

**WORKERS' COMPENSATION APPEALS BOARD  
STATE OF CALIFORNIA**

**DUONG TANG, *Applicant***

**vs.**

**SOLAR LINK INTERNATIONAL;  
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, *Defendants***

***Real Party in Interest:*  
KHRISTINE EROSHEVICH, *Lien Claimant***

**Adjudication Number: SAU6852145  
Van Nuys District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted the Petition for Reconsideration<sup>1</sup> filed by lien claimant Kristine Eroshevich, M.D., Ph.D. (lien claimant) in order to study further the legal and factual issues raised therein. This is our Opinion and Decision after Reconsideration.

Real party in interest and lien claimant Khristine Eroshevich (lien claimant) sought reconsideration of the “Findings of Fact & Order after Remand by the Workers’ Compensation Appeals Board” (F&O), issued on September 22, 2020 by a workers’ compensation administrative law judge (WCJ). The WCJ found in pertinent part that lien claimant was convicted of a misdemeanor for fraudulently prescribing a controlled substance in violation of Health and Safety Code section 11173, subdivision (a) (11173(a)); that this conviction was the only basis for the WCJ’s determination; and, that lien claimant failed to meet the burden of proof required to rebut the presumption set forth in Labor Code<sup>2</sup> section 139.21, subdivision (g) (section 139.21(g)); and, therefore, all liens and underlying bills for service and claims for compensation from lien claimant arise from the conduct set forth in the Order of Suspension of lien claimant pursuant to section 139.21, subdivision (a)(1)(A)(iv) (section 139.21(a)(1)(A)(iv)). The WCJ ordered in pertinent part

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<sup>1</sup> Commissioner Lowe, who previously served on the panel which granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

<sup>2</sup> All further references are to the Labor Code unless otherwise noted.

that lien claimant's liens be dismissed with prejudice and that lien claimant shall have no right to payment on all underlying bills for service and claims for compensation within the jurisdiction of the workers' compensation system.

Lien claimant contends that the WCJ denied her request to reopen discovery in violation of her right to due process given that good cause existed after the April 6, 2020 Opinion and Decision after Reconsideration (2020 Decision) issued by the Workers' Compensation Appeals Board (Appeals Board),<sup>3</sup> clarified how the WCJ should apply the section 139.21(g) presumption; that the WCJ was biased against lien claimant and pre-judged the issue presented, i.e., whether lien claimant rebutted the section 139.21(g) presumption based on the clarification in the 2020 Decision, as evidenced by the fact that the WCJ issued the decision from the bench during the hearing dismissing all lien claimant's liens; that the WCJ failed to understand or failed to heed the clarification of the law in the 2020 Decision given that the evidence submitted by lien claimant was sufficient to rebut the section 139.21(g) presumption because lien claimant had not written prescriptions for any person who was not an actual patient within the 10 years preceding her September 10, 2019 testimony.

Designated liaison counsel for the carriers filed an "Answer to Petition for 1) Reconsideration 2) Recission 3) Removal Filed by Lien Claimant Khristine Eroshevich Dated October 19, 2020" (Carrier Answer); Department of Industrial Relations Anti-Fraud Unit (DIR-AFU) filed a joinder to the Carrier Answer. The WCJ filed a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report).

We have reviewed the record in this consolidated matter as well as the allegations in the Petition for Reconsideration, the Carrier Answer, and the contents of the Report. It is our decision after reconsideration to affirm the F&O in part, but to amend the Findings of Fact and the Orders to find that lien claimant did rebut the section 139.21(g) presumption; that lien claimant's lien claims are not dismissed with prejudice; and, that adjudication of the merits of lien claimant's lien claims are deferred pending decision by the workers' compensation administrative law judge pursuant to section 139.21, subdivision (i), whether to adjudicate the liens or to transfer the liens back to the district offices having venue over the cases in which the liens were filed.

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<sup>3</sup> We incorporate the 2020 Decision as though fully set forth herein.

## DISCUSSION

Section 139.21(g) states in full:

(g) It shall be a presumption affecting the burden of proof that all liens to be adjudicated in the special lien proceeding, and all underlying bills for service and claims for compensation asserted therein, arise from the conduct subjecting the physician, practitioner, or provider to suspension, and that payment is not due and should not be made on those liens because they arise from, or are connected to, criminal, fraudulent, or abusive conduct or activity. A lien claimant shall not have the right to payment unless he or she rebuts that presumption by a preponderance of the evidence.

(Lab. Code, § 139.21(g).)

As set forth in the 2020 Decision, lien claimant seeks payment for services rendered to workers' compensation claimants in approximately 1,100 lien claims. Pursuant to section 139.21(g), those liens and all underlying bills for service and claims for compensation are presumed to have arisen from the conduct that subjected lien claimant to suspension under section 139.21(a)(1)(A), i.e., a misdemeanor conviction for prescription fraud (Lab. Code, § 139.21(g).) As a result of this presumption, no payment is due on the liens *because* the liens are presumed to have arisen from or be connected to the criminal conduct at issue. (*Ibid.*)

Thus, in order to seek payment on any one of the approximately 1,100 liens at issue herein, lien claimant had the burden of proof to establish, based on a preponderance of the evidence, that the liens did *not* "arise from" her misdemeanor conviction for prescription fraud.

We conclude that **the word "arise," in conjunction with the word "connected," has a clear, plain meaning within the context of the workers' compensation system, requiring a causal link, or nexus, between the criminal conduct and the provision of service for which a lien claimant seeks payment,** and is not ambiguous or susceptible to more than one "reasonable interpretation." (*Wells, supra*, 39 Cal.4th at p. 1190.)

...

**The Legislature expressly limited the special lien proceedings created in section 139.21(e) to those suspensions based on section 139.21(a)(1)(A).** (Lab. Code, § 139.21(e) ["the following procedures apply for the adjudication of any liens of a physician, practitioner, or provider suspended pursuant to subparagraph (A) or (D) of paragraph (1) of subdivision (a)..."].) Section 139.21(e)(2) then states that the special lien proceedings are "described in subdivisions (f) to (i), inclusive." Section 139.21(g) thereafter describes the presumption affecting the burden of proof in all section 139.21(e) lien

proceedings. Finally, given that suspension under section 139.21(a)(1)(A) requires that the provider be convicted of one of the enumerated crimes in subdivisions (i) through (iv), it appears that **the Legislature intentionally limited the application of the section 139.21(g) presumption to that conduct arising out of a conviction for one of those enumerated crimes.**

...

**Here, Dr. Eroshevich was convicted of one count of misdemeanor prescription fraud, and therefore suspended because she was convicted of a crime as enumerated in section 139.21(a)(1)(A)(iv).** Consequently, the approximately 1,100 liens she filed seeking payment for services rendered to workers' compensation claimants became subject to section 139.21(e) special lien proceedings "as described in subdivisions (f) to (i)," including the presumption of section 139.21(g). As a result of the Legislature's explicit limitation of special lien proceedings, **neither the WCJ nor the Appeals Board may consider any additional conduct that may have resulted in Dr. Eroshevich's suspension from Medicare (which in this case resulted from the temporary suspension of her medical license by the Medical Board), when determining whether she rebutted the section 139.21(g) presumption.**

(2020 Decision, pp. 22-25, bold added.)

A hearing was held on September 1, 2020 after these consolidated proceedings returned to the trial level following the 2020 Decision. (Transcript of Proceedings, September 1, 2020.) The sole issue raised and to be adjudicated was whether lien claimant rebutted the presumption "affecting the burden of proof" in section 139.21(g) that all liens and all underlying bills for service and claims for compensation asserted herein arose from the conduct subjecting her to suspension, i.e., the misdemeanor conviction for prescription fraud. (*Id.*, at p. 5.)

Contrary to lien claimant's contentions, the WCJ understood the 2020 Decision. "I could only use the fraud misdemeanor conviction." (Transcript of Proceedings, September 1, 2020, p. 6.) The WCJ understood further that he was unable to "consider any additional conduct that may have resulted in suspension from Medicare or the Medical Board in determining whether...Ms. Eroshevich had rebutted the 139.21(g) presumption." (*Ibid.*) The WCJ also understood that pursuant to the 2020 Decision, "there must be a causal link or nexus between the criminal conduct and the provision of service for which the lien claimant seeks payment." (*Ibid.*)

Lien claimant requested discovery be reopened to permit her the opportunity to address what she perceived to be a clarification of how the section 139.21(g) presumption should be adjudicated and determined by the WCJ. (Transcript of Proceedings, September 1, 2020, pp. 9-

10.) The WCJ denied the request, and issued a ruling from the bench based on the existing record and without further proceedings:

So it is also noted in her testimony that Dr. Eroshevich had issued prescriptions in her workers' compensation claims. Dr. Eroshevich offered no evidence as to show which of her workers' compensation cases did not result in prescriptions. She did not offer even a case to show that the prescriptions were not made in each or any of her workers' compensation cases or not.

So it would be my finding that there is a causal link as nexus as the Appeals Board defined between unlawful prescriptions of controlled substances and workers' compensation cases, and as no evidence is provided to confirm this is true, and as there has been no evidence timely provided to rebut the presumption as required, and as the lien claimant has not met the burden of proof under 139.21(g), the provider lien claimant is found to have lost the right to pursue payment on all active liens on lien claims.

It is my decision and is so ordered.

(Transcript of Proceedings, September 1, 2020, pp. 7-8.)

The 2020 Decision returned this matter to the WCJ to issue a new findings and order based on the existing record and/or to open the record, at the WCJ's discretion. We do not agree with lien claimant that it was an abuse of discretion by the WCJ to deny her request to reopen discovery after the 2020 Decision; we concur with the WCJ that the existing record at the time of the September 1, 2020 hearing was sufficient to make a determination on the issue presented.<sup>4</sup> However, we disagree with the WCJ's interpretation and application of the section 139.21(g) presumption in this matter and thus, the conclusion and finding that lien claimant failed to rebut the presumption.

In finding that lien claimant failed to rebut the section 139.21(g) presumption, the WCJ broadly extended the presumption to include not just the 2006 conduct resulting in the lien claimant's conviction, but to any and all *potentially* fraudulent conduct related to *any* prescription she may have written in any of the claims at issue herein – whether or not she was convicted or even charged with a crime in connection with that *potential* conduct. The Appeals Board has since

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<sup>4</sup> Even had lien claimant brought a proper petition for disqualification pursuant to section 5311 and WCAB Rule 10960 (Cal. Code Regs., tit. 8, § 10960) – **which lien claimant did not** - we do not agree with lien claimant that the WCJ's statements from the bench constituted grounds for disqualification. (See *Mackie v. Dyer* (1957) 154 Cal.App.2d 395; *Taylor v. Industrial Acc. Com. (Thomas)* (1940) 38 Cal.App.2d 75 [5 Cal.Comp.Cases 61]; cf. *Kreling v. Superior Court* (1944) 25 Cal.2d 305.)

rejected this broad interpretation of the section 139.21(g) presumption in *Aguilar v. Brady SoCal, Inc.*, 2024 Cal. Wrk. Comp. P.D. LEXIS 6 (“*Aguilar*”). In a dispute involving the proper scope of discovery in a section 139.21(g) presumption matter, the carriers in *Aguilar* argued for the same broad interpretation of the presumption as was relied on by the WCJ in this matter. (*Id.*, at \*14-15.) The panel in *Aguilar* rejected the argument stating:

The Carriers interpret the Labor Code section 139.21(g) presumption to extend very broadly to any fraudulent or abusive conduct by the medical provider, whether or not the provider has been convicted or even charged with a crime in connection with the conduct. This interpretation contravenes the language in Labor Code section 139.21(g), which limits application of the presumption to the conduct that subjected the provider to suspension from the workers’ compensation system. Pursuant to Labor Code section 139.21(a)(1)(A), providers can only be suspended if they have been convicted of one or more of the crimes specified in the statute. Therefore, the presumption cannot extend to conduct that did not result in a conviction. Secondly, only convictions relied upon by the Administrative Director to suspend the provider are relevant to the presumption. Therefore, for purposes of the application of the Labor Code section 139.21(g) presumption, discovery is confined to the crime for which the provider was convicted that was used by the Administrative Director as the basis for suspending the provider from the workers’ compensation system. More far ranging discovery may be appropriate to the litigation of the lien claims that survive the application of the presumption, if any.

(*Aguilar, supra*, at \*14-15.)

We concur with the reasoning of the panel in *Aguilar*.

Here, lien claimant was suspended from participating in the workers’ compensation system on December 8, 2017. (2020 Decision, p. 8; see Defense Exh. I, DIR/DWC Determination and Suspension Order, 12/8/2017.) The conviction subjecting lien claimant to suspension pursuant to section 139.21 (a)(1)(A)(iv), and thus to subdivision (e) proceedings and the section 139.21(g) presumption, was a conviction for one misdemeanor count of obtaining a controlled substance by fraud in violation of Health and Safety Code section 11173(a). (2020 Decision, p. 4.) This conviction involved a single prescription for Hydrocodone (Vicodin), written on November 24, 2006 by lien claimant in the name of a person without that person’s knowledge. (*Ibid.*) On a motion for new trial, Superior Court Robert J. Perry reduced the jury’s verdict on various felony counts against lien claimant to the one misdemeanor count involving the November 24, 2006 prescription and imposed summary probation with no supervision, and a \$100 fine that was stayed unless she violated probation. (*Ibid.*)

Pursuant to the un rebutted and undisputed testimony of lien claimant, she began treating workers' compensation patients approximately 10 years prior to September 10, 2019, i.e., 2009. (2020 Decision, p. 10, citing Transcript of Proceedings, September 10, 2019.) As stated, the conduct for which lien claimant was convicted was a fraudulent prescription written by lien claimant on *November 24, 2006*. Given that lien claimant did not begin treating the workers' compensation claimants (whose treatment liens are at issue in these consolidated proceedings) until at the earliest *2009*, it is not possible that any of the liens identified in these consolidated proceedings or the underlying bills for service arose from a conviction based on one fraudulent prescription written in 2006. *In this matter*, it is that one fraudulent prescription that constitutes the sum total of "the conduct subjecting the physician, practitioner, or provider to suspension..." (Lab. Code, § 139.21(g).)

We also reiterate our conclusion from the 2020 Decision that *in this matter*, the conviction subjecting lien claimant to suspension pursuant to section 139.21(a)(1)(A)(iv), and thus to subdivision (e) proceedings did not affect her fitness to practice medicine to such a degree that no services provided after the commission of that crime could be "reasonably, actually, [or] necessarily incurred..." (Lab. Code, § 4621 (a)). (See 2020 Decision, §IV, pp. 25-26.)

Accordingly, there is sufficient evidence in the existing record to find that lien claimant did rebut the presumption "affecting the burden of proof" in section 139.21(g) that her lien claims "and all underlying bills for service and claims for compensation asserted therein, [arose] from the conduct subjecting the physician, practitioner, or provider to suspension..." (Lab. Code, § 139.21(g).)

For the foregoing reasons,

**IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Order after Remand by the Workers' Compensation Appeals Board issued on September 22, 2020 by a workers' compensation administration law judge is **AFFIRMED** except that it is **AMENDED** as follows:

#### **FINDINGS OF FACT**

...

4. The case of Duong Tang SAU6852145/ADJ6852145 is the designated master file for the cases consolidated herein pursuant to Labor Code section 139.21, subdivision (e) (subdivision (e) proceedings) ["(e) The following procedures apply for the adjudication

- of any liens of a physician, practitioner, or provider suspended pursuant to subparagraph (A) or (D) of paragraph (1) of subdivision (a)...”]. The consolidated cases herein relate to suspended lien claimant Khristine Eroshevich (lien claimant) and was heard and regularly submitted before a workers’ compensation administration law judge on September 1, 2020.
5. The sole issue raised and adjudicated was whether lien claimant rebutted the presumption “affecting the burden of proof” in Labor Code section 139.21, subdivision (g), that all liens identified in these consolidated proceedings “and all underlying bills for service and claims for compensation asserted therein, [arose] from the conduct subjecting the physician, practitioner, or provider to suspension...” (Lab. Code, § 139.21(g).)
  6. The liens identified in these consolidated proceedings are those filed in the cases listed in Exhibit X, which was originally taken into evidence on August 28, 2018 and updated in Attachment 2 to the March 19, 2019 Amended Minutes of Hearing.
  7. The conviction subjecting lien claimant to suspension pursuant to Labor Code section 139.21, subdivision (a)(1)(A)(iv), and thus to subdivision (e) proceedings, was a conviction for one misdemeanor count of obtaining a controlled substance by fraud in violation of Health and Safety Code section 11173, subdivision (a). This conviction involved a single prescription for Hydrocodone (Vicodin), written on November 24, 2006 by lien claimant in the name of a person without that person’s knowledge. On a motion for new trial, Superior Court Robert J. Perry reduced the jury’s verdict on various felony counts against lien claimant to the one misdemeanor count involving the November 24, 2006 prescription and imposed summary probation with no supervision, and a \$100 fine that was stayed unless she violated probation.
  8. Lien claimant began treating workers’ compensation patients in approximately 2009 and was suspended from participating in the workers’ compensation system on December 8, 2017.
  9. The conduct for which lien claimant was subjected to suspension as set forth in paragraph 7, *supra*, was a fraudulent prescription written by lien claimant on November 24, 2006. Given that it is undisputed that lien claimant did not begin treating the workers’ compensation claimants whose treatment liens are at issue in these



consolidated proceedings until at the earliest 2009, it is not possible that any of the liens identified in these consolidated proceedings or the underlying bills for service arose “from the conduct subjecting the physician, practitioner, or provider to suspension...” (Lab. Code, § 139.21(g).)

10. The conviction subjecting lien claimant to suspension pursuant to Labor Code section 139.21, subdivision (a)(1)(A)(iv), and thus to subdivision (e) proceedings, as set forth in paragraph 7, *supra*, did not necessarily affect her fitness to practice medicine to such a degree that no services provided after the commission of that crime could be “reasonably, actually, [or] necessarily incurred...” (Lab. Code, § 4621 (a).)
11. Lien claimant rebutted the presumption “affecting the burden of proof” in Labor Code section 139.21, subdivision (g), that all liens identified in these consolidated proceedings “and all underlying bills for service and claims for compensation asserted therein, [arose] from the conduct subjecting the physician, practitioner, or provider to suspension...” (Lab. Code, § 139.21(g).)

### **ORDER**

...

c) **IT IS ORDERED** that that the lien claims of real party in interest and lien claimant Khristine Eroshevich are **NOT DISMISSED** with prejudice because lien claimant successfully rebutted the presumption affecting the burden of proof in in Labor Code section 139.21, subdivision (g), as set forth in the Findings of Fact numbers 4 through 11.

d) **IT IS ORDERED** that adjudication of the merits of the lien claims of real party in interest and lien claimant Khristine Eroshevich is deferred pending decision by the workers' compensation administrative law judge pursuant to Labor Code section 139.21, subdivision (i), whether to adjudicate the liens or to transfer the liens back to the district offices having venue over the cases in which the liens were filed.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

**I CONCUR,**

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**August 30, 2024**

**SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED ON THE FOLLOWING PAGE AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

**AJF/abs**

I certify that I affixed the official seal of the  
Workers' Compensation Appeals Board to this  
original decision on this date. *abs*

**SERVICE LIST**

**DAVID BAUTISTA, HEARING REP.  
KIRSTINE EROSEVICH, M.D.  
OFFICE OF THE DIRECTOR, ANTI-FRAUD UNIT  
ROSENBERG YUDIN & PEATMAN  
STANDER REUBENS THOMAS KINSEY  
TOBIN LUCKS, LLP  
WOOLFORD & ASSOCIATES  
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