

# INTER-OFFICE MEMORANDUM

TO: ATTORNEYS & CLIENTS

FROM: W. Joseph Truce

DATE: April 18, 2006

RE: The Ongoing War with Lien Claimants – The Empire Strikes Back

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From the lobby bar at the Hyatt . . .

I remarked to George the bartender last night that lien claimants are certainly the crab grass on the lawn of life. In this memo, I want to outline potential defenses which are extremely effective in extinguishing liens and/or billings in their entirety not only for outpatient surgery centers but also for purveyors of durable goods.

**Court of Appeal deals a mortal blow to outpatient surgery centers in its published decision filed March 20, 2006: Zenith Insurance Company v. WC Appeals Board of the State of California (case attached).**

In the Zenith case the Court of Appeal overturned a decision by the Appeals Board in which the Board ignored a contention by Zenith that the Beach Cities Surgery Center was unlicensed and unaccredited in violation of the Business and Professions Code and the Health and Safety Code and allowed the lien claim and/or billing of the outpatient surgery center in full. In noting that “it is illegal to operate an outpatient setting in California, including ambulatory surgical centers and surgical clinics, if the outpatient setting is not properly licensed or accredited” the court in some magnificent language, states that the “lien claimant had the burden of proof” to establish whether or not it complied with the provisions of the Business and Professions Code Section 2069 and the corresponding regulations governing medical assistants . . .” The court went on to note that “the lien claimant also had the burden of proving the lien claimant was properly providing services, including documentation of properly licensed personnel supervising the therapy as required by Official Medical Fee Schedule . . .” The court went on to note that the lien claimants “bore the initial burden of proving” that the “lien claimant properly provided services including documentation on this issue and they failed to do so . . .” (*emphasis added*).

Pursuant to the Court of Appeal decision in Zenith it would appear that we do not even have to engage in discovery or civil suit (as Zenith did in this case) but that we can simply raise this as an initial issue at the Mandatory Settlement Conference quoting the precise language from the Court of Appeal decision in Zenith. Once the issue has been raised the surgery centers, not us, have the burden of providing the evidence as required by the Court of Appeal in Zenith.

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Persons most knowledgeable (PMK) deposition subpoenas are the death knell for lien claimants such as outpatient surgery centers and hospitals primarily utilized by applicant's physicians. For years, civil practitioners have utilized persons most knowledgeable deposition subpoenas (PMK) and LC Section 5710 mandates that these depositions can also be utilized in the practice of WC law. LC Section 5710 entitled "depositions of witnesses" provides in relevant part as follows: The Appeals Board, a workers' compensation judge, . . . may . . . cause the deposition of witnesses residing within or without the State to be taken in the manner prescribed by law for like depositions in civil actions in the Superior Court . . ." LC Section 5710 specifically refers to the discovery statutes of the **Code of Civil Procedure (CCP)**, which authorizes the issuance of deposition subpoenas on the PMK to testify as to the information required or to produce those documents which may be relevant to our case.

We have been extremely successful in serving PMK deposition subpoenas on hospitals and outpatient surgery centers ordering the PMK, with respect to the ownership of such facility, to present himself or herself for deposition. These deposition subpoenas are usually met with an Objection or Motion to Quash and that usually is the demise of the particular lien claimant as we have an absolute right to determine whether or not the referring physician or his immediate family has an ownership and/or beneficial interest in said hospital and/or surgery center.

LC Section 139.3, with certain narrow exceptions, prohibits the referring physician from having an ownership interest in a medical entity to which he makes a referral. If this Section is violated, our client has NO liability to either the referring physician or to the entity or medical facility to whom the referral was made.

In one case, I served a deposition subpoena on the PMK for inpatient facility which is frequently utilized by numerous applicant's doctors. It was my information that this hospital was owned by numerous physicians in the industry - all of whom made direct referrals to this hospital. The hospital's lien, was well over \$100,000. Once the deposition subpoena was properly served, I received a call from a silk stocking law firm in Century City representing the particular hospital advising me that my deposition subpoena was now moot as they have withdrawn their lien claim. My impression was they were not really concerned about my particular case, but they did not want to disclose the ownership information with respect to the hospital as it would affect a whole host of other cases.

I must emphasize that this type of discovery must commence early in the case and usually during the litigation of the case-in-chief. A note of caution: the deposition subpoena must be actually served by a process server on the hospital and/or outpatient facility. Once served, a Notice of Taking Deposition of the PMK must be served on all parties, which would include the applicant's attorney and the representatives for all lien claimants.

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The service of the subpoena on the hospital and/or outpatient surgery centers must be made at least two weeks before the actual deposition.

The result of the PMK deposition will either be a “**no appearance**” or an objection to the deposition subpoena itself. In such case, we file the appropriate motion for enforcement of the subpoena and/or dismissal of the lien claim, file our Declaration of Readiness to Proceed, and have the lien dismissed.

Make mine a double, George . . .

WJT:ib

Enclosure - Zenith Decision

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ZENITH INSURANCE CO.,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD OF THE STATE OF  
CALIFORNIA et al.,

Respondents.

D046783

(WCAB No. SDO0294042)

Petition for writ of review from an order of the Workers' Compensation Appeals Board. The order is annulled and the matter remanded.

Zenith Insurance Company (Zenith), a workers' compensation insurance carrier, seeks review of an order by the Workers' Compensation Appeals Board (the Board) refusing to reconsider the decision of a workers' compensation judge (the WCJ) awarding facility fees to two outpatient medical treatment centers. We conclude the Board erred in denying the petition for reconsideration because the lien claimants failed to establish their licensure or

accreditation as an essential element of their lien claims. As such, the Board's decision was not supported by substantial evidence and is annulled.

#### FACTUAL AND PROCEDURAL BACKGROUND

Gilberto Capi injured his lower back while working as a book binder for International Coil Bindery, then insured for workers' compensation claims by Zenith. Capi received outpatient medical treatment for his injury from various providers, including Beach Cities Surgery Center (Beach Cities) and Pain Intervention Therapy of San Diego (PIT; together the lien claimants). Zenith settled Capi's claims via a compromise and release; however, it disputed the reimbursement claims made by several of Capi's health care providers, including the claims for facility fees sought by the lien claimants.

At a lien conference hearing, Zenith informed the WCJ that it had filed a civil action against the lien claimants and others that alleged, among other things, that the lien claimants illegally billed for facility fees when they were unlicensed and unaccredited in violation of the Business and Professions Code and the Health and Safety Code. (*Zenith Ins. Co. v. Brett L. Allen et al.* (Super. Ct. San Diego County, 2004, No. GIN036344).) Zenith presented a copy of its civil complaint to the WCJ, requested additional time to complete discovery and for the matter to be stayed pending resolution of its civil action. A pretrial conference statement listed the issues in dispute, including whether the lien claimants engaged in a fraudulent scheme involving billing improprieties. The WCJ refused to continue the matter and the case proceeded to trial. In his findings of fact and order, the WCJ allowed the liens of Beach Cities and PIT, in the respective amounts of \$22,100 and \$24,000.

Zenith filed a petition for reconsideration with the Board, challenging that portion of the findings and order awarding facility fees to the lien claimants. Zenith argued that the awards were: (1) unjust or unlawful because the WCJ refused to stay the claims or allow it to present evidence regarding the legal status of the lien claimants; and (2) not supported by the evidence because the lien claimants failed to meet their burden of proving that they were licensed or accredited to operate an outpatient facility and thus were not entitled to collect facility fees. The WCJ recommended denial of reconsideration, concluding that Zenith had waived the issues raised in its petition by not raising them at trial and could not shift the burden of proof to the lien claimants because it did not frame the issues in this fashion.

The Board adopted the recommendation of the WCJ and denied reconsideration. Zenith filed this petition for review, asserting that the Board erred in denying its petition because the awards were not supported by the evidence and it should have been allowed to present evidence that the lien claimants were operating illegally. We issued a writ of review. Although we invited the lien claimants to file an answer to the petition, they have filed no response and we decide this matter based on the petition and the record. (Cal. Rules of Court, rule 17(b).)

#### DISCUSSION

Our Legislature has recognized that many surgical procedures are performed in numerous types of outpatient settings and determined that, although the health professionals delivering the services are licensed, further quality assurance is needed to ensure that the services are safely and effectively performed. (Bus. & Prof. Code, § 2215.) To implement this intent, the Health and Safety Code contains regulatory and licensing provisions

governing different types of outpatient settings. (Bus. & Prof. Code, § 2217.) Notably, it is illegal to operate an outpatient setting in California, including ambulatory surgical centers and surgical clinics, if the outpatient setting is not properly licensed or accredited. (Health & Saf. Code, §§ 1248, subd. (c), 1248.1, subd. (a), (d), (f) & (g), 1248.8.)

In workers' compensation matters, the burden of proof rests on the party or lien claimant "holding the affirmative of the issue." (Lab. Code, §§ 5705, 3202.5.) Where the injured employee does not prosecute his or her claim, the lien claimant bears the burden of establishing the injury, entitlement to benefits and the reasonable value of the services. (2 Cal. Workers' Comp. Practice (Cont.Ed.Bar 4th ed. 1998) § 15.82, p. 1108.) Although there is not a great deal of case law on this issue, a lien claimant must also prove that its services were properly provided, meaning it complied with applicable licensure or accreditation requirements. (*PM & R Associates v. Workers' Comp. Appeals Bd.* (2000) 80 Cal.App.4th 357, 370 [lien claimant had the burden to prove its liens were for properly provided services, including whether it had complied with the provisions of Business and Professions Code section 2069 and the attendant regulations governing medical assistants]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd.* (1995) 34 Cal.App.4th 1204, 1212-1213 [lien claimant had the burden of proving lien was for properly provided services, including documentation that properly licensed personnel supervised the therapy as required by official medical fee schedule]; see *Continental Medical Center etc. v. Workers Comp. Appeals Bd.* (2000) 65 Cal.Comp.Cases 162, 164-165 [lien claimant medical center was not entitled to payment for medical treatment because it was not a professional corporation at the

time of applicant's treatment]; 9 Witkin, Cal. Procedure (4th ed. 1996) Appeal, § 922, p. 960 [board decisions may be cited for their persuasive value].)

Accordingly, in order to establish their right to reimbursement, the lien claimants bore the burden of proving they were properly licensed or accredited. Although the Board stated that Zenith was attempting to shift the burden of proof to the lien claimants, the foregoing discussion establishes that the lien claimants bore the initial burden of proof on this issue and they failed to do so. Thus, the award was not supported by substantial evidence.

The Board also concluded that Zenith waived the issue by not raising it; however, this alleged failure did not obviate the lien claimants' burden of proof. (See *Kunz v. Patterson Floor Coverings, Inc.* (2002) 67 Cal.Comp.Cases 1588, 1591.) Based on these conclusions, we need not reach Zenith's alternative claim that the Board erred in denying reconsideration because the WCJ improperly barred it from presenting evidence that the lien claimants were operating illegally.

Therefore, we annul the Board's order and remand the matter to the Board for further proceedings, including, if necessary, further development of the record. (Lab. Code, § 5906.)

DISPOSITION

The order denying reconsideration is annulled. The matter is remanded to the Board to grant the petition for reconsideration and conduct further proceedings in accordance with this opinion.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P. J.

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IRION, J.

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

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APPEALS BOARD OF THE STATE OF  
CALIFORNIA et al.,

Respondents.

D046783

(WCAB No. SDO0294042)

ORDER FOR PUBLICATION

THE COURT:

The opinion filed March 20, 2006 is ordered certified for publication.

The attorneys of record are:

Proskauer Rose and Lary Alan Rappaport for Petitioner.

No appearance for Workers Compensation Appeals Board.

Michael T. Morris for Respondent.

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McCONNELL, P. J.