of Klonopin—a point Plaintiffs do not dispute in their Response to Amicus Curiae Briefs (RBAC 19). Indeed, presumably such a warning should have been extended at the time the drug was initially prescribed. The plaintiff in *Wickline* surely could have styled her claim as one for "failure to warn" by the Medi-Cal physician about the possible consequences of early discharge from the hospital given the plaintiff's condition. But nothing in *Wickline* suggests that the court would have imposed liability on the Medi-Cal consultant for a failure to warn. To the extent that a warning should have been provided, the treating physician would have been the appropriate party to provide a warning, both in *Wickline* and in this case.

The CMA also attempts to distinguish *Wickline* apparently on the basis that because Dr. Sharma is a doctor, "the exercise of medical judgment and professional discretion afforded to physicians carry independent obligations and duties." (CMA Br. 30.) But the reviewer in *Wickline* was also a physician, and the Court nowhere suggested that in those circumstances he needed to offer any warnings or medical treatment advice beyond responding to the request before him.

Whether utilization review constitutes "the practice of medicine" does not alter the exclusive process for challenging a utilization review decision or the tort remedies available to a claimant allegedly injured in connection with the utilization review process. King's sole vehicle for challenging the way Dr. Sharma handled his utilization review decision is

to pursue the IMR process—a challenge he pursued unsuccessfully. Medical malpractice principles may separately give King a remedy against his treating physician, who had the ultimate responsibility for his Klonopin treatment. Regardless of whether Dr. Sharma was practicing medicine for licensing purposes when carrying out his utilization review duties, neither the WCA nor tort principles obligated him to advise the treating physician as to how to deliver care to *his patient*. (PB 33-46; PRB 19-29.)

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

Plaintiffs' claims are in any event preempted by the exclusive remedy provisions of the WCA. (See PB 15-32.) The CMA takes no position on the preemption question, though it acknowledges that the Legislature made IMR "the sole appeals remedy" for utilization review decisions. (CMA Br. 11; see also *Ramirez v. Workers' Comp. Appeals Bd.* (Mar. 29, 2017, No. C078440) ___ Cal.Rptr.3d ___ [2017 WL 1164538, at p. *9] ["The Legislature has provided only one method of review or appeal for a utilization review, and that is by independent medical review."].) The Applicants' Attorneys and CSIMS, however, argue that the WCA's exclusive remedy provisions do not apply, on the grounds that (1) King's injuries are not "derivative of or collateral to" the original workplace injury, and (2) such provisions apply only to employers and insurers, not to utilization review providers. Neither contention has merit.

First, even Plaintiffs acknowledge that King's injuries were "collateral to or derivative of" the original workplace injury. (See RBAC 8; PRB 1.) *Amici*'s assertion to the contrary is foreclosed by settled law. The Legislature has directed that WCA provisions "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (§ 3202.)

Decades of case law have confirmed and applied this principle. (See PB 24-30; PRB 1-2; RBAC 8.) This protects workers by ensuring them benefits on a no-fault basis if they are injured in the course of the workers' compensation process. The Applicants' Attorneys and CSIMS offer no persuasive reason why this principle should be discarded in this case, which would deprive workers of no-fault coverage for such injuries and leave them to the uncertainties of negligence litigation in the tort system.

Second, echoing Plaintiffs' position, the Applicants' Attorneys and CSIMS argue that claims against utilization review providers are not preempted because such providers are not "employers." They ignore the fact that utilization review is an employer function under the WCA, and that providers like Defendants conduct utilization review only when they are retained by an employer or the employer's insurer to do so on their behalf. (See § 4610, subd. (b) ["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."].) As this Court held in *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1, 8, it would "vitiate the very purpose of the exclusive remedy provisions of the [WCA]" to draw artificial distinctions in the preemption context between employers/insurers, who are ultimately responsible for workers' compensation benefits, and those hired by employers/insurers to administer workers' compensation benefits on their behalf. (See PRB 12-15.) Neither *amicus* addresses *Marsh*, let alone tries to distinguish it.

CONCLUSION

Petitioners respectfully request that this Court reverse the Court of Appeal's decision and reinstate the trial court's order sustaining the demurrer without leave to amend.

Dated: April 12, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that, pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, Petitioners' Consolidated Answer to Amicus Curiae Briefs is produced using 13-point Roman type and, including footnotes, contains 5,308 words. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: April 12, 2017

/s/ Fred A. Rowley, Jr.
Fred A. Rowley, Jr.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 560 Mission Street, 27th Floor, San Francisco, CA 94105.

On April 12, 2017, I served true copies of the following document(s) described as **PETITIONERS' CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 12, 2017 at San Francisco, California.

Mark Roberts

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