

ZOMBIE LIENS - ROUND TWO

By: James Wolken, Associate
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This newsletter is prepared for the benefit of our clients as a general review of recent developments in workers' compensation, subrogation, civil and employment law. These articles should not be construed as legal advice or opinion, and are not meant as a substitute for the advice of counsel in individual cases.

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We all remember the notion of Zombie liens from a few years ago, which the legislature tried to combat by enacting regulations to allow dismissal of liens for failure to prosecute a lien (8 CCR § 10582.5) and enacting legislation requiring payment of the controversial lien activation fee (Labor Code § 4903.06; 8 CCR § 10208). The legislature and the DWC presumably hoped that such action would alleviate the cost and expense defendants incurred in keeping files open due to these dormant Zombie liens.

The primary issue we are now facing with liens is the newly-enacted Labor Code sections addressing medical treatment and billing fraud. For instance, in its simplest terms, Labor Code § 4615 states that any lien filed by or on behalf of a medical provider for medical treatment services shall be automatically stayed upon the filing of criminal charges against that provider for fraud related to the alleged treatment or billing (this section also applies to medical-legal liens).

The stay is to remain in effect from the time criminal charges are filed until the final disposition of the criminal proceedings. Once the conviction is finalized, the stay of the lien is then lifted until lien consolidation proceedings are initiated, which is the stage we are now in with chiropractor Dr. Rigler's liens in Southern California. If a medical provider is not actually convicted of fraud and is otherwise cleared of criminal charges, then the lien may be adjudicated in the workers' compensation system just as if it was never stayed in the first place.

Although the ultimate goal of enacting legislation to combat fraud may be achieved some day, it likely will not be without unforeseen costs to defendants throughout California. We are perhaps entering the second round of the Zombie Lien phenomenon in California. The problem defendants are now facing is that the process of staying liens, the criminal adjudication process, and the lien consolidation process are far from swift.

Once criminal charges are filed against a medical provider for fraud, the lien is then stayed pending the final disposition of criminal charges. When dealing with any criminal defendant, the criminal prosecution can take years. What happens when we are dealing with a complex scheme of insurance fraud involving several medical providers? We are faced with a realistic situation that criminal adjudication could take several years, which means that these stayed liens remain in limbo and dormant, just as Zombie Liens from years past.

Control costs further with an enlightened use of UR/IMR. Triage requests for authorization of treatment that are clearly indicated to avoid unnecessary UR/IMR costs. These items include treatment that is less expensive than the review process and items that are needed for resolution of cases, such as diagnostic tests. Where such tests will eventually be required by the medical-legal physician, UR review only increases the cost of a claim.

To make matters more complicated, once criminal proceedings have been finalized, any resulting convictions then subject the medical provider and their liens to the lien consolidation process, which has its entirely own discovery process. Should defendants choose to participate in the lien consolidation process, it suffers the cost of keeping claims open for years, with the false hope of perhaps obtaining some restitution through the criminal adjudication process, or perhaps more realistically, only the satisfaction of partaking in the process of taking down bad actors.

What happens in the case where defendants wait years for the criminal process to finalize with respect to any given medical provider, only for the result to not be a conviction? Defendants are left in a position where their claims remain open for years, only to now have to deal with liens that are now potentially several years old. These defendants now must face the reality from the first round of Zombie Liens – in the passage of time, evidence can be lost, witnesses may no longer be available, and lien litigation starts back at square one.

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To be clear, nothing in the enacted fraud legislation requires defendants to participate in the processes described above. Moreover, nothing in the enacted fraud legislation prohibits a defendant from making a payment to a stayed lien claimant. In many situations, defendants may be better served by truly considering the cost of settling stayed liens for pennies on the dollar compared to awaiting (1) the criminal adjudication process and (2) the lien consolidation process – all while suffering the expense of keeping claims open. The obvious problem with paying these stayed lien claimants a nominal sum, is that it perhaps only encourages the fraud we are trying to prevent, leading to an endless circle of potentially fraudulent lien claims. So, then, perhaps the question is whether reactionary and remedial legislation is not the answer, but rather, preventative legislation that discourages fraudulent practices in the first place may be the answer.



Our Success Stories From the Trenches...



AARON HEMMINGS RECEIVES A 0% PD AWARD

Aaron Hemmings, Shareholder in the San Fernando Valley/Central Coast office, obtained a 0% PD award on an admitted head injury case at the Van Nuys WCAB. Following the injury, the applicant was taken to the emergency room via ambulance but was discharged with a diagnosis of a head laceration. However, upon retention of counsel, the additional body parts of the neck, headaches, spine and neurological system were pled. Interestingly, the applicant had one visit with the company doctor who deemed the incident to be first aid and without factors of impairment. A few weeks following the company doctor visit, the applicant was arrested and spent several months in jail for a DUI and assault upon a police officer. Mr. Hemmings secured the prison records which reflected

medical examinations while incarcerated, but without reference to any head, neck, spine or cognitive symptoms! The records and the discharge report were served upon applicant's counsel without objection per LC§4061 and no panel was requested by applicant's counsel until a few days before trial. At trial, Mr. Hemmings was able to use the case of *Strawn v. Golden Eagle Insurance Co.* to convince the court that the objection was too late and discovery was closed. The court was not impressed with the Applicant's current complaints of cognitive issues, headaches and cervical spine pain given the prison records suggested none of those problems after the injury and Awarded 0% PD. Way to go Aaron!

KATHLEEN ROBERTS RECEIVES A TAKE NOTHING

Kathleen Roberts, Shareholder in the San Jose office, successfully obtained a "take nothing further" after an applicant had an injury to her left elbow from opening a refrigerator door while working at a client's home as a caregiver. Applicant really did have an injury and needed tendon surgery, claimed that she did not improve from the surgery, and convinced the evaluator that she had not improved. The evaluator continued her on TD and recommended another surgery. She told the PTP that she could not use her arm at all and that her hand was a claw that was so stiff she couldn't open her fingers. This went on for many months. We then got film of the applicant shopping with her daughter, using her cell phone, driving, filling up her gas tank, and putting on her elbow brace as she went into the PTP's office and taking the brace off when she came out.

The PQME saw the film and said that she was MMI with no PD and no need for medical care. We took the case to trial, and the WCJ ordered us to go back and ask the PQME if she really didn't need any medical care because she had the tendon surgery. He said yes.

Then, the Santa Cruz County DA's office prosecuted her for fraud. She pled guilty and was ordered to pay \$236,896.05 in restitution and begin minimum payments of \$1975.00 per month as a condition of probation. Great job Kathleen!

TIM KINSEY RECEIVES ALJ FINDING

Tim Kinsey, Managing Shareholder of our Orange County office, obtained a finding from the ALJ in an Industrial Disability Retirement hearing precluding denying applicant's request for Industrial Retirement benefits from CalPERS. Through documentary and testimonial evidence, Tim was able to convince the trial judge that the City would have been able to provide applicant with a permanent modified position had applicant not retired and moved out of state. In fact, applicant testified that

he had purchased property in Oregon years prior to being declared MMI and therefore provided evidence that he had never intoned on participating in ten permanent modified duty program offered bit the City. Additional testimony showed that the City would have tailored a position around applicant's permanent work restrictions and therefore applicant was not "substantially incapacitated" per *Stuessel v. City of Glendale*. Go Tim!

ZUNIGA vs. WCAB (2018) 19 CAL APP. 5TH 98: CLAIMANT'S ATTEMPT TO REVEAL THE IDENTITIES OF IMR REVIEWERS

By: Paul Zayat, Senior Associate | El Segundo Office

The First Appellate District, in a published decision, held that the Workers' Compensation Appeals Board was prohibited from ordering that the identities of the reviewer(s) of the Independent Medical Review (IMR) process be revealed to the workers' compensation claimant.

Senate Bill 863 took effect on January 1, 2013. One of the major provisions in the bill was changes made to California's Utilization Review (UR) Process. A request for medical treatment in the workers' compensations system for accepted cases must go through a UR process to confirm that it is medically necessary before it is approved. If UR denies, delays or modifies a treating physician's request for medical treatment because the treatment is not medically necessary, the injured employee can ask for a review of that decision through IMR.

The costs of IMR are paid by employers who are required by law to provide injured employees with all medical treatment that is reasonable and necessary to cure or relieve the effects of a work-related injury. The DWC is required to contract with one or more independent medical review organizations (IMROs) to conduct IMR on its behalf.

The determination of the IMR organization is deemed to be the determination of the administrative director, and is binding on all parties, subject to appeal on narrow statutory grounds.

The IMR organization is required by statute to describe the qualifications of

the medical professionals who prepare the determination of medical necessity and to keep the names of the reviewers confidential in all communications outside the IMR organization.

In this case, the claimant, Zuniga sustained an injury to his left shoulder in 2007. His doctor submitted a request for authorization for prescription medications. The request for authorization was partially approved and partially denied. Zuniga appealed the decision through the IMR process but some of the medications remained denied.

“The Court of Appeal held that keeping the reviewers identities confidential does not violate Due Process.”

Zuniga appealed again claiming that the IMR decision resulted from erroneous factual findings. The appeal was upheld, reversing the original IMR decision. A new IMR review was ordered and a new reviewer reviewed Zuniga's case.

While the second reviewer was in the process of reviewing Zuniga's case, he filed a petition asking the Board to reveal the identities of the first and second reviewers to the parties or to the judge. Zuniga's essential argument was that he was being denied due process because one could not rule out the fact that the same reviewer could be reviewing his case again because there was only one IMRO that handles all reviews.

A hearing was held based on Zuniga's Petition to reveal the identities of the reviewers. The judge issued his findings and order denying Zuniga's request.

Zuniga filed a Petition for reconsideration which was denied by the Board and a Petition for Writ of Review was filed by Zuniga.

The court of appeal concluded that the Board has no authority to Order the Disclosure of the Identity of the IMR reviewers. They found no ambiguity in Labor Code Section 4610.6(f) which states that IMR shall keep the names of the reviewers confidential in all communications with individuals outside the organization.

Most notably, the Court of Appeal held that keeping the reviewers identities confidential does not violate Due Process. Zuniga essentially states that a party to the action has the right to determine and evaluate the qualifications of the person(s) making the final decisions on benefits on a matter. The court disagreed stating that the IMR reviewers are not adversaries to the claimant but rather simply decision makers.

In the end, the Court of Appeal concluded that Zuniga did not demonstrate that his due process rights were violated by the statutory provision that the identity of IMR reviewers must remain confidential.



CASE NOTES

LUISA SEQUERIA DE BUSTOS v. WCAB, RANDSTAD PLACEMENT PROS, ACE AMERICAN INSURANCE, BY ESIS, INC. 2018 CAL.WRK. COMP. LEXIS 4303

By: David Samarco, Senior Associate | Fresno Office

Applicant claimed injury to her lumbar and cervical spine while working for Randstad Placement Pros. Applicant treated with three different primary treating physicians, none of whom found her cervical spine to be MMI. The parties went to Dr. Jacob Mathis as a PQME. He found applicant to be MMI on both the lumbar and cervical spine. Based on Dr. Mathis' report, defendant filed a Declaration of Readiness to Proceed. Applicant objected, arguing that the PTP had not commented on P&S status. Ultimately, trial went forward on all issues. Applicant was awarded 20% permanent disability, based on the opinion of Dr. Mathis. Applicant filed a Petition for Reconsideration, asserting defendant's DOR was defective pursuant to Labor Code Section 4061(i) because there was no report from applicant's PTP finding applicant P&S on all body parts. The WCAB affirmed the WCJ's decision, finding Section 4061(i) does not require a P&S finding by all physicians. It points out, "a Declaration of Readiness to Proceed is merely the first step to a trial." The WCJ found the PQME report to be substantial medical evidence to support an award of permanent disability. Applicant's Petition for Writ of Review was denied.

SUTTER SOLANO MEDICAL CENTER v. WCAB (Go)
2018 CAL.WRK.COMP. LEXIS 26

By: David Chun, Shareholder | Fresno Office

Applicant, a field worker, injured his arm and upper extremity on 6/1/2015 when his arm was run over by truck while he was taking lunch break in an orchard adjacent to the employer's premises. WCAB affirmed WCJ decision that this injury was considered AOE/COE when all crew members working with the applicant, including applicant's supervisor, took lunch breaks in this shady field across from employer's property to escape scorching heat due to no shade on the employer's premises. The WCAB found that due to there being no restrictions regarding the implied permissible use of the adjacent orchard, that seeking shade on a hot day for a break was reasonably contemplated by employment, and that employer did not comply with 8 Cal. Code Reg. § 3395, because it did not provide a place on its premises for employees to sit in shade to rest and eat as provided by law.

COMMUNITY CORNER



Kathleen Roberts recently completed the San Francisco Hot Chocolate 15K & 5K!



Congratulations to James Lim, associate attorney in Orange, on his engagement to Stella Kim.



Kim Dyess, David Chun and Bethe Barkley presented on case law and apportionment to a full house at Keenan's Torrance office.



COMMUNITY CORNER



SRTK sponsored VICA's annual Crab Feed in Sacramento this past February, which was a huge success!



Bethie Barkley presented a case law update to the California Self-Insurers Association!



Joanne Thomas, Stewart Reubens and Bethie Barkley at the California Self-Insurers Association conference.

Welcome Aboard!

Anna Ghajar

Anna Ghajar joins the SRTK family as an associate in our **Orange County** office. She earned both Bachelor of Arts and a Master of Arts degrees from the University of Maryland in Baltimore, subsequently earning her Juris Doctorate from the University of La Verne College of Law in Ontario, California. Ms. Ghajar brings several years of experience as a defense attorney in workers' compensation, representing self-insureds, insurance carriers and various employers. She also had brief experience representing applicants, as well as performing real estate, mortgage and bankruptcy litigation. Her wealth of knowledge and legal experience, particularly in the courtroom and during depositions are a welcome addition to the SRTK family. In her spare time, Ms. Ghajar enjoys working out, hot yoga and cycling.

Gabriela Guzman

Gabriela Guzman earned both Bachelor of degrees in Spanish and Political Science from Pepperdine University, receiving the distinguished honor of outstanding political science graduate for the class of 2001. Ms. Edwards subsequently earned her Juris Doctorate Valparaiso University School of Law in Valparaiso, Indiana, where she was President of the Hispanic Law Student Association and a student recruiter for the admissions office, in addition to her excellence academics, placing her on the Dean's List. Ms. Edwards has worked exclusive, for several years, defending employers, insurance carriers and third party administrators at some of the top law firms in the state. We are pleased to have her wealth of experience and knowledge in the **Orange County** office of SRTK.

Aldo Jan

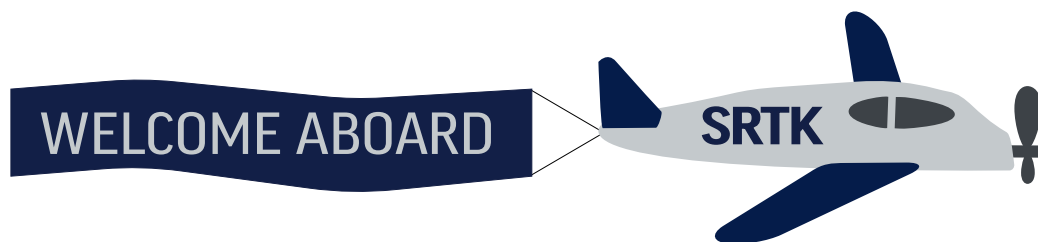
Aldo Jan earned a Bachelor of Arts Degree in Legal Studies and Environmental Economics and Policy from the University of California, Berkeley, while instructing and tutoring ESL students for the ACT and SAT. Mr. Jan subsequently earned his Juris Doctorate from Loyola Law School, where he received First Honors in Advanced Legal Research, among other academic accolades. Mr. Jan also served as an intern to the Honorable Diane E. Phillips and the Honorable Anne J. Horelly at the Workers' Compensation Appeals Board, Los Angeles District Office. In addition to these distinguished experience, Mr. Jan was a Law Clerk for the Los Angeles County District Attorney's Office, as well as a Representative for the California State Board of Equalization, State Income Tax Clinic. We look forward to Mr. Jan's breadth of knowledge and excitement for workers' compensation in our **El Segundo** office.

Ann Walker

Ann Walker earned her Bachelor of Arts Degrees in History from Patrick Henry College in Purcellville, VA, further completing the Spanish Diploma Program from La Academia Hispano Americana San Miguel de Allende, Mexico. Ms. Walker subsequently earned her Juris Doctorate from San Joaquin College of Law in Clovis, CA, where she served as a Law Clerk for a well-respected civil litigation firm, drafting, researching and filing legal motions, trials and mediation briefs, jury instructions and many other memoranda, as well as meeting clients, scheduling, preparing for and attending depositions and hearings. Upon graduation, she immediately put her legal skills to work as a workers' compensation attorney for several local defense firms, defending employers, insurance carriers and third party administrators. Ms. Walker did provide applicant representation for approximately eight months and returned to her passion for defense work with a new perspective and renewed vigor for the work we do at SRTK. We are pleased to have her wealth of experience and knowledge in the **Fresno** office of SRTK.

Joseph Szilagyi

Joseph Szilagyi joins the SRTK family as an associate in our **Corona** office. He earned a Bachelor's Degree in Communication: Print Journalism and a Bachelor's Degree in Political Science from California State Fullerton, graduating *magna cum laude* and earning the J. William Maxwell Award for Outstanding Communications Student. Subsequently, Mr. Szilagyi earned his Juris Doctorate from Loyola Law School, where he received the State Bar of California recognition for the Wiley M. Manuel Certificate for Pro Bono Legal Services. Among other excellent internship opportunities, Mr. Szilagyi gained a variety of legal experience on health-related legal issues, probate, insurance and work discrimination claims while working at the Public Law Center in Santa Ana, California. We are so pleased to have Mr. Szilagyi join our SRTK family.



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SRTK is so pleased to announce the addition of **Lanissa Schnoor** as Client Services Manager!

Lanissa joins the SRTK family with over 25 years in the workers' compensation industry, leading California claim operations as an Assistant Vice President for one of the largest Third Party Administrators, Gallagher Bassett. Her technical expertise includes effective analysis and execution of strategic initiatives for aggressive claim resolution and impactful service outcomes. She managed a claims team with over 6,800 open indemnity files to ensure adherence to each clients' particular needs, guidelines, service standards and regulatory requirements and is eager to serve SRTK clients in the same manner. In addition to her many leadership roles, Lanissa possesses her Workers' Compensation Claims Professional (WCCP) designation, certification to handle California Workers' Compensation Claims, and is a Self-Insured Administrator. She gained prior experience as an Assistant Branch Manager and Workers' Compensation Claims Supervisor at Gallagher Bassett, as well as claims adjuster and supervisor for Fireman's Fund, Cunningham Lindsey, Schools Insurance Authority and Gallagher Bassett. Lanissa is more than capable with strategic risk analysis and results. She provides detailed presentations, training and guidance, along with the SRTK team, to employer and carrier partners on claim specific topics and current regulatory changes that allow specific and valuable outcomes for our individual clients' needs. She has extensive interaction with employers, brokers, carriers and captive directors, working directly with the firm's Shareholders to expertly align with and maximize our customers' strategic goals with efficiency, experience and outside-the-box-thinking. In her leisure time, Lanissa enjoys spending quality time with her two teenage sons, entertaining family and friends in her home and boating on the Sacramento River. We are thrilled to have Lanissa's experience and dedication to SRTK and our clients.