No. S S232197

IN THE SUPREME COURT 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 CASE NO. E063527

PETITION FOR REVIEW

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

COME NOW, defendants and respondents COMPPARTNERS, INC., and NARESH SHARMA, M.D. (hereinafter referred to collectively, and in the singular, as "CompPartners"), and respectfully submit this petition for review.

1. 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?

2. INTRODUCTION

A. Why review should be granted

Hard cases make bad law.

What makes this case ***hard*** is its embryonic state – i.e., a published opinion based on an order sustaining a demurrer to an initial complaint without leave to amend. This forced the Court of Appeal to issue a literally unprecedented decision undermining the exclusive remedies of the *Labor Code* concerning Utilization Review decisions made under the auspices of the Workers' Compensation Act ("WCA") based on assumed or hypothetical facts, as the opinion itself acknowledges. Yet based on these assumed or hypothetical facts, the opinion effects a sea-change in the WCA by undermining the mechanism carefully crafted by the Legislature for resolving disputes that arise over utilization review decisions.[1]

What makes this law ***bad*** is that it blurs the roles and duties of treating physicians responsible for day-to-day care of injured workers with the roles and duties of physicians providing utilization review on behalf of a qualified WCA Utilization Review Organization ("URO") such as CompPartners.

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[1] For this reason, CompPartners has filed a separate letter requesting this Court order the Court of Appeal's opinion depublished.

CompPartners submits the Court of Appeal's opinion holding that in some cases, a WCA URO might owe duties to the injured workers similar to those owed by the treating physician is new to California law. The irony of this opinion is that the Court of Appeal had no trouble discerning that some WCA URO disputes ***are*** preempted by the *Labor Code*, and thus ***affirmed*** the trial court order sustaining the demurrer based on preemption.

Respectfully, the opinion goes wrong in two broad respects: (1) it erroneously holds preemption might not apply in some cases, based on purely hypothetical facts; and (2) it erroneously holds that a duty might be owed in some cases under those same hypothetical facts.

True, the opinion seeks to ameliorate its holding by acknowledging this new duty imposed on a WCA URO varies with the relationship of the parties and requires a case-by-case approach. (Opinion, p. 17.) But this does not cure the harm inflicted on the WCA. To the contrary, the Court of Appeal's opinion instructs workers and their attorneys just exactly how to avoid the inconvenient ramifications of California's exclusive remedy provisions with nothing more than a rote allegation that the WCA URO should have issued a warning directly to the worker about the consequences of its decision. This pronouncement wholly undermines the carefully-crafted legislative framework defining how WCA URO decisions are to be made and how disappointed workers can invoke a specific statutory administrative procedure to challenge and reverse those decisions.

As this Petition will demonstrate, the validity of the intricate statutory mandates which regulate WCA UROs, in general, and how these organizations are to make, announce and allow review of their decisions, in particular, is now in doubt because of the Court of Appeal's less than rigorous analysis of these statutes. If the Court of Appeal's opinion, based as it is on nothing more than speculative facts, is allowed to survive, Superior Courts throughout California will face a multiplicity of civil actions which the legislature clearly intended to be within the jurisdiction of the WCA.

Further, the opinion is not supported by the case law on which it relies and is contrary to the Legislature's plan for utilization review under both the *Labor Code* and the *California Code of Regulations.* The sweeping preemption of civil litigation by the exclusive remedies of the WCA indelibly brands this as a question of great importance on an issue affecting every California employer and employee subject to the WCA.

Accordingly, CompPartners requests that this Court grant review for the purpose of resolving the important questions presented and holding (a) that the claim alleged by the Kings is preempted, (b) that a WCA URO does not owe a duty of care to an injured worker, and (c) that the Court of Appeal erred in reversing the trial court's ruling sustaining the demurrer without leave to amend.

B. Background

(1) The Predicate Facts of Plaintiffs' Complaint

At issue in the Court of Appeal's opinion is a *Utilization Review* decision made by two URO physicians affiliated with defendant and respondent CompPartners in the context of a pending Workers' Compensation claim filed by plaintiff and appellant employee, Kirk King. CompPartners was retained by State Compensation Insurance for *Utilization Review* on behalf of Kirk King's employer as a URO under the statutory authority of *California Labor Code* section 4610(b).

During the *Utilization Review* process, the URO physicians are alleged to have decertified a medication being administered to Kirk King concluding it was not medically necessary. (*Labor Code* section 4610(b).) (AA 0003:23-0004:14.) It is important to note that a URO physician does not enjoy the far reaching discretion afforded to treating physicians. While treating physicians may have the entire *pharmacopeia* at their disposal, *Labor Code* section 4610(c) restricts URO physicians to specific and closely circumscribed schedules for medical treatment. In any case, Kirk King alleged in his complaint that the decertification of this medication caused him to experience four seizures. (AA 0004:6-7.)

Seeking damages as a result of the seizures, Kirk King filed the civil action, which is the subject of the Court of Appeal's opinion. (AA 0001-0009.) The complaint does not allege, nor do plaintiffs contend, that Kirk

King ever disputed the decertification via the statutorily created dispute resolution mechanisms set forth in *California Labor Code* section 4610.5 which provides all *Utilization Review* disputes, "*shall be resolved only in accordance with this section.*" (See, e.g., *State Compensation Ins. Fund vs. Workers' Comp. Appeals Bd.* (2008) 44 Cal.4th 230, 279-280.)

(2) CompPartners' General Demurrer

CompPartners filed a general demurrer in response to plaintiffs' original complaint (AA 0019-0043) arguing that the causes of action essayed in the Kings' complaint were wholly and inescapably preempted by the exclusivity provision of California's Workers' Compensation statutes. (*California Labor Code* section 3600, subd. (a.) (AA 0020:5-6; *Id.* 0028:15-0032:20.) As an adjunct to its principal preemption argument, CompPartners argued that *even if* preemption did not knock out plaintiffs' claims, plaintiffs' claims could not state any causes of action since a *Utilization Review* physician acting on behalf of a URO for an employer owed no duty of care to plaintiffs as a matter of California law. (See, e.g., *Keene vs. Wiggins* (1977) 69 Cal.App.3d. 308, 313.) (AA 0032:23-0034:24.)

(3) The Trial Court's Decision to Sustain CompPartners' General Demurrer Without Leave to Amend

The trial court sustained CompPartners' general demurrer without leave to amend. (AA 0072-0073.) The trial court's decision concluded that

the plaintiffs' claim was preempted and that the URO physicians who made the decertification recommendation did not owe plaintiff Kirk King a duty of care. Despite these rulings, the trial judge observed, "This needs to go to the court of appeals. There is really no good law, any law under utilization." (AA 0111:23-24.) After the demurrer was sustained without leave to amend, an Order of Dismissal was entered. (AA 0083-0084.)

(4) The Court of Appeal's Published Opinion[2]

The Court of Appeal's published opinion *affirmed* the trial court's decision to sustain CompPartners' general demurrer to plaintiffs' original complaint, but *reversed* the trial court's refusal to grant plaintiffs leave to file a first amended complaint. In its opinion, the Court of Appeal initially opined that while the URO physicians' decision to decertify Kirk King's medication could be subject to preemption, plaintiffs' complaint was unclear. The Court of Appeal indicated that ***if*** plaintiffs claimed their damages were caused as a result of the decision to decertify Kirk King's medication by the *Utilization Review* physicians, then their action was preempted. On the other hand, preemption would not apply if plaintiffs were really claiming that their damages were caused as a result the URO physicians' failure to "*communicat[e] a warning to Kirk, their claims are*

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[2] Pursuant to *California Rules of Court* rule 8.504(b)(4), a copy of the Court of Appeal's opinion is attached hereto as Exhibit "A"

not preempted . . . because that warning would be beyond the 'medical necessity' determination made by [Dr.] Sharma." (Opinion, p.13.)

The Court of Appeal didn't stop at preemption.

Citing *Palmer vs. Superior Court* (2002) 103 Cal.App.4th 953, the Court of appeal announced a blanket rule that, *"[c]ase law provides a Utilization Review doctor has a doctor-patient relationship with the person whose records are being reviewed[.]* (Opinion, p. 17.) Thereafter, and without acknowledging that the facts of this case are inextricably governed by the labyrinth of statutory law which makes up California's Workers' Compensation statutes, the court held that under the opinion in *Palmer*, *"there is a doctor-patient relationship between Kirk and [Dr.] Sharma. Because there is a doctor-patient relationship, Sharma owed a duty of care."* (Opinion, p.17.)

The trouble with this analysis is that the plaintiff in *Palmer* was challenging a *Utilization Review* decision made by, or on behalf of, his HMO. He was not an injured worker seeking review of a decision by a Workers' Compensation URO. There would have been no occasion to consider preemption. The court concluded its duty analysis by indicating there was a question concerning the scope of that duty. (Opinion, p. 18.)

(5) Statement re: Rehearing (*Cal. Rules Ct.* rule 8.504(b)(3)

No petition for rehearing was filed.

LEGAL DISCUSSION

1. REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW HAVING WIDESPREAD INTEREST CONCERNING APPLICATION OF THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT TO DECISIONS BY UTILIZATION REVIEW ORGANIZATIONS.

This dispute raises questions of first impression concerning WCA *Utilization Review* whose vital importance is underscored by the fact that the resolution reached by the Court of Appeal undermines an elaborate hierarchy of review crafted by the legislature and codified in the *Labor Code*. As such, grounds for review exist under *California Rules of Court* Rule 8.500(b)(1)

As noted above, the Court of Appeal reversed the dismissal issued by the trial court. That dismissal came about after the trial court sustained CompPartners' demurrer without leave to amend on the grounds that the Kings' claim was preempted and that CompPartners did not owe the Kings any duty of care. Review is respectfully requested to reverse the Court of Appeal's opinion on issues of preemption and duty so that there is no basis for granting leave to amend and the dismissal should be affirmed insofar as the defects in the complaint were matters of law that could not be cured by amendment. (*Lawrence v. Bank of America* (1985) 163 Cal.App.3d 431, 436.)

2. THE KINGS' CIVIL ACTION IS PREEMPTED BY THE EXCLUSIVE REMEDY PROVISIONS OF THE WORKERS' COMPENSATION ACT

A. An overview of the utilization review process under the Workers' Compensation Act.

The Legislature has established a detailed mechanism for resolving disputes regarding the appropriate level of care that should be rendered to an injured employee. The mainspring of this mechanism can be found in *Labor Code* section 4610 which requires every employer to establish utilization review processes "that prospectively, retrospectively, or concurrently review and approve, modify, delay, or deny, based in whole or in part on medical necessity to cure or relieve treatment recommendations by the physician." (*Labor Code* section 4610(a); see also, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 236.)

The Legislature has also crafted an equally detailed mechanism for resolving an injured employee's disputes over the treatment request. (*Labor Code* sections 4062, 4610.5; *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., (2000)* 80 Cal.App.4th 1041, 1048.)

Initially, *Labor Code* section 4062(b) provides a means for an employee to object to a utilization review decision, including a request for authorization of a particular treatment. In such cases, "the objection shall be resolved only in accordance with the independent medical review process established in section 4610.5." (*Labor Code* section 4062(b) [emphasis

added].) Here, of course, the complaint essentially objects to the utilization review decision to "decertify" Klonopin, meaning that plaintiffs' sole resort is to *Labor Code* section 4610.5. This section applies to "[a]ny dispute over a utilization review decision if the decision is communicated to the requesting physician on or after July 1, 2013, regardless of the date of injury" and that such disputes "shall be resolved only in accordance with this section." (*Labor Code* section 4610.5 [emphasis added].) Such is the case here. Although Mr. KING's on-the-job injury alleged occurred in 2008, and Klonopin was first prescribed in 2011, Klonopin was not "decertified" by way of utilization review until "July of 2013" as confirmed by a second utilization review "[i]n October of 2013." (AA 0003:23-0004:14.)

In this regard, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th 230 is particularly instructive. There, an employee suffered a work-related accident. Two physicians sent the employer's insurer a request to authorize an MRI. In response, the employer referred the matter to utilization review. The doctor that performed the review denied the request based on new medical treatment guidelines. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 234.) In explaining the dispute process contemplated by *Labor Code* sections 4062 and 4610, court explained:

> (1) the Legislature intended for employers to use the utilization review process in section 4610 to review and resolve any and all requests for treatment, and (2) if dissatisfied with an employer's decision, an employee (and only an employee) may use section 4062's provisions to resolve the dispute over the treatment request.

(*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., supra*, 44 Cal.4th at p. 237.) This ruling is reinforced in *Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th 1041 which holds, in relevant part:

> When there are disputes about the appropriate medical treatment . . . or the need for continuing medical care, *Labor Code* section 4061 or 4062 applies. (Citation.) Sections 4061 and 4062 of the *Labor Code* establish the procedures for resolving such disagreements.

(*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th at p. 1048 [emphasis added].)

In summary, there can be no doubt that if Mr. King wished to challenge the utilization review decision by his employer (allegedly facilitated by CompPartners) he was required do so by way of the appropriate sections of the WCA that establish the procedures for resolving such disagreements. (*Tenet/Centinela Hospital Medical Center v. Workers' Comp. Appeals Bd., supra*, 80 Cal.App.4th at p. 1048.) Not only does the WCA preclude a civil suit against his employer, it also precludes a civil suit against those involved in utilization review because "the exclusivity

provisions encompass all inquiries '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, 813.)

By way of example, if a workplace accident contributes to a later injury outside the workplace, that latter injury is still deemed to be a "compensable consequence" of the original workplace injury even if the injured claimant was not working at the time of the subsequent accident. (*Beaty v. Workers' Comp. Appeals Bd.* (1978) 80 Cal.App.3d 397, 402.) in *Beaty,* the court reasoned that the work-related injury "need not be the exclusive cause of the Subsequent Accident but only a contributing factor to it. So long as the Industrial Injury was a contributing factor to the Subsequent Accident, liability is established on an industrial basis." (*Id.* at p. 402, citing *State Comp. Ins. Fund v. Ind. Acc. Com.* (1960) 176 Cal.App.2d 10 [worker suffered an eye injury and while suffering the effects of the eye injury, lost a finger while using an electric saw].)

Indeed, the Court of Appeal's opinion here acknowledges that preemption applies to disputes that are "deemed collateral to or derivative of the employee's injury." (Opinion, p. 10, citing *Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997.) The opinion also acknowledges that *Vacanti* holds that the WCA exclusive remedy applies to "'injuries arising out of and in the course of the workers' compensation claims process . . . because this process is tethered to a compensable injury.'"

(Opinion, p. 11, citing *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund, supra*, 24 Cal.4th at p. 815.) Moreover, the opinion "interprets" *Vacanti* "to mean that if something goes wrong in the claims process for the workplace injury," then exclusivity applies. (Opinion, p. 12, citing *Charles J.Vacanti, M.D. v. State Comp. Ins. Fund, supra,* 24 Cal.4th at pp. 813-814.)

That is exactly what has been alleged here, under ***any*** interpretation of the complaint. Even if the Kings' complaint is construed as alleging the injury was caused by failure to warn of the effects of sudden Klonopin withdrawal, that failure to warn cannot logically be separated from the claims process because the failure to warn arose ***during*** the claims process. Mr. King alleges he suffered a work related injury, that he submitted a WCA claim, and that the claim was being handled by referral to a treating physician who had prescribed Klonopin. In the course of the claim, the recommendation for Klonopin was submitted to WCA URO at which time Klonopin was decertified.

The alleged failure to warn at issue herein is still an inherent incident of the claims process and as such Mr. King had an immediate and detailed review process under the *Labor Code* at his disposal. Thus, contrary to the opinion, the civil claim ***is*** preempted under *Vacanti.*

But the opinion goes on to read the complaint to allege two "options" for finding CompPartners harmed Mr. King – one subject to

preemption and another which now has a green light to proceed in civil court. Thus, this case has become a real-world manifestation of the threat of double tracked claims involving WCA URO decisions raised by the Kings' complaint. Briefly, as the opinion describes it, one option (which ***is*** preempted) is that CompPartners incorrectly decertified Klonopin without a weaning regimen. The second option (which in the Court of Appeal's view ***is not*** preempted) is that CompPartners simply failed to warn the Kings of the effect of quitting Klonopin cold turkey after it was decertified. The opinion draws the distinction on the grounds that warning about a sudden withdrawal was not part of the "medical necessity" analysis." (Opinion, p. 12-13.)

This is a distinction without a difference.

In the first place, if a weaning regimen is important enough to require a warning that sudden withdrawal could cause seizures, then the decision that any number (or no number) of extra doses is required becomes an inseparable component of medial necessity. Thus, both scenarios require – and can be resolved by – application of the WCA review provisions. It should be noted that the Kings' failure to state whether the MTUS vests the WCA URO with any discretion to order a weaning regimen deprives the Court of Appeal of any firm factual basis for its conclusion that a "failure to warn" decision is now preempted. This only serves to underscore the harm inherent in creating a new duty on speculative and incomplete facts.

Second, the Court of Appeal acknowledged that if CompPartners had simply failed to authorize a certain number of doses until weaning was complete, the weaning decision would have been part of the medical necessity determination. But that is exactly what the complaint alleges, at least by inference, and what the Court of Appeal assumes: that CompPartners' utilization review decision concluded, based on the appropriate guidelines, that weaning was not a matter of medical necessity.

Third, the utilization review provisions of the WCA are tailor made for either dispute. Once the utilization review decision was complete, it was the employer's duty to report that to Mr. King's treating physician so as to facilitate, if necessary, peer-to-peer discussion with the WCA URO pursuant to 8 CCR 9792.9.1E(5)(K). Assuming that CompPartners continued to maintain that the appropriate MTUS did not provide for a Klonopin regimen (or a Klonopin weaning regimen), the WCA provided an opportunity for review of that decision.

Thus, suppose that CompPartners ***did*** know cold turkey Klonopin withdrawal was dangerous, and simply failed to warn of that trap. If that were the case, then surely Mr. King's treating physician would have been under a duty to make such a contemporaneous warning to Mr. King at the time of the decertification, not months later after seizures had allegedly occurred as a result of the decertification. Then Mr. King's physician had every opportunity to challenge the URO decision under the *Labor Code*.

As a result, whether the Court of Appeal parses this out as a failure to warn or a failure to certify, either outcome is inseparable from a determination of medical necessity, meaning that by the court's own reasoning, the claim should be preempted.[3]

3. COMPPARTNERS DID NOT OWE THE KINGS A DUTY OF CARE THAT COULD GIVE RISE TO A CIVIL CAUSE OF ACTION

A. Introduction and context of the duty issue

By way of introduction, the principal argument on demurrer was that WCA preemption barred the Kings' civil lawsuit. Indeed, the trial court's tentative ruling only addressed the issue of preemption. (AA 0071.) Lack of duty was raised in the demurrer and addressed by the trial court as an alternative basis for dismissing the Kings' claims. (AA 0027:18-19; 0032:24-0034:24; *Id.,* 0101:28-0102:1) So far as it pertains to this petition, it will suffice to note that the Court of Appeal's opinion concludes that a WCA URO owes some duty of care to the injured claimant, although the extend of that duty will depend on the facts of the case.

This holding was wrong for the following reasons.

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[3] Of course, the Complaint does not reveal if Mr. King ever complained to his treating physician, if the treating physician sought a "peer-to-peer" review, or if the detailed appellate procedures set out in the *Labor Code* were followed.

B. CompPartners and Dr. Sharma owed no duty of care to the Kings

The opinion acknowledges that a claim for medical malpractice requires a patient-physician relationship. (Opinion, p. 14, citing *Keene v. Wiggins, supra,* 69 Cal.App.3d 308.) However, the opinion does not address the *Keene* analysis on analogous facts. In *Keene*, an injured employee's disability status was reviewed by the defendant, a doctor retained by the employer's workers' compensation carrier. Unhappy with the outcome of the report, plaintiff sued the doctor for medical malpractice. ***Unlike*** the present case, the injured employee was actually seen by the doctor. (*Id.* at pp. 310-311.) Nevertheless, the court still held the absence of a physician/patient relationship warranted dismissal of a medical malpractice claim by the injured employee against the examining doctor. This was because "the physician is liable for malpractice or negligence ***only*** where there is a relationship of a physician-patient as a result of contract, express or implied, that the doctor will ***treat*** the patient." (*Id.* at p. 313 [emphasis added].) The court explained:

> [I]t is apparent where a doctor conducts an examination of an injured employee solely for the purpose of rating the injury for the employer's insurance carrier in a workers' compensation proceeding, neither offers or intends to treat, care for or otherwise benefit the person examined, and has no reason to believe the person examined will rely on this report, the doctor is not liable to the person being examined for negligence in making that report.

(*Keene v. Wiggins, supra,* 69 Cal.App.3d at p. 313-314.) Thus, the court held the absence of a physician-patient relationship was fatal to the plaintiff's medical malpractice claim. (*Id.* at p. 315.)

The Kings' complaint does not allege the WCA URO doctors ever examined Mr. King face to face (AA 0004:1-2 [Dr. Sharma]; *Id.*, 0006:1-2 [Dr. Ali]) and there are no facts establishing a relationship of physician-patient as a result of contract, express or implied, that the URO doctors would ***treat*** Mr. King. Thus, CompPartners and Dr. Sharma owed no duty to the Kings.

The Court of Appeal's opinion did not address these factors. Instead of applying *Keene*, the opinion leapfrogs *Keene's* language regarding an express or implied relationship to treat the patient (*Id.* at p. 313) to reach *Palmer v. Superior* Court, *supra* 103 Cal.App.4th at p. 953 and to hold utilization review gives rise to a doctor-patient relationship so that a duty of care arises under *Keene.* (Opinion, p. 17.)

There are several errors in this analysis.

First, the opinion applies *Palmer* too broadly. As the opinion notes, what *Palmer* was addressing was the question of whether leave of court to allege punitive damages pursuant to *Code of Civil Procedure* section 425.13 was required where the claim arose from a dispute over utilization review outside of the WCA. Thus, the narrow question for the court was ***not*** whether a doctor-patient relationship existed between the patient and

the utilization review physician. Rather, the question for the court was whether that utilization review physician's services amount to professional negligence. In turn, this required the court to apply the test for defining professional negligence: "'whether a health care provider's negligence constitutes professional negligence is whether the negligence occurred in rendering services for which the health care provider is licensed.'" (Opinion, p. 10.)

While there is no question that a physician providing a medical opinion in WCA URO matters is rendering some degree of professional services, the Court of Appeal's reliance on *Palmer* begs the question of duty – that is, to whom is the duty owed? *Keene* answers that question by holding that a doctor-patient relationship only arises where there is a "contract, express or implied, that the doctor will treat the patient." (*Keene v. Wiggins, supra,* 69 Cal.App.3d at p. 313.). Certainly the services provided in *Keene* (conducting an examination of a patient to rate the injury) were professional in nature. What was missing in *Keene* (as in this case) was an agreement to treat the patient. The issue of duty in the present case is controlled by *Keene,* not by *Palmer.*

Second, the Court of Appeal's opinion also begs the question of preemption, because its analysis of *Palmer* correctly notes the decision did not arise in the context of the WCA. Rather, the decision was made by a hospital's utilization review department (Opinion, p. 15, citing *Palmer v,*

Superior Court, supra, 103 Cal.App.4th 958-959) so *Palmer* had no occasion to address preemption. *Palmer* thus has no application to the question of whether breach of any duty owed to the claimant by a WCA URO (assuming solely for the sake of argument, that such a duty existed) is nevertheless preempted by the exclusive remedy provisions of the WCA.

Third, the Court of Appeal's analysis rests on the notion that a WCA URO has the same medical discretion enjoyed by treating physicians in recommending treatment. That is not the case. As noted in CompPartners' brief on the appeal (and as reiterated in this petition) the benchmark for acceptable treatment in the WCA context is provided by specific schedules for medical treatment utilization. (section 4610(c.) This robs the WCA URO of its ability to consider and implement what might be acceptable practice in the locality. Instead, the specific guidelines must be consulted. (See respondent's brief, p. 25.)

The details of this limitation on the WCA URO*'s* decisions were fully explained in the recent Request for Decertification filed on behalf of the California Workers' Compensation's Institute. By way of summary, the legislature has adopted an objective Medical Treatment Utilization Schedule ("MTUS") drawn from evidence-based, peer reviewed and nationally recognized standards of medical treatment. The MTUS thus provides a WCA URO with the yardstick to measure whether recommendations by the treating physician are medically necessary.

Thus, WCA case law and pertinent regulations distinguish the role (and the duties) of a treating physician from the role (and the duties) of a WCA URO.

In *Simmons v. State of California* (2005) 70 Cal. Comp. Cases 866 (Appeals Board en banc opinion) the court emphasized the limited role of a WCA URO physician. In language reminiscent of *Keene*, the decision observes that "***a utilization review physician does not physically examine the applicant, does not obtain a full history of the injury or a full medical history, and might not review all pertinent medical records***" (*Id.* at p. 874 [emphasis added].) Rather, according to *Labor Code* section 4610(a) "utilization review is directed solely at determining the 'medical necessity' of treatment recommendations." (*Simmons v. State of California, supra* 70 Cal. Comp. Cases 866 at p. 873.). Additionally, *McCool v. Monterey Bay Medicar* (2014) 2014 Cal. Wrk. Comp. P.D. LEXIS 578 is instructive even if not binding. In that case, a WCA URO decertified pain medications without a weaning regimen. However, the matter was resolved entirely within the dispute resolution schematic provided by the Legislature in the WCA and the decision indicated that "future decisions which violate section 4610(c) may be referred to the Administrative Director to review defendant's written policies and procedures and potentially assess penalties for abuse of the UR process." *McCool v Monterey Bay Medicar, supra*, 2014 Cal. Wrk. Comp. P.D. LEXIS 578 at p. [*13].

Similarly, regulatory authorities confirm that the role of the treating physician is to submit a "request for authorization" with supporting documentation. (8 CCR 9792.6.1(t)(2).) The role of the employer is to subject that request to "utilization review" (which can of course be lawfully delegated to a WCA URO such as CompPartners) to test the request against the applicable guideline (8 CCR 9792.9.1(c)(3)) and then report that conclusion to the treating physician. (8 CCR 9792.9(c)(4)) inviting a "peer-to-peer" discussion. (8 CCR 9792.9.1(e)(5)(K).) Of course this would have been a golden opportunity for Kirk King's treating physician to raise questions about a weaning regimen. And if the WCA URO still concluded cold turkey decertification was required under the guidelines, CCR 9792.9.1(c)(4) provided for expedited review.

In this case, the complaint does not allege that any of this occurred. Indeed the opinion acknowledges that "the Kings' complaint includes few factual details" and that (again assuming a duty exists) discharge of [this] duty will depend "on the facts/circumstances of this particular case." (Opinion, p. 18.) A declaration of potential duty based on speculation as to what the facts ***might*** be is premature and inappropriate.

C. There are no other grounds for duty

(1) The Kings were not owed a generalized duty of care

Citing *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, the opinion discusses a generalized duty to warn, concluding

that such a duty and its discharge will depend on the facts and circumstances of each case. (Opinion, p. 18.) But this only serves to bring the discussion back to square one. While an employer may owe employees a generalized duty, a claim for breach of that duty is a claim under the WCA. Any contrary outcome would undermine the WCA.

(2) Established factors for assessing duty do not apply in this case

The opinion makes brief reference to the traditional elements of duty, such as the parties' relationship, the foreseeability of harm and reliance. (Opinion, p. 17 citing *Keene v. Wiggins, supra*, 69 Cal.App.3d at p. 313.) However, the opinion does not address these factors in depth and, in fact, a more detailed analysis of the factors establishes that no duty should be found here.

(a) It was not foreseeable that Mr. King would forego his WCA remedies

The availability of a detailed WCA appeal mechanism clouds foreseeability to the point of obscurity. CompPartners and Dr. Sharma had no reason to foresee that Mr. King would not pursue an appeal under section 4610.5, or anticipate what the outcome might have been if Mr. King did pursue an appeal. The element of foreseeability is absent and cannot support a duty.

(b) Injury from an erroneous decision is uncertain because Mr. King did not seek WCA review

The availability of a WCA appeal of the utilization review decision also dissipates the certainty of any injury from conduct by CompPartners or Dr. Sharma. It can hardly be certain that an erroneous utilization review decision will cause injury where the claimant elected not to bring a speedy appeal as was his right (and exclusive remedy) under the WCA.

(c) There is an inadequate connection between the conduct alleged and the injury

Simply put, the Kings' failure to avail themselves of their appeal rights under the WCA severs any alleged connection between the consequences of the Kings' decision and CompPartners or Dr. Sharma's performance of their utilization review duties.

(d) There is no moral blame for decertifying Klonopin

CompPartners and Dr. Sharma did exactly what they were obligated to do under the WCA. Assuming *arguendo* that a weaning regimen was desirable, an expedited review under section 4610(g)(2) could have speedily reinstated Klonopin. Mr. King's unexplained and unforeseeable election to forego his WCA appeals erases any blame on CompPartners and Dr. Sharma.

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(e) WCA penalties reduce the threat of harm from erroneous decisions

WCA UROs do not enjoy immunity; instead, significant penalties can be imposed for utilization review failures. By way of example, *Labor Code* section 4610.1 targets "an unreasonable delay in completion of the utilization review process set forth in section 4610." (*Labor Code* section 4610.1.) In turn, section 5814 provides for penalties of up to $10,000 if "payment of compensation has been unreasonably delayed or refused." Civil liability is not necessary to protect claimants; indeed subsection (f) of Section 5814 cautions that "[n]othing in this section shall be construed to create a civil cause of action." Moreover, rogue WCA URO decisions are presently deterred by section 4610(i) which provides that the administrative director may assess administrative penalties ultimately benefiting the public through deposit in the Workers' Compensation Administrative Revolving Fund. Any URO causing such penalties will certainly not be retained by employers in the future. Enforcing the WCA exclusive remedy provisions is the best way to minimize the threat of future harm without undermining the certainty of WCA by imposing unforeseen civil liability.

(f) Imposing a duty would create an undue burden on WCA UROs

A generalized standard of care is not the benchmark for utilization review; rather, the benchmark is provided by specific schedules for medical treatment utilization. (*Labor Code* section 4610(c).) This means the WCA

URO cannot merely rely on what might be acceptable practice in the locality; instead, the specific guidelines must be consulted. Imposing the additional benchmark of the local standard of care would increase the burden on WCA UROs particularly where the standards conflict.

(g) Allowing a civil suit would adversely affect the availability of insurance

A claim that a WCA URO can very easily obtain malpractice insurance fails to consider the increased cost and decreased availability of that insurance if the duty imposed by the opinion stands. Because a WCA URO is not a claimants' personal physician, its exposure would be reduced and premiums would have been reduced in proportion. Broadening that exposure by opening a new class of civil liability not previously contemplated by the WCA will affect both the cost and availability of insurance, which militates against the duty imposed by the Court of Appeal.

Accordingly, there is no basis on which to impose a duty on the WCA URO providers as to Mr. King.

4. THE TRIAL COURT'S ORDER OF DISMISSAL SHOULD BE AFFIRMED BASED ON WCA PREEMPTION AND THE ABSENCE OF DUTY

It is not an abuse of discretion to sustain a demurrer without leave to amend, even on the initial round of the pleadings, where the defect is one of law that cannot be cured by amendment.

> Leave to amend should be denied where the facts are not in dispute and the nature of the claim is clear but no liability exists under substantive law.

(*Lawrence v. Bank of America, supra* 163 Cal.App.3d at p. 436.)

Such is the case here. Holding that the Kings' civil action was preempted by the WCA and insofar as the element of duty could not be established, the trial court sustained CompPartners' demurrer without leave to amend.

As set forth in this petition, CompPartners submits that this Court should grant review for the purpose of instructing that the Court of Appeal reached the wrong result on the issues of duty and preemption. That being the case, no amount of amendment would allow the Kings to plead around the admission in their complaint that their claim arose in the course of utilization review by a WCA URO and as such is subject to the exclusive remedy provisions of the WCA, preempting their civil lawsuit against CompPartners as a matter of law.

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5. CONCLUSION

Based on the foregoing, CompPartners Inc., and Naresh Sharma, M.D., respectfully request this Court grant this petition for review.

DATED: February 12, 2016

Respectfully submitted,

MURCHISON & CUMMING, LLP

By: _____

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Attorneys for CompPartners Inc.
and Naresh Sharma, M.D.

CERTIFICATE OF WORD COUNT

(*California Rules of Court*, Rule 8.504(d)

The text of this petition consists of 6354 words as counted by the Microsoft Word processing program used to generate this brief.

Dated: February 12, 2016

By: _____
William D. Naeve
Terry L. Kesinger
David A. Winkle

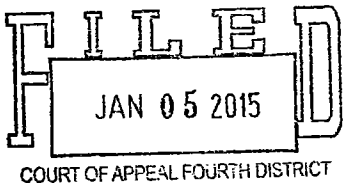
EXHIBIT "A"

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



KIRK KING et al., Plaintiffs and Appellants, v. COMPPARTNERS, INC. et al., Defendants and Respondents.	E063527 (Super.Ct.No. RIC1409797) OPINION

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge. Affirmed in part; reversed in part.

Law Offices of Patricia A. Law, Patricia A. Law and Jonathan A. Falcioni for Plaintiffs and Appellants.

Murchison & Cumming, William D. Naeve, Ellen M. Tipping and Terry L. Kesinger for Defendants and Respondent.

Kirk King (Kirk)[1] sued CompPartners, Inc. (CompPartners) and Naresh Sharma, M.D. (Sharma), for (1) professional negligence; (2) negligence; (3) intentional infliction of emotional distress; and (4) negligent infliction of emotional distress. Kirk's wife, Sara King (Sara), sued CompPartners and Sharma (collectively, "defendants") for loss of consortium. Kirk and Sara (collectively, "the Kings") sought general, special, exemplary, and punitive damages.[2] The trial court sustained defendants' demurrer without leave to amend.

The Kings raise three issues on appeal. First, the Kings contend their claims are not preempted by the Workers' Compensation Act (WCA). Second, the Kings assert defendants owed them a duty of care. Third, the Kings contend the trial court erred by denying them leave to amend. We affirm the sustaining of the demurrer but reverse the denial of leave to amend.

FACTUAL AND PROCEDURAL HISTORY

A. COMPLAINT

The facts in this section are taken from the allegations in the Kings' complaint. On February 15, 2008, Kirk sustained a back injury while at work. In July 2011, Kirk suffered anxiety and depression due to chronic back pain resulting from the back injury. In 2011, Kirk was prescribed a psychotropic medication known as Klonopin.

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[1] We use first names for the sake of clarity. No disrespect is intended.

[2] The Kings also sued Mohammed Ashraf Ali, M.D. (Ali); Whittier Drugs; and Does 1 through 100. The forgoing three defendants are not respondents in this appeal. At the time of the hearing on the demurrer, Ali had not been served with the complaint.

The Klonopin was provided to Kirk through Workers' Compensation. In July 2013, a Workers' Compensation utilization review was conducted to determine if the Klonopin was medically necessary.[3] (Labor Code, § 4610, subd. (a).)[4] Sharma, an anesthesiologist, conducted the utilization review. Sharma determined the drug was unnecessary and decertified it. As a result, Kirk was required to immediately cease taking the Klonopin. Typically, a person withdraws from Klonopin gradually by slowly reducing the dosage. Due to the sudden cessation of Klonopin, Kirk suffered four seizures, resulting in additional physical injuries.

In September 2013, someone requested Kirk again be permitted to take Klonopin. In October 2013, Ali, a psychiatrist, conducted a second utilization review. Ali also determined Klonopin was medically unnecessary. Neither Sharma nor Ali examined Kirk in-person, and neither warned Kirk of the dangers of an abrupt withdrawal from Klonopin. Sharma and Ali were employees of CompPartners. CompPartners was a Workers' Compensation utilization review company.

B. DEMURRER

Defendants demurred to the complaint. Defendants asserted the Kings' claims were preempted by the WCA because they arose out of a utilization review. Defendants interpreted the complaint as objecting to the decision to decertify Klonopin. Defendants

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[3] "Utilization review" is the process by which employers "review and approve, modify, delay, or deny" employees' medical treatment requests within the Workers' Compensation system. (Labor Code, § 4610, subd. (a); *State Compensation Ins. Fund v. Workers' Comp Appeals Bd.* (2008) 44 Cal.4th 230, 234, fn. 3 (*State Fund*).)

[4] All subsequent statutory references will be to the Labor Code unless indicated.

asserted the utilization review was performed at the behest of Kirk's employer and was conducted in connection with the payment of benefits for Kirk's workplace back injury. Defendants contended the Labor Code set forth a procedure for objecting to a utilization review decision, and that procedure preempted the Kings' complaint.

Alternatively, defendants asserted they did not owe Kirk a duty of care. Defendants argued there was no doctor-patient relationship because they never personally examined Kirk and did not treat him. Defendants reasoned that because there was no relationship, there was no duty of care.

Defendants further asserted the Kings had improperly split a medical malpractice cause of action into two negligence causes of action. Defendants contended the emotional distress causes of action were subsumed by what should have been a single medical malpractice claim, and that Sara's loss of consortium claim failed because there was no underlying tort cause of action to support it.

C. OPPOSITION

The Kings opposed the demurrer. First, the Kings asserted their claims were not preempted by the WCA. The Kings asserted their claims concerned the failure to provide Kirk with a Klonopin-weaning regimen; they were not disputing the decision to decertify the Klonopin. The Kings contended this claim fell within the ambit of a negligence cause of action—it did not fall within the procedures set forth in the Labor Code/WCA for disputing a utilization review decision.

Second, the Kings asserted defendants owed Kirk a duty of care because Kirk's medical treatment was effectively being determined by defendants' decisions at the

utilization reviews. Third, the Kings asserted they did not improperly split a medical malpractice cause of action because their cause of action for general negligence was brought in the alternative, in case the court determined the defendants were not healthcare providers for purposes of the professional negligence cause of action. Fourth, the Kings asserted Kirk's cause of action for intentional infliction of emotional distress set forth sufficient facts to support an independent cause of action; however, the Kings also referenced a proposed First Amended Complaint filed concurrently with the opposition that alleged additional facts to support the cause of action for intentional infliction of emotional distress.[5] Fifth, the Kings asserted there were sufficient facts alleged to support the loss of consortium cause of action.

D. HEARING

The trial court issued a tentative opinion sustaining the demurrer due to the lawsuit being preempted by the WCA. At the hearing on the demurrer, the Kings explained they were not disputing the decision to decertify Klonopin; rather, they were focused on the manner in which the decision was carried out—the decision to abruptly halt the medication rather than gradually reduce the dosage. The Kings asserted there were two requirements that triggered Workers' Compensation—(1) the employee was working at the time of the injury, and (2) the injury was proximately caused by the employee's job. The Kings asserted Kirk's seizures did not meet these two

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[5] The Kings did not file the Proposed First Amended Complaint. The proposed First Amended Complaint is not included with the Opposition in the Appellant's Appendix.

requirements and, thus, fell outside the ambit of the WCA. Further, to the extent the WCA encompasses derivative or collateral claims, the seizures were "a wholly separate injury."

The trial court said, "So if I'm wrong on the exclusivity, you trip over another issue which is duty." The Kings explained that a doctor-patient relationship was not needed for a duty to be created. Rather, a duty is owed when a doctor's decision affects the patient's treatment. The Kings asserted Sharma's decision affected Kirk's treatment by effectively dictating the treatment. No other doctor was involved in the decision to terminate the Klonopin; the insurance company asked Sharma if the Klonopin was medically necessary, and based upon Sharma's answer, the Klonopin was discontinued. The Kings asserted Sharma's decision was negligent because no weaning schedule or warnings about seizures were given.

Defendants asserted the Kings were "obviously" contesting the utilization review decision, and a challenge to the utilization review falls within the ambit of the WCA. Next, defendants asserted they owed no duty to Kirk because Kirk did not hire defendants and defendants did not meet Kirk when performing the utilization review.

The Kings again explained that they were not contesting the utilization review decision. The Kings said they did not want Klonopin to be prescribed again; rather, they were complaining about Sharma's decision to abruptly stop the Klonopin rather than gradually stop the Klonopin.

The trial court said, "You may have convinced me that, you know, maybe Worker's Comp exclusivity may or may not apply; because you are correct, he's not

actually trying to challenge the decision directly." However, the trial court also said, "I don't think there is a duty." The trial court explained Sharma did not prescribe the Klonopin; rather, "[h]e made a recommendation under the utilization review that it be withdrawn." The court said, "Somebody else prescribed this medication. Somebody else took it off—took him off it immediately without any slow withdrawal. That's the person who made the medical decision for your client, not the doctor who was simply reviewing the procedure."

The Kings asserted "it wasn't anybody else's decision other than Dr. Sharma's to discontinue [the Klonopin]. [¶] It wasn't merely a recommendation. It was Dr. Sharma—is this patient—essentially, the question was: Is this patient going to continue receiving this medication or not, put your stamp on it. He says, No. It ceases." The trial court asked the Kings what facts they could add if they were granted leave to amend their complaint. The Kings said they would add facts about "the patient-client relationship, that CompPartners hired this doctor to make treatment decisions. Based off of a review of the patient's chart, the doctor made treatment decisions."

CompPartners responded with two points. First, CompPartners said that if the Kings were suing due to a discreet injury then Kirk could "directly amend his application for adjudication of claim in the Workers' Compensation Appeals Board and seek retribution or damages for whatever treatment decisions were made during the process." Second, CompPartners argued, "Just think about the duty implications if this Court ruled that someone who reviewed medical records and made a recommendation could be held liable for whatever ultimate decision. Because it's not his decision to

make. He's making a review and making a recommendation. They don't have to agree with [the] utilization review. The statute doesn't require it. It just says they will review it and make recommendations, and then it's out of his hands." The Kings again explained that their claim involved a third party physician—not Kirk's employer—and therefore, the claim did not come within the WCA.

The trial court said, "My ruling stands. I'm sustaining the demurrer without leave to amend." The trial court added, "[T]his needs to go up to the Court of Appeals. There is really no good law, any much law under the utilization." The trial court explained that it sustained the demurrer due to both the exclusivity and duty issues.

DISCUSSION

A. OVERVIEW OF THE WORKERS' COMPENSATION UTILIZATION REVIEW PROCESS

"The workers' compensation scheme makes the employer of an injured worker responsible for all medical treatment reasonably necessary to cure or relieve the worker from the effects of the injury. [Citation.] When a worker suffers an industrial injury, the worker reports the injury to his or her employer and then seeks medical care from his or her treating physician. After examining the worker, the treating physician recommends any medical treatment he or she believes is necessary and the employer is given a treatment request to approve or deny." (*State Fund, supra*, 44 Cal.4th at pp. 237-238.)

Disputes about treatment requests are resolved via the utilization review process, in which "employers can have their utilization review doctors review treatment

requests." (*State Fund, supra*, 44 Cal.4th at pp. 243-244.) After a utilization review is conducted, a treatment request may be approved, modified, delayed or denied. (§ 4610, subd. (a).) "[U]nder the statutory scheme, only an employer's utilization review physician applying approved criteria can modify, delay, or deny treatment requests—an employer may not, on its own, object to a treatment request. (§ 4610, subds. (e) & (f).)" (*Smith v. Workers' Comp Appeals Bd.* (2009) 46 Cal.4th 272, 279 (*Smith*).)

"Further, the utilization review scheme contains a procedure for resolving disputes over treatment requests that uses doctors, rather than judges, as the adjudicators. [Citations.] 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." (*Smith, supra*, 46 Cal.4th at pp. 279-280; see also § 4610.6.)

B. PREEMPTION

1. *CONTENTION*

The Kings contend the trial court erred in sustaining the demurrer because their causes of action are not preempted by the WCA.

2. *STANDARD OF REVIEW*

"We independently review the construction of workers' compensation statutes." (*Smith, supra*, 46 Cal.4th at p. 277.) We also apply the independent standard of review to rulings on demurrers (*McCall v. PacifiCare of California, Inc.* (2001) 25 Cal.4th 412,

415) and rulings on issues of preemption (*Cellphone Termination Fee Cases* (2011) 193 Cal.App.4th 298, 311). Thus, we apply the independent standard of review.

3. *PREEMPTION*

The Workers' Compensation exclusivity provision provides, in relevant part: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . 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 . . . in those cases where the following conditions of compensation concur: . . . [¶] . . . [¶] (2) Where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment and is acting within the course of his or her employment. [¶] (3) Where the injury is proximately caused by the employment, either with or without negligence." (Former § 3600, subd. (a) [eff. Jan. 2010].) In some portions of the Labor Code, the term "employer" includes a utilization review organization. (§ 4610.5, subd. (c)(4).)

"Based on the [foregoing] statutory language, California courts have held workers' compensation proceedings to be the exclusive remedy for certain . . . claims deemed collateral to or derivative of the employee's injury." (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 997.) Derivative or collateral claims must still meet the conditions of compensation set forth *ante*: (1) that the injury occur within the course of the employee's job; and (2) the injury is proximately caused by the employee's job. (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal. 4th 800 813-814 (*Vacanti*).) If the collateral or derivative claim does not meet the

conditions of compensation, then it is not subject to exclusivity. In other words, "a cause of action predicated on an injury where 'the basic conditions of compensation' are absent is not preempted. [Citation.] For example, courts have allowed tort claims in cases where the alleged injury—the aggravation of an existing workplace injury—did not occur in the course of an employment relationship." (*Ibid.*)

In the Kings' complaint, they allege Kirk suffered a back injury at work in 2008. Then, in 2013, "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." This failure on Sharma's part caused Kirk to suffer seizures. The seizure injury did not occur in the course of Kirk's job because there are no allegations Kirk was working at the time of the seizures. The 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. As a result, based upon the Kings' complaint, the conditions of compensation have not been met.

We note, however, the *Vacanti* opinion further provides, "Courts have also consistently held 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." (*Vacanti, supra*, 24 Cal.4th at p. 815.) For example, where a person's business is damaged due to "the failure to receive full and timely payment on their lien claims before the [Workers' Compensation Appeals Board]," those "causes of action [are] collateral to or derivative of a

compensable workplace injury and fall[] within the scope of the exclusivity provisions." (*Ibid.*)

When this portion of the *Vacanti* opinion is read in context with the portion discussed *ante*, which requires the conditions of compensation to be met, we interpret *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. However, if a new injury arises or the prior workplace injury is aggravated, then the exclusivity provisions do not necessarily apply. (*Vacanti, supra*, 24 Cal.4th at pp. 813-814.)

The Kings' complaint presents an interesting issue on this point. The Kings complaint reads, "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. Due to the improper withdrawal of the medication, Mr. King sustained a series of four seizures resulting in additional physical injury. In September of 2013, there was a request to return Mr. King to the Klonopin due to the continuation of seizures. In October of 2013, another utilization review was performed by Mohammed Ashraf Ali, M.D., a Psychiatrist. Once again, Mr. King was denied the use of the Klonopin. Dr. Ali failed to authorize the use of the Klonopin until a gradual reduction in dosage was achieved or warn of the abrupt withdrawal of the medication." (Italics added.)

The Kings have alleged two options for how Sharma allegedly harmed Kirk. The first option is that Sharma harmed Kirk by not informing Kirk of the possible

consequences of abruptly ceasing Klonopin. This option involves a second step in the utilization review process: Sharma determines the drug is medically unnecessary and then must warn Kirk of the possible consequences of that decision. The second option is that Sharma harmed Kirk by incorrectly determining Klonopin was medically unnecessary, because the drug was medically necessary until Kirk was properly weaned from it. In this second option, the "medically necessary" decision was alleged to have been incorrectly determined, and thus, part of the claims process is alleged to have gone wrong. The "medically necessary" question is directly part of the claims process. (§ 4610, subd. (c).)

To the extent the Kings are faulting Sharma for not communicating a warning to Kirk, their claims are not preempted by the WCA because that warning would be beyond the "medical necessity" determination made by Sharma. To the extent the Kings are faulting Sharma for incorrectly deciding the medical necessity decision because Klonopin was medically necessary until Kirk was weaned, and thus a particular number of pills, e.g., 10, 20, should have been authorized for weaning, the Kings' claims are preempted by the WCA because the Kings are directly challenging Sharma's medical necessity determination.

Due to the uncertainty of the allegations in the complaint, the trial court properly sustained the demurrer. (Code, Civ. Proc., § 430.10, subd. (f) [pleading is uncertain].) However, because there is a possibility the causes of action are not preempted, the trial court erred by denying the Kings leave to amend. (See *Nolte v. Cedars Sinai Medical Center* (2015) 236 Cal.App.4th 1401, 1406 ["'If it is reasonably possible the pleading

can be cured by amendment, the trial court abuses its discretion by not granting leave to amend'"].)

C. *DUTY*

The Kings contend the trial court erred by concluding defendants did not owe Kirk a duty of care.

"It long has been held that an essential element of a cause of action for medical malpractice is a physician-patient relationship giving rise to a duty of care." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1471.) "When the physician-patient relationship exists, either expressed or implied, the patient has a right to expect the physician will care for and treat him with proper professional skills and will exercise reasonable and ordinary care and diligence toward the patient." (*Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313 (*Keene*).)

Case law provides a utilization review doctor has a doctor-patient relationship with the person whose medical records are being reviewed. In *Palmer v. Superior Court* (2002) 103 Cal.App.4th 953 (*Palmer*), the plaintiff sued his insurance carrier (the HMO) and his primary healthcare provider (the hospital). The trial court struck the plaintiff's allegations claiming entitlement to punitive damages against the hospital under Civil Code of Procedure section 425.13, which reflects punitive damages cannot be included in a complaint for damages arising out of the professional negligence of a healthcare provider. The plaintiff sought a writ of mandate setting aside that order. (*Palmer*, at p. 957.)

The plaintiff had lost both legs below his knees due to a bacterial infection, and needed leg prostheses to walk. (*Palmer, supra,* 103 Cal.App.4th at p. 958.) In 2000, the plaintiff's prosthetist (Norton) concluded the plaintiff's prostheses needed to be replaced. Norton sent a letter to the plaintiff's primary care physician (Rivkin), a doctor at the hospital, recommending the use of ultra light prostheses. At Rivkin's request, Norton prepared a cost estimate for the prostheses. A hospital employee from Rivkin's office called Norton to inform him the prostheses request had been approved as medically necessary, and the request was being forwarded to the hospital's utilization review department. The plaintiff received a letter from the hospital reflecting the request had been denied because the hospital's medical director determined the prostheses were not medically necessary. (*Id.* at pp. 958-959.)

Rivkin informed the plaintiff that he was being pressured by the HMO to deny the new prostheses. However, Rivkin drafted a letter asserting the prostheses were medically necessary. The HMO sent the plaintiff a letter reflecting it upheld the denial of the prostheses, and the plaintiff had the right to have the decision reviewed by the HMO's appeals and grievance review committee. The plaintiff initiated the review process, but a prompt decision was not issued. (*Palmer, supra,* 103 Cal.App.4th at pp. 959-960.)

The plaintiff filed a lawsuit against the HMO, the hospital and Rivkin, which included causes of action for intentional and negligent infliction of emotional distress. (*Palmer, supra,* 103 Cal.App.4th at p. 960.) The plaintiff alleged the hospital provided a utilization review to the HMO, which determined whether requested medical services

were medically necessary. (*Id.* at p. 958.) The hospital sought to strike the punitive damages allegations because the cause of action arose out of the professional negligence of a healthcare provider. (Code Civ. Proc., § 425.13.) The trial court found the plaintiff's claims were "directly related to the manner in which [the hospital] provided professional health care services, whether through Dr. Rivkin or [the hospital's] utilization review." (*Palmer*, at p. 961.)

The appellate court explained, "'The test of whether a health care provider's negligence constitutes professional negligence is whether the negligence occurred in rendering services for which the health care provider is licensed.'" (*Palmer*, *supra*, 103 Cal.App.4th at p. 962.) The appellate court examined whether the unfavorable utilization review services conducted by the hospital amounted to allegations of medical negligence. (*Ibid.*) The plaintiff argued the utilization review did not amount to healthcare services, and thus, he could sue for punitive damages. The plaintiff asserted the utilization review was purely administrative. (*Id.* at p. 968.) The appellate court concluded that the hospital's medical director, who concluded the prostheses were not medically necessary, "was acting as a health care provider as to the medical aspects of that decision." (*Id.* at p. 969.) The appellate court explained that the medical director's utilization review decision amounted to medical care, and was not purely administrative, because the utilization review had to "be conducted by medical professionals, and they must carry out these functions by exercising medical judgment and applying clinical standards." (*Id.* at p. 972.) The appellate court concluded the trial court properly struck the punitive damages allegations because the damages arose out of

the professional negligence of a health care provider (Code Civ. Proc., § 425.13, subd. (a)). (*Palmer*, at p. 973.)

Thus, under *Palmer*, there is a doctor-patient relationship between Kirk and Sharma. Because there is a doctor-patient relationship, Sharma owed Kirk a duty of care. As quoted *ante*, "When the physician-patient relationship exists, either expressed or implied, the patient has a right to expect the physician will care for and treat him with proper professional skills and will exercise reasonable and ordinary care and diligence toward the patient." (*Keene, supra*, 69 Cal.App.3d at p. 313.)

However, the existence of a duty does not mean "a doctor is required to exercise the same degree of skill toward every person he sees. The duty he owes to each varies with the relationship of the parties, the foreseeability of injury or harm that may be expected to flow from his conduct and the reliance which the person may reasonably be expected to place on the opinion received. A case-by-case approach is required." (*Keene, supra*, 69 Cal.App.3d at p. 313.) In other words, determining the scope of the duty owed depends upon the facts of the case.

In *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, our Supreme Court examined whether a murderer's therapist had a duty to warn the victim of the murderer's intention to kill the victim, even though the victim was not the therapist's patient. (*Id.* at pp. 430-431.) Our Supreme Court concluded, "[O]nce a therapist does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger.

While the discharge of this duty of due care will necessarily vary with the facts of each case, in each instance the adequacy of the therapist's conduct must be measured against the traditional negligence standard of the rendition of reasonable care under the circumstances." (*Id.* at p. 439, fn. omitted.)

Thus, while there is a duty owed by Sharma to Kirk, the scope or discharge of that duty will depend upon the facts/circumstances of this particular case. The Kings' complaint includes few factual details. For example, it is unclear how Kirk came to learn that the Klonopin had been decertified—did he receive a letter, a phone call, a denial at the pharmacy widow? The complaint reflects Sharma was the only doctor involved in the decision to decertify the Klonopin, until Ali reviewed that decision and affirmed it, but it is unclear what input, if any, the prescribing doctor may have had following Sharma's decision. Given the lack of factual allegations related to duty, the scope of the duty owed cannot be determined from the complaint. Accordingly, we conclude the trial court properly sustained the demurrer. (Code Civ. Proc., § 430.10, subd. (e) [failure to plead sufficient facts].)

Nevertheless, the trial court should have granted the Kings leave to amend because it is possible, given the allegation that Sharma was the only doctor involved in the decision, that, when more details are provided they could support a conclusion that, under the circumstances, the scope of Sharma's duty included some form of warning Kirk of or protecting Kirk from the risk of seizures. The Kings have explained they do have further facts to add to a potential First Amended Complaint. For example, they could offer an additional fact such as seizures being a known consequence of abruptly

ceasing Klonopin, and Sharma knowing that his decision to decertify the Klonopin would lead to the immediate denial of more Klonopin without any review by Kirk's prescribing doctor. (See *Nolte v. Cedars Sinai Medical Center*, *supra*, 236 Cal.App.4th 1401, 1406 ["'If it is reasonably possible the pleading can be cured by amendment, the trial court abuses its discretion by not granting leave to amend'"].) In sum, additional facts could cure the problems presented by the complaint and the Kings have additional facts to plead; therefore, the trial court erred by denying the Kings leave to amend.

DISPOSITION

The order sustaining the demurrer is affirmed. The denial of leave to amend is reversed, and the case remanded for the Kings to file an amended complaint. The parties are to bear their own costs on appeal.

CERTIFIED FOR PUBLICATION

MILLER
J.

We concur:

McKINSTER
Acting P. J.

KING
J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

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 Orange, State of California. My business address is 18201 Von Karman Avenue, Suite 1100, Irvine, California 92612-1077.

On February 12, 2016, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED LIST

BY MAIL: 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 February 12, 2016, at Irvine, California.

Johnetta Caldwell

SERVICE LIST via U.S. MAIL

Kirk King, Sara King vs. CompPartners, Inc., et al.

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