STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

DIVISION OF WORKERS' COMPENSATION

BEFORE THE ADMINISTRATIVE DIRECTOR

In Re: PROVIDER SUSPENSION **MITCHELL G. COHEN,** *Respondent.*	**Case No. AD PS-17-03** **DETERMINATION AND ORDER RE: SUSPENSION**

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).

Based upon a review of the record in this case, including the recommended Determination and Order re: Suspension of the designated Workers' Compensation Administrative Law Judge, the Acting Administrative Director finds that Respondent Mitchell G. Cohen meets the criteria for suspension set forth in Labor Code section 139.21(a) 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 Acting Administrative Director hereby adopts and incorporates the recommended Determination and Order re: Suspension of the Workers' Compensation Administrative Law Judge as the Acting Administrative Director's Determination and Order re: Suspension.

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IT IS HEREBY ORDERED that Mitchell G. Cohen is hereby suspended from participating in the workers' compensation system as a physician, practitioner, or provider.

Date: April 3, 2017

GEORGE PARISOTTO
Acting Administrative Director
Division of Workers' Compensation

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

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In Re: PROVIDER SUSPENSION

MITCHELL G. COHEN, M.D.,
Respondent.

Case No. AD PS-17-03

DETERMINATION AND ORDER

RE: SUSPENSION

A hearing was held in the above-captioned matter on March 1, 2017 pursuant to Labor Code section 139.21(b)(2). At that time, counsel for the parties requested and were granted time to file and serve hearing briefs. The lead brief by counsel for Dr. Cohen was to be filed by the close of business on Monday, March 13, 2017 and counsel for OD Legal was given until March 17, 2017 to serve and file a reply brief, the matter would stand submitted as of Monday, March 13, 2017. A continuation of this briefing schedule was requested by OD Legal and was granted and the briefs were due as follows: Dr. Cohen, March 13, 2017, and OD Legal by March 24, 2017. The matter was to stand submitted on 3/24/17 at 5:00 p.m.

At the Hearing Dr. Cohen raised two issues; 1. Is there a conviction under federal law that has been entered? 2. The crime for which he was convicted, Tax Fraud, did not go to the practice of medicine and therefore his right to participate in the workers' compensation system should not be suspended, and his third issue raised for the first time in the trial brief was 3. That the notice issued to Dr. Cohen for his suspension was not proper as it failed to give him due process and to set forth the specific section of Labor Code §139.21 he supposedly violated.

Dr. Cohen's statement of facts is inaccurate. On page three, lines 3-15 of his brief he discusses learning of a raid on a hospital and at that time learning that the contracts he entered into might not be legal. These contracts have been illegal under the Labor Code since 1994. This conduct of receiving kickbacks was already illegal under Labor Code §139.3 which was adopted in 1993 and specifically stated that it is to apply to dates of injury after 1/1/94. This conduct of accepting kickbacks was already a misdemeanor under 139.3(g) and the defendant was already not liable for payment of these liens 139.3(f).

Here, the new statute Labor Code §139.21 gives the Department of Workers' Compensation a consolidated way to handle the liens, as well as additional disciplinary action against the offending parties. The conduct Dr. Cohen is accused of and pled guilty to, was already illegal under the Labor Code, and he knew it was at the time he entered into the contracts.

Dr. Cohen's first argument is that there is no conviction yet as it has not been entered into the record. Respondent's Exh. A shows the guilty plea was entered into the record on 12/18/15. Sentencing was continued many times and is now set for 7/14/17 and that the matter is pending. Based on a transcript of the hearing the only thing left for the court to determine is sentencing. The argument that there is no conviction until the judgement is entered, to this hearing officer is not borne out by the facts. Even if the respondent were able to back out of the plea agreement, everything stated in the plea agreement can be used against him. He admits to taking illegal kickbacks. This conduct alone means he cannot collect on the liens associated with that kickback scheme under either Labor Code §139.21 or Labor Code §139.3. A conviction occurs when a defendant is tried and convicted or pleads guilty to a crime, As set forth in the OD Legal Reply Brief, the rule Dr. Cohen relies on to suggest he is not yet convicted arises in a separate section of the Federal Rules of Criminal Procedure. Rule 32(k)(1) of Title VII is titled Post Conviction Procedures, which by its name means the conviction has already been entered. Labor Code §139.21(a)(1)(A) requires a conviction, and this test has been met. Dr. Cohen has been convicted of a qualifying felony for purposes of this statute. There is no due process violation.

Dr. Cohen argues his second point that pleading guilty to tax fraud is not one of the enumerated prohibited or criminal conducts under Labor Code §139.21(a)(1)(A). This guilty plea stemmed from the taking of illegal kickbacks for performing surgeries, using specific hardware during the surgeries, and failing to report that income. This is specifically what is contemplated in all four subsections of Labor Code §139.21(a)(1)(A). This relates to patient care as surgeries may have been done that were not or were marginally necessary and the defendants in those cases ended up spending more money on each surgery due to this kickback scheme. We cannot look just to the crime he pled guilty to but also to the conduct that led to the conviction. Clearly subsections (i), and (ii) deal with patient care and the conduct of doing surgeries for profit questions the need for the patient care, the illegal kickback scheme clearly falls within subsections (iii), (iv). Subsection (ii) deals with financial crimes that deal with workers'

compensation which clearly this is and subsection (iv) is also met as this brings into question that the conduct was substantially related to the qualifications, functions or duties of a provider. There is no doubt Dr. Cohen's conduct fell within these parameters and specifically within subsection (ii). As pointed out in OD Legal's reply brief on page 4 lines 2-19, the filing of a false tax return by a doctor was determined to be a crime that was related to the practice of medicine and the Court of Appeal in ***Windham v. Board of Medical Quality Assurance*** *(1980) 104 Cal. App. 3d 461* held that the filing of a false tax return was related to the practice of medicine. It further said that because the doctor's specialty was forensic medicine it demanded a higher standard of honesty concerning examination and testifying. In workers' compensation the courts rely on the doctors to determine levels of disability, temporary and permanent, current and future medical treatment needs. They act as the forensic doctors for the courts. Up until 12/7/15 when Dr. Cohen was suspended due to this conviction, he was a Qualified Medical Evaluator for the State of California acting as an independent doctor conducting examinations and evaluations of the injured applicants. He was acting as a forensic specialist for the Board. Here Dr. Cohen's pleading guilty to tax fraud is directly related to his credibility and the credibility of his reporting which the courts must rely on. Dr. Cohen's taking the kickbacks did violate Labor Code §§139.21(a)(1)(A)(i), (ii), (iii) and (iv).

The last argument raised was the due process argument that the notice by the Administrative Directive was defective as it failed to set forth the specific grounds for the suspension as required by 8 Cal. Code of Regs §9788.1(2). It is true the notice was defective in that it did not set forth with specificity the subsection that was violated. However, as the court requested trial briefs on all issues and delayed submission of this matte until receipt of the trial briefs, Dr. Cohen was given due process to address this defect. The facts clearly show that Dr. Cohen violated subsection (iii) as this was a financial crime that arose out of the worker's compensation system. It has been a crime since 1993 when Labor Code §139.3 was passed and enacted by the legislature. When the doctor accepted the kickbacks it was already illegal within the workers' compensation system. Labor Code §§139.21(a)(1)(A) procedurally established a way to handle this illegal conduct and the liens associated therewith.

Labor Code §139.21(e) states that once a doctor is convicted, it is not just the liens of the doctor which go into the special adjudication process but also any liens filed by "any clinic, group or corporation in which the suspended physician, practitioner, or provider has an

ownership interest." This is further reiterated in Labor Code §4615. Here the plea agreement indicates that Dr. Cohen passed these kickbacks through several entities, Dr. Mitchell G. Cohen, Mitchell G. Cohen, M.D., Inc., and Spine Care Center. All three entities were participants in this fraud and as such all three are subject to the suspension of their rights to participate in the workers' compensation system as a physician, practitioner, or provider. The notice though defective, was cured by allowing parties time to address all issues they needed to in the briefing schedule and due to the fact that since this conduct was already illegal under Labor Code §139.3 Dr. Cohen knew his conduct violated at a minimum Labor Code §139.21(a)(1)(A)(iii).

Therefore, based on the above, this hearing officer makes his determination that Dr. Cohen violated Labor Code §§139.21(a)(1)(A)(i), (ii), (iii) and (iv) and Dr. Mitchell G. Cohen , Mitchell G. Cohen, M.D., Inc., and Spine Care Center be suspended from participation in the workers' compensation system.

IT IS SO ORDERED that Dr. Mitchell G. Cohen, Mitchell G. Cohen, M.D., Inc., and Spine Care Center are hereby suspended from participating in the workers' compensation system as a physician, practitioner, or provider.

DATE: 3/24/17

WCJ ALAN SKELLY
Hearing Officer

CERTIFICATE OF SERVICE BY MAIL
(C.C.P. section 1013(a), 2015.5)

In Re PROVIDER SUSPENSION

I am over the age of 18 years and not a party to the entitled action. My business address is 1515 Clay Street, 18th Floor, Oakland, California 94612.

On **April 3, 2017**, I served the following document(s):

- **DETERMINATION & ORDER RE: SUSPENSION FROM WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE, ALAN SKELLY AND ACTING ADMINISTRATIVE DIRECTOR, GEORGE P. PARISOTTO**

on the following person(s) at the following address(es):

BY U.S. CERTIFIED MAIL

Mitchell Cohen
11160 Warner Avenue, Suite 305
Fountain Valley, CA 92708-4055

Counsel for Cohen:
Lindsay M. Johnson, Esq.
Ray & Bishop, PLC
5000 Birch Street, Suite 7000
Newport Beach, CA 92660-8151

The documents were served by the following means:

[X] **(BY U.S. CERTIFIED MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and:

[X] Placed the envelope or package for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope or package with the postage fully prepaid.

I declare under penalty of perjury under the laws of State of California that the above is true and correct.

Executed on **April 3, 2017**, at Oakland, California.

ROBRIELLE BEVERLY