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

In Re: PROVIDER SUSPENSION

Case No. AD PS-17-13

KHRISTINE EROSHEVICH,
Respondent.

**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 November 29, 2017 recommended Determination and Order re: Suspension of the designated Hearing Officer, the Administrative Director finds that Respondent Khristine Eroshevich 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 Administrative Director hereby adopts and incorporates the November 29, 2017 recommended Determination and Order re: Suspension of the designated Hearing Officer, attached hereto, as the Administrative Director's Determination and Order re: Suspension.

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

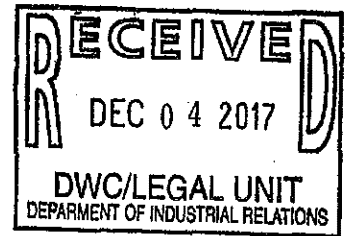
Date:

12/8/17



GEORGE PARISOTTO
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

KHRISTINE EROSHEVICH,

Respondent.

**DETERMINATION AND
ORDER RE: SUSPENSION**

A hearing was held in the above-referenced matter on October 10, 2017 pursuant to Labor Code § 139.21(b)(2). All parties appeared and were given the opportunity to present evidence and testimony. At the request of the parties, time was granted to file trial briefs. It was ordered that the matter shall stand submitted for decision as of the close of business on November 15, 2017.

Respondent has filed several Petitions, a Trial Brief and Post Trial Brief.

Respondent requests:

1. Dismissal of the Suspension Proceedings;
2. That an Order issue striking DIR's Trial Brief and evidence;
3. That there be a Finding of Fact that Respondent has not been convicted of a crime which would subject Respondent to suspension pursuant to Labor Code § 139.21(a)(1);
4. That a continuance be granted; and
5. That judicial notice be taken of the following:
 - (a) Petition for Dismissal in People v Eroshevich
 - (b) Order of Dismissal in People v Eroshevich
 - (c) Superior Court of California Docket Sheet in People v Eroshevich
 - (d) June 2017 Updated Emergency Findings of Fact by the DWC
 - (e) September 2017 Updated Emergency Findings of Fact by the DWC
 - (f) Declaration of Charles Rondeau

Respondent, Khristine Eroshevich, asserts:

- 1) That it was prejudice to post the name of Dr. Eroshevich on the DWC website as already being suspended;
- 2) Respondent challenges Labor Code § 139.21 on Constitutional grounds;
- 3) That Labor Code § 139.21 applies prospectively;
- 4) Labor Code § 139.21 fails to provide for a right to refute or reinstate as provided in Welfare and Institutions Code § 14123 for the California Medi-Cal/Medicaid program;
- 5) Respondent's prior convictions are not a proper basis for suspension. Labor Code § 139.21 does not permit suspension based on a criminal conviction that has been dismissed pursuant to Penal Code §1203.4;
- 6) The suspension hearing is not related to Respondent's function or qualifications, or duties as a physician.

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 that individual has been convicted of any felony or misdemeanor described in Labor Code § 139.21(a)(1)(A)(i)-(iv).

2. Labor Code § 139.21(a)(1)(B) 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 that individual or entity has been suspended, due to fraud or abuse, from the federal Medicare or Medicaid programs.

3. On October 28, 2010, a jury found Khristine Eroshevich guilty of the crime of unlawfully prescribing a controlled substance, an opiate, by fraud, deceit or

misrepresentation or concealment of a material fact, in violation of Health and Safety Code § 11173(a). The judge reduced the conviction to a misdemeanor (Exhibit C).

4. On July 26, 2012, Eroshevich was notified by the State of California-Health and Human Services Agency -Department of Health Care Services that Khristine Eroshevich was suspended and prohibited from participating in the Medi-Cal program for an indefinite period of time. The reasons for the suspension were that The Deputy Director and Chief Counsel of the State Department of Health Care Services was notified that the medical license of Dr. Eroshevich had been suspended for 90 days effective March 30, 2012, and the Department had been notified of the October 28, 2010 misdemeanor conviction in the case of People v. Khristine Eroshevich for violation of Health and Safety Code, section 11173(a). The letter further states that the Director is required to suspend a provider of service for conviction of any felony or misdemeanor involving fraud, abuse of the Medi-Cal program or any patient, or otherwise substantially related to the qualifications, functions, or duties of a provider of service (Exhibit 4).

5. On September 22, 2016, A Petition for Dismissal was filed stating that the conditions of probation had been fulfilled and requesting dismissal under section 1203.4 of the Penal Code (Exhibit A). On September 22, 2016 an Order for Dismissal issued granting the Petition for Dismissal under Penal Code § 1203.4.

6. On September 8, 2017, A Notice of Provider Suspension was sent to Khristine Eroshevich notifying the provider of suspension pursuant to Labor Code sections 139.21(a)(1)(A) and 139.21(a)(1)(B).

7. On September 14, 2017, Respondent requested a hearing. Respondent argued that the single misdemeanor conviction was “expunged” and noted that Respondent had been suspended from the Medi-Cal program and that her license to practice medicine

had been suspended for 90 days. Following a successful completion of probation, the medical license was fully restored by the medical board. Respondent contests the application of 139.21(a)(1) to her situation and argued that it was improper to retroactively apply 139.21(a)(1) (Exhibit 5).

DETERMINATION

Based on Khristine Eroshevich, M.D. having been convicted of a misdemeanor as described in Labor Code § 139.21(a)(1)(A) and having been suspended due to fraud or abuse, from the federal Medicare or Medicaid programs, it is recommended that Khristine Eroshevich be suspended from participating in the Workers' Compensation System as a physician, practitioner, or provider. Labor Code §139.21(a)(1)(A) and Labor Code § 139.21(a)(1)(B) applies to Respondent, Khristine Eroshevich, M.D. As a result, the Administrative Director is required to immediately suspend Respondent.

BASIS FOR DECISION

The Administrative Director issued Dr. Eroshevich a notice of suspension stating Labor Code § 139.21(a)(1)(A) and 139.21(a)(1)(B) as the basis for the suspension (Exhibit 1). The notice advised that the suspension would start 30 calendar days after the date of mailing of the notice unless a written request for hearing was submitted. Dr. Eroshevich timely requested a hearing (Exhibit 5) and the matter was set before the undersigned (Exhibit 6). At the time of trial, Dr. Eroshevich requested a continuance to seek reinstatement from her prior suspension from the Medi-Cal program. This request was denied at trial. Respondent renews the request for a continuance in their post-trial brief. The State of California-Health and Human Services Agency, Department of Health Care Services notified Dr. Eroshevich by letter dated July 26, 2012 that she was suspended and prohibited from participating in the Medi-Cal program (Exhibit 4). Dr. Eroshevich has had

over five years to request reinstatement and as of the October 10, 2017 has failed to request or obtain reinstatement. The undersigned did not find good cause to grant a continuance of the Suspension Hearing and the request was denied.

The Respondent filed a Motion requesting Judicial Notice of the Petition for Dismissal in *People v Eroshevich*, Order of Dismissal in *People v Eroshevich*, Superior Court of California Docket Sheet in *People v Eroshevich*, June 2017 Updated Emergency Findings of Fact by the DWC, September 2017 Updated Emergency Findings of Fact by the DWC, and the Declaration of Charles Rondeau. Respondent offered these documents at the time of trial and all documents offered were received into evidence at the October 10, 2017 hearing.

Attorney for the Department of Industrial Relations has submitted a request for Judicial Notice of Committee notes from the Assembly Concurrence in Senate Amendments as amended August 19, 2016, Medical Board Record-Second Amended Accusation, and Medical Board-Stipulated Settlement and Disciplinary Order. Legislative committee reports and analyses, including statements pertaining to the Bill's purpose, are properly the subject of judicial notice (*Hutnick v. United States Fidelity & Guaranty Co.* (1988) 47 Cal.3d 456). The courts have held that judicial notice may be taken of legislative committee bill analysis documents, particularly when legislative intent is an issue. (*In re J. W.* (2002) 29 Cal. 4th 200, 57 P.3d 363, 126 Cal. Rptr. 2d 897, 2002 Cal. Lexis 7614).

The Medical Board of California is a state government agency which licenses and disciplines medical doctors. The Board provides two principal types of services to consumers; public-record information about California-licensed physicians, and investigation of complaints against physicians. As a state government agency, the Medical Board is responsible for maintaining public records. The records are not reasonably subject to dispute and are capable of

immediate and accurate determination by resort to sources of reasonably indisputable accuracy. The records and files of an administrative board are properly the subject of judicial notice. (*Hogen v. Valley Hospital* (1983) 147 Cal.App.3d 119).

California Code of Regulation 9788.3(b) allows the hearing officer to admit relevant evidence if it is the sort of evidence reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make the admission of the evidence improper over objection in civil actions. The legislative committee analyses and the records of the California Medical Board are the sort of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Pursuant to Regulation 9788.3 and California Evidence Code § 452 the request to take judicial notice of Legislative Analysis Committee notes from the Assembly Concurrence in Senate Amendments as Amended August 19, 2016, Medical Board Record Second Amended Accusation, and Medical Board Stipulated Settlement and Disciplinary Order is granted and the documents are ordered admitted into evidence as Exhibits 8, 9, and 10 respectively.

Respondent argues that Dr. Eroshevich is prejudiced by her name being posted on the DWC website as already being suspended. The DWC website referred to by Respondent is nothing more than the court docket identifying all providers that have been issued suspension notices or suspension orders. The DWC website states the grounds raised for the suspension and provides the status of the case. Contrary to Respondent's assertion, Dr. Eroshevich is not listed as already having been suspended. The DWC list shows the status of the Notice of Suspension for Dr. Eroshevich as appealed. The DWC website clearly states "Providers on the list were issued suspension notices or suspension orders per Labor Code § 139.21(a). The suspension takes effect 30 calendar days after the notice is issued, unless it is appealed." The Respondent argues that the posting of

Respondent's name on the DWC website list of providers served with suspension notices was an "act of misconduct and irremediable prejudice" and asserts that it was "manifestly unfair, unjust, and unethical warranting dismissal with prejudice." The Respondent's claim of prejudice is not supported by the facts in this case and the request for dismissal of the suspension hearing is denied.

Respondent raises Constitutional challenges to Labor Code § 139.21. An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power to determine that a statute is unconstitutional. This Hearing Officer lacks jurisdiction to determine the constitutional challenges raised by Respondent. Therefore, whether or not Labor Code § 139.21 is constitutional is not a factor this court can determine and it cannot be a basis for a decision in this matter.

Respondent asserts that Labor Code § 139.21 fails to provide for a right to refute or reinstate as provided in Welfare and Institutions Code § 14123 for the California Medi-Cal/Medicaid program. This issue is not properly before this Hearing Officer.

Dr. Eroshevich asserts that Labor Code § 139.21 cannot be applied retroactively and must be applied prospectively. The retroactive application of Labor Code § 139.21 is determined by the intent of the Legislature. Labor Code § 139.21 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 section 139.21(a)(1)(A). The Assembly Floor Analysis states that the purpose of AB1244 is to combat workers' compensation fraud by changing the incentives facing medical providers in the California Workers' Compensation System. The bill creates a suspension process for providers who are convicted of a felony, a misdemeanor connected to fraud or to patient or privilege abuse, or when the medical provider's license is suspended or revoked. Contained within the legislative

committee analyses of AB1244 is a list of providers that represent examples of fraud addressed by the bill. Several of the named doctors either pled guilty or were convicted prior to the enactment of the statute. The committee notes, "Despite the charges, medical bills and workers' compensation liens from doctors convicted of medical fraud are still being pursued." They further comment that some providers are seeking payment for treatment that is likely fraudulent. It is clear that the legislative intent was to provide a suspension process to prevent this result. If the intent of the statute were to apply prospectively the legislation would not address the fraud of the providers specifically named that were convicted prior to the passage of AB1244. It is clear that the legislature intended the suspension provisions of Labor Code § 139.21 to apply to Respondent regardless of the date of conviction.

Respondent has failed to show how Labor Code § 26 applies to the facts in this case. Section 26 states "no person who has not previously obtained a license regulated by this code shall be denied a license solely on the basis that he has been convicted of a crime if he has obtained a certificate of rehabilitation under Section 4852.01 and following of the Penal Code, and if his probation has been terminated and the information or accusation has been dismissed pursuant to Section 1203.4 of the Penal Code." This suspension hearing is not dealing with the granting or denial of a "license regulated by this code." Therefore, Labor Code Section 26 is inapplicable to this suspension hearing.

In the case of *People v. Eroshevich*, the jury found Dr. Kristine Eroshevich guilty of the crime of unlawfully prescribing a controlled substance, an opiate, by fraud, deceit or misrepresentation or concealment of a material fact. Eroshevich had written numerous prescriptions for opiates using false names and information. Eroshevich wrote prescriptions for controlled substance for persons whom were not her patients, for no legitimate medical purpose. Health and Safety Code § 11173(a) states that no person shall obtain or attempt to

obtain controlled substances, or procure or attempt to procure the administration of or prescription for controlled substances, (1) by fraud, deceit, misrepresentation, or subterfuge; or (2) by the concealment of a material fact. Section 11173(a), prescription fraud, is committed by doctors and other medical professionals authorized to write prescriptions. Medical professionals commit prescription fraud when they write prescriptions for controlled substances that are not issued for legitimate medical purposes, and/or are not issued in the usual course of their professional practice.

Labor Code § 139.21(a)(1) requires the Administrative Director to suspend any physician from participating in the Workers' Compensation system if that physician has been convicted of a crime described in section 139.21(a)(1)(A). Respondent was convicted of a misdemeanor for violation of Health and Safety Code § 11173(a) for prescription fraud. The conviction clearly comes within 139.21(a)(1)(A)(iv). The conviction for misdemeanor prescription fraud is a crime that is substantially related to the qualifications, functions, or duties of a provider of services.

Labor Code § 139.21(a)(1)(B) clearly applies to the facts of this case. This section requires the Administrative Director to suspend any physician from participating in the Workers' Compensation system if that physician has been suspended due to fraud or abuse, from the Federal Medicare or Medicaid programs. Medicaid is a joint Federal and State program. The Federal Medicaid program in California is called Medi-Cal. On July 26, 2012 the Director of the Department of Health Care Services notified Eroshevich that she was suspended and prohibited from participating in the Medi-Cal program for an indefinite period of time. The suspension was based on the 90 day suspension of her license to practice medicine and the misdemeanor conviction for violation of Health and Safety Code § 11173(a). The medical license was suspended for 90 days for engaging in dishonest acts by making false statements in a psychiatric report and billing statement regarding a Workers' Compensation

claimant and because she was convicted of a misdemeanor involving a crime substantially related to the qualifications, functions, or duties of a physician and surgeon (Health and Safety Code § 11173(a)). (Exhibit 4 & 9 Second amended Accusation). Respondent was suspended from the Medi-Cal program due to the conviction of a crime involving fraud, and therefore, suspension under section 139.21(a)(1)(B) is appropriate.

Respondent argues that her prior conviction was dismissed pursuant to Penal Code § 139.21, and therefore, cannot be used as a basis for suspension under Labor Code § 139.21. In October of 2010, a jury found the Respondent guilty of violating Health and Safety Code § 1173(a). After completion of all conditions of probation, Eroshevich filed a Petition for Dismissal requesting that her conviction be dismissed pursuant to Penal Code § 1203.4. The petition was granted and an Order for Dismissal issued on September 22, 2016. An order granting dismissal under Penal Code § 1203.4 provides that the probationer shall be released from all penalties and disabilities resulting from the offense of which they have been convicted. However, dismissal under 1203.4 does not eradicate a conviction or purge a defendant of the guilt established thereby. It merely frees the convicted from certain penalties. (*People v. Barraza* (1994) Cal. App. 4th 114). Penal Code § 1203.4 contains a limitation on the relief it offers, stating specifically that “in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.” The fact that the dismissed conviction may be used in any subsequent prosecution nullifies the argument that the term “expungement” accurately describes the relief granted under § 1203.4. Penal Code § 1203.4 is not an “expungement” of the prior conviction. Expungement is the eradication of a record and not the lifting of penalties or disabilities as granted in Penal Code § 1203.4. The appellate courts have upheld denial of a license or denial of the right to pursue a particular profession in cases where

the denial was based on a conviction dismissed pursuant to Penal Code § 1203.4. In the case of *In re Phillips* (1941) 17 Cal.2d 55, the court upheld the disbarment of an attorney based on a felony conviction that was dismissed pursuant to Penal Code § 1203.4. The Supreme Court rejected the argument that the dismissal of the conviction eliminated the conviction as a basis for the disbarment. The Court stated that the "final judgment of conviction is a fact; and its effect cannot be nullified...by the later order dismissing the action after judgment." In *Meyer v. Board of Medical Examiners* (1949) 34 Cal.2d 62, a physician was convicted of a felony for violation of Health and Safety Code 11164. The physician obtained a dismissal of his conviction pursuant to Penal Code § 1203.4. The Board of Medical Examiners suspended the license of the doctor based on the felony conviction. The Supreme Court of California upheld the suspension, concluding that the discipline by the Medical Board cannot be construed as the type of "penalty" or "disability" released by Penal Code § 1203.4.

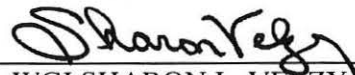
In light of the well-publicized rampant abuse of the Workers' Compensation system, Labor Code § 139.21 appears to be a reasonable exercise of the Legislature's plenary power to combat fraud and abuse. The suspension process provided for in Labor Code § 139.21 is not for the purpose of punishment but for the protection of the public.

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

ORDER

IT IS ORDERED that Kristine Eroshevich is hereby suspended from participating in the Workers' Compensation system as a physician, practitioner or provider.

Dated: 11/29/17



WCJ SHARON L. VELZY
HEARING OFFICER