April 13, 2015

Hon. Tani Gorre Cantil-Sakauye, Chief Justice and the Hon. Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Electronic Waveform Lab, Inc. v. EK Health Services, Inc. Case No. S225192
Court of Appeal Case No. 2nd Civ. B249840

To Chief Justice Cantil-Sakauye and the Honorable Associate Justices:

The California Coalition on Workers’ Compensation (“CCWC”) supports State Compensation Insurance Fund’s Petition for Review of the above-referenced case.

The Court of Appeal’s decision is bad for all participants in California’s worker’s compensation system. It subjects all participants in the highly regulated Utilization Review process to litigation in civil courts. It could also cause medical decisions to be made based on threats or fear of litigation, instead of sound medical reasoning. We urge this Court to grant the Petition.

*Interests of Amicus Curiae*

The California Coalition on Workers’ Compensation (CCWC) is a member-driven organization dedicated to providing leadership, education and advocacy towards an equitable and efficient workers’ compensation system. CCWC is the only organization that exclusively represents California’s employers on the issue of workers’ compensation. CCWC members are comprised of small and large businesses, third party administrators, local government agencies, special districts, associations and service providers.

Employers are faced with rapidly escalating insurance premiums and associated system costs that threaten their ability to stay competitive, create jobs and provide for their employees. CCWC’s singular focus is to create a more balanced, efficient and stable worker’s compensation system for you. To accomplish their mission, CCWC works alongside California state lawmakers and regulators to make positive change happen.

*This Court Should Grant the Petition for Review*

CCWC support review because the Court of Appeal’s decision could significantly impact CCWC’s members and constituents. CCWC’s members are committed to providing reasonable and necessary medical care. Utilization review process is the sole process for members to determine what is reasonable and necessary. Maintaining the integrity of this process is essential to delivering required benefits to injured workers in need. The Court of Appeal’s decision is contrary to and inconsistent with California’s well-settled workers’ compensation exclusivity law.
CCWC supports review for the following reasons:

First, the Court of Appeal’s holding opens the door to litigation outside the workers’ compensation arena against participants in the UR process, including employers and UR doctors as a way to influence their decision-making regarding UR matters. Under the Court of Appeal’s reasoning, employers and doctors who participate in UR could face expensive and protracted litigation based on a decision made for or against a course of treatment. For example, the manufacturer of a device or drug could now use civil litigation as a tactic to coerce UR doctors and employers to prescribe its device or drug. This threat is real. A press release issued by Electoronic Waveforms’ counsel after the Court of Appeal’s decision noted that “The decision has industry wide ramifications and may open up the utilization review (UR) process to civil challenges…” (February 20, 2015, Press Release Titled: RPNA Wins Appellate Court Decision Resulting in Industry Wide Ramifications For Workers' Comp Utilization Reviews in California). This is bad for California employers and all other participants in the UR process. Such threats of civil litigation will lead to fewer doctors willing to participate in UR or to decision of medical necessity being made not on sound medical judgment, but rather in response to such threats. This is not what the California Legislature wanted when it created the UR system.

Second, the comprehensive UR statutory scheme evidences the Legislature’s intent to give the DWC and the Administrative Director oversight and control over the UR process. The Court of Appeal’s decision, however, either ignores or minimizes this oversight. Under the Workers’ Compensation Act, all employers must establish a UR process, either directly or through their workers’ compensation insurers. Cal. Lab. Code §4610(b). The Workers’ Compensation Act vests the Administrative Director of the Department of Industrial Relations of the California Division of Workers’ Compensation (“DWC”) with the authority and responsibility to (a) review employer and insurer UR plans, (b) ensure compliance with Section 4610, (c) review requests for independent medical review, (d) investigate complaints, and (e) assess penalties for non-compliance. Cal. Lab. Code §§4610(i), 4610.5; 8 Cal. Code Regs. §§9792.11(a), (e)-(f), 9792.15. UR statutes should be interpreted and enforced by the DWC and review of, and challenges to, UR plans belong in the workers’ compensation system, not in civil courts.

Third, the Court of Appeal’s decision foreshadows possible erosion of the exclusive jurisdiction and remedy of the workers’ compensation system. The California Legislature created a “complete system” of workers’ compensation. Labor Code §§ 3200, et seq.; American Psychometric Consultants, Inc. v. Workers’ Comp. Appeals Bd., 36 Cal.App.4th 1626, 1638 (1995). The Legislature could have, but did not, include civil courts in this complete system. Rather, the Legislature created the Workers’ Compensation Appeals Board (the “WCAB”) an granted it the exclusive “power, authority and jurisdiction” to determine any dispute or matter arising under the Workers’ Compensation Act. Cal. Lab. Code §§ 111, 5300, 5301. As this Court has recognized, civil courts play a very limited role under the Workers’ Compensation Act. Pursuant to California Labor Code section 5955, an order, decision or award issued by a Workers’ Compensation Judge must first be appealed to the WCAB by way of a petition for reconsideration. Cal. Lab. Code § 5900. Only after the WCAB rules on such a petition may a party aggrieved by an order or award seek review directly with the Court of Appeal or the Supreme Court. Cal. Lab. Code §§ 5950, 5955; Greener v. Workers’ Comp. Appeals Bd., 6
Cal.4th 1028, 1040 (1993). The Court of Appeal’s decision is inconsistent with this workers’ compensation exclusivity. The author of one article covering the Court of Appeal’s decision recognized this risk noting the fact that an appellate court “found that an administrative workers’ compensation process that has been declared mandatory to be exempt from California's anti-SLAPP laws is significant - perhaps evidence of further erosion of the exclusive remedy of the Labor Code.” (February 13, 2015, Article Titiled: UR is Not Protected Activity, by David DePaolo).

Conclusion

For the reasons set forth above, CCWC respectfully suggests that this Court should grant review.

Respectfully submitted,

[Signature]

Paul Yoder
Managing Director, CCWC