

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF WORKERS' COMPENSATION
BEFORE THE ADMINISTRATIVE DIRECTOR

In Re: PROVIDER SUSPENSION

Case No. AD PS-18-03

AMENDED DETERMINATION AND ORDER RE: SUSPENSION

BRUCE ELIOT FISHMAN, M. D.;
BRUCE ELIOT FISHMAN, M.D., FICS, INC.; AND FAMILY URGENT CARE &
INDUSTRIAL MEDICAL CLINIC, INC.

Respondent.

The Administrative Director of the Division of Workers' Compensation is required to suspend any physician, practitioner, or provider from participating in the workers' compensation system as a physician, practitioner, or provider if the individual or entity meets any of the express criteria set forth in Labor Code section 139.21(a)(1).

This matter has been remanded to the Administrative Director of the Division of Workers' Compensation by the Superior Court of California, County of Los Angeles, for reconsideration under the standards for administrative decisions set forth by the California Supreme Court in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506. Based on a second review of the record in this case, including the parties' briefs, the November 30, 2018 Interim Orders, the January 30, 2019 Transcript of Proceedings, and March 6, 2019 recommended Determination and Order re: Suspension issued by the designated Hearing Officer, the Administrative Director again finds that Respondent Bruce Eliot Fishman, Bruce Fishman, M.D., FICS, Inc., and Family Urgent Care & Industrial Medical Clinic, Inc. (Respondents) meet the criteria for suspension set forth in Labor Code section 139.21(a)(1) and shall be suspended from participating in the workers' compensation system as a physician, practitioner, or provider.

Pursuant to California Code of Regulations, title 8, section 9788.3(d), the Administrative Director further: (a) adopts and incorporates the procedural timeline of the March 6, 2019 recommended Determination and Order re: Suspension of the designated Hearing Officer, attached hereto; and (b) modifies the determination of the designated Hearing Officer as it pertains to the decision regarding suspension of Bruce Eliot Fishman, Bruce Fishman, M.D., FICS, Inc., and Family Urgent Care & Industrial Medical Clinic, Inc., and under Labor Code section 139.21(a)(1) finds that Respondents meet the criteria for suspension under that section.

FINDINGS OF FACTS

1. On January 28, 1983, Respondent Bruce Fishman was named in a criminal indictment in United States of America vs. Bruce Fishman, et al., case number 83-60055-01, in the United States District Court, for the Eastern District of Michigan. (See Office of the Director's Exhibit 2, "Criminal Indictment.") Count One of the Criminal Indictment alleged that Respondent Fishman engaged in a conspiracy to "knowingly, intentionally, and unlawfully" distribute various controlled substances "by issuing and filling prescriptions for said drug[s] outside the usual course of medical practice and for no legitimate medical purpose" in violation of Section 846, Title 21, United States Code. The Criminal Indictment further described the alleged acts performed by Respondent Fishman in furtherance of the conspiracy, including obtaining prescription forms for the purpose of issuing prescriptions for controlled substances and writing prescriptions for Schedule II Controlled Substances outside the usual course of medical practice and for no legitimate purpose.
2. On or about July 14, 1983, Respondent Fishman pled guilty and was "convicted as charged of the offense(s) of conspiracy to distribute Narcotic and Non-Narcotic Controlled Substances" in violation of Section 846, Title 21, of the United States Code, in case number 83-60055-01, in the United States District Court, Eastern District of Michigan. (See Office of the Director's Exhibit 3, "Judgment and Commitment Order.") Respondent Fishman was sentenced to serve three and one-half years and fined the sum of \$25,000. The Judgment and Commitment Order was signed by the Honorable Robert E. DeMascio, U.S. District Court Judge, on July 15, 1983.
3. Based on his criminal conviction in the U.S. District Court, Eastern District of Michigan, Respondent Fishman's license to practice medicine in California was revoked by the California Medical Board on February 26, 1985. (See Fishman Exhibit A, "Medical Board Case No. L-40352," p.2.)
4. Subsequent to his August 1986 release from prison, Respondent Fishman petitioned the California Board of Medical Quality Assurance (CBMQA) to have his medical license reinstated. (See Medical Board Case No. L-40352, p.2.) The CBMQA initially denied the petition on July 31, 1987. (See Medical Board Case No. L-40352.)
5. Respondent Fishman petitioned the CBMQA a second time for reinstatement of his license in August 1989. (See Fishman Exhibit B, "Medical Board Case No. L-49870.") On May 7, 1990, the CBMQA granted the petition, reinstating Respondent Fishman's license on a probationary status and imposing various conditions upon him including precluding him from prescribing, administering, dispensing, ordering or possessing any controlled substances as defined in the California Uniform Controlled Substances Act. (See Medical Board Case No. L-49870.)
6. In March 1993, Bruce Fishman filed a petition with CBMQA requesting termination of his probation, which was granted and his license was reinstated without restriction. (See Fishman Exhibit C, "Medical Board Case No. L-61422.")

7. On April 19, 2018, the Administrative Director of the Division of Workers' Compensation issued a Notice of Provider Suspension to Respondent Fishman, under the provisions of Labor Code section 139.21(a)(1)(A). (See Stipulation by Parties Re Supplemental Notice of Provider Suspension & Amended Appeal; Request for Continued Suspension Hearing, dated May 25, 2018, "Stipulation.") Respondent Fishman filed a timely request for hearing to contest the suspension and the matter was set for hearing on May 29, 2018, before Workers' Compensation Administrative Law Judge Bolynda Schultz. (See Stipulation and Office of the Director's Exhibit 1, "Notice of Suspension Hearing".)

8. On May 25, 2018, the Administrative Director issued a Supplemental Notice of Provider Suspension identifying Bruce Eliot Fishman, M.D., F.I.C.S., Inc. and Family Urgent Care & Industrial Medical Clinic, Inc., as entities controlled by Respondent Fishman, as subject to suspension under 139.21(a)(1)(D). Respondent Fishman is an officer or director of the named entities or was a shareholder with a 10% or greater interest in the entities. (See Stipulation.)

9. The suspension hearing proceeded as outlined in the Procedural Timeline section of the Hearing Officer's recommended Determination and Order re: Suspension. On November 30, 2018, the Hearing Officer issued Interim Orders addressing the admissibility of evidence, as well as a number of Respondent Fishman's legal arguments including those raising due process, collateral estoppel, res judicata, and jurisdictional issues. The parties did not object to or seek review of any of the Interim Orders. On March 6, 2019, the Hearing Officer issued a recommended Determination and Order re: Suspension, which was served on the parties on March 7, 2019.

DETERMINATION

Labor Code section 139.21(a)(1) applies to Respondents Fishman, Bruce Fishman, M.D., FICS, Inc., and Family Urgent Care & Industrial Medical Clinic, Inc. Respondents are hereby suspended from participating in the California workers' compensation system.

BASIS FOR DETERMINATION

Labor Code section 139.21 expressly provides:

(a)(1) The administrative director shall promptly suspend, pursuant to subdivision (b), any physician, practitioner, or provider from participating in the workers' compensation system as a physician, practitioner, or provider if the individual or entity meets any of the following criteria:

(A) The individual or entity has been convicted of any felony or misdemeanor and that crime comes within any of the following descriptions:

(i) It involves fraud or abuse of the federal Medicare or Medicaid programs, the Medi-Cal program, or the workers' compensation system, or fraud or abuse of any patient.

(ii) It relates to the conduct of the individual's medical practice as it pertains to patient care.

(iii) It is a financial crime that relates to the federal Medicare or Medicaid programs, the Medi-Cal program, or the workers' compensation system.

(iv) It is otherwise substantially related to the qualifications, functions, or duties of a provider of services.

(B) The individual or entity has been suspended, due to fraud or abuse, from the federal Medicare or Medicaid programs or the Medi-Cal program.

(C) The individual's license, certificate, or approval to provide health care has been surrendered or revoked.

(D) The entity is controlled by an individual who was been convicted of a felony or misdemeanor described in subparagraph (A).

The principles governing statutory construction are well established. To determine legislative intent, reviewing courts are required to first look at the language of the statute, giving the words their usual and ordinary meaning. See, *Lennane v. Franchise Tax Board* (1994) 9 Cal.4th 263. "If there is no ambiguity in the language of the statute, 'then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.' [Citation omitted.] 'Where the statute is clear, courts will not interpret away clear language in favor of an ambiguity that does not exist.' [Citations omitted.]" *Id.* at 268.

There is no ambiguity in the plain language of Labor Code section 139.21(a)(1). It clearly directs the Administrative Director to suspend a provider that meets one or more of the statutory criteria. It does not authorize the Administrative Director to second guess either the validity of a criminal conviction, a determination that a provider be suspended from the Medicare or Medicaid programs for fraud or abuse, or the basis for a licensing entity's decision to revoke a provider's license. Nor does it authorize the Administrative Director to evaluate a provider's fitness to practice medicine or provide goods or services or determine whether a provider has been sufficiently rehabilitated for his or her crime. Section 139.21's mandate neither gives the Administrative Director discretion to discount criminal convictions that are remote in time nor provides for consideration of this temporal element. Had the Legislature intended that the Administrative Director conduct such inquires, it could have included language in the statute to that effect, but it did not do so. Instead, it authorizes the Administrative Director to determine if providers meet the enumerated statutory criteria, and directs the Administrative Director to suspend them from participating in the workers' compensation system if they do.

Pursuant to Labor Code section 139.21(a)(1)(A)(iv), a physician, practitioner, or provider may be suspended if they have been convicted of any felony or misdemeanor that “is otherwise substantially related to the qualifications, functions, or duties of a provider of services.” In this regard, the conduct resulting in the conviction need not have occurred in the actual practice of medicine in order to be substantially related to the qualifications, functions, or duties of the provider. See *Windham v. Board of Medical Quality Assurance* (1980) 104 Cal.App.3d 461 (income tax fraud); *Krain v. Medical Board* (1999) 71 Cal.App.4th 1416 (soliciting perjury).

Here, the record shows that Respondent Fishman was criminally charged for acts in violation of Title 21, United States Code section 846, including using his medical license to obtain prescription forms for the purpose of issuing prescriptions for controlled substances and to write prescriptions for Schedule II Controlled Substances outside the usual course of medical practice and for no legitimate purpose. Bruce Fishman plead guilty to that charge. His plea was accepted by the court and Bruce Fishman was “convicted as charged of the offense(s) of conspiracy to distribute Narcotic and Non-Narcotic Controlled Substances.”

The criminal activity to which Respondent Fishman plead guilty is substantially related to the qualifications, functions, or duties of a provider of services. Respondent Fishman’s criminal conduct was entirely dependent on his medical practice and his function as a licensed physician; without his license he would not have had the tools to commit the crime. The connection between this conduct, undertaken with no legitimate medical purpose, and the “qualifications, functions, or duties of a provider of services” is made plain in Business and Professions (B & P) Code. B & P Code section 2236.1 (c), which expressly provides (emphasis added):

Notwithstanding subdivision (b), a conviction of any crime referred to in Section 2237, or a conviction of Section 187, 261, 262, or 288 of the Penal Code, shall be conclusively presumed to be substantially related to the qualifications, functions, or duties of a physician and surgeon and no hearing shall be held on this issue.

Correspondingly, B & P Code section 2237(a) provides (emphasis added):

The conviction of a charge of violating any federal statutes or regulations or any statute or regulation of this state, regulating dangerous drugs or controlled substances, constitutes unprofessional conduct. The record of the conviction is conclusive evidence of such unprofessional conduct. A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this section.

This conclusion is further supported by the fact that his California medical license was revoked on the basis of his criminal conviction. While Respondent Fishman’s criminal conviction occurred in 1983, and he has since regained his license to practice in California, Labor Code section 139.21 does not allow its application to be contingent or conditioned upon an analysis of the basis for the provider’s past conviction and the provider’s current qualifications, functions, or duties. (Section 139.21(a)(1) uses “a”

provider of services, not “the” provider of services.) In creating Labor Code section 139.21, the Legislature simply did not authorize the Administrative Director to set aside the suspension mandate if one of the underlying conditions are satisfied. In this case, such a condition, the conviction of a crime that is otherwise substantially related to the qualifications, functions, or duties of a provider of services, was satisfied.

The record further shows that on May 25, 2018, the parties entered into a stipulation establishing that the entities of Bruce Fishman, M.D., FICS, Inc., and Family Urgent Care & Industrial Medical Clinic, are controlled by Bruce Fishman as defined in Labor Code section 139.21(a)(3).

ORDERS

IT IS HEREBY ORDERED that pursuant to Labor Code section 139.21(a)(1)(A), Respondent Bruce Fishman is hereby suspended from participating in the workers’ compensation system as a physician, practitioner, or provider.

IT IS FURTHER ORDERED that pursuant to Labor Code section 139.21(a)(1)(D), the entities of Respondent Bruce Fishman, M.D., FICS, Inc., and Family Urgent Care & Industrial Medical Clinic, Inc. are hereby suspended from participating in the workers’ compensation system at a physician, practitioner, or provider.

Date: August 27, 2020

/S/George Parisotto

GEORGE PARISOTTO
Administrative Director
Division of Workers’ Compensation