

In the
Supreme Court of the United States

LORI MADDEN-GRAMMER,

Petitioner,

v.

INDUSTRIAL CLAIM APPEALS OFFICE;
POUDRE VALLEY HOSPITAL; and
COLORADO HOSPITAL ASSN. TRUST,

Respondents.

On Petition for Writ of Certiorari to the
Colorado Court of Appeals

BRIEF IN OPPOSITION

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DECEMBER 3, 2019

CORPORATE DISCLOSURE STATEMENT

Poudre Valley Hospital, a nonprofit organization under Poudre Valley Health Care, Inc., dba Poudre Valley Healthcare System, is now part of University of Colorado Health, dba UCHealth, a locally-owned, not-for-profit organization.

Colorado Hospital Association (CHA) is a non-profit association of non-profit hospitals. CHA Trust is a self-insured insurance pool funded by member hospitals, of which Poudre Valley Hospital was formerly associated.

No publicly held company owns 10% or more of the stock of any Respondent or its parent company.

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BRIEF IN OPPOSITION

The respondents, Poudre Valley Hospital and Colorado Hospital Association Trust, by and through their attorney, Douglas L. Stratton, respectfully request that the court deny the petition for a writ of certiorari for the reasons briefed below.

STATEMENT OF THE CASE

Despite the petitioner's representation to the contrary, this case is not about an injured worker who was deprived of her only source of treatment for her medical condition resulting from the state's removal of a treating physician. Nor is this case about an injured worker who was deprived of a particular treatment regimen without a hearing. Both contentions misstate the facts. This case is about the constitutionality of a statute that has existed in its present form since 1991 and which long ago passed the scrutiny of Colorado's highest court.



SUMMARY OF THE ARGUMENT

The petitioner argues that Colorado's statutory medical utilization review provision violates her due process rights as guaranteed by the 14th Amendment. Colorado's Workers' Compensation Act does not create a constitutionally-protected property right to a particular provider or to a particular form of medical treatment. Consequently, Ms. Grammer's due process rights were not violated.



ARGUMENT

Section 8-43-501, Colo. Rev. Stat., et seq., generally referred to as the medical utilization review (MUR) provision, falls within Colorado's Workers' Compensation Act (the Act), § 8-40-101, C.R.S., et seq. This provision permits a party to request the Division of Workers' Compensation (the Division) to conduct a utilization review to determine if the care provided by a particular physician is "reasonably necessary or reasonably appropriate according to accepted professional standards." The statute provides the Director of the Division the authority to appoint physicians to a committee who are charged with reviewing an injured worker's care and determining whether a change of provider should be ordered. § 8-43-501(3)(a)-(c), C.R.S. The conclusions of the committee members are "afforded great weight." § 8-43-501(5)(a), C.R.S.

In this case, the respondents (Ms. Grammer's employer and its workers' compensation insurer) asked the Director to review the medical care provided to Ms. Grammer by Brian Lemper, D.O. Per the MUR provision, the Director appointed three independent physicians to review medical records and other documentation and asked them to render their opinions regarding whether Dr. Lemper's care was reasonably necessary or reasonably appropriate according to accepted professional standards. The three physicians independently and unanimously agreed that Dr. Lemper's care was not reasonably appropriate according to professional standards. Based on the panel physician's findings and recommendations, the Director ordered

a change of provider away from Dr. Lemper. The Director's order was affirmed by an administrative law judge, the Colorado Industrial Claim Appeals Office, and the Colorado Court of Appeals. The Colorado Supreme Court denied the petition for writ of certiorari.

No Colorado law provides an individual the right to a particular medical treatment or to treatment from a particular physician. Thus, an injured worker does not have a constitutionally-protected right to such. As stated in *Board of Regents v. Roth*, 408 U.S. 564, 577, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972):

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.

In *Colorado Compensation Ins. Auth. v. Nofio*, 886 P.2d 714 (Colo. 1994), the Colorado Supreme Court held that an injured worker does not have a protected property interest in receiving care from a particular medical provider or in receiving a certain type of medical treatment because neither the Act nor any state law grants such a right. *Nofio*, 886 P.2d at 719. Thus, the MUR provision did not violate a constitutionally-protected right to a hearing under the due process clause. This decision has been followed by at least two published decisions by the Colorado Court of Appeals. *See Franz v. Industrial Claim Appeals Office*, 250 P.3d 755, 758 (Colo. App. 2010), *cert. den. in Franz v. Brookharts, Inc.*, 2010 Colo. LEXIS 776 (Colo. October 18, 2010) and *Rook v. Industrial Claim Appeals Office*, 111 P.3d. 549, 553 (Colo. App. 2005) *cert. den. in Rook v. Industrial Claim Appeals Office*, 2005 Colo.

LEXIS 469 (Colo. May 16, 2005). No Colorado appellate court has published a conflicting decision.

Ms. Grammer mischaracterizes the consequential effect of the MUR decision by asserting that the state's removal of Dr. Lemper deprived her of her only source of treatment for her medical condition. This argument fails on its face, as it could only hold true if Dr. Lemper was the only physician capable of treating her complex regional pain syndrome (CRPS). Further, the Director did not merely remove Dr. Lemper, he ordered a change of physician as per the MUR provision that outlines the procedure for selecting a new physician after the removal of the subject physician. § 8-43-501(4), C.R.S.

Ms. Grammer further asserts that de-authorizing Dr. Lemper without a hearing left her without platelet-rich plasma (PRP) treatment. Again, this argument fails on its face, as it could only hold true if Dr. Lemper was the only physician qualified to provide PRP treatment. More to the point, prior to the MUR proceeding, a full hearing over the course of two days was held before an administrative law judge of the Colorado Office of Administrative Courts resulting in a finding that additional PRP injections (which were being administered by Dr. Lemper) were not reasonable or necessary to cure or relieve Ms. Grammer from the effects of her 1988 work injury. (See Pet.App.21a, fn 1.) Ms. Grammer's assertion that the MUR decision effectively terminated her PRP treatment without a hearing misstates the procedural and factual history of this case. The MUR provision does not authorize the termination of medical treatment, only a change of provider. *Nofio*, 886 P.2d at 719.

The Act does not create a constitutionally-protected property right in a particular provider or in a particular form of medical treatment. Consequently, Ms. Grammer's due process rights were not violated.



CONCLUSION

This case does not present an important question of federal law. Nor does the Colorado Supreme Court's precedent on this issue conflict with this Court's decisions. The petitioner has failed to state a compelling reason for why this Court should review this matter on a writ of certiorari. The respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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