

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

NATALIA BECK, KIM FORTES, *Applicants*

vs.

STATE COMPENSATION INSURANCE FUND, *Defendant*

MARTIN GOLDBERG AS COURT APPOINTED POST- JUDGEMENT RECEIVER OF JUDGEMENT DEBTOR KEVIN BARKAL (SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, CENTRAL DIVISION, CASE NO. GIC 757374), FOR BARKAL'S INTEREST IN BEACH CITIES SURGICAL CENTER LP AS SOLE SHAREHOLDER OF PEMCOR, INC., AND PARTNER OF BEACH CITIES SURGICAL CENTER, AND FOR BARKAL'S SHAREHOLDER INTEREST IN PAIN INTERVENTION THERAPY OF SAN DIEGO; AND FOR ALLAN AND VALLANDINGHAM, SHAREHOLDERS INTEREST, IN PAIN INTERVENTION THERAPY OF SAN DIEGO AND WILLIAM LEONARD, LIMITED PURPOSE RECEIVER OF BEACH CITIES SURGICAL CENTER LP (SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO, CENTRAL DIVISION, CASE NO. 37-2007-77424), FOR THE INTERESTS OF ALL THREE PARTNERS IN BEACH CITIES SURGICAL CENTER LP (PEMCOR, INC., KELLETT, INC., AND WAR, INC.), AND THE INTEREST OF INDIVIDUAL OWNERS OF THE CORPORATE OWNERS FORMING BEACH CITIES SURGERY CENTER (KEVIN BARKAL, JEFFREY VALLANDINGHAM AND BRETT ALLAN); AND RICHARD KIPPERMAN, AS CHAPTER 7 TRUSTEE FOR THE BANKRUPTCY ESTATES OF DEBTOR KEVIN BARKAL (UNITED STATES BANKRUPTCY COURT, SOUTHERN DISTRICT OF CALIFORNIA, BANKRUPTCY NO. 10-14968), FOR BARKAL'S INTEREST IN BEACH CITIES SURGICAL CENTER LP AS SOLE SHAREHOLDER OF PEMCOR, INC., A PARTNER OF BEACH CITIES SURGICAL CENTER LP, AND FOR BARKAL'S SHAREHOLDER INTEREST IN PAIN INTERVENTION THERAPY OF SAN DIEGO,
Real Party in Interest

**Adjudication Numbers: ADJ878332 (SDO 0319918), ADJ2502806 (SDO 0295752)
San Diego District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.¹

¹ Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 5, 2019. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

On May 29, 2019, the Workers' Compensation Administrative Law Judge ("WCJ") issued a decision entitled "Findings and Opinion on Decision." Therein the WCJ found that Dr. Barkal, formerly a licensed physician, was not required to obtain fictitious business name permits from the Medical Board of California in connection with his ownership interest in Beach Cities Surgery Center ("BCSC") and Pain Intervention Therapy of San Diego ("PITSD"), and that the lien claims of these entities are not invalid for lack of fictitious business name permits. The WCJ also found that the ownership of BCSC and PITSD by Dr. Barkal, along with two chiropractor majority co-owners, was not in violation of the law and does not render the lien claims invalid.

Defendant, State Compensation Insurance Fund, filed a timely Petition for Reconsideration of the WCJ's decision. Defendant contends that BCSC and PITSD have failed to show they have appropriate fictitious name permits, and that this failure justifies dismissal of their liens. Defendant further contends that the evidence justifies a finding that the ownership interests in BCSC and PITSD are illegal, and that the WCJ erred in not following prior decisions involving BCSC and PITSD, issued by the California Medical Board and by the Court of Appeal in *Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (2006) 138 Cal.App.4th 373 [71 Cal. Comp. Cases 374].

Martin Goldberg and William Leonard ("respondents"), the court-appointed receivers in two San Diego County Superior Court cases involving recovery on the lien claims of the entities in question, filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's Petition for Reconsideration, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below, and in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, we will affirm the WCJ's decision of May 29, 2019.

At pages fifteen through eighteen of its petition for reconsideration, defendant apparently contends that by reason of the Stipulated Surrender of License and Order, adopted by the California Medical Board in its Decision dated November 10, 2005,² respondents are estopped from denying that PITSD was required to have a fictitious business name permit and that BCSC did not have "the necessary accreditation or certification to operate as an outpatient surgery center." (See Petition for Reconsideration, p. 17:1-4.)

² Defense Exhibit D, presented at trial on June 7, 2017.

We are not persuaded. It appears that defendant is attempting to rely upon collateral estoppel, specifically the doctrine of “issue preclusion.” However, defendant has not established the required elements of the defense: (1) there was a final adjudication of the issues in question (fictitious business name permit, outpatient surgery accreditation or certification); (2) the issues were identical in the other forum; (3) the identical issues were actually litigated and necessarily decided in the other forum; and (4) the identical issues were litigated between the same parties or parties in privity. (*State Comp. Ins. Fund v. ReadyLink Healthcare, Inc.* (2020) 50 Cal.App.5th 422, 446-448 [264 Cal.Rptr.3d 68].)

Similarly, we are not persuaded by defendant’s reliance upon *Zenith Ins. Co. v. Workers’ Comp. Appeals Bd. (Capi)* (2006) 138 Cal.App.4th 373 [71 Cal.Comp.Cases 374] (“*Capi*”). In *Capi*, the Court of Appeal reversed the Board in affirming the WCJ’s allowance of the liens of PITSD and BCSC, the same entities whose liens are at issue here. In *Capi*, the Court stated that in order to establish their right to reimbursement, the lien claimants bore the burden of proving they were properly licensed or accredited, but they failed to do so. However, it is unclear whether that failure happened because PITSD and BCSC failed to produce evidence on the issue, or because the Board allowed the liens solely based on the mistaken belief that the insurance carrier had improperly attempted to shift the burden of proof to the lien claimants. In remanding the matter to the Board, the Court of Appeal apparently left the door open for PITSD and BCSC to present evidence on licensure or accreditation, stating that further proceedings could include further development of the record.

There are several more reasons why *Capi* may not be controlling here. It is unclear whether the services involved in the liens in *Capi* were provided in the same time frame as the services involved in the liens at issue in this case. Further, the WCJ states in his Report here that the need for PITSD and BCSC to be licensed, certified or accredited has not been submitted for decision yet. Since there is no final order, it appears that defendant’s petition for reconsideration is premature concerning the supposed need for PITSD and BCSC to be licensed, certified or accredited. (*Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

Finally, we note that respondents allege in their answer that defendant should be sanctioned for filing a frivolous petition for reconsideration. (Lab. Code, § 5813.) The WCJ should consider and resolve this issue in further proceedings at the trial level.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Opinion on Decision of May 29, 2019 is **AFFIRMED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings by the WCJ, including but not limited to a determination of respondents' request for sanctions, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 10, 2024

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

**NATALIA BECK
KIM FORTES
BEACH CITIES SURGERY CENTER
PAIN INTERVENTION THERAPY OF SAN DIEGO, INC.
LAW OFFICES OF ROBERT A. MCLAUGHLIN
JOSEPH C. LACOSTA, ESQ.
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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

OPINION ON DECISION

Beach Cities Surgery Center (BCSC) and Pain Intervention Therapy San Diego (PITSD) leased and operated outpatient surgery centers for use by various physicians, including non-owner physicians, to perform surgical procedures. All of the lien claims of BCSC and PITSD are for facility fees.

BCSC and PITSD were owned one-third by Barkal, a licensed physician, one-third by Allan, a chiropractor, and one-third by Vallandingham, a chiropractor.

The defendant contends that the lien claims are invalid because Barkal failed to obtain fictitious name permits from the Medical Board of California. The laws cited by the defendant pertain to the regulation of a physician's medical practice. It has not been established that BCSC or PITSD were Barkal's medical practices. The weight of the evidence is to the contrary. BCSC and PITSD leased free-standing outpatient surgical centers available for use by various physicians, including those with no ownership interest in BCSC and PITSD. All of the lien claims are for facility fees. None of the lien claims are for medical treatment or professional medical services rendered by Barkal.

The defendant contends that the majority ownership of BCSC and PITSD by nonphysicians (two chiropractors) contravene state law. The laws cited by the defendant pertain to ownership of a physician's medical practice. It has not been established that BCSC or PITSD were Barkal's medical practices. The weight of the evidence is to the contrary. These entities were established as vehicles for the purpose of leasing outpatient surgery centers. The surgery centers were available for use by non-owner physicians. The bills and liens are all for charges relating to the use of the facilities to perform surgical procedures. There is no evidence that Barkal practiced medicine in the name of BCSC or PITSD.

May 29, 2019

DATE

CLIFFORD LEVY
WORKERS' COMPENSATION JUDGE

REPORT ON RECONSIDERATION

INTRODUCTION

This is the consolidated lien proceeding involving lien claims filed by two outpatient surgery centers, Beach Cities Surgery Center (BCSC) and Pain Intervention Therapy of San Diego (PITSD), in cases filed at the San Diego WCAB in which State Compensation Insurance Fund has insurance coverage or is the administrator for legally uninsured entities. There are approximately 86 cases in which BCSC has filed lien claims, and 23 cases involving lien claims filed by PITSD.

The lien claimants (BCSC and PITSD) are not the parties pursuing payment in this proceeding. The parties pursuing payment are receivers appointed by the Superior Court, and a trustee for the bankruptcy estate of Paul K. Barkal, (Barkal).

Barkal was a licensed physician at the time BCSC and PITSD were in operation. He had a one-third ownership interest in each facility.

Because the petitioner uses the term "lien claimants" to refer to the receivers and bankruptcy trustee, and because the receivers and trustee stand in the shoes of the lien claimants in terms of meeting their burden of proof that BCSC and PITSD complied with applicable permitting and ownership laws, the term "lien claimant" will be used interchangeably throughout this report to mean the receivers and trustee as well as the actual outpatient surgery centers.

The purpose of the lien consolidation is to hear threshold issues common to all of the liens. The issues submitted for decision most recently on March 14, 2019 are, 1, whether Barkal was required to obtain fictitious-name permits from the Medical Board of California in connection with his ownership interest in BCSC and PITSD, and 2, whether the ownership of BCSC and PITSD by a licensed physician (Barkal) and two chiropractors (Allan and Vallandingham) was in violation of the law.

The petitioner, State Compensation Insurance Fund, is aggrieved by the May 29, 2019 findings that the lien claims of BCSC and PITSD are not invalid for lack of fictitious-name permits from the Medical Board of California for Barkal, and that the ownership of BCSC and PITSD by Barkal and two chiropractors did not contravene State law.

On June 24, 2019, the petitioner filed a timely verified Petition for Reconsideration from the May 29, 2019 Findings and Opinion on Decision.

RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

PETITIONER'S CONTENTIONS

The petitioner contends that Barkal was required to obtain fictitious-name permits from the Medical Board of California because he was a licensed physician, he was a co-owner of BCSC

and PITSD, and, according to SCIF, he was "using his medical license" in connection with his co-ownership of these outpatient surgery centers, both of which were operated under fictitious names.

The petitioner contends that the WCAB is bound by the 2005 stipulations entered into between Barkal and the Medical Board of California for the voluntary surrender of his license to practice medicine. The petitioner asserts that these stipulations constitute "findings" by a "sister agency," which the petitioner characterizes as "a court of competent jurisdiction."

According to the petitioner, Barkal admitted in the stipulated surrender of his medical license that he was required to obtain a fictitious-name permit in connection with his interest in BCSC and PITSD, and that he failed to do so. The petitioner asserts that the burden of proof was improperly shifted to SCIF to establish that Barkal was required to obtain fictitious-name permits from the Medical Board, whereas it is the lien claimants who must establish they operated with required permits.

Lastly, the petitioner asserts that the ownership interests in BCSC and PITSD were in violation of California Business and Professions Code section 2416 and California Corporations Code section 13401.5 which prohibit non-physician majority ownership of the medical practice of a licensed physician.

DISCUSSION

It is undisputed that the receivers and trustee stand in the shoes of the lien claimants and must establish the validity of the lien claims. This includes establishing that required permits were obtained while the surgery centers were in operation, and that the ownership of the facilities by Barkal and two chiropractors was not in contravention of the law.

Pursuant to California Business and Professions Code section 2415, a physician is required to obtain a fictitious-name permit from the Medical Board of California if the physician intends to use a fictitious name in connection with his or her practice of medicine:

"§2415. Fictitious-name Permit:

(a) Any physician and surgeon or any doctor of podiatric medicine, as the case may be, who as a sole proprietor, or in a partnership, group, or professional corporation, desires to practice under any name that would otherwise be a violation of Section 2285 may practice under that name if the proprietor, partnership, group, or corporation obtains and maintains in current status a fictitious-name permit issued by the Division of Licensing, or, in the case of doctors or podiatric medicine, the California Board of Podiatric Medicine, under the provisions of this section."

Pursuant to Business and Professions Code section 2285, it is "unprofessional conduct" for a physician to use a name other than his or her own for the physician's medical practice without having obtained a fictitious-name permit:

"§2285. Use of Fictitious Name in any Public Communication:

The use of any fictitious, false, or assumed name, or any name other than his or her own by a licensee either alone, in connection with a partnership or group, or as the name of a professional corporation, in any public communication, advertisement, sign, or announcement of his or her practice without a fictitious-name permit obtained pursuant to Section 2415 constitutes unprofessional conduct."

SCIF contends that both BCSC and PITSD were Barkal's "practice" of medicine. The parties stipulated that Barkal did not obtain fictitious-name permits from the Medical Board of California.

The lien claimants deny that BCSC and PITSD were Barkal's medical practices. They are not asserting that the lien claims are for medical treatment rendered by Barkal. BCSC and PITSD were outpatient surgery centers. Barkal was a one-third owner of each entity. All of the lien claims filed by BCSC and by PITSD are for facility fees. The parties stipulated to this, (Minutes of Hearing, March 14, 2019.) As the lien claimants are not claiming payment for medical treatment rendered by Barkal, or rendered by any other physician, the burden of proof shifted to SCIF to establish that the lien claims of BCSC and PITSD are, in fact, for the practice of medicine by a licensed physician.

The petitioner's contentions concerning illegal ownership of BCSC and PITSD are based on the same theory, namely that both were Dr. Barkal's medical practices. If it was established that BCSC and PITSD were Barkal's medical practices, the majority ownership of these entities by non-physicians (Chiropractors Allan and Vallandingham) would be in violation of State law.

In relation to BCSC, Business and Professions Code section 2416 requires that when physicians "conduct their professional practices in a partnership," a majority of the partners and partnership interest must be physicians. BCSC was a partnership.

In relation to PITSD, a general corporation, California Corporations Code section 13401.5 provides that a physician may practice as a corporation, but a majority of shares in the corporation must be controlled by licensed physicians. Chiropractors Allan and Vallandingham controlled two-thirds of the shares in PITSD.

SCIF offered no evidence to establish that BCSC or PITSD were Barkal's medical practices, other than the November 10, 2005 Decision of the Division of Medical Quality Medical Board of California (Defendant's Exhibit D), which will be discussed later.

According to SCIF, when a "medical doctor" owns and operates an outpatient surgery center, the doctor is "using his medical license," and therefore he is required to obtain a fictitious-name permit from the Medical Board. (Petition for Reconsideration, page 10, lines 17 through 20). SCIF asserts that "Business and Professions Code section 2285 applies to every physician who seeks to run an outpatient surgery setting," (Petition for Reconsideration, page 11, lines 3 through 4).

More specifically, SCIF declares "The services provided were part of medical practice because the use of Dr. Barkal's medical license in the operation of PITSD and BCSC makes it part of the medical practice." (Petition for Reconsideration, page 12, lines 3 through 5). Also, SCIF asserts "By the virtue that PITSD and BCSC were operating under Dr. Barkal's medical license, then

PITSD and BCSC were providing 'professional services' under California law..." (Petition for Reconsideration, page 15, lines 5 through 8).

According to SCIF, "The only relevant fact pertaining to the requirement of fictitious-name permits is the actual ownership of an outpatient surgery center..." (Petition for Reconsideration, page 13, lines 6 through 7).

The essence of SCIF's position concerning fictitious- name permits and legal ownership structure is that the ownership of an outpatient surgery center, in whole or in part by a licensed physician, is ipso facto the physician's medical practice. SCIF's position does not find support in case law. There are a number of Appeal's Board panel decisions, writ denied panel decisions, and one significant panel decision that discusses when a lien claimant must prove it has obtained a fictitious-name permit in compliance with Business and Professions Code sections 2415 and 2285. These cases stand for an entirely different proposition than the one advanced by SCIF. WCAB panel decisions are not binding precedent, but they may be cited and considered for persuasive reasoning. Significant panel decisions are citable but not binding precedent. These have been reviewed by each of the commissioners who agree the decision addresses issues of importance, including recurring issues.

It is well-established that a licensed physician needs a fictitious-name permit from the Medical Board to conduct his or her medical practice under a fictitious name. In the case of *Continental Medical Center of Paramount, etc., v. WCAB (Greene) (2000) 65 Cal.Comp.Cases 162 (Writ Denied)* where a fictitious name was used for the medical practice of the applicant's treating physician and the physician did not obtain a fictitious-name permit from the Medical Board, the lien claimant medical center was not entitled to payment of its lien claim. The same result occurred in *Gandhi v. WCAB (Matus) (2000) 65 Cal.Comp.Cases 719 (Writ Denied)* where the treating physician conducted his practice under the fictitious name "Figueroa Medical Clinic." Without having a fictitious-name permit from the Medical Board, the lien of the medical clinic was properly disallowed.

In the case of *Stokes v. Patton State Hospital/ Department of Mental Health (2007) 72 Cal.Comp.Cases 996*, a "significant panel decision" (and a case involving SCIF), the panel discussed when a fictitious-name permit is required for an outpatient surgery center doing business under an assumed or fictitious name. The panel held there was no need for a fictitious-name permit from the Medical Board under Business and Professions Code sections 2415 and 2285 if its lien claim is merely for providing an outpatient setting where licensed physicians are providing medical treatment. A fictitious-name permit would only be required if the outpatient surgery center was claiming payment for provision of medical treatment in its own name as a clinic.

Outpatient surgery centers bill "facility fees" for use of the facility to perform surgical procedures. The Appeals Board discussed the concept of a "facility fee" in the case of *Kunz v. Patterson Floor Covering (2002) 67 Cal.Comp.Cases 1588 (Appeals Board en bane decision)*:

"The term "facility fee" appears to include all services provided at an outpatient surgery center, except for the professional medical services provided, referred, or prescribed by a surgeon, assistant surgeon, anesthesiologist, or other 'physicians' within the meaning of section 3209.3 et seq. Thus, without now deciding the

question, a 'facility fee' might include charges for the operating room, the recovery room, nursing services, medicines, medical and surgical supplies, and medical apparatus." (*Id.*, 67 *Cal.Comp.Cases* at page 1598).

Thereafter, multiple panel decisions have held that where an outpatient surgery center is claiming a facility fee, it is not required to prove that it had a fictitious-name permit from the Medical Board (*Marin Surgery Center, Inc., v. WCAB (Jeanne Mann) (2009) 74 Cal.Comp.Cases 552 (Writ Denied)*), *Leon v. Edward Services/SCIF (2008) 2008 Cal.Wrk.Comp. P.D. LEXIS 86*).

In a panel decision in the matter of *Garcia v. Kenneson Farms, Inc., SCIF (2009 Cal.Wrk.Comp P.D. LEXIS 299)*, the panel was unable to distinguish which of the lien claims filed by N&S Neurology Center, a professional medical corporation owned by a licensed physician, were for medical treatment rendered by a licensed physician versus liens for facility fees. The panel stated that "A fictitious-name permit from the Medical Board is not needed to support a claim by a facility where services were rendered." The panel set forth its reasoning in detail:

"Stipulation number 10 of the parties at the trial on October 6, 2008 states that N&S filed bills and liens from 1999 to April 2006 for 'professional services,' and for 'the facility where services were rendered,' and for 'physician's suppliers [sic].' However, a fictitious-name permit is only required for medical treatment provided by a licensed physician. (Business and Professions Code sections 2285 and 2415.) Licenses to practice medicine are issued to individual physicians who meet certain educational requirements. (Business and Professions Code sections 2050, 2089-2096.) The acts requiring a license, including, 'use of drugs or devices in or upon human beings and to sever or penetrate the tissues of human beings and to use any and all other methods in the treatment of diseases, injuries, deformities, and other physical and mental conditions,' can only be performed by a natural person. (Business and Professions Code section 2051; Lathrop, *supra* [The Medical Practices Act clearly intends only individual persons to be licensed to practice medicine'.]) Because only individual 'licensees' are required to have a fictitious-name permit to provide medical treatment under a fictitious name, lien claims that involve the provision of other services or goods do not implicate that requirement.

(Citing *Stokes, Matus, Topia, and Kunz*).

These decisions reveal that for purposes of determining the need for fictitious-name permits, the Appeals Board has consistently differentiated liens for facility fees from liens for professional medical services rendered by a physician in the course of the physician's medical practice.

According to SCIF, a "finding" has already been made that Barkal was required to obtain fictitious-name permits for his involvement with PITSD and BCSC. The petitioner is referring to the stipulated surrender of Barkal's license to practice medicine, which became effective on November 17, 2005 (Defendant's Exhibit D). SCIF contends that the Division of Medical Quality of the Medical Board of California, Department of Consumer Affairs, was "a court of competent jurisdiction," and made "findings" that are binding on the Appeals Board.

Barkal became a licensed physician on December 14, 1987. Beginning in 1997, the Medical Board pursued disciplinary charges against him. (Defendant's Exhibit D, Decision of Division of Medical Quality, Medical Board of California, Bates stamp A000010).

In 2005, Barkal entered into a stipulated surrender of his license to practice medicine. An order was made for the surrender of his license on November 10, 2005, but did not become effective until November 17, 2005. The disciplinary charges made against Barkal by the Medical Board were numerous and far reaching, and covered the period of 1996 through 2003.

Barkal was accused of gross negligence in the treatment rendered to multiple patients. He was accused of incompetence and dishonesty. He was accused of failing to pay his employees, failing to pay rent for his office, failing to pay payroll taxes and Social Security taxes. He was accused of misrepresenting the value of his accounts receivable in order to secure a loan from a bank, for writing a bad check to cover his malpractice insurance, and for failing to pay fines, including a speeding ticket. He was accused of altering medical reports of other physicians, and of "upcoding" medical bills. He was accused of failing to comply with the terms of probation imposed by the Medical Board, failing to submit reports to his probation monitors, failing to attend required continuing education courses, failing to submit quarterly declarations in compliance with conditions of probation, and untimely payment for the costs of probation monitoring and disciplinary investigations.

Under the heading "Sixth Additional Cause for Discipline," item 23, Barkal was accused of "failing to obtain a fictitious-name permit during the providing of general anesthesia to perform a procedure known as 'manipulation under anesthesia' (MUA), (Exhibit D, Bates stamp A000024). It was noted that Barkal was "The President and Chief Executive Officer, a Director, and incorporator of Pain Intervention Therapy (PIT), a corporation organized and existing under the laws of the State of California." It was also noted that two chiropractors were corporate officers of PITSD. It is recited that Barkal was one of three partners in Beach Cities, a limited partnership, (Exhibit D, Bates stamp A000024).

It was noted under item (F) that:

"F. Respondent first used the surgery center on or about July 30, 2002, for the purpose of performing manipulations under anesthesia (MUAs). Respondent's patients were virtually all non-English speaking Hispanic individuals who had been referred to PIT by Brett A. and/or Jeffrey V." (Bates stamp A000024).

The following notations were made about PITSD and BCSC:

"N. Respondent's patients received the MUAs and the general anesthesia on three successive days regardless of their need for additional procedures.

P. Respondent charged an outpatient surgery facility fee for PIT, generally in the amount of \$4,000 for each of the manipulations. At no time was PIT a licensed, accredited or certified outpatient setting. Brett A., Jeffrey V., and respondent, through PIT, billed in excess of \$240,000 for MUAs and anesthesia to one

insurance company alone." (In a footnote, it was reflected that the insurance company was Zenith).

"Q. Beach Cities entered into a leasing agreement with the Del Mar Cosmetic Medical Center to use that facility on specified days. Beach Cities billed for surgical facility fees for the administration of outpatient pain injections despite never obtaining the necessary accreditation or certification to operate as an outpatient surgery center." (Bates stamp A000026).

Under item 24 of the accusations, paragraphs H, I, and J, the following accusations were made:

"H. Patients underwent MUAs without first undergoing more conservative chiropractic modalities, and without being told they needed orthopedic surgery.

I. Patients received the MUAs and the general anesthesia on three successive days regardless of their need for additional procedures.

J. Respondent billed surgery center facility fees despite not being certified or accredited as a surgery center."

(Bates stamp A000025).

This is the full extent of the information about PITSD and BCSC contained in the 2005 stipulated surrender of Barkal's license to practice medicine. There is no accusation that Barkal was required to obtain a fictitious-name permit in connection with BCSC. There is no accusation that PITSD was Barkal's medical practice. The accusation that Barkal was required to obtain a fictitious-name permit in connection with PITSD is apparently premised on the accusation that general anesthesia was administered during the performance of certain MUAs at that facility. No information is provided in support of this accusation. No patients are identified by name. It cannot be ascertained if any of the matters contained in the accusation relate to the lien claims filed in the cases subject to the consolidated lien proceeding. SCIF was not a party to the disciplinary hearings.

The Division of Medical Quality of the Medical Board is not a court. No evidentiary record was made in connection with the disciplinary charges. The disciplinary proceeding against Barkal did not concern the lien claims of PITSD and BCSC. The WCAB has exclusive jurisdiction over these lien claims. There was no "hearing." Barkal stipulated that if the charges were proven at a hearing, they would constitute the basis for imposing discipline by the Medical Board, (Exhibit D, Bates stamp A000005). Barkal gave up his right to contest that cause for discipline exists based on the charges. By signing the stipulations, he acknowledged that the Medical Board could revoke his license to practice medicine without further process, (Exhibit D, Bates stamp A000005).

Barkal stipulated to the following:

"No. 15. Respondent fully understands and agrees that if he ever files an application for licensure or a petition for reinstatement in the State of California, the Board shall treat it as a petition for reinstatement. Respondent must comply with all the laws, regulations and procedures for reinstatement of a revoked license

in effect at the time the petition is filed, and all of the charges and allegations contained in the Third Amended Accusation and Petition to Revoke Probation No. D2-1991-15215, 19-2002-137347, and 9-2004-156874 shall be deemed to be true, correct, and admitted by Respondent when the Division determines whether to grant or deny the petition."

There is nothing in the record to substantiate that Barkal has applied for reinstatement of his revoked license.

It is worth noting that although the Medical Board was aware of Barkal's minority interest in BCSC and PITSD, no accusation was made by the Medical Board that he was in violation of laws prohibiting non-physicians from having a majority interest in a physician's medical practice.

It should also be noted that the Medical Board of California does not have authority to regulate all outpatient surgery centers, only those defined in Health and Safety Code section 1248 (b) (1):

"1248. For purposes of this chapter, the following definitions shall apply:

(a) 'Division' means the Medical Board of California. All references in this chapter to the division, the Division of Licensing of the Medical Board of California, or the Division of Medical Quality shall be deemed to refer to the Medical Board of California pursuant to Section 2002 of the Business and Professions Code.

(b) (1) 'Outpatient setting' means any facility, clinic, unlicensed clinic, center, office, or other setting that is not part of a general acute care facility, as defined in Section 1250, and where anesthesia, except local anesthesia or peripheral nerve blocks, or both, is used in compliance with the community standard of practice, in doses that, when administered have the probability of placing a patient at risk for loss of the patient's life-preserving protective reflexes.

(3) 'Outpatient setting' does not include, among other settings, any setting where anxiolytics and analgesics are administered, when done so in compliance with the community standard of practice, in doses that do not have the probability of placing the patient at risk for loss of the patient's life-preserving protective reflexes.

(c) 'Accreditation Agency' means a public or private organization that is approved to issue certificates of accreditation to outpatient settings by the board pursuant to Sections 1248.15 and 1248.4."

The issues concerning the need for BCSC and PITSD to be licensed, certified, or accredited have not been submitted for decision in the consolidated lien proceeding. The parties agreed to defer this inquiry pending the determination of the issues presented on March 14, 2019. No decision has been made whether BCSC and PITSD were "outpatient settings" as defined under California Health and Safety Code section 1248(b)(1). "Outpatient settings" are subject to the regulatory authority of the Medical Board of California.

The lien claimants maintain they were not "outpatient settings" as defined under Health and Safety Code section 1248, and that they are specifically excluded from the regulatory authority of the Medical Board pursuant to Health and Safety Code section 1248(b)(3).

The determination of these issues depends on the type and amount of anesthesia used in the various surgical procedures and the probability of risk for the loss of each patient's life-preserving protective reflexes. It has yet to be determined if these issues are appropriate for consolidated proceedings.

CONCLUSION

BCSC and PITSD were outpatient surgery centers. All of the lien claims filed by these entities in the consolidated lien proceeding are for facility fees. SCIF did not establish that these entities were Barkal's medical practices, therefore, Barkal was not required to obtain fictitious-name permits from the Medical Board, and the ownership of these outpatient surgery centers by Barkal and two chiropractors did not violate State law.

It is recommended that the Petition for Reconsideration be denied.

July 9, 2019
DATE

CLIFFORD LEVY
WORKERS' COMPENSATION JUDGE