

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 Case No. PAS 0040032

4 **LOUIS JONES,**

5 *Applicant,*

6 vs.

7 **TARGET STORES; CONSTITUTION
STATE SERVICES,**

8 *Defendants.*

9
10 **OPINION AND ORDER
GRANTING RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

11 Defendant employer seeks reconsideration of the Findings of Fact and
12 Order issued August 11, 1998, in which Workers' Compensation
13 Administrative Law Judge (WCJ) George C. Rothwell found that defendants
14 "are to pay to lien claimant Integrative Industrial [II] the sum of \$666.16
15 which may be adjusted to reflect credit for any subsequent payments made
16 and/or any additional services rendered." WCJ Rothwell found that II had
17 not violated Labor Code section 139.3 (§ 139.3), and therefore ordered
18 defendant to pay the lien claim in an adjusted amount.

19 Defendant contends error, asserting that Dr. Peter Lucero, applicant's
20 physician and a salaried staff physician employed by II, illegally referred
21 applicant for physical therapy (PT) to be performed at the same clinic where
22 Dr. Lucero was employed, by therapists who were also employees of II.
23 Defendant alleges that it has no duty to pay II's lien claim for the PT it
24 provided because the referral was unlawful pursuant to § 139.3 and Labor
25 Code section 139.31(e) (§ 139.31(e)).

26 Based on the record, and for the reasons set forth below, we will grant
27 reconsideration, rescind the decision of August 11, 1998, and issue a
substitute decision finding that defendant is not liable for II's lien claim. We

1 will also take this opportunity to note that § 139.31(e), as presently stated,
2 simply omits the word “shall” in the phrase referring to the need for
3 preauthorization.

4 I.

5 The facts disclose that applicant Louis Jones, a stocker born March
6 15, 1998, sustained an admitted industrial injury to his low back, left foot
7 and left leg on December 16, 1995. Defendant voluntarily provided benefits,
8 including medical treatment. Applicant subsequently selected Dr. Lucero of
9 the Integrative Industrial and Family Practice Medical Clinic (II) as his free-
10 choice primary treating physician. Dr. Lucero ordered PT for applicant, and
11 referred him to the therapists employed by II, his own employer.

12 On March 25, 1996, defendant wrote Dr. Lucero authorizing treatment
13 but requesting that it be contacted for authorization for referrals for PT,
14 diagnostic studies, and similar procedures. In its letter, defendant first
15 raised the issue of § 139.3. Defendant raised the same statutory issue in
16 subsequent correspondence dated April 9, 1996, May 30, 1996, August 30,
17 1996, and September 24, 1996 and also requested the names and
18 qualifications of the people providing PT, as well as Dr. Lucero’s
19 qualifications and curriculum vitae (CV). Defendant did not receive any
20 response(s) to these requests.

21 On November 13, 1996, defendant filed a Motion to Disallow II’s lien
22 claims in their entirety, and to strike II’s medical reports, based upon II’s
23 alleged failure to produce the requested information (see Lab. Code §4628
24 (e) (k); § 139.31(e)).

25 On November 16, 1996, a Mandatory Settlement Conference (MSC)
26 was held and the parties prepared Stipulations and Issues in which
27 defendant again raised the issue of II’s alleged violation of both § 139.3 and

1 § 4628(k). The matter was continued on notice to the trial calendar, but
2 before the matter came up for trial, II partially complied with defendant's
3 requests and served a copy of Dr Lucero's CV on January 7, 1997. Dr.
4 Lucero's CV noted that he held three physician positions (a full time
5 position at the L.A. Multi-Specialty Medical Center, a staff position at The
6 California Hospital Medical Center, and a part-time position at the
7 Department of Social Services), but it did not indicate Dr. Lucero's
8 employment by II. II simultaneously served a request that the lien issues be
9 set for trial.

10 On January 30, 1997, pursuant to Stipulations With Request for Award
11 (SWRA) submitted by the parties, the parties resolved the principal issues in
12 this case and an Award issued which was approved by the WCJ. The Award
13 provided that applicant was entitled to future medical treatment pursuant to
14 Dr. Lucero's opinion, but the SWRA deferred II's lien claim of \$3,879.74 for
15 medical-legal expenses, providing instead that defendant was to pay, adjust,
16 or litigate it in the future. A Lien Trial was scheduled for July 16, 1997,
17 before WCJ Rothwell.

18 At trial on July 16, 1997, the parties agreed to submit the issue of the
19 alleged violation of § 139.3 for decision on the record, with each party
20 having the opportunity to file Points and Authorities and/or written
21 argument. After considering both parties' arguments, WCJ Rothwell
22 determined that Dr. Lucero's referral of applicant to his employer for PT
23 was not in violation of § 139.3. It is from this ruling that defendant seeks
24 reconsideration.

25 II.

26 In his Report and Recommendation on Petition for Reconsideration
27 (Report), the WCJ indicates that the "crux of the dispute in this case is one

1 of statutory interpretation of the provisions of [§§] 139.3 and 139.31.” He
2 also points out that applicant received PT at II, both before and after
3 issuance of the Stipulated Award of January 30, 1997; that defendant has
4 consistently objected to this treatment, alleging it was obtained in violation
5 of § 139.3; and that defendant nevertheless appears to have made
6 substantial payments to II.

7 Section 139.3 makes unlawful a physician’s referral to a person or
8 entity with which the physician has a financial interest, and states, in
9 pertinent part:

10 “(a) Notwithstanding any other provision of law, to the
11 extent those services are paid pursuant to Division 4
12 (commencing with Section 3200), it is *unlawful* for a
13 *physician to refer* a person for clinical laboratory,
14 diagnostic nuclear medicine, radiation oncology,
15 *physical therapy*, physical rehabilitation, psychometric
16 testing, home infusion therapy, or diagnostic imaging
17 goods or services *whether for treatment or medical-*
18 *legal purposes if the physician* or his or her immediate
19 family has a *financial interest* with the person or in the
20 entity that *receives the referral*.

21 “(b) For purposes of this section and Section 139.31,
22 the following shall apply:

23

24 “(3) "Physician" means a physician as defined in Section
25 3209.3.

26 “(4) A "*financial interest*" includes, but is not limited to,
27 any type of ownership, interest, debt, loan, lease,
compensation, remuneration, discount, rebate, refund,
dividend, distribution, subsidy, or other form of direct
or indirect payment, whether in money or otherwise,
between a licensee and a person or entity to whom the
physician refers a person for a good or service specified
in subdivision (a)....

“(5) A "*physician's office*" is either of the following:

1 “(A) An office of a physician in solo practice.

2 “(B) An *office* in which the *services* or goods are
3 *personally provided by the physician or by employees in*
4 *that office*, or personally by independent contractors in
5 that office, in accordance with other provisions of law.
6 Employees and independent contractors shall be
7 licensed or certified when that licensure or
8 certification is required by law.

9 “(6) The "office of a group practice" is an office or
10 offices in which two or more physicians are legally
11 organized as a partnership, professional corporation, or
12 not-for-profit corporation licensed according to
13 subdivision (a) of Section 1204 of the Health and Safety
14 Code for which all of the following are applicable:

15

16 “(f) *No insurer, self-insurer, or other payor shall pay a*
17 *charge or lien for any good or service resulting from a*
18 *referral in violation of this section.*” (Emphases added.)

19 **Exceptions to § 139.3 are set forth in § 139.31 which states, in**
20 **pertinent part:**

21 “Section 139.31. The prohibition of Section 139.3
22 shall *not apply to or restrict* any of the following:

23

24 “(c)(1) A physician may refer a person to a *health*
25 *facility* as defined in Section 1250 of the Health and
26 Safety Code, ... *if the recipient of the referral does not*
27 *compensate the physician for the patient referral...*

.....

“(c)(3) A physician may refer a person to a health
facility for any service classified as an emergency under
subdivision (a) or (b) of the Health and Safety Code.
For nonemergency outpatient diagnostic imaging
services performed with equipment for which, when
new, has a commercial retail price of four hundred
thousand dollars (\$400,000) or more, the *referring*
physician shall obtain a service preauthorization from
the insurer, or self-insured employer. Any oral

1 authorization shall be memorialized in writing within
2 five business days.

3 ...

4 “(e) The prohibition of Section 139.3 *shall not apply to*
5 *any service* for a specific patient that is *performed*
6 *within*, or goods that are supplied by, a *physician's*
7 *office*, or the office of a group practice. Further, the
8 provisions of Section 139.3 *shall not alter, limit, or*
9 *expand* a physician's ability to deliver, or to direct or
10 supervise the delivery of, *in-office* goods or *services*
11 according to the laws, rules, and regulations governing
12 his or her scope of practice. With respect to
13 diagnostic imaging services ... or for *physical therapy*
14 services, ... the referring physician *[] obtains* a *service*
15 *preauthorization* from the insurer or self-insured
16 employer. Any oral authorization shall be memorialized
17 in writing within five business days.

18 “(f) The prohibition of Section 139.3 *shall not apply*
19 where the physician is in a group practice as defined in
20 Section 139.3 and refers a person for services
21 specified in Section 139.3 to a multispecialty clinic, as
22 defined in subdivision (l) of Section 1206 of the Health
23 and Safety Code. For diagnostic imaging services[,] ...
24 or *physical therapy services*, ... the referring physician
25 *shall obtain a service preauthorization* from the insurer
26 or self-insured employer. Any oral authorization shall
27 be memorialized in writing within five business days.

“(g) The *requirement for preauthorization* in sections
(c), (e), and (f) *shall not apply to a patient for which*
the physician or group accepts payment on a capitated
risk basis.

20 The record discloses that Dr. Lucero testified he worked at II for a flat
21 salary which did not depend upon the number of people he treated or the
22 extent of the treatment he provided. Dr. Lucero further stated he was free to
23 refer patients to other medical groups for therapy when he felt it was
24 warranted. Because Dr. Lucero's compensation did not depend upon the
25 number of patients he referred or the duration of the treatment they
26 received, the WCJ found there was no “quid pro quo” and therefore found no
27 violation of § 139.3. The WCJ further noted that the sole remaining issue is

1 whether Dr. Lucero's referral was statutorily authorized by the "physician's
2 office" exception set forth in § 139.31(e).

3 We agree with the WCJ that the facts establish that Dr. Lucero did not
4 have a "financial interest" in referring patients for PT to II's therapists, since
5 his salary ("compensation") was independent of any such referrals. We also
6 agree that the present factual situation may come within the exception
7 described in § 139.31(e) which deals with a service being provided to a
8 specific patient within a physician's office. Furthermore, the final two
9 sentences of subsection (e), like the final two sentences of subsections (c) and
10 (f), require that the referring physician first obtain a preauthorization from
11 the insurer or self-insured employer, or in the case of an oral authorization,
12 that it be memorialized in writing within five days.

13 In the present case, it appears that while the service may have been
14 performed within the physician's office, the condition precedent of a
15 preauthorization was not obtained, which would thus preclude recovery.
16 Furthermore, because the II group does not appear to accept payment on a
17 capitated basis, § 139.31(g) is inapplicable to the present factual situation, but
18 it additionally evidences legislative intent to require the preauthorization
19 procedures set forth in subsections (c), (e), and (f). We finally note, however,
20 that the word "shall" appears simply to have been omitted in subsection (e) in
21 the phrase referring to the preauthorization requirement, and the word
22 "obtains" is erroneously substituted for "obtain." This omission appears to be
23 a drafting error in subsection (e), since the plain language contained in
24 subsections (c) and (f) appears to be the correct phrasing for the
25 preauthorization requirement. Accordingly, for purposes of a plain reading of
26 the statute, we are persuaded that the language of the preauthorization
27

1 requirement set forth in subsections (c), (e), and (f) should be understood as
2 meaning that the referring physician “shall obtain” such preauthorization.

3 Given this record, and in light of II’s failure to obtain the requisite
4 statutory preauthorization for Dr. Lucero’s PT referral, and particularly in light
5 of the employer’s request for such preauthorization as well as its consistent
6 objection to the PT absent such preauthorization, we are persuaded that
7 defendant employer is not liable for II’s lien claim for PT. Accordingly, we
8 will rescind the WCJ’s decision of August 11, 1998, and issue a substitute
9 decision finding that II’s recovery is barred by its failure to obtain
10 preauthorization pursuant to § 139.31(e).

11 For the foregoing reasons,

12 **IT IS ORDERED** that defendant employer’s Petition for Reconsideration
13 filed August 26, 1998 is **GRANTED**.

14 **IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the
15 Workers’ Compensation Appeals Board, that the Finding of Fact and Order
16 issued August 11, 1998 is **RESCINDED**, and the following is **SUBSTITUTED** in
17 its place:

18 **“FINDING OF FACT**

19 “1. The physical therapy portion of the lien claim of Integrative
20 Industrial and Family Practice Medical Clinic, which provided physical therapy
21 to applicant pursuant to the referral of its staff physician, Dr. Peter Lucero,
22 without obtaining preauthorization for such therapy as set forth in Labor Code
23 section 139.31(e), is denied.

24 ///

25 ///

26 ///

27 ///

1 **"ORDER**

2 **"IT IS HEREBY ORDERED** that lien claimant Integrative Industrial
3 Family Practive Medical Clinic shall take nothing further with respect to that
4 portion of its lien claim for physical therapy as set forth above."

5 **WORKERS' COMPENSATION APPEALS BOARD**

6
7
8 /s/ Richard P. Gannon

9
10 **I CONCUR**

11
12 /s/ Douglas M. Moore, Jr.

13
14 /s/ Arlene N. Heath

15
16 **DATED AND FILED IN SAN FRANCISCO, CALIFORNIA**

17 *October 26, 1998*

18 **SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE**
19 **OFFICIAL ADDRESS RECORD EXCEPT LIEN CLAIMANTS BUT SERVING**
20 **LIEN CLAIMANT INTEGRATED INDUSTRIAL AND FAMILY MEDICAL**
21 **CLINIC/DR. PETER LUCERO.**

22 *csl*