

1 STATE OF CALIFORNIA
2 DEPARTMENT OF INDUSTRIAL RELATIONS
3 DIVISION OF WORKERS' COMPENSATION
4 BEFORE THE ADMINISTRATIVE DIRECTOR

5 **In Re: PROVIDER SUSPENSION**

Case No. AD PS-17-09

6 **DETERMINATION AND ORDER**

7 **RE: SUSPENSION**

8 **FERMIN IGLESIAS,**
9 *Respondent.*

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

16 Based upon a review of the record in this case, including the July 24, 2017 recommended
17 Determination and Order re: Suspension of the designated Hearing Officer, the Acting Administrative
18 Director finds that Respondent Fermin Iglesias meets the criteria for suspension set forth in Labor Code
19 section 139.21(a) and shall be suspended from participating in the workers' compensation system as a
20 physician, practitioner, or provider. Pursuant to California Code of Regulations, title 8, section
21 9788.3(d), the Acting Administrative Director hereby adopts and incorporates the July 24, 2017
22 recommended Determination and Order re: Suspension of the designated Hearing Officer, attached
23 hereto, as the Acting Administrative Director's Determination and Order re: Suspension.

24 **IT IS HEREBY ORDERED** that Fermin Iglesias is hereby suspended from participating in the
25 workers' compensation system as a physician, practitioner, or provider.

26 Date: August 2, 2017



27 GEORGE PARISOTTO
28 Acting Administrative Director
Division of Workers' Compensation

**STATE OF CALIFORNIA
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FERMIN IGLESIAS,

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**Case No. AD PS-17-09
DETERMINATION AND ORDER
RE: SUSPENSION**

A hearing was held in the above-captioned matter on 6/13/17 pursuant to Labor Code § 139.21(b)(2). At that time, counsel for Fermin Iglesias, Respondent, submitted a hearing brief for the Hearing Officer's consideration. OD Legal requested time to file a reply brief to which no objection was made by Respondent. OD Legal was given until 7/14/17 to submit a response to Respondent's hearing brief at which time the matter was submitted for decision.

Respondent has argued the suspension provision of Labor Code § 139.21 is impermissible for the following reasons:

1. The suspension provision is a prospective law and thus cannot be applied to Respondent's criminal conduct and resulting guilty plea which predated the effective date of the statute;
2. If applied retroactively to Respondent, the suspension provision would violate the Ex Post Facto Clause of the United States and California Constitutions;
3. The suspension provision is void for vagueness under the United States and California Constitutions; and

4. The evidentiary standard applicable to hearings conducted by the DWC with respect to proposed provider suspensions pursuant to Labor Code § 139.21(a)(1), as defined in Title 8, California Code of Regulations, § 9788.3 violates the Due Process clauses of the United States and California Constitutions.

This is the undersigned Hearing Officer's Recommended Determination and Order Re: Suspension pursuant to Title 8, California Code of Regulations, § 9788.3(c).

FACTS

1. Labor Code § 139.21(a)(1) requires the Administrative Director to suspend any physician, practitioner, or provider from participating in the workers' compensation system as a physician, practitioner, or provider if the individual has been convicted of any felony or misdemeanor described in Labor Code § 139.21(a)(1)(A).

2. On 12/4/16, Respondent, Fermin Iglesias, signed a plea agreement with the United States Attorney's Office in which Respondent agreed to plead guilty to a felony, Conspiracy to Commit Honest Services Mail Fraud and Health Care Fraud in violation of 18 U.S.C. § 1349, before the United States District Court for the Southern District of California. (*Exhibit 2*).

3. Conspiracy to Commit Honest Services Mail Fraud and Health Care Fraud in violation of 18 U.S.C. § 1349 is a crime meeting the criteria given in Labor Code § 139.21(a)(1)(A).

DETERMINATION

Labor Code § 139.21(a)(1)(A) applies to Respondent, Fermin Iglesias. As a result, the Administrative Director is required to immediately suspend Respondent pursuant to Labor Code § 139.21(b)(2).

BASIS FOR DETERMINATION

Both Respondent and OD Legal have submitted briefs which have been reviewed and considered by this Hearing Officer.

Section 139.21(a)(1) requires the Administrative Director to suspend any physician, practitioner, or provider from participating in the workers' compensation system if that physician, practitioner, or provider has been convicted of a crime described in Labor Code § 139.21(a)(1)(A). There is no dispute that Respondent signed a plea agreement in which he pled guilty to Conspiracy to Commit Honest Services Mail Fraud and Health Care Fraud, 18 U.S.C. § 1349. This is a crime that is a felony and meets the criteria listed in Labor Code § 139.21(a) (1) (A). Respondent also admitted in the plea agreement as true the facts giving rise to a violation of this crime. (*Exhibit 1*) Based on the facts, and Labor Code § 139.21(a) (1), Respondent is required to be suspended from the worker's compensation system by the Administrative Director.

Respondent has argued the suspension provision is a prospective law and thus cannot be applied to his criminal conduct and resulting guilty plea which predated the effective date of the statute. Respondent argues there is no evidence that Labor Code § 139.21 should apply retroactively. Both of these arguments lack merit.

Respondent's first argument is that the statute cannot be applied retroactively prior to the effective date of the statute. To determine this we must look at the legislative intent when the statute was drafted and passed. It is clear that the legislature wanted this law to apply to all liens and lien claimants. AB1244, the bill in which Labor Code § 139.21 was enacted, dealt with existing liens and how new liens were to be filed. It changed how liens were to be filed, and required new disclosures on existing liens. This shows the clear legislative intent that the bill was to be applied retroactively as it applied to all liens. Labor Code § 139.21 gives the Division of Workers' Compensation a consolidated way to handle the liens of criminally convicted providers, as well as additional disciplinary action against the offending parties. Since the legislative intent was to apply the bill retroactively, the suspension provisions of § 139.21 would

also be applied to criminal conduct and any resulting guilty plea that occurred prior to the effective date of the statute.

When the Senate passed SB899 in 2004 one thing it did was change the methodology of how penalties were to be applied. In Green v. WCAB (2005) 70 Cal. Comp. Cas. 294, the Court of Appeal reached back to a judge's decision that issued the year before the new law passed and applied the statute retroactively changing the way penalties were to be calculated on all cases, not just on issues that arose after the law was passed. Additionally, the Court of Appeal in Kleman v. WCAB (2005) 70 Cal. Comp. Cas. 133 and Rio Linda Union School District v. WCAB (Scheftner) (2005) 70 Cal. Comp. Cas. 999 also held that SB899 was to be applied retroactively to all cases on the separate issue of apportionment. Workers' Compensation law is a creature of statute and not common law, so the legislature may apply different standards. In his plea agreement, Respondent specifically stated as true the facts giving rise to a violation of the charged allegations, which included facts establishing illegal conduct under Labor Code § 139.21(d)(1). (Ex 2 P 7) The facts alleged and agreed as true by Respondent also included the admission that he knew his conduct was illegal at the time he was committing it between the dates of 2013 through at least May 2015. (Ex 2 P 4-5) Though this conduct and resulting guilty plea predates the enactment of Labor Code § 139.21, it is clear the legislature intended the suspension provisions of the statute to apply regardless of the date of conviction, and thus the statute has been properly applied retroactively against Respondent.

Respondent's second argument is that the suspension provision of Labor Code § 139.21 is an unconstitutional violation of the Ex Post Facto Clause of the United States and California Constitutions. That determination is not within the scope of this hearing officer's jurisdiction. Therefore, whether or not Labor Code § 139.21 et al is an unconstitutional ex post facto law, is not a factor this Hearing Officer can determine and it cannot be a basis for a decision in this matter at this Hearing.

Respondent also argues the suspension provision of Labor Code § 139.21 is void for vagueness under the United States and California Constitutions because the statute fails to

adequately define the term “convicted”, and also fails to adequately define the type of criminal conduct which will trigger its application. As previously noted this hearing officer does not have jurisdiction over claims of constitutional violations and a determination that Labor Code § 139.21 is void for vagueness on constitutional grounds will not be addressed. This hearing officer will make a finding that the statute is not vague on its face, and is able to be interpreted based on its plain meaning and is the basis for the hearing at hand.

Labor Code § 139.21 requires the Director to suspend a physician or provider who has been “convicted” of certain crimes, and although the statute does not define the term “convicted,” it is easily interpreted. The term “convicted” has two possible definitions. The first possible definition has been described as follows: “It has been settled law for over 250 years that a person stands ‘convicted’ upon the return of a guilty verdict...*or by the entry of a plea admitting guilt.*” (People v Davis (2010) 185 Cal App. 4th 998, 1001 [emphasis added].) Under this definition, Respondent has been convicted. The second possible definition has been described as “an *exception to the general rule* of the term. Where a civil penalty, such as disenfranchisement or debarment from office, follows as a consequence of the conviction, the conviction is held not to occur until sentence has been pronounced.” (*Id.* [emphasis added].) Under this definition. Respondent has not yet been convicted. The first definition of the term “conviction” has been described by the courts as its “primary” and “ordinary” definition. (Davis, supra, 185 Cal. App 4th at 1001.) There is no reason not to use the “primary” and “ordinary” definition of the term “convicted” in interpreting Labor Code § 139.21, particularly in the absence of any evidence that the definition described as an “exception” should be used. Under the very similar suspension process for Medi-Cal, a provider may be suspended if convicted of certain crimes, and “[a] plea...of guilty...is deemed to be a conviction within the meaning of this section.” (Welfare and Institutions Code § 14123.) This Hearing Officer concludes there is no reason not to interpret the term “conviction” in Labor Code § 139.21 to mean a plea of guilty. Respondent has signed a plea agreement with the United States Attorney’s Office admitting that he committed a crime described in Labor Code § 139.21(a)(1)(A), thus Respondent has been “convicted” within the meaning of the statute.

Respondent argues the suspension provisions of Labor Code § 139.21 are unconstitutionally vague because the statute does not adequately define the criminal offenses that will trigger its application. Labor Code § 139.21(a)(1) states the Administrative Director shall suspend from the worker's compensation system a physician, practitioner or provider, who is convicted of a crime that falls within certain specified criteria listed in Labor Code § 139.21 (a) (1). There is no vagueness, but rather in order for the suspension provisions to apply, the statute provides that the individual must meet one of the specific listed criteria that includes a conviction of specifically described crimes. This is not an endless list of offenses as Respondent argues, but rather the statute clearly defines certain types of crimes that will result in a suspension. A provider is given an opportunity in the statute to show the crime for which they were convicted of is not of the type of offence listed, and therefore should not give rise to the suspension provisions. Respondent was given this opportunity, but never argued the crime he was convicted of didn't come within any of the listed descriptions. He was convicted of a crime due to acts he committed which amounted to fraud within and against the worker's compensation system. It is clear from the facts admitted in the plea agreement that the crime Respondent was convicted of comes within one of the descriptions listed in Labor Code § 139.21(a)(1)(A)(i)-(iv) based on the plain meaning of the statute. He is exactly the sort of provider to whom the suspension provisions of the statute is intended to apply.

Respondent also argues the evidentiary standards contained in Title 8 California Code of Regulations § 9788.3 are so minimal as to "invite an "evidentiary "food fight" where either party could hurl any "evidence" of very questionable veracity and credibility with the only limitation being that be "the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs."", and that "the burden on the DWC to conduct an procedurally appropriate hearing subject to the usual rules of evidence is minimal." Respondent asserts the hearings conducted by the DWC pursuant to Labor Code § 139.21 violate the due process clauses of the United States and California constitutions. This Hearing Officer will not address the constitutional issues but will briefly respond to Respondent's argument.

Respondent's argument ignores the regular litigation procedure of each side submitting evidence for admission, subject to objection by the opposing side, and a judicial officer ruling on any objections to the evidence and its admissibility. The evidence offered by the parties for admission need not be admissible, and may be of very questionable veracity and credibility and thus inviting an objection. The real issue is that Respondent has failed to show he has been prejudiced by the suspension hearing being conducted according to the Reg. § 9788.3 procedure. Respondent participated in the hearing and made no objection to the evidence submitted by OD Legal, nor did Respondent object to any other matters at the hearing. Respondent also questions the evidentiary standard with the question "what kind of evidentiary standard is that?" The evidentiary standard in Reg. § 9788.3 is the same used in Government Code § 11513(c) that is applicable to other administrative hearings.

The hearings conducted pursuant to the suspension provisions of Labor Code § 139.21 are not conducted according to the technical rules relating to evidence and witnesses, nor are the hearings as formal as a civil court proceeding. The hearings are not a WCAB proceeding, but it should be noted that Labor Code § 5709 states no informality in a WCAB proceeding nor the admission of evidence not admissible under the common law or statutory rules of evidence shall invalidate any decision made. The Legislature described the suspension hearings in Reg. § 9788.3 as not being conducted according to the technical rules of evidence and witnesses, and as such there is no reason not to apply the same reasoning from Labor Code § 5709 and for this Hearing officer to find the informality of the proceedings alone does not invalidate the proceedings.

For the foregoing reasons, a determination was made that Labor Code § 139.21(a)(1)(A) applies to Respondent, and immediate suspension is therefore required by Labor Code § 139.21(b)(2).

ORDER

IT IS ORDERED that Fermin Iglesias is hereby suspended from participating in the workers' compensation system as a physician, practitioner, or provider.

Date: 07/24/2017



William E. Gunn

Hearing Officer