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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MISAEL MENDOZA-HERNANDEZ, Plaintiff and Appellant, v. STATE COMPENSATION INSURANCE FUND, Defendant and Respondent.	B296422 (Los Angeles County Super. Ct. No. BC668631)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lia R. Martin, Judge. Affirmed.

Asvar Law, Christopher A. Asvar and Jonathan J. Perez for Plaintiff and Appellant.

Anthony Lewis, Noah Graff and John B. de Leon for Defendant and Respondent.

Misael Mendoza-Hernandez appeals from an order sustaining the demurrer of respondent State Compensation Insurance Fund (State Fund) without leave to amend.[1] Mendoza-Hernandez sued State Fund for intentional infliction of emotional distress after State Fund refused to comply with a stipulated order in a workers' compensation proceeding requiring it to pay for Mendoza-Hernandez's home health care services as recommended by a physician. Claims such as this "arising out of and in the course of the workers' compensation process" are included within the exclusive remedy provisions of the Workers' Compensation Act (the Act; Lab. Code, § 3201 et seq.).[2] (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 815 (*Vacanti*).) We therefore affirm.

BACKGROUND

1. Mendoza-Hernandez's Injury[3]

Mendoza-Hernandez suffered a "non-catastrophic" injury in September of 2007 while working for his employer, Colosseum

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[1] An order sustaining a demurrer is not appealable. (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1290–1291.) The record on appeal does not include a judgment. However, we have discretion to treat an order sustaining a demurrer without leave to amend as a judgment of dismissal. (*Ibid.*) We do so here.

[2] Subsequent undesignated statutory references are to the Labor Code.

[3] Consistent with the standard of review on appeal, we summarize the facts based on the allegations in Mendoza-Hernandez's third amended complaint (Complaint) and on documents from Mendoza-Hernandez's workers' compensation

Athletics Inc. (Colosseum). State Fund was Colosseum's workers' compensation insurer. In November 2008, a physician designated by State Fund injured Mendoza-Hernandez's spine while giving him an epidural, rendering Mendoza-Hernandez "effectively quadriplegic."

As a result of his injury, Mendoza-Hernandez needs catheterization every four to six hours. He cannot use his hands to do this, so he needs skilled nursing care for the catheterization. He also needs rectal suppositories to be able to defecate and must rely on another person to insert the suppositories.

2. Mendoza-Hernandez's Workers' Compensation Proceeding

Mendoza-Hernandez filed a claim with the Workers' Compensation Appeals Board (WCAB). At a hearing before a WCAB judge on August 6, 2013, Mendoza-Hernandez and State Fund entered into a written stipulation that State Fund would pay for home health care for eight hours per day, seven days per week, "until such time" as the parties' agreed medical examiner (AME), Dr. Jurkowitz, reviewed certain documents and issued a supplemental report on Mendoza-Hernandez's home health care needs. State Fund was to "then abide by those recommendations." State Fund was also to "restart rehab gym payments and authorizations until an AME report to [the] contrary." The WCAB judge incorporated the stipulation into an order (the August 6, 2013 Order).

On February 9, 2014, Dr. Jurkowitz issued his report, which recommended that Mendoza-Hernandez be provided

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proceedings that the trial court judicially noticed. (Evid. Code, § 459, subd. (a).)

24-hour home health care by a licensed vocational nurse. Despite the stipulated order requiring State Fund to abide by Dr. Jurkowitz's recommendation, State Fund did not pay for 24-hour home care or for the rehabilitative gym membership. State Fund's failure to comply with the order forced Mendoza-Hernandez to engage in further litigation before the WCAB to enforce the order.

In November 2014, the parties stipulated that Mendoza-Hernandez had a permanent, 100 percent disability. The stipulation left for later determination Mendoza-Hernandez's claims for penalties, sanctions, and attorney fees based upon State Fund's violation of the August 6, 2013 Order. The stipulation also did not resolve the issue of a lien that Marina Hernandez, Mendoza-Hernandez's mother, had filed seeking compensation for the care that she and other family members had been forced to provide to Mendoza-Hernandez in the absence of professional home care.

Following a hearing on these remaining issues, on June 15, 2015, WCAB Judge Semial Treadwell issued findings of fact, an opinion, and an order. Judge Treadwell found that: (1) State Fund had violated the August 6, 2013 Order to "provide home healthcare pursuant to the medical reporting of Dr. Jurkowitz" and to "authorize rehabilitation gym membership"; (2) State Fund "unduly delayed and continue[s] to delay provision of adequate and proper home healthcare since the August 6, 2013 order"; and (3) based on the August 6, 2013 Order and Dr. Jurkowitz's report, Mendoza-Hernandez was "entitled and remains entitled to home healthcare 24 hours per day seven days per week." Judge Treadwell reserved the issue of sanctions, concluding that Mendoza-Hernandez had provided insufficient

itemization to determine what costs should be assessed against State Fund, including the reasonable value of Mendoza-Hernandez's "self-procured medical treatment." Judge Treadwell also rejected Mendoza-Hernandez's requests for treble damages and for compensation for his emotional distress on the ground that those requests were inappropriate for workers' compensation.

The parties subsequently agreed on the amounts of attorney fees, penalties, and sanctions that State Fund should pay. Their agreement was incorporated into an order on November 4, 2015. As amended on November 10, 2015, that order awarded attorney fees and litigation costs in the amount of $27,131 and penalties and sanctions in the amount of $12,500 ($4,125 of which went to Mendoza-Hernandez's counsel). The order left open the amount to be awarded for the value of self-provided health care, including resolution of the lien filed by Marina Hernandez.

On April 14, 2015, Judge Treadwell entered a stipulated order awarding Marina Hernandez $90,000 (less attorney fees) on her lien.

Apart from and in addition to his mother's lien, Mendoza-Hernandez requested compensation for the value of the home medical services that State Fund had refused to provide. He claimed that he was entitled to the value of those services in addition to the $10,000 statutory maximum penalty (which was included in the November 10, 2015 order), because otherwise insurers such as State Fund would have a financial incentive to

violate an order for the payment of health care services.[4] He claimed that State Fund had saved over $640,000 by refusing to pay for his 24-hour home health care, and, if it were allowed to keep that money, it would be subject only to the maximum penalty of $10,000 for its violation.

Judge Treadwell denied this request and awarded sanctions against Mendoza-Hernandez's counsel in the amount of $500 for raising a frivolous issue. On August 1, 2016, the WCAB granted reconsideration of this ruling "to allow sufficient opportunity to further study the factual and legal issues in this case." At oral argument, the parties represented that Mendoza-Hernandez's workers' compensation claim has now been settled, thus terminating the workers' compensation proceedings before the WCAB issued a ruling on the request for reconsideration.

3. Mendoza-Hernandez's Complaint

Mendoza-Hernandez's operative Complaint in this action contains a single cause of action for intentional infliction of emotional distress. Mendoza-Hernandez alleges that State Fund violated the August 6, 2013 Order while knowing that its violation would deny Mendoza-Hernandez "urgently-needed, quality-of-life and potentially life-saving medical treatment." Mendoza-Hernandez claims that State Fund intentionally refused to provide the medical care that he needed "because of the undeniable financial incentives and leverage [it] saw in

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[4] Section 5814, subdivision (a) provides that, "[w]hen payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the amount of the payment unreasonably delayed or refused shall be increased up to 25 percent or up to ten thousand dollars ($10,000), whichever is less."

continuing to deny the care." He further alleges that State Fund offered to provide a "substantial part" of the home health care hours, but only if Mendoza-Hernandez would agree to something less than 100 percent disability.

As a result of State Fund's conduct, Mendoza-Hernandez allegedly suffered extreme physical and emotional distress from his inability to void his bladder or to defecate and from the fear of a stroke due to the absence of 24-hour home health care.

4. The Trial Court's Ruling

State Fund demurred to the Complaint. The trial court sustained the demurrer without leave to amend in a written order on February 4, 2019.

The court concluded that the exclusive remedy provisions of the Act applied to Mendoza-Hernandez's claim. The court explained that, in *Unruh v. Truck Insurance Exchange* (1972) 7 Cal.3d 616 (*Unruh*), our Supreme Court created an exception to exclusive jurisdiction "where an employer's insurance carrier intentionally commits outrageous and extreme conduct totally unnecessary to and far beyond the bounds of normal investigation and defense of a worker's claim." However, the court concluded that this exception did not apply to the facts that Mendoza-Hernandez alleged. The court cited *Everfield v. State Compensation Insurance Fund* (1981) 115 Cal.App.3d 15 (*Everfield*) for the proposition that an insurer's "mere denial of payment, even if intentional, is still within the jurisdictional purview of the workers' compensation scheme."

The trial court also rejected Mendoza-Hernandez's argument that the WCAB had denied jurisdiction over his claim and that this ruling was res judicata. The court concluded that

the WCAB "already asserted jurisdiction to his claims generally, and simply denied his emotional distress claims."

DISCUSSION

1. Workers' Compensation Is Mendoza-Hernandez's Exclusive Remedy for the Injury He Alleges in This Case

We review de novo the trial court's ruling sustaining Mendoza-Hernandez's demurrer. (*King v. CompPartners, Inc.* (2018) 5 Cal.5th 1039, 1050.) We " 'treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law.' " (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

a. *The WCAB exercised jurisdiction over Mendoza-Hernandez's claim*

Mendoza-Hernandez argues that the WCAB has already decided that his claim is outside the jurisdiction of the workers' compensation system. He claims that this decision is res judicata and that the trial court therefore should have exercised jurisdiction over his claim. The argument is based on a misinterpretation of the record.

The premise underlying the system of workers' compensation is the " ' "compensation bargain." ' " (*Vacanti, supra,* 24 Cal.4th at p. 811, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16 (*Shoemaker*).) Under this presumed bargain, " 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange,

gives up the wider range of damages potentially available in tort.' " (*Vacanti,* at p. 811, quoting *Shoemaker,* at p. 16.)

To implement this bargain, with some exceptions not relevant here, the remedies available through the workers' compensation system are exclusive when an injury falls within the scope of the Act.[5] (*Vacanti, supra,* 24 Cal.4th at p. 811.) The exclusive remedy provisions of the Act apply to the employer as well as to the employer's workers' compensation insurance carrier, who " 'retain[s] immunity from lawsuit as the "alter ego"

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[5] As amended in 1982, section 3600, subdivision (a) and section 3602, subdivision (a) operate to make workers' compensation an employee's exclusive remedy against his or her employer for an injury suffered by an employee arising out of and in the course of the employment, except for specific exceptions identified in sections 3602, 3706, and 4558. Those exceptions include an employer's: (1) willful physical assault; (2) fraudulent concealment of an employee's injury; (3) sale or transfer of defective products to a third person that then injure an employee; and (4) failure to install or knowing removal of a point of operation guard on a power press. (See §§ 3602, subd. (a), 4558.) In addition, an employee may pursue a civil action when an employer fails to secure the payment of compensation. (§ 3706.) Where one of the exceptions identified in section 3602 or section 4558 applies, concurrent jurisdiction exists in the WCAB and in the superior court, and any compensation an employee receives through the workers' compensation system is credited against a civil judgment arising from the same injury. (§ 3600, subd. (b); *LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 287–288; *Burnelle v. Continental Can Co.* (1987) 193 Cal.App.3d 315, 320.) None of these enumerated exceptions applies here.

of the employer.' " (*Id.* at p. 813, quoting *Unruh, supra,* 7 Cal.3d at p. 625.)

This means that the WCAB and the superior court do not generally have concurrent jurisdiction over a claim against an employer or insurer. Rather, of the two tribunals, one will generally be "without jurisdiction to grant any relief whatsoever, depending upon whether or not the injuries were suffered within the course and scope of an employment relationship." (*Scott v. Industrial Accident Com.* (1956) 46 Cal.2d 76, 82–83 (*Scott*).)

However, the two tribunals do have concurrent jurisdiction to *determine* jurisdiction. (See *Scott, supra,* 46 Cal.2d at p. 83.) The determination of jurisdiction by one tribunal is binding on the other. "Thus, if there is a final determination as to the matter of coverage (i.e., of jurisdiction) in either the [WCAB] or the superior court proceedings, such determination will be res judicata in subsequent proceedings before the other tribunal between the same parties or those in privy to them." (*Ibid.;* see *Styne v. Stevens* (2001) 26 Cal.4th 42, 55, fn. 6 ["the first forum invoked has jurisdiction, to the exclusion of the other, to finally determine if the facts give it, rather than the other, jurisdiction over the merits of the controversy"]; *Furtado v. Schriefer* (1991) 228 Cal.App.3d 1608, 1613 ["Once the trial court determines the injures were suffered within the course and scope of employment, its jurisdiction terminates and the plaintiff's exclusive remedy is workers' compensation"].)

Thus, Mendoza-Hernandez is correct that if the WCAB had made a final determination that it had no jurisdiction over the claim that Mendoza-Hernandez asserts in this action, that ruling would have been binding on the trial court. However, the WCAB did not make such a determination. On the contrary, the record

shows that the WCAB exercised jurisdiction over the injury that is the subject of Mendoza-Hernandez's claim in this action.

Mendoza-Hernandez sought remedies from the WCAB for State Fund's refusal to pay the costs of 24-hour home health care and a rehabilitative gym membership in violation of the August 6, 2013 Order. That is the same injury that he claims entitles him to damages for emotional distress in this action. The WCAB exercised jurisdiction over that application. In fact, Judge Treadwell found that State Fund violated the August 6, 2013 Order and awarded relief that included attorney fees and sanctions.

Mendoza-Hernandez relies on several comments by Judge Treadwell during the hearing on Mendoza-Hernandez's application for relief from State Fund's violation of the August 6, 2013 Order. In stating that he would deny Mendoza-Hernandez's request for treble damages, Judge Treadwell mentioned that such a request belonged "across the street" in civil court and was "not workers' compensation." Similarly, he said that Mendoza-Hernandez's request for $50,000 in emotional distress was "not a workers' compensation issue."

The trial court fairly characterized these comments by Judge Treadwell as an "off-the-cuff" remark. Judge Treadwell did not state that the WCAB lacked jurisdiction over the injury that Mendoza-Hernandez claimed; indeed, he awarded compensation for that injury. Nor did he offer any view that Mendoza-Hernandez had a viable civil claim for emotional distress or punitive damages. Judge Treadwell's comment clearly referred only to the fact that particular remedies that Mendoza-Hernandez sought—treble damages and emotional distress for

State Fund's violation of an order—were not available in the workers' compensation system.

The Act does not provide compensation for every element of damages flowing from a workplace injury. As mentioned, the essence of the "compensation bargain" underlying the workers' compensation system is that the employee receives relatively swift and certain payment of benefits without having to prove fault but, in exchange, "gives up the wider range of damages potentially available in tort." (*Shoemaker, supra,* 52 Cal.3d at p. 16.) This bargain means that the " 'existence of a noncompensable injury does not, by itself, abrogate the exclusive remedy provisions of the . . . Act.' " (*Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 754 (*Livitsanos*), quoting *Renteria v. County of Orange* (1978) 82 Cal.App.3d 833, 840.) Thus, workers' compensation may provide the exclusive remedy for a particular injury even if it provides no remedy at all. (See *Livitsanos,* at p. 755.)

That Judge Treadwell's oral comments at the hearing referred to the availability of a remedy rather than to jurisdiction is apparent from his written ruling. His June 15, 2015 opinion referred to the lack of a remedy, not the absence of jurisdiction. Judge Treadwell stated that he was denying Mendoza-Hernandez's request for treble damages "as being inappropriate to Workers' Compensation." He similarly denied Mendoza-Hernandez's request for $50,000 for emotional distress "as being inappropriate to Workers' Compensation Law." Any possible interpretation of Judge Treadwell's ruling as a finding that the WCAB lacked jurisdiction was foreclosed by his statement that "[j]urisdiction is reserved over this matter until the value for the home healthcare is determined."

Mendoza-Hernandez does not argue that Judge Treadwell was wrong in ruling that treble damages and emotional distress damages were not available in the workers' compensation system. (See *Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621 ["The workers' compensation system only authorizes payment of 'compensation' for work-related injuries and does not authorize punitive damages"]; *Livitsanos, supra,* 2 Cal.4th at p. 754 [emotional injury is compensable under the Act only if it results in an industrial disability].) In any event, Mendoza-Hernandez's remedy for any such error would have been to seek appellate review of Judge Treadwell's ruling, not to file a separate civil action.

b. *The WCAB's jurisdiction was exclusive*

It is clear that the injury that Mendoza-Hernandez claims in this action is covered by the Act. Mendoza-Hernandez alleges that State Fund abused the workers' compensation process by failing to pay benefits in violation of a WCAB order. As the court noted in *Vacanti,* courts have "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.)

Mendoza-Hernandez argues that worker's compensation was nevertheless not his *exclusive* remedy. He claims that State Fund's conduct falls within an exception to workers' compensation exclusivity that applies when the "alleged acts or motives" at issue are not " 'reasonably encompassed within the compensation bargain.' " (*Vacanti, supra,* 24 Cal.4th at pp. 819–820, quoting *Shoemaker, supra,* 52 Cal.3d at p. 16.) The basis for the exception is that the defendant's conduct shows it is "*no*

longer acting as an 'employer,' as understood in [the exclusive remedy] provisions." (*Vacanti,* at p. 820; see *Unruh, supra,* 7 Cal.3d at pp. 629–631.) If the defendant's acts are a normal part of the employment relationship or the workers' compensation claims process, "the cause of action is subject to exclusivity. Otherwise, it is not." (*Vacanti,* at p. 820.)

For example, in *Unruh*, the case that first recognized this exception, our Supreme Court concluded that an insurance company acted outside its role as a workers' compensation insurer by intentionally using a claims investigator who engaged in exceptionally manipulative and deceitful conduct. (*Unruh, supra,* 7 Cal.3d at pp. 629–631.) The investigator pretended to establish a personal relationship with the worker and covertly filmed her on a trip to Disneyland. (*Id.* at p. 627.) The court permitted the employee's intentional tort claims to proceed against the insurer on the ground that the insurer's conduct went "beyond the normal role of an insurer in a compensation scheme intended to protect the worker." (*Id.* at p. 630.)

Before analyzing whether this exception applies to State Fund's conduct here, we consider the significance of the WCAB's decision to exercise jurisdiction. As discussed above, a final decision by the WCAB that Mendoza-Hernandez's injury was covered by the Act is res judicata in this action. (See *Scott, supra,* 46 Cal.2d at p. 83.) Citing *Jones v. Brown* (1970) 13 Cal.App.3d 513 (*Brown*), State Fund argues that the WCAB's exercise of jurisdiction over Mendoza-Hernandez's claim was binding on the trial court and therefore deprived the trial court of jurisdiction.

However, our Supreme Court's decision in *Unruh* suggests that res judicata does not bar a civil claim when the exception

that it recognized in that case applies.. In *Unruh*, the court explained that the exception was based on the theory that the insurer "stepped out of its proper role as an insurer and became a 'person other than the employer.' " (*Unruh, supra,* 7 Cal.3d at p. 636.) The court held that this precluded the application of res judicata in that case, even though the WCAB had previously made a final ruling that awarded the plaintiff compensation for injuries caused by the investigator's conduct. (*Id.* at pp. 634–636.)

Because the conduct of the defendant in that case brought it outside its role as the employer's insurer, it had a "dual legal personality." (*Unruh, supra,* 7 Cal.3d at p. 636.) The defendant stood in the position of the plaintiff's employer for purposes of the workers' compensation proceeding, but it acted outside that role in committing intentional torts. (*Ibid.*) Thus, the insurance company defendant was, in essence, a different party for purposes of res judicata. (*Ibid.*)

A decision that the *Unruh* exception applies here would require a similar recognition that State Fund acted outside its role as a workers' compensation insurer in causing Mendoza-Hernandez's injury. Under the court's analysis in *Unruh,* this would also mean that State Fund is essentially a different party in this lawsuit than it was in Mendoza-Hernandez's workers' compensation proceedings, and res judicata would not apply.

We therefore proceed to consider the merits of Mendoza-Hernandez's argument that the *Unruh* exception applies to his claim.

State Fund's alleged acts and motives do not fall within the category of a risk that is outside the "compensation bargain." (*Vacanti, supra,* 24 Cal.4th at pp. 819–820.) Mendoza-Hernandez

claims that State Fund intentionally violated an order to pay benefits while knowing that the violation would cause him extreme physical and psychological distress. But a refusal to pay benefits, however egregious, is "intrinsic to the workers' compensation claims process" and is therefore a risk contemplated by the compensation bargain. (*Id.* at p. 821.) As the court explained in *Vacanti,* "California courts have invariably barred statutory and tort claims alleging that an insurer unreasonably avoided or delayed payment of benefits even though the insurer committed fraud and other misdeeds in the course of doing so." (*Ibid.*)

For example, in *Vacanti,* the court held that the plaintiffs' abuse of process and fraud claims, which alleged a "pattern or practice of delaying or denying payments in bad faith," were encompassed within the compensation bargain. (*Vacanti, supra,* 24 Cal.4th at p. 823.) Similarly, in *Marsh & McLennan, Inc. v. Superior Court* (1989) 49 Cal.3d 1 (*Marsh*), the court held that a plaintiff's claims for fraud, intentional infliction of emotional distress and other causes of action based on a claims administrator's alleged failure to pay benefits were barred by the workers' compensation exclusivity provisions.

The court in *Marsh* cited with approval this court's holding in *Everfield* that "an insurer that delays making payments to an injured worker or changes the amount of payments is not, under *Unruh*, subject to liability outside of the workers' compensation scheme." (*Marsh, supra,* 49 Cal.3d at p. 7, citing *Everfield, supra,* 115 Cal.App.3d at p. 19.) In *Everfield,* the court concluded that the defendant's alleged delay and arbitrary reduction of compensation payments and intentional disregard of a subpoena did not "warrant a departure from the basic general rule that

matters relative to claims for workers' compensation, their payment and enforcement, are within the exclusive jurisdiction of the . . . Act." (*Everfield,* at p. 17.) The court in *Marsh* also cited with approval this court's holding in *Fremont Indemnity Co. v. Superior Court* (1982) 133 Cal.App.3d 879 (*Fremont*), which held that worker's compensation exclusivity applied to claims alleging conduct similar to claims in *Everfield.* (*Marsh,* at p. 7; *Fremont,* at pp. 881–882.) In *Marsh,* our Supreme Court explained that *Everfield* and *Fremont* "confirmed the principle that the WCAB is the most appropriate forum for resolving disputes over the delay or discontinuance of benefits." (*Marsh*, at p. 7.)

Mendoza-Hernandez's allegation that State Fund failed to comply with an *order* requiring payment does not change this analysis.[6] " 'The reasons for delay, whether intentional or negligent, whether excusable or not, can be well inquired into by the board and where necessary discipline imposed.' " (*Marsh,*

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[6] Nothing in this opinion should be read to condone State Fund's conduct in violating a stipulated order to provide home health care services that were necessary to meet Mendoza-Hernandez's basic needs. As alleged, that conduct was an egregious abdication of State Fund's duty as an insurer that caused Mendoza-Hernandez extreme physical and mental distress. But this court is not free to recognize a civil tort claim simply because State Fund's alleged conduct was egregious. Under *Unruh* and the cases interpreting the exception that it recognized, an insurer's conduct is not remediable outside the workers' compensation system just because it shows egregious bad faith; rather, the conduct must consist of acts apart from the insurer's role as an insurer. The remedy for State Fund's conduct in withholding benefits, however unreasonable, lies in the WCAB, not in a civil action.

supra, 49 Cal.3d at p. 7, quoting *Everfield, supra,* 115 Cal.App.3d at p. 19.) Indeed, the WCAB imposed such discipline here.

Violation of a stipulated order to pay benefits is a particularly blatant breach of an insurer's legal obligation, but it is still simply an extreme example of bad faith. It is not different in kind from the conduct that the court in *Vacanti* held was within the compensation bargain. That conduct included the defendants' alleged misuse of the claims process "by making frivolous objections, filing sham petitions and documents with the WCAB, issuing unnecessary subpoenas, and improperly threatening to depose plaintiffs' physicians." (*Vacanti, supra,* 24 Cal.4th at p. 823.)

Mendoza-Hernandez's allegation that State Fund withheld payment as leverage to pressure Mendoza-Hernandez to agree to a finding of less than 100 percent disability also does not change this analysis. Mendoza-Hernandez points out that such conduct is an unfair insurance practice under Insurance Code section 790.03, subdivision (h)(12). However, the plaintiffs in both *Marsh* and *Fremont* similarly alleged that the conduct of the defendants in those cases violated Insurance Code section 790.03. (*Marsh, supra,* 49 Cal.3d at p. 5; *Fremont, supra,* 133 Cal.App.3d at p. 882.) Moreover, in *Vacanti,* our Supreme Court held that the defendants' alleged fraudulent misuse of the workers' compensation process did not fall outside the compensation bargain even though it might constitute a crime under the Insurance Code. (*Vacanti, supra,* 24 Cal.4th at pp. 823–824.)

An insurance company's use of unfair or bad faith payment tactics does not necessarily mean it has engaged in "tortious acts *independent of its role as a provider of workers' compensation benefits.*" (*Marsh, supra,* 49 Cal.3d at p. 10, italics added.) The

essence of Mendoza-Hernandez's allegations is that State Fund refused to pay benefits that it was obligated to pay in order to obtain a negotiating advantage and to save money. However unreasonable or damaging such conduct may have been, it was not outside State Fund's capacity as an insurer.

At bottom, Mendoza-Hernandez's claim in this case is not that State Fund acted in some role other than as a workers' compensation insurer, but rather that it took advantage of insufficient penalties for insurers' bad faith conduct *within* the workers' compensation system. Mendoza-Hernandez alleges that when State Fund "calculated the financial windfall in comparison to the maximum statutory penalty of $10,000 as [its] worst case scenario, [State Fund] . . . willfully disobeyed the WCAB Order for as long as [it] could." Mendoza-Hernandez claims that, by virtue of this disobedience, State Fund "directly benefited approximately $660,000 in claims cost savings."

The settlement of Mendoza-Hernandez's workers' compensation claim means that the WCAB now will not decide whether State Fund should have been required to pay the $660,000 that it allegedly saved by refusing to pay for Mendoza-Hernandez's professional home health care in addition to the $10,000 sanction that Judge Treadwell imposed. That issue is not before this court.

It is also not our role to decide whether the remedies available in the workers' compensation system for an insurer's bad faith conduct are sufficient. As Mendoza-Hernandez argues, it may be that the prospect of a $10,000 sanction is not adequate to counteract an insurer's financial incentive to withhold benefits under the circumstances alleged in this case. But that is an issue for our Legislature, not this court. The remedies that are

available within the workers' compensation system are exclusive under the facts that Mendoza-Hernandez has alleged. We therefore affirm the trial court's order sustaining State Fund's demurrer.[7]

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[7] Mendoza-Hernandez has not challenged the trial court's denial of leave to amend, and he has not provided any basis to conclude that he could allege facts in an amended complaint that would take his claim outside the exclusive remedy provisions of the Act. We therefore also affirm the trial court's order denying leave to amend. (See *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349 ["Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading"].)

DISPOSITION

The judgment is affirmed. State Compensation Insurance Fund is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.