



Law Review Article
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**DON'T LET "AMBULATORY" SURGICAL CENTERS
"WALK ALL OVER YOU!"**

Recent cases have demonstrated opportunities to SUCCESSFULLY defend against over-reaching lien claimants who are not licensed, do not have a proper permit or overcharge and do not help the applicant. In this article, I address what can be viewed as three very significant lines of defense. If you and your Mullen & Filippi attorney work together, you CAN help yourself avoid being "walked over" during negotiations and you CAN increase your prospects for success if you are forced to go to trial.

NO LICENSE – DON'T PAY!

A surgical center that charges a facility fee must be licensed under Business & Professions Code § 2215 and Health & Safety Code §§ 1248(c), 1248.1(a)(d)(f)(g) and 1248.8. It is illegal to operate an ambulatory surgical center without a license.

In a very significant decision published 4/6/06, *Zenith Insurance Company v. WCAB* (2006 Cal. App. LEXIS 479) it was held that lien claimants have the burden to prove that they are licensed or accredited before they are entitled to their facility charges. Zenith objected to bills from lien claimant, Beach Cities Surgery Center and Pain Intervention Therapy of San Diego, arguing that they were illegal because the surgical centers were not licensed and not accredited. The WCJ found against Zenith. Zenith filed for Writ of Review and the Court of Appeal granted and held that to prove entitlement to facility charges, lien claimants DID HAVE TO PROVE they had "licensure or accreditation." Since the lien claimants failed to satisfy that burden of proof, the award to the surgical center was reversed.

A medical management company not owned or operated by a licensed physician cannot collect fees for medical treatment. In *Robert Pallas, M.D., dba Valley Family Medical Group (VFMC) v. WCAB* (1/28/98) 63 CCC 208 the court looked beyond the doctors performing the medical procedures and found that the management company was the actual medical provider because it was operated and run by two non-physicians in violation of LC 3209.3 and Business & Professions Code 2415. Further, Dr. Pallas, who marketed doing business as VFMC, did not own nor invest any money in the surgical center, did not sign the lease, pay for medical equipment or pay employee salaries. In fact, Dr. Pallas was merely an employee according to the contract between the parties and only intermittently worked for the center. The fictitious name permit was issued to the lay managers who billed and collected for the medical services. The lien was denied by the WCJ, his decision was upheld on Recon and a Writ of Review was denied.

PHYSICIANS AND DOCTORS WITH FICTITIOUS BUSINESS NAMES MAY COLLECT

A physician doing business under any name other than the physician's own name must have a fictitious business name permit under Business and Professions Code Sections 2415 and 2285. *Continental Medical Center of Paramount, et al v. WCAB (2/3/00) 65 CCC 162*, held that the lien claimant medical group was not entitled to payment for medical treatment because it did not have a fictitious name permit at the time the treatment was provided. Continental was merely a general corporation at the time of the medical treatment. It was not a licensed professional medical corporation and it did not have a fictitious name permit. By the time of the hearing, Continental had complied with the code and wanted to apply the fictitious name permit retroactively. The WCJ found that this defect could not be cured retroactively. Not only did the WCJ find that defendant did not have to pay the lien claimant's bills, the WCJ also held that defendant could seek restitution for money already paid to the lien claimant. The case was upheld on appeal. In commenting on the WCAB's jurisdiction regarding payment of medical bills, the WCJ in *Continental* stated:

"The legislature required the fictitious business name permit for a purpose. The entire purpose of such a statute is to allow the public to check and determine who owns the medical provider and to allow the patient to properly name and sue the proper party in the ... event that the patient might have been subjected to ... medical malpractice. It also allows patients to determine that those who are rendering treatment are in fact physicians licensed to practice...."

"These public policy objectives are not mere technicalities, but designed to protect the public health." Also on point is *Gandhi v. WCAB (6/5/00) 65 CCC 719*. In this case, the medical provider, Dr. Anil K. Gandhi, was doing business under the name Figueroa Medical Clinic. A fictitious name permit was filed with the County of Los Angeles but not with the Medical Board of California. The WCJ cited CCR 1350.2 (c) which states: "No licensed person shall render professional services under a fictitious ... name or any name other than his or her own unless and until a Fictitious Name Permit has been issued by the Medical Board of California." The WCJ then disallowed the bill of Figueroa Medical Clinic with the comment: "Conduct which violates State Law cannot be sanctioned by the Workers' Compensation Appeals Board."

As an example that the issue remains active, in *Herman Smith v. State of California, Dept. of Mental Health and SCIF (OAK 314238)*, an Oakland case pending on a Petition for Reconsideration, the WCJ 2/16/06 relied on the decisions in *Gandhi* and *Continental* in disallowing a lien of Bay Surgery Center who did not have a fictitious name permit. Although the outcome is never guaranteed, we expect the decision of the WCJ to be affirmed because the precedents should control!

WCAB WILL ORDER OUTRAGEOUS BILLS PAID IF DEFENDANT FAILS THEIR BURDEN

Bills from ambulatory surgical centers were not covered under the official medical fee schedule until 2004. Ambulatory surgical centers charged their usual and customary rates. In the landmark case *Kunz v. Patterson Floor Covering (12/5/02) 67 CCC 1588* it was held that fees charged by ambulatory surgical centers must be reasonable. Reasonableness was determined by looking at the medical providers usual fee and the usual fee of other medical providers in the same geographical area including inpatient providers. **Usual fee is the fee usually accepted not**

the fee usually charged. The fee the surgical center usually accepts also includes the fee accepted **in both workers' compensation cases and non-workers' compensation cases** including contractually negotiated fees. Recent cases have interpreted the adequacy of the proof provided by the defendant on the reasonableness of the charges in rebuttal to the lien claimant's bill.

Despite the "roadmap" set forth in *Kunz* for successful defense against OUTRAGEOUS outpatient surgical procedure fees and facility charges, defendants continue to rely, to their peril, on mere bill review company's recommended reductions based on internally determined "reasonable charges" or perceived inconsistencies in billing practices of lien claimants. When the defendant does not follow the "roadmap" in *Kunz*, surgical centers continue to "get away with" what appear to be "outrageous" charges! Following are merely two "hot off the press" examples of lien claimants "getting away with it!"

In *City of Los Angeles, PSI v. WCAB* (3/17/06) 71 CCC 520, the applicant had two surgical procedures performed to her hands at Bohm Medical Group Ambulatory Surgery Center (Bohm). The AME reported that the first surgery provided some pain relief but the second surgery was of no benefit and caused no change in the applicant's condition. Defendant paid a reduced amount for both surgeries. Bohm filed a lien for the remainder of the treatment costs for both surgeries. At trial, defendant submitted the AME report which found the first surgery to be somewhat helpful but the second surgery of no benefit at all and a bill review recommendation for a reduction of the charges for both surgeries and testimony of an expert from the bill review company regarding inconsistencies in the billing. The WCJ found in favor of defendant finding Bohm had been adequately compensated. On Reconsideration, the WCAB reversed allowing the full amount charged for the first surgery but based on the AME report, affirmed as to the second surgery. The court, citing *Kunz*, stated: "in the absence of persuasive rebuttal evidence by defendants, **the bill, by itself, will normally constitute adequate proof** that the fee being billed is what the outpatient surgery center usually accepts for the services rendered (and that the fee being billed is also consistent with what other medical providers in the same geographical area accept)."

In order for defendant to have rebutted the reasonableness of the billing, defendant needed to present: "(1) evidence that the fees billed by Bohm were greater than the fee Bohm usually accepts for the same or similar services, both in a workers' compensation context and a non-workers' compensation context, including contractually negotiated fees; or (2) evidence that the fees billed by Bohm were greater than the fee usually accepted by other providers in the same geographical area, including in-patient providers."

The WCAB disallowed charges for the second surgery based on the AME's report that the second surgery was of no benefit. The WCAB cited LC 4600 that: "A lien for medical treatment in a compensable claim will be allowable only if the treatment rendered was reasonably required to cure or relieve the injured worker from the effects of the industrial injury."

In *Universal Building Services, Cypress Insurance Company v. WCAB, Yturbe* (2006 Cal. Wrk. Comp. LEXIS 152, 4/17/06) the WCAB, on Reconsideration, allowed \$40,000.00 in arthroscopic surgical fees even though it agreed with the WCJ that the charges appeared unreasonable on their face, but because defendant failed to present evidence to satisfy *Kunz*, lien claimant's billing "by itself" was enough to prevail! Applicant had surgeries to his shoulder and knee at Bay Surgery Center that billed defendant \$23,795.00 and \$17,500.00, respectively, for

the outpatient procedures. Defendant paid \$7,260.50 for the shoulder arthroscopy and \$7,566.49 for the knee surgery. Bay Surgery Center filed a lien for the unpaid balances. At trial the WCJ dismissed the liens finding the charges outrageous. The WCJ relied on the testimony of the defendant's bill review company of what would be paid for "test bills" for similar services in five geographical area inpatient hospitals. The testimony was not based on actual bills and actual acceptances of payments but on what the review company would recommend for payment. The WCAB found that this did not meet the burden of proof under *Kunz* and reversed the WCJ on reconsideration. The Court of Appeals denied defendant's Petition for Writ of Review 4/27/06.

CONCLUSION

1. Find out whether the business is licensed properly under Health & Safety Code 1248 and Business & Professions Code 2215. In an objection to a bill, ask to be provided a copy of the license. You can also check the California Department of Consumer Affairs: www2.dca.ca.gov. Once there, scroll to Medical Board.
2. Find out whether the business has a Fictitious Business Name Permit, not with the county, but with the State of California. In an objection to a bill, ask to be provided a copy of the permit. You can also the California Department of Consumer Affairs: www2.dca.ca.gov. Once there, scroll to Medical Board, then Fictitious Business Name Permits.
3. As to the reasonableness of charges, you need to determine when the medical charges are high enough to justify a challenge that may require preparing for trial on a lien. Depending on the facts of each case, the "work up" should include:
 - a. Investigate and/or subpoena the "right" business records as to what the surgical facility typically accepts.
 - b. Investigate other facilities who provide the same type of services in the same "geographical area" and what charges they accept.
 - c. Your Mullen & Filippi attorney can help you determine the scope of needed discovery. In particular, how "geographical area" is defined can make a huge difference in the market survey analysis. It can be very wide, depending on the facts of each case. For example, if the surgery was done in Beverly Hills, the market survey should be much broader than just the City of Beverly Hills, especially when the case venue is San Diego or Redding or Fresno!)
4. If lien claimant forces a trial, then **restitution** against that lien claimant if you paid for services provided when the lien claimant was NOT licensed or NOT properly permitted through the appropriate Medical Board may be available, as it was in *Continental*.
5. Perhaps, now that we have settled law on licenses and permits as to medical providers, if you paid the lien claimant and it still pursues "for more" money forcing you to a trial, you should consider raising LC 5813 to seek sanctions and restitution! WCJ Nancy Gordon on 5/30/06 in *Jaime Huerta v City Sea Foods Inc, Zenith Ins Co*

WCAB Case AHM 0096882 and AHM 0113443 (reported 6/21/06 in Work Comp Central) imposed **sanctions** of \$1,400.00 against Advanced Radiology of Beverly Hills for forcing a trial despite having already been paid per OMFS after the lien representative candidly told the Judge that he “was **simply present to get more money regardless of any legal entitlement to its receipt**”!!! (Oh, well. NOT very good for lien claimant. But, VERY VERY good for defendant!)