

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **DUONG TANG,**

5 *Applicant,*

6 **vs.**

7 **SOLAR LINK INTERNATIONAL;
8 TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA ,**

9 *Defendants.*

10 *Real Parties in Interest:*

11 Lien Claimant Kristine Eroshevich, M.D., Ph.D.

Case No. **SAU6852145**
(Van Nuys District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

12
13 We previously granted the Petition for Reconsideration filed by lien claimant Kristine
14 Eroshevich, M.D., Ph.D., (lien claimant or Dr. Eroshevich) in order to study further the legal and factual
15 issues raised therein. This is our Opinion and Decision after Reconsideration.

16 Lien claimant seeks reconsideration of the Findings of Fact & Order issued on October 22, 2019
17 (F&O) by a workers' compensation administrative law judge (WCJ). The WCJ admitted into evidence
18 defendant carriers¹ Exhibits A-E and H-L, lien claimant's Exhibit 1, and Joint Exhibits F-G, and found as
19 follows: Dr. Eroshevich was convicted of four felony counts that were reduced to one misdemeanor;
20 Dr. Eroshevich stipulated to a determination by the Medical Board of California based on certain acts in
21 workers' compensation claims such that her medical license was suspended after a stay of revocation;
22 Dr. Eroshevich was suspended from participating in the Workers' Compensation system pursuant to
23 an order issued on November 29, 2017; and that Dr. Eroshevich filed liens in each of the cases involved

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27 ¹ Defendant carriers referred to herein as either defendants or carriers.

1 in this consolidated matter as shown in Exhibit X.² The WCJ further found that lien claimant failed to
2 meet the burden of proof required to rebut the presumption of Labor Code³ section 139.21(g), and
3 therefore, all liens of Dr. Eroshevich and all underlying bills for service and claims for compensation
4 from Dr. Eroshevich arise from the conduct giving rise to her suspension pursuant to section 139.21
5 (a)(1)(A)(i), (ii) and (iv).

6 Lien claimant contends that sections 4615 and 139.21 violate her substantive and procedural
7 rights to due process; that section 139.21 is an ex post facto law that imposes punishment for criminal
8 actions retroactively; and that application of section 139.21 is a violation of the Double Jeopardy Clause
9 of the Fifth Amendment to the United States Constitution.⁴ In addition, lien claimant contends that she
10 met her burden of producing evidence to rebut the section 139.21(g) presumption

11 Defendant carriers (defendants) and the Anti-Fraud Unit of the Department of Industrial Relations
12 (AFU) filed answers to the Petition for Reconsideration (Answers). AFU also filed a Motion for Nunc
13 Pro Tunc, but failed to request permission to do so pursuant to WCAB Rule 10848 (Cal. Code Regs., tit.
14 8, § 10848).⁵ Therefore, the Motion for Nunc Pro Tunc “shall neither be accepted nor deemed filed for
15 any purpose...” (*Id.*)⁶

16 The WCJ filed a Report and Recommendation on Petitions for Reconsideration (Report) wherein
17 the WCJ recommends that both petitions be denied.

18 We have reviewed the record in this matter and considered the allegations of the Petition for
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20 _____
21 ² The WCJ took judicial notice of Exhibit X, which the WCJ identifies as a list of cases involved in this consolidation
originally taken into evidence on August 28, 2018, and updated in Attachment 2 to the March 19, 2019 Amended Minutes of
Hearing.

22 ³ All further references are to the Labor Code unless otherwise noted.

23 ⁴ The Workers’ Compensation Appeals Board (WCAB) is precluded by Article III, section 3.5, of the California Constitution,
24 from declaring a statute unenforceable or refusing to enforce a statute on the basis that the statute is unconstitutional or in
violation of federal law unless an appellate court has previously made such a determination. (*Greener v. Workers’ Comp.*
25 *Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 [58 Cal.Comp.Cases 793].) We therefore cannot and do not address lien claimant’s
constitutional challenges to section 139.21. We note, however, that section 4615 is not at issue in this matter.

26 ⁵ Effective January 1, 2020, WCAB Rule 10848 is now 10964.

27 ⁶ AFU’s Motion for Nunc Pro Tunc should arguably be handled by the WCJ at the District Office. We have not considered the
motion in any way.

1 Reconsideration, defendants' Answer, AFU's Answer, and the contents of the Report. Based on our
2 review of the record, and for the reasons set forth below, our decision after reconsideration is to rescind
3 the F&O, and return this matter to the trial level for further proceedings consistent with this decision.
4 When new findings, orders and/or awards are issued, any aggrieved person may timely seek
5 reconsideration.

6 **BACKGROUND**

7 On September 23, 2009, Dr. Eroshevich was charged with six felony counts including Count 7,
8 which states as follows:

9 On or between October 17, 2006 and November 24, 2006, in the County
10 of Los Angeles, the crime of OBTAINING A PRESCRIPTION FOR
11 OPIATES BY FRAUD, DECEIT, OR MISREPRESENTATION, in
12 violation of Section 11173(a) of the Health and Safety Code, a Felony,
13 was committed by KHRISTINE EROSHEVICH and HOWARD KEVJN
14 STERN, who did unlawfully obtain and attempt to obtain a controlled
15 substance, to wit: OPIATES and did procure and attempt to procure the
16 administration of and prescription for said controlled substance by fraud,
17 deceit and misrepresentation. (Joint AFU/Carriers Exh. A, p. 11.)

18 On October 28, 2010, and after more than two months of trial, Dr. Eroshevich was found guilty
19 by a jury of four felony counts, including Count 7, *supra* (referred to as Count 7 or conviction for
20 prescription fraud) (Joint AFU/Carriers Exh. C; Lien Claimant Exh. 1, pp. 1, 10.)

21 On January 6, 2011, Superior Court Judge Robert J. Perry (Judge Perry) heard and decided a
22 motion to grant a new trial pursuant to Penal Code section 1181, and a motion to dismiss the charges in
23 the furtherance of justice pursuant to Penal Code section 1385. (Lien Claimant Exh. 1, LASC Daily
24 Transcript of Proceedings, January 6, 2011, pp. 8-9.) Judge Perry explained the grounds for each motion
25 as follows:

26 Subsection 6 states, that a new trial may be granted when the verdict is
27 contrary to the law or evidence. On a Motion for new trial a trial court
may not dismiss the charges for insufficiency of the evidence, but may
only Grant a Motion for a new trial. Citing *People vs. Porter*, a 2009
decision of our Supreme Court, at 47 Cal.4th 125.

The court must view the evidence in a light most favorable to the
prosecution. To Grant a Motion for new trial, the court must find that no
reasonable trier of fact, based on the evidence at trial, could convict.

The motion which invites the court to dismiss a charge in furtherance of
justice under Penal Code section 1385 is made to the court as an invitation

1 from the defense, and under that section the court may order an action
2 dismissed if the court finds no substantial evidence of each element of the
offense. (*Id.*, pp. 8-9, mistakes in the original.)

3 Judge Perry dismissed the two conspiracy counts against Dr. Eroshevich in the interests of justice
4 pursuant to Penal Code section 1385 (*Id.*, p. 33-35, 47:1-9), but chose “not to disturb the jury’s verdict”
5 as to the remaining two counts against Dr. Eroshevich, including Count 7, *supra.* (*Id.*, p. 38.)

6 Eroshevich was also convicted of two substantive Counts, Counts 7 and 9.
7 Count 7 pertained to the charge of obtaining a controlled substance by
8 fraud in violation of 11173(a) of the Health and Safety Code. Count 9
9 charged a violation of giving a false name in a prescription for a controlled
substance in violation of 11174. Both counts involved a single prescription
for Hydrocodone, otherwise known as vicodin, written on November 24th,
2006, by Eroshevich in the name Charlene Underwood.

10 ...

11 I choose not to disturb the jury’s verdict regarding Eroshevich on Counts 7
12 and 9. There is no doubt in the court’s mind that based on the evidence
13 Eroshevich acted out of a heart-felt desire to help her friend. Obtaining a
14 prescription in the name of another person, Charlene Underwood, without
15 Underwood’s knowledge or consent was clearly wrong and constituted a
16 violation of the law. As a doctor Eroshevich well knew she should not
17 have done this and it is clear to the court that she acted with the required
18 intent to defraud. The Motion for new trial for insufficiency of the
19 evidence as to counts 7 and 9 is therefore denied. I also decline the
20 invitation to dismiss these counts pursuant to Penal Code section 1385.
21 (*Id.*, pp. 6, 38-39.)

22 Judge Perry then vacated Count 9 “because it’s the same event and I don’t think it’s appropriate
23 to punish her twice...” (*Id.*, pp. 41-42.) He then reduced Count 7 to a misdemeanor stating as follows:

24 I feel that reduction to a misdemeanor is probably the right thing to do in
25 this case for this Defendant under these circumstances, so I am reducing
26 count 7 to a misdemeanor and I am imposing a Grant of summary
27 probation. I don’t think she needs probation supervision. I am imposing a
fine of \$100 for the misdemeanor, and there’s another \$100 fine that is
stayed unless she violates probation. You are to obey all laws, Ms.
Eroshevich—Dr. Eroshevich, as you well know. (*Id.*, pp. 42-46.)

28 On October 12, 2011, The Medical Board of California, Department of Consumer Affairs
29 (Medical Board) issued an accusation against Dr. Eroshevich seeking disciplinary action pursuant to
30 Business and Professions Code section 2236, based on her conviction for “a crime substantially related to
31 the qualifications, functions, or duties as a physician and surgeon.” (Joint AFU/Carriers Exh. D, p. 26,
32 Second Amended Accusation, Sixth Cause for Discipline.)

1 In addition, the Accusation was brought pursuant to Business and Professions Code section
2 2234(e), for “dishonest acts,” including allegations that Dr. Eroshevich engaged in dishonest acts by
3 making false statements in a psychiatric report and billing statement regarding a workers’ compensation
4 claimant. (*Id.*, p. 22, First Cause for Discipline.)⁷ The allegations related to the Sixth Cause for Discipline
5 were that although Dr. Eroshevich’s colleagues met with a workers’ compensation patient, she falsely
6 signed a November 2, 2006 statement that she examined the patient; further, that on November 23, 2006,
7 she made a false statement under the penalty of perjury in a 38-page report that she personally took the
8 history, performed the examination, and administered/scored all tests; then she billed the carrier for the
9 report. (*Id.*, pp. 22-24.) The allegations also set forth that approximately eight months later, Dr.
10 Eroshevich filed a supplemental report about the same patient stating that contrary to her November 23,
11 2006 statement under the penalty of perjury, another physician performed the clinical interview, and that
12 another staff member “assisted in obtaining information” from the patient. (*Id.*, p. 24.)

13 On January 19, 2012, the California Attorney General and Dr. Eroshevich entered into a
14 Stipulated Settlement and Disciplinary Order (Medical Board Stipulation) based on the First and Sixth
15 cause for discipline, as set forth, *supra*. (Joint AFU/Carriers Exh. D, pp. 13-14.) The Medical Board
16 Stipulation contains the following reservation:

17 11. The admissions made by Respondent herein are only for the
18 purposes of this proceeding, or any other proceedings in which the
19 Medical Board of California or other professional licensing agency is
involved, and shall not be admissible in any other criminal or civil
proceeding. (*Id.*, p. 3.)⁸

20 As a result of the Medical Board Stipulation, Dr. Eroshevich’s Physician’s and Surgeon’s
21 Certificate (licence) was revoked, then immediately stayed and placed a five-year probation under
22 conditions including a 90-day suspension “beginning the forty-fifth (45th) day after the effective date of
23

24 ⁷ Given the Medical Board’s disposition which was based only on these two counts in the Accusation, we do not address the
other allegations of the Accusation.

25 ⁸ The Medical Board Stipulation contained the following additional reservation: “Respondent agrees that if she ever petitions
26 for early termination or modification of probation, or if the Board ever petitions for revocation of probation, all of the charges
and allegations contained in Second Amended Accusation No. 17-2009-197998 shall be deemed true, correct and fully
27 admitted by Respondent for purposes of that proceeding or any other licensing proceeding involving Respondent in the State
of California.” (AFU/Carriers Exh. D, p. 3, emphasis added.)

1 this decision.” (*Id.*, p. 4.) Other conditions included: 25 hours of continuing education; a prescribing
2 practices course; an ethics course; a psychiatric evaluation; a medical evaluation and treatment and
3 quarterly reports from the treating physician stating if she is capable of practicing medicine safely;
4 producing all records to a practice and billing monitor who was to submit quarterly reports; submission
5 of the Medical Board Stipulation to every hospital where Dr. Eroshevich had privileges; prohibition
6 against supervising physicians’ assistants; that she obey all laws; and, quarterly declarations from
7 Dr. Eroshevich stating compliance with the conditions. (*Id.*, pp. 4-9.)

8 The Medical Board Stipulation became effective on March 30, 2012. (Joint AFU/Carriers Exh.
9 E.)

10 On May 6, 2016, the Medical Board terminated probation and reinstated Dr. Eroshevich’s license
11 based on good cause pursuant to Business and Professions Code section 2307 and California Code of
12 Regulations, title 16, section 1360.2. (AFU/Carriers Exhs. F-G.) The Medical Board concluded that
13 based on the evidence produced at hearing, “the chance of any recidivism by Petitioner is very low. The
14 public interest would not be put at risk by terminating her probation one year before it is due to expire by
15 its own terms.” (AFU/Carriers Exh. F, pp. 3, 5.)

16 On September 8, 2017, the Administrative Director (AD) of the Department of Industrial
17 Relations (DIR) issued a Notice of Provider Suspension – Workers’ Compensation. (AFU/Carriers Exh.
18 H.) The notice stated that the AD was required by section 139.21 to suspend Dr. Eroshevich from
19 participating in the workers’ compensation system because she had been convicted of a crime described
20 in section 139.21(a)(1)(A), and/or because she had been suspended due to fraud or abuse from
21 participation in the federal Medicare or Medicaid programs pursuant to section 139.21 (a)(1)(B). (*Id.*)

22 On October 10, 2017, an evidentiary hearing was held to determine whether lien claimant would
23 be suspended from participating in the worker’s compensation system. (AFU/Carriers Exh. I,
24 Determination and Order Re: Suspension, December 8, 2017, including Recommended Determination
25 and Order Re: Suspension, November 29, 2017, p. 2.)

26 On December 4, 2017, the WCJ issued a Recommended Determination and Order Re:
27 Suspension, concluding as follows:

1 Based on Khristine Eroshevich, M.D., having been convicted of a
2 misdemeanor as described in Labor Code §139.21(a)(1)(A) and having
3 been suspended due to fraud or abuse, from the federal Medicare or
4 Medicaid programs, it is recommended that Khristine Eroshevich be
5 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. AB a result, the Administrative Director is required to
immediately suspend Respondent. (*Id.*, p. 5.)

6 The WCJ explained the decision as follows:

7 Labor Code § 139.21(a)(1) requires the Administrative Director to
8 suspend any physician from participating in the Workers' Compensation
9 system if that physician has been convicted of a crime described in section
10 139.21(a)(1)(A). Respondent was convicted of a misdemeanor for
11 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.

12 Labor Code § 139.21(a)(1)(B) clearly applies to the facts of this case. This
13 section requires the Administrative Director to suspend any physician
14 from participating in the Workers' Compensation system if that physician
15 has been suspended due to fraud or abuse, from the Federal Medicare or
Medicaid programs. . . 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.

16 Respondent argues that her prior conviction was dismissed pursuant to
17 Penal Code § 139.21, and therefore, cannot be used as a basis for
18 suspension under Labor Code § 139.21. . . An order granting dismissal
19 under Penal Code§ 1203.4 provides that the probationer shall be released
20 from all penalties and disabilities resulting from the offense of which they
21 have been convicted. However, dismissal under 1203.4 does not eradicate
22 a conviction or purge a defendant of the guilt established thereby. It
23 merely frees the convicted from certain penalties. (*People v. Barraza*
24 (1994) Cal.App.4th 114). Penal Code§ 1203.4 contains a limitation on the
25 relief it offers, stating specifically that "in any subsequent prosecution of
26 the defendant for any other offense, the prior conviction may be pleaded
27 and proved and shall have the same effect as if probation had not been
granted or the accusation or information not 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 us 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

1 disbarment. The Court stated that the “final judgment of conviction is a
2 fact; and its effect cannot be nullified...by the later order dismissing the
3 action after judgment.” In *Meyer v. Board of Medical Examiners* (1949)
4 34 Cal.2d 62, a physician was convicted of a felony for violation of Health
5 and Safety Code 11164. The physician obtained a dismissal of his
6 conviction pursuant to Penal Code § 1203.4. The Board of Medical
7 Examiners suspended the license of the doctor based on the felony
8 conviction. The Supreme Court of California upheld the suspension,
9 concluding that the discipline by the Medical Board cannot be construed
10 as the type of “penalty” or “disability” released by Penal Code § 1203.4.

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

16 For the foregoing reasons, a determination was made that Labor Code
17 section 139.21(a)(1)(A) and 139.21(a)(1)(B) applies to respondent, and
18 immediate suspension is therefore required by section 139.21(b)(2). (*Id.*,
19 pp. 10-12.)

20 On December 8, 2017, the AD issued a Determination and Order Re: Suspension based on the
21 WCJ’s December 4, 2018 Recommended Determination and Order. (*Id.*, p. 1.) Defendants allege in their
22 Answer that lien claimant filed an appeal of the AD’s Determination and Order Re: Suspension:

23 In response to the Order, Eroshevich filed a writ of Administrative
24 Mandamus in the Los Angeles Superior Court, alleging that Labor Code
25 section 139.21 violated her equal protection and due process rights and that
26 retroactive application of the statute violated ex post fact laws, and was a
27 violation of the Separation of Powers doctrine. After briefing and oral
28 argument, the Court denied Eroshevich’s writ petition. Eroshevich did not
29 appeal that decision. (Carriers’ Answer, p. 4.)

30 The AFU confirms defendants’ allegation that Dr. Eroshevich filed an appeal of the AD’s
31 Determination and Order Re: Suspension:

32 In response to the Order of Suspension, Petitioner filed a writ of
33 administrative mandamus in Los Angeles Superior Court alleging that
34 Labor Code section 139.21 violated the equal protection and due process
35 clauses of the United States and California Constitutions, that retroactive
36 application of the statute violated the prohibition of the ex post facto
37 clause, and that application of the statute violates the separation of powers
38 doctrine. After extensive briefing and oral arguments, the Court denied
39 Petitioner’s writ. (EAMS Ref. #29578535, Exhibit G.) Petitioner did not
40 appeal this determination. (AFU Answer, p. 3.)⁹

41 ⁹ See footnote 8, *supra*.

1 The AD also alleges that Dr. Ersohevich sought declaratory and/or injunctive relief against the
2 AD prior to the October 17, 2017 suspension hearing:

3 On October 6, 2017, prior to the suspension hearing, Eroshevich filed a
4 complaint in federal court against the DWC and George Parisotto in his
5 official capacity as Administrative Director of the DWC, alleging various
6 constitutional claims and seeking declaratory, injunctive, or other relief
7 pursuant to 42 U.S.C. § 1983. (USDC ND Cal. Case No. 2:17-CV-07343
8 (EAMS Ref. #29578535, Exhibit E.)) The court granted the defendants'
9 motion to dismiss that action on abstention grounds on December 21, 201
0 7. (EAMS Ref. 7 #29578535, Exhibit F.) (AFU Answer, pp. 2-3.)¹⁰

11 No evidence of the federal action filed by Dr. Eroshevish, or of her appeal of the AD's
12 Determination and Order Re: Suspension to the Superior Court was introduced or admitted at trial.
13 Dr. Eroshevich does not specifically dispute these allegations.

14 On February 16, 2018, the Chief Judge of the Department of Workers' Compensation issued a
15 Consolidation and Order Staying Liens. (Order of Consolidation, Designation of Master File, Order
16 Staying Liens, and Notice of Hearing, February 16, 2018 (Consolidation Order).) On March 14, 2018,
17 lien claimant filed a response to the Consolidation Order requesting that her suspension from the
18 workers' compensation system be vacated. (Response to Order of Consolidation, Designation of Master
19 File, Order Staying and Petition for an Order Vacating Suspension and Reinstatement of Lien Claims,
20 March 14, 2018.) There is no petition for removal or reconsideration of the Consolidation Order in the
21 record of this case.

22 On August 28, 2018, a status conference was held. (Minutes of Status Conference (With
23 Attachments), August 28, 2018.) A master file was assigned, and it was determined that consolidation
24 was appropriate due to the common questions of law and fact involved in the approximately 1,100 lien
25 claims at issue in this matter. (*Id.*) The WCJ admitted into evidence Exhibit X, which at the time of the
26 hearing, was a list of the liens consolidated and stayed pursuant to the Consolidation Order. (*Id.*)
27

¹⁰ The exhibits referenced by the AFU in the Answer refer to exhibits to a declaration filed with the AFU's Opposition to Lien Claimant's Trial Brief, filed on June 25, 2019. Neither the declaration nor the exhibits were produced or admitted at trial in this case, and are therefore not evidence on which the Appeals Board may rely in its decision. In general, we note that a dismissal based on abstention indicates a dismissal pending resolution of underlying proceedings that may affect the matters plead.

1 This matter went to trial on September 10, 2019. (Transcript of Proceedings, September 10, 2019
2 (September Transcript).) The sole issue at trial was whether lien claimant was able to rebut the
3 presumption under section 139.21(g). (*Id.*, p. 7.) The parties submitted evidence for identification, and
4 the WCJ admitted all evidence produced at that time, including the AFU's Request for Judicial Notice
5 and the documents therein, i.e., legislative analysis of section 139.21, and the California Medical Board's
6 Second Amended Accusation and Stipulated Settlement and Disciplinary Order. (*Id.*, pp. 7-10.) Lien
7 claimant introduced the January 6, 2011 LASC Daily Transcript of Proceedings (excerpted, *supra*). (*Id.*)
8 None of the liens, medical records, or billing records for services rendered by Dr. Eroshevich were
9 submitted for admission into evidence.

10 Dr. Eroshevich testified at trial. (*Id.*, pp. 11-40.) She testified that she has treated workers'
11 compensation patients for 10 years, and has been in practice for a total of 40 years. (*Id.*, pp. 12, 14.) She
12 testified that she had never been convicted of workers' compensation, Medical/Medicaid fraud, or
13 insurance fraud; nor had she ever been investigated for workers' compensation, Medicare/Medicaid
14 fraud, or insurance fraud. (*Id.*, pp. 12-13.)

15 In preparation for her testimony, Dr. Eroshevich reviewed three documents:

16 I looked at my expungement of my misdemeanor. I looked at the dismissal
17 of my misdemeanor. I looked at my Medical Board decision that released
18 me from probation early, especially the burden and standard of proof,
19 number seven, that states rehabilitation is a state of mind and the law looks
with favor upon rewarding with the opportunity to serve one who has
achieved reformation and regeneration. (September Transcript, p. 25.)¹¹

20 Dr. Eroshevich testified on direct examination that she did not write prescriptions in any workers'
21 compensation matter. (September Transcript, p. 13.)

22 Q Dr . Eroshevich, as far as you are aware, in the cases that are
23 consolidated for this hearing , did you ever write a prescription?

24 A No.

25 Q Why?

26 _____
27 ¹¹ The "expungement" document was objected to by defendants' counsel as not previously admitted as an exhibit; therefore,
the WCJ agreed that it not be made part of the record. (September Transcript, p. 26.)

1 A I practice psychotherapy. I also primarily would evaluate, provide
2 psychological testing, and write a report for injured workers and then
3 would provide a brief course of psychological treatment, psychotherapy. I
4 practice psychotherapy. I also primarily would evaluate, provide
psychological testing, and write a report for injured workers and then
would provide a brief course of psychological treatment, psychotherapy.
(*Id.*, p. 13.)

5 On cross-examination, lien claimant was asked three additional times about prescribing in
6 workers' compensation matters:

7 Q BY MR. PEATMAN: In any workers' compensation case that you have
8 ever been a part of, I guess where you have been a treater, have you ever
written any prescriptions?

9 A I don't remember any.

10 Q So that kind of contradicts some of the other papers that were filed in
11 this consolidation. Are you sure? Because you are under oath. Can you
12 testify with absolute certainty that you never prescribed any medication in
any workers' compensation case?

13 A Not with a gun to my head like that, no.

14 Q Well, that's -- it's not a gun, but it is -- you swore under oath to tell the
truth.

15 A Yes. Yes.

16 Q So just to be absolutely clear, is it your testimony that you have never
17 prescribed any medication in any workers' compensation case?

18 A Correct.

19 Q You have never prescribed it?

20 A I can't think of any case that I prescribed. (September Transcript, p. 28.)
...

21 Q So my question was without looking at your histories, chart notes,
22 patient records, how do you know that the prescriptions that you have
23 written in the last ten years were only in non- workers' compensation
matters?

24 A Because I don't write for workers' compensation patients.

25 Q Why?

26 A Because they are short-term patients.

27 THE COURT: Can I have clarification on what "short-term" means.

THE WITNESS: Six weeks. (*Id.*, p. 31.)

1 ...

2 Q Okay. So just to be absolutely clear, under penalty of perjury, right now,
3 final answer, are you 100 percent sure, without reviewing any documents ,
4 without reviewing any patient histories, without reviewing any chart notes
5 or any other information, are you 100 percent sure that you have never
6 written a workers' compensation medical prescription?

7 A Not now. Now that you have presented it this way, you have changed
8 my opinion. (*Id.*, p. 34.)

9 Defendant confronted Dr. Eroshevich with statements made in a verified trial brief filed on her
10 behalf regarding the prescription of medication to patients. (September Transcript, pp. 29-31.)
11 Specifically, defendant pointed to the first full paragraph on page three of the trial brief where it states
12 that Dr. Eroshevich made a "handful of prescriptions." (*Id.*; see Trial Brief, April 2, 2019, p. 3: 9-12.)¹²
13 Dr. Eroshevich testified that 80 percent of her business are workers' compensation patients, and about 20
14 percent are private clients; she wrote prescriptions in her private client cases. (*Id.*, pp. 30-31.) She
15 testified that without looking at any of her records, she knows she did not prescribe in workers'
16 compensation cases because those patients are short-term patients (six-week patients). (*Id.*)

17 Dr. Eroshevich did not review the medical records for any of the liens prior to her testimony.
18 (September Transcript, pp. 28-29.) Her testimony that she did not prescribe medications was from her
19 memory. (*Id.*)

20 Dr. Eroshevich testified that she did not "think" she was found guilty by jury of conspiring to
21 commit the crime of obtaining substances by fraud, deceit, misrepresentation, or concealment of a
22 material fact. (September Transcript, pp. 16-17.) When shown Exhibit C, a Minute Order from the Los
23 Angeles Superior Court (LASC), stating that she was found guilty by a jury of four felony counts,
24 including two conspiracy counts, Dr. Eroshevich testified as follows:

25 Okay. I was confused that I was found guilty of a misdemeanor. Not that -
26 - that the jury was wrong. According to the Judge acting as the 13th juror,
27 that wasn't a real conviction. The conviction was overturned. I'm sorry,

¹² "The majority of Petitioner's patients have industrially related injuries. Also, it should be noted that since Petitioner's misdemeanor conviction, Petitioner has written less than a handful of prescriptions. More importantly, Petitioner believes that no prescription has been written in any workers' compensation case that is part of this consolidation." (Trial Brief, April 1, 2019, p. 3:9-12.)

1 Your Honor. (*Id.*, p. 17.)

2 Dr. Eroshevich did not know the name of the misdemeanor of which she was convicted, and
3 denied that it involved deceit. (September Transcript, p. 32.)

4 Dr. Eroshevich testified that she did not know if she signed declarations under section 4903.05 for
5 each of the liens at issue in this matter. (September Transcript, pp. 18-21.) She was not familiar with that
6 Labor Code section. (*Id.*, p. 35.) She testified that all of the liens at issue were submitted based on her
7 determination that the services and care of the patient were reasonable and necessary. (*Id.*, p. 22.) She
8 based that determination on her medical knowledge, and agreed that her determination was based on her
9 qualifications as a provider of medical services. (*Id.*, pp. 22-23.)

10 THE COURT: I have a quick question for you. Now, prior to our lunch
11 break, you had some evidence that had refreshed some of your memory.
12 There was discussion as to the – some declarations that were signed under
13 4903.05. You seem not to recall what that declaration was for, but it was
14 defined for you. Do you remember signing any sort of declaration that
15 indicated in your mind that your billing was based on necessity?

16 THE WITNESS: I have a billing department, and they provide me
17 documents to sign. And I don't recall specifically what they were, but they
18 always make sure I'm in compliance. So I rely on them to sign the
19 appropriate documents.

20 THE COURT: Do you read those documents that you sign?

21 THE WITNESS: Yes.

22 Only one of the lien claims at issue in this matter is dated prior to January 10, 2011; the rest of the
23 claims are dated after January 10, 2011. (September Transcript, p. 39.)

24 The WCJ issued the F&O on October 22, 2019. In the Opinion on Decision, the WCJ clarified his
25 findings and orders. (F&O, Opinion on Decision, October 22, 2019.) The WCJ stated the grounds for
26 dismissing all of Dr. Eroshevich's liens as follows:

27 Khristine Eroshevich was convicted (Exhibit C) of conspiracy to commit a
crime (Counts 1 and 3-Felony), unlawfully prescribing a controlled
substance (Count 7-Felony), and unlawfully obtaining a prescription by
giving a false name (Count 9-Felony). The Superior Court dismissed
Counts 1 and 3 (Applicant's Exhibit 1, page 38) and, while confirming the
intent to defraud, (Applicant's Exhibit 1, page 38), vacated Count 9 as
duplicative (Applicant's Exhibit 1, page 41) of Count 7. Therefore, the 4
felony convictions were reduced to a single misdemeanor, Count 7, which
includes intent to defraud. A misdemeanor that involves fraud is an act
adequate (Labor Code §139.21(a)(1)(A)(i), (ii)) to invoke the presumption

1 under Labor Code §139.21(g).

2 Further, lien claimant Khristine Eroshevich was also found by the Medical
3 Board of California, Department of Consumer Affairs (Exhibit D), based
4 on the signed admission by Khristine Eroshevich, to have engaged in
5 dishonest acts by making false statements in a psychiatric report and
6 billing statement regarding a workers' compensation claimant and for
7 conviction of a crime, which also activates Labor Code §139.21(a)(1)(B)
8 and (C) so as to invoke the presumption under Labor Code §139.21(g).

9 The California Medical Board found the acts to be worthy of revocation,
10 and reduced this to a suspension of her medical license. Defense Exhibit
11 D, page 2, line 27-28 shows that Applicant admitted to each of the charges
12 set forth by the Medical Board in its "Second Amended Accusation"
13 (Exhibit A to named Exhibit D)...Khristine Eroshevich was also suspended
14 from the Med-Cal program. This was adequate for Labor Code §139.21
15 (a)(1)(C).

16 ...
17 The history as to conviction of a crime and revocation of the license was
18 found adequate to suspend the practitioner from [*sic*] participating in the
19 Workers' Compensation system and require the liens of the practitioner to
20 be stayed and adjudicated in a Special Lien Proceeding pursuant to LC
21 139.21.

22 The lien claimant must thereafter, per Labor Code § 139.21 (g), rebut the
23 presumption that all liens to be adjudicated in this special lien proceeding,
24 and all underlying bills for services and claims for compensation arise
25 from the conduct subjecting the physician, practitioner or provider to the
26 suspension, and that payment is not due and should not be made on those
27 liens because they arise from, or are connected to the criminal, fraudulent
conduct or activity. The lien claimant shall not have the right to payment
unless the lien claimant rebuts the presumption by a preponderance of the
evidence.

18 In her testimony, the Lien Claimant witness, Khristine Eroshevich, did not
19 discuss any specific case where these acts were not committed. Applicant
20 testified that she had not reviewed any of the consolidated cases
21 (Transcript of Proceedings 09/10/2019, pg. 28, line 24 – pg. 29, line 7). In
22 direct examination, the Lien Claimant denied writing prescriptions in any
23 of the cases (Transcript of Proceedings 09/10/2019, pg. 13, lines 17-20).
24 However, on cross-examination, the lien claimant was not able to state
25 that she did not write prescriptions in any of the consolidated cases
26 (Transcript of Proceedings 09/10/2019, pg. 33, lines 3-10).

27 Further, Lien Claimant did not offer any testimony to rebut the acts
resulting in the revocation of her license. The lien claimant testifies that
her suspension from Medi-Cal was as to the Medical Board counts
(Transcript of Proceedings 09/10/2019, pg. 31, lines 19-24), but does not
rebut these, or relate that these acts did not occur in any of the
consolidated cases. Therefore, the admissions set forth in the Exhibit D
remain unchallenged. Lien Claimant asserted in her trial brief that most of
the services were post-criminal conviction. However, there is no evidence
as to whether there were acts through the date of the license revocation

1 and suspension by the Medical Board, for which she signed the acceptance
2 January 28, 2012.

3 Based on the demeanor of the witness and her inconsistent responses, I
4 determined that Khristine Eroshevich was not credible.

5 The lien claimant failed to present adequate credible evidence that rebuts
6 the presumption, to a level of a preponderance as required in Labor Code §
7 139.21(g), that the liens from the consolidated cases are not payable. The
8 evidence presented by lien claimant was her testimony that she was not
9 convicted of workers compensation fraud, insurance fraud, or Med-Cal
10 fraud. The lien claimant further offers testimony that she did not write
11 prescriptions in workers compensation claims. Exhibit D sets forth, by her
12 admission, that the Lien Claimant did falsify documents, including
13 workers compensation reports and did bill an insurance carrier falsely, was
14 grossly negligent (Labor Code § 139.21.(1)(a) (i), (ii) and (iv)), for falsely
15 issuing reports without evaluation of the patients, and her criminal acts.

16 Labor Code Section 139.21(g) sets forth that the lien claimant shall not
17 have the right to payment unless the lien claimant rebuts the presumption
18 that the liens arose from the conduct giving rise to the suspension by a
19 preponderance of the evidence. No evidence was presented by lien
20 claimant to show the liens did not arise from that conduct. Real Party in
21 Interest Khristine Eroshevich has failed to rebut the presumption of non-
22 payment of the liens by a preponderance of the evidence as required under
23 Labor Code Section 139.21(g). (*Id.*, pp. 5-6.)

24 In the Report, the WCJ confirmed the basis for his decision:

25 Petitioner has set forth that the Petitioner is “shocked and financially
26 devastated” by the Order. The question is not whether the Lien Claimant,
27 after conviction for crimes, and after entering stipulations to acts of fraud
should be allowed to profit from the fraudulent actions some time down
the line. Labor Code Section 139.21(g) sets forth that the lien claimant
shall not have the right to payment unless the lien claimant rebuts the
presumption that the liens arose from the conduct giving rise to the
suspension by a preponderance of the evidence. The question, therefore, is
whether the Petitioner has met the burden to show that there were any of
her billings and liens that did not arise from the conduct giving rise to the
suspension by a preponderance of the evidence.

28 As an analogy, if a person steals a car, and is caught, he is found guilty.
29 He has a jail sentence. He might get a reduced sentence due to good acts.
30 He can even be introduced back to employment selling cars. However,
31 somewhere along the way, the stolen car is returned to the victim. The
32 person convicted, once released, is not able to sell the stolen car to
33 someone and profit from the sale of the stolen car. He can sell a car that he
34 has legitimate basis to sell. He could show he has title. Here, Petitioner is
35 seeking to take her profits from fraudulent actions “13 years ago.” She
36 practiced acts of fraud. Not only in the use of another’s name as found in
37 the criminal proceeding, but for falsifying reports and billing for acts she
did not perform in the workers’ compensation system. And she, now,
wants to go back and collect on bills from these performed “13 years ago.”

1 Lien Claimant did not offer any testimony to rebut the acts resulting in the
2 revocation of her license. The lien claimant testified that her suspension
3 from Medi-Cal was as to the Medical Board counts (Transcript of
4 Proceedings 09/10/2019, pg. 31, lines 19-24). Kristine Eroshevich does
5 not rebut the relation between these acts and the acts in the consolidated
6 cases. Nor did Kristine Eroshevich relate that these acts did not occur in
7 any of the consolidated cases. Therefore, the admissions set forth in the
8 Exhibit D remain unchallenged. Had the Petitioner presented specific files
9 that she could show were not tainted by the fraudulent acts, then there is
10 the ability to rebut the presumption.

11 The petitioner states that the determinations provided were based on
12 poorly written legislation. However, the constitutionality of the Labor
13 Code § 1139.21 was addressed in *Barri v. WCAB* (2018) 83 CCC 1643.
14 The 4th District Court of Appeal upheld the constitutionality of the lien
15 fraud statutes. The court concluded, "While the new system is far from
16 perfect, it cannot be said sections 4615 and 139.21 are unconstitutional."
17 The *Barri* Court also held that LC 139.21 applies retroactively but that it
18 did not violate the ex post facto clause, which applies only to criminal
19 statutes, because it was part of a civil regulatory scheme designed to
20 prevent the unnecessary processing and payment on liens tainted by fraud
21 and other misconduct. The court concluded that the anti-fraud legislation
22 at issue may have some punitive aspects, but it primarily serves important
23 nonpunitive goals (Ibid 1676-1679) [*sic*].

24 Petitioner had a hearing with the burden of proof on the lien claimant to
25 show what services were not tainted. The opportunity was not taken to go
26 through each file to show she did not falsify any of the reports wherein she
27 allegedly provided services. The petitioner did not show each file. The
petitioner did not present a random sample of files or hand-picked files to
overcome the presumptions that all the files were tainted. There was no
evidence other than testimony that the provider did not issue prescriptions
on her cases. There was no question or testimony as to the issue of
fraudulent acts such as performed as to billing for services not rendered,
and setting forth evaluations that she did not attend. These were the
charges set forth by the Medical Board, causing revocation of the
petitioner's license, and activating 139.21(a)(1)(B) and (C).

The evidence presented by lien claimant was her testimony that she was
not convicted of workers [*sic*] compensation fraud, insurance fraud, or
Med-Cal fraud. However, the evidence showed otherwise. The lien
claimant further offers testimony that she did not write prescriptions in
workers compensation claims. Exhibit D sets forth, by admission of
Khristine Eroshevich, which was not rebutted, that the Lien Claimant did
falsify documents, including workers compensation reports and did bill an
insurance carrier falsely, was grossly negligent (Labor Code §
139.21.(1)(a)(i), (ii) and (iv)), for falsely issuing reports without
evaluation of the patients, and her criminal acts.

Labor Code § 139.21(g) sets forth that the lien claimant shall not have the
right to payment unless the lien claimant rebuts the presumption that the
liens arose from the conduct giving rise to the suspension by a
preponderance of the evidence. No evidence was presented by lien
claimant to show the liens did not arise from that conduct. Real Party in

1 Interest Khristine Eroshevich has failed to rebut the presumption of non-
2 payment of the liens by a preponderance of the evidence as required under
3 Labor Code Section 139.21(g). (Report, pp. 4-7.)

4 Dr. Eroshevich now seeks reconsideration of the F&O.

5 DISCUSSION

6 Section 139.21 states in pertinent part:

7 (a) (1) The administrative director shall promptly suspend, pursuant to
8 subdivision (b), any physician, practitioner, or provider from
9 participating in the workers' compensation system as a physician,
10 practitioner, or provider if the individual or entity meets any of the
11 following criteria:

(A) The individual or entity has been **convicted** of any
12 felony or misdemeanor and that crime comes within any of
13 the following descriptions:

(i) It involves fraud or abuse of the federal
14 Medicare or Medicaid programs, the Medi-Cal
15 program, or the workers' compensation system, or
16 fraud or abuse of any patient.

(ii) It relates to the conduct of the individual's
17 medical practice as it pertains to patient care.

(iii) It is a financial crime that relates to the federal
18 Medicare or Medicaid programs, the Medi-Cal
19 program, or the workers' compensation system.

(iv) It is otherwise substantially related to the
20 qualifications, functions, or duties of a provider of
21 services.

(B) The individual or entity has been suspended, due to
22 fraud or abuse, from the federal Medicare or Medicaid or
23 the Medi-Cal program.

(C) The individual's license, certificate, or approval to
24 provide health care has been surrendered or revoked.

(D) The entity is controlled by an individual who has been
25 convicted of a felony or misdemeanor described in
26 subparagraph (A).

27 ...

(4) For purposes of this section and Section 4615, **an individual or
entity is considered to have been convicted of a crime if any of the
following applies:**

1 (A) A judgment of conviction has been entered by a
2 federal, state, or local court, regardless of whether there is
3 an appeal pending or whether the judgment of conviction or
4 other record relating to criminal conduct has been
5 expunged.

6 (B) There has been a verdict or finding of guilt by a federal,
7 state, or local court.

8 (C) A plea of guilty has been accepted by a federal, state, or
9 local court.

10 (b)

11 (1) The administrative director shall adopt regulations for
12 suspending a physician, practitioner, or provider from participating
13 in the workers' compensation system, subject to the notice and
14 hearing requirements in paragraph (2).

15 (2) The administrative director shall furnish to the physician,
16 practitioner, or provider written notice of the right to a hearing
17 regarding the suspension and the procedure to follow to request a
18 hearing. ... The physician, practitioner, or provider may request a
19 hearing within 10 days from the date the notice is sent by the
20 administrative director. ...

21 (3) The administrative director shall have power and jurisdiction to
22 do all things necessary or convenient to conduct the hearings
23 provided for in paragraph (2). ...

24 ...

25 (d) Upon suspension of a physician, practitioner, or provider pursuant to
26 this section, the administrative director shall give notice of the suspension
27 to the chief judge of the division, and the chief judge or his or her designee
shall promptly thereafter provide written notification of the suspension to
district offices and all workers' compensation judges. The method of
notification to all district offices and to all workers' compensation judges
shall be in a manner determined by the chief judge in his or her discretion.
The administrative director shall also post notification of the suspension
on the department's Internet Web site.

(e) The following procedures apply for the adjudication of any liens of a
physician, practitioner, or provider suspended **pursuant to subparagraph
(A) or (D) of paragraph (1) of subdivision (a)**, including any liens filed
by or on behalf of the physician, practitioner, or provider or any entity
controlled by the suspended physician, practitioner, or provider:

(1) If the disposition of the criminal proceeding provides
for or requires, whether by plea agreement or by judgment,
dismissal of liens and forfeiture of sums claimed therein, as
specified in the criminal disposition, all of those liens shall
be deemed dismissed with prejudice by operation of law as
of the effective date of the final disposition in the criminal

1 proceeding, and orders notifying of those dismissals shall
2 be entered by workers' compensation judges.

3 **(2) All liens that have not been dismissed in accordance**
4 **with paragraph (1) and remain pending in any workers'**
5 **compensation case in any district office within the state**
6 **shall be consolidated and adjudicated in a special lien**
7 **proceeding as described in subdivisions (f) to (i),**
8 **inclusive.**

9 (f) After notice of suspension, pursuant to subdivision (d), and if
10 subdivision (e) applies, the administrative director shall appoint a
11 special lien proceeding attorney, who shall be an attorney
12 employed by the division or by the department. The special lien
13 proceeding attorney shall, based on the information that is
14 available, identify liens subject to disposition pursuant to
15 subdivision (e), and workers' compensation cases in which those
16 liens are pending, and shall notify the chief judge regarding those
17 liens. **Based on this information, the chief judge or his or her**
18 **designee shall identify a district office for a consolidated**
19 **special lien proceeding to adjudicate those liens,** and shall
20 appoint a workers' compensation judge to preside over that
21 proceeding.

22 (g) **It shall be a presumption affecting the burden of proof that**
23 **all liens to be adjudicated in the special lien proceeding, and all**
24 **underlying bills for service and claims for compensation asserted**
25 **therein, arise from the conduct subjecting the physician,**
26 **practitioner, or provider to suspension,** and that payment is not
27 due and should not be made on those liens because they arise from,
or are connected to, criminal, fraudulent, or abusive conduct or
activity. **A lien claimant shall not have the right to payment**
unless he or she rebuts that presumption by a preponderance
of the evidence.

(h) The special lien proceedings shall be governed by the same
laws, regulations, and procedures that govern all other matters
before the appeals board. The administrative director may adopt
regulations for the implementation of this section.

(i) If it is determined in a special lien proceeding that a lien does
not arise from the conduct subjecting a physician, practitioner, or
provider to suspension, the workers' compensation judge shall
have the discretion to adjudicate the lien or transfer the lien back to
the district office having venue over the case in which the lien was
filed.

...

(Lab. Code, § 139.21(a)-(i), emphasis added.)

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I.

In this case, Dr. Eroshevich was suspended from participating in the worker's compensation system as a result of her conviction for prescription fraud (section 139.21(a)(1)(A)(iv)), and her suspension from the federal Medicare program (section 139.21(a)(1)(B)). It appears undisputed that Dr. Eroshevich's appeal of the suspension order (see Cal. Code Regs., tit. 8, § 9788.3(f)) was unsuccessful. Moreover, the evidence shows that the criminal proceedings did not dispose of the liens at issue. Judge Perry ultimately convicted Dr. Eroshevich of one misdemeanor for writing a fraudulent prescription on November 24, 2006, and sentenced her to one year of unsupervised, summary probation and a \$100.00 fine. (Lien Claimant Exh. 1, pp. 46, 48.)

Dr. Eroshevich's liens became subject to consolidation and special lien proceedings pursuant to section 139.21(e)(2), "as described in sections (f) to (i), inclusive" because she was suspended "pursuant to subparagraph (A) or (D) of paragraph (1) of subdivision (a)." (Lab. Code, § 139.21(e), (e)(2).) The Consolidation Order issued, the above-captioned matter was created, and all liens at issue became subject to the presumption found in section 139.21(g), i.e., that all the liens arose out of the conduct for which Dr. Eroshevich was suspended, i.e., under section 139.21(a)(1)(A). (See Lab. Code, § 139.21(e), (e)(2).) The issue for trial in this special lien proceeding necessarily became whether Dr. Eroshevich could rebut the presumption in section 139.21(g) by a preponderance of the evidence.

The Legislature specifically identified the presumption in section 139.21(g) as a presumption affecting the burden of proof, rebuttable only by a preponderance of the evidence. (Lab. Code, § 139.21(g).) Therefore, the presumption affecting the burden of proof in section 139.21(g) "shifts the ultimate responsibility of persuasion" to the lien claimant. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 696 [1984 Cal. LEXIS 141].)

The effect of some rebuttable presumptions is to shift the burden of proof: Where, absent the presumption, one party would have the burden of proving some proposition, ***the presumption means the proposition is presumed true unless the other party proves it false.*** (Evid. Code, §§ 601, 605, 606.) The effect of other rebuttable presumptions is to shift the burden of producing evidence: If the presumption applies to a proposition, the proponent of the proposition need not prove it unless the opposing party produces evidence undermining it, in which case the presumption is disregarded and the trier of fact must decide the question without regard to

1 it. (Evid. Code, §§ 603, 604.) (*Pellerin, supra*, 145 Cal.App.4th at p. 1106,
2 emphasis added.)

3 The section 139.21(g) presumption should not be confused with a presumption that merely affects
4 the burden of producing evidence.¹³ On the other hand, the section 139.21(g) presumption must also be
5 distinguished from a “conclusive” presumption. Evidence Code section 620 provides that all
6 “presumptions established by this article and all other presumptions *declared by law* to be conclusive, are
7 conclusive presumptions.” (Ev. Code, § 620, emphasis added.) According to Witkin: “[A] conclusive or
8 indisputable presumption is entirely different from the ordinary rebuttable presumption...[N]o evidence
9 may be received to contradict it. Hence, it is more accurately described as a rule of substantive law rather
10 than of evidence. [Citations.]” (1 Witkin, Cal. Evidence [5th ed. 2019] Burden of Proof and
11 Presumptions, § 164.) The Legislature did not declare the presumption in section 139.21(g) to be
12 “conclusive;” rather, it declared the presumption to be one affecting the burden of proof.

13 In addition, “presumptions affecting the burden of proof are those that are intended not only to
14 facilitate fact finding, but also to advance some substantive policy goal.” (*Pellerin v. Kern County*
15 *Employees’ Retirement Assn.* (2006) 145 Cal.App.4th 1099, 1106 [72 Cal.Comp.Cases 60 (*Pellerin*)].)¹⁴
16 “It is the existence of this further basis in policy that distinguishes a presumption affecting the burden of
17 proof from a presumption affecting the burden of producing evidence.” (Evid. Code, § 605, Law
18 Revision Commission Comments 1965.)

19 The public policy meant to be implemented by the section 139.21 included combatting “workers’
20 compensation fraud by changing the incentives facing medical providers in the California workers’
21 compensation system.” (AFU/Carriers Exh. L, p. 4, Sen. Ins. Com., Concurrence in Senate Amendments

22
23 ¹³ “The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the
24 existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in
25 which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without
26 regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be
27 appropriate.” (Evid. Code, §604.)

¹⁴ “A presumption affecting the burden of proof is a presumption established to implement some public policy other than to
facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of
establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of
those who entrust themselves or their property to the administration of others.” (Evid. Code, § 605.)

1 to A.B. 1244 (2015-2016 reg. sess.), as amended August 19, 2016.) Specifically, section 139.21 was
2 enacted to create “a suspension process for medical providers who commit serious crimes or are involved
3 in fraudulent activity...” (*Id.*, p. 4.)

4 Similar to Medi-Cal, this bill requires that a suspended medical provider
5 be excluded from the system and denies further payment for services. In
6 the case of Medi-Cal however, existing law allows for a suspension of any
7 and all payments in the case of a medical provider being charged with
8 fraudulent activity. This bill instead suspends the provider and denies
9 further payment after conviction and the completion of the suspension
10 process, unless the suspension is for non-fraud related reasons or payment
11 was already provided. (*Id.*, p. 5.)

12 II.

13 In this case, Dr. Eroshevich seeks payment for services rendered to workers' compensation
14 claimants in approximately 1,100 lien claims. Pursuant to section 139.21(f), those liens are presumed to
15 have arisen out of, i.e., caused by, the criminal conduct of Dr. Erosevich. In order to seek payment on
16 any one of the almost 1,100 liens at issue herein, Dr. Eroshevich had the burden to establish, based on a
17 preponderance of the evidence, that each of those liens did *not* “arise from, or [were] connected to,
18 criminal, fraudulent, or abusive conduct or activity.” (Lab. Code, § 139.21(g); see *Pellerin, supra*, 145
19 Cal.App.4th at p. 1106.)

20 We first address the meaning of the word “arise” in section 139.21(g). The best indicator of
21 legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois v.*
22 *Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387-388 [58 Cal.Comp.Cases 286, 289] (*DuBois*).)
23 When the statutory language is clear and unambiguous, there is no room for interpretation and the
24 WCAB must enforce the statute according to its plain terms. (*DuBois, supra*, 5 Cal.4th at p. 387 [58
25 Cal.Comp.Cases at p. 289]; *Atlantic Richfield Co. v. Workers' Comp. Appeals Bd. (Arvizu)* (1982) 31
26 Cal.3d 715, 726 [47 Cal.Comp.Cases 500, 508].) It is only when statutory language is ambiguous and
27 susceptible of more than one reasonable interpretation that the Appeals Board may look to other maxims
of statutory construction, to legislative history, or to other evidence of the Legislature's intent. (*Wells v.*
One2One Learning Foundation (2006) 39 Cal.4th 1164, 1190 [2006 Cal. LEXIS 10227] (*Wells*); *Benson*

1 v. *Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1543 [74 Cal.Comp.Cases 113, 117]
2 (*Benson*).

3 The common definition of “arise” is “to begin to occur or to exist: to come into being or to
4 attention; to originate from a source.” (“Arise.” Merriam-Webster.com Dictionary, Merriam-Webster,
5 <https://www.merriam-webster.com/dictionary/arise>. Accessed 20 Feb. 2020.) Section 139.21(g) also
6 states that “payment is not due and should not be made” on any such liens “because they arise from, *or*
7 *are connected to*, criminal, fraudulent, or abusive conduct or activity.” (Lab. Code, § 139.21(g),
8 emphasis added.) The common definition of “connected” is “joined or linked together,” and “having the
9 parts or elements logically linked together.” (“Connected.” Merriam-Webster.com Dictionary, Merriam-
10 Webster, <https://www.merriam-webster.com/dictionary/connected>. Accessed 20 Feb. 2020.)

11 In workers’ compensation proceedings, liability for compensability “shall exist...for any
12 injury...arising out of and in the course of employment...” (Lab. Code, § 3600.) In that context, the term
13 “arise out of” means that an injury “must ‘occur by reason of a condition or incident of [the]
14 employment...’ (citation)” (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733-734 [].)
15 “That is, the employment and the injury must be linked in some causal fashion (citation).” (*Id.*, at p. 734.)

16 We conclude that the word “arise,” in conjunction with the word “connected,” has a clear, plain
17 meaning within the context of the workers’ compensation system, requiring a causal link, or nexus,
18 between the criminal conduct and the provision of service for which a lien claimant seeks payment, and
19 is not ambiguous or susceptible to more than one “reasonable interpretation.” (*Wells, supra*, 39 Cal.4th at
20 p. 1190.)

21 III.

22 In order to rebut the causal nexus between Dr. Eroshevich’s criminal conduct and the provision of
23 services for which she seeks payment in the liens, Dr. Eroshevich introduced a Reporter’s Daily
24 Transcript of Proceedings from the underlying criminal proceedings (criminal transcript), Judge Perry
25 presiding, and her testimony at trial. The WCJ determined that Dr. Eroshevich did not rebut the section
26 139.21(g) presumption.

1 In part, the WCJ’s decision was based on his conclusion that Dr. Eroshevich “did not offer any
2 testimony to rebut the acts resulting in the revocation of her license.” (F&O, Opinion on Decision,
3 October 22, 2019, pp. 5-6.)¹⁵ It is true that Dr. Eroshevich was suspended from participating in the
4 workers’ compensation system under both sections 139.21(a)(1)(A)(iv) and (a)(1)(B) [suspension from
5 the Medicare system]. However, we must read the individual subdivisions of section 139.21 together.
6 (Lab. Code, § 139.21(e)(2); see *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276; *Lungren v.*
7 *Deukmejian* (1988) 45 Cal.3d 727, 735 [“each sentence must be read not in isolation but in the light of
8 the statutory scheme”].)

9 The Legislature expressly limited the special lien proceedings created in section 139.21(e) to
10 those suspensions based on section 139.21(a)(1)(A).¹⁶ (Lab. Code, § 139.21(e) [“the following
11 procedures apply for the adjudication of any liens of a physician, practitioner, or provider suspended
12 pursuant to subparagraph (A) or (D) of paragraph (1) of subdivision (a)...”].) Section 139.21(e)(2) then
13 states that the special lien proceedings are “described in subdivisions (f) to (i), inclusive.” Section
14 139.21(g) thereafter describes the presumption affecting the burden of proof in all section 139.21(e) lien
15 proceedings. Finally, given that suspension under section 139.21(a)(1)(A) requires that the provider be
16 *convicted* of one of the enumerated crimes in subdivisions (i) through (iv), it appears that the Legislature
17 intentionally limited the application of the section 139.21(g) presumption to that conduct arising out of a
18 *conviction* for one of those enumerated crimes.

19 Here, Dr. Eroshevich was convicted of one count of misdemeanor prescription fraud, and
20 therefore suspended because she was convicted of a crime as enumerated in section 139.21(a)(1)(A)(iv).
21 Consequently, the approximately 1,100 liens she filed seeking payment for services rendered to workers’
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23 ¹⁵ We note that the WCJ also determined that Dr. Eroshevich was not credible based on “the demeanor of the witness and her
24 inconsistent responses.” (F&O, Opinion on Decision, October 22, 2019 (O/D), pp. 5-6.) We grant deference to the credibility
25 determinations of a WCJ because a WCJ has the opportunity to observe the demeanor of the witness. (*Garza v. Workmen’s*
Comp. Appeals Bd. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Only evidence of considerable substantiality can
warrant rejecting a WCJ’s credibility determinations. (*Ibid.*)

26 ¹⁶ We acknowledge that the Legislature does not appear to have provided for additional adjudication procedures for the liens
27 of providers suspended under section 139.21(a)(1)(B) or (C). Moreover, we find no AD rules establishing such adjudication
procedures.

1 compensation claimants became subject to section 139.21(e) special lien proceedings “as described in
2 subdivisions (f) to (i),” including the presumption of section 139.21(g). As a result of the Legislature’s
3 explicit limitation of special lien proceedings, neither the WCJ nor the Appeals Board may consider any
4 additional conduct that may have resulted in Dr. Eroshevich’s suspension from Medicare (which in this
5 case resulted from the temporary suspension of her medical license by the Medical Board), when
6 determining whether she rebutted the section 139.21(g) presumption.

7 It is therefore our decision after reconsideration to rescind the F&O, and return this matter to the
8 trial level for further proceedings consistent with this decision.

9 **IV.**

10 Finally, the AFU and carriers contend Dr. Eroshevich’s conviction for medication fraud
11 “‘substantially related to the qualifications, functions, or duties of a provider of services.’ Once she
12 committed her crime, she became unqualified to provide services in the workers’ compensation system.”
13 (AFU/Carriers Answer, p. 9.)

14 Because that conduct - prescribing a controlled substance by fraud, deceit,
15 misrepresentation, or concealment ... - related to her qualifications as a
16 provider of services, all of the liens for medical treatment she provided to
17 injured workers after commission of her crime arose out of and were
18 connected to the conduct that subjected her to suspension. Indeed, by
operation of statute, it rendered her unqualified to continue serving as a
provider in the workers’ compensation system. The fact that the victim of
Petitioner’s known crime was not being treated in the workers’
compensation system does not change the analysis. (*Id.*)

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1 Section 139.21(a)(1)(A)(iv) is a catch-all provision that enables the AD to suspend providers
2 based on convictions for crimes “substantially related to the qualifications, functions, or duties of a
3 provider of services.” (Lab. Code, § 139.21(a)(1)(A)(iv).) Dr. Eroshevich was suspended because she
4 was convicted of misdemeanor prescription fraud, which was found to fall within subdivision (iv). It
5 appears that the AFU and carriers want the Appeals Board to impose a “conclusive” presumption against
6 any provider who is suspended for conviction of a crime that falls within subdivision (iv) of section
7 139.21(a)(1)(A). We decline to do so based on the explicit language of section 139.21(g).¹⁷

8 Accordingly, our decision after reconsideration is to rescind the F&O, and return this matter to
9 the trial level for further proceedings consistent with this decision. When new findings, orders and/or
10 awards are issued, any aggrieved person may timely seek reconsideration.

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24 ¹⁷ We do not say that there may never be a case where the conviction is for a crime that necessarily affects the provider’s
25 fitness to practice medicine to such a degree, that no services provided after the commission of the criminal acts could be
26 “reasonably, actually, [or] necessarily incurred...” (Lab. Code, § 4621(a).) See eg., Opinion and Decision after
27 Reconsideration in *Sergio Juarez v. Safe Scaffolding, et al.*, SAU8706806, wherein we stated: “We emphasize that the
relationship between doctor and patient involves physical intimacy, and “is based on utmost trust and confidence in the
doctor’s honesty and integrity.” (*Windham, supra*, 104 Cal.App.3d at p. 470.) It is simply not possible for us to
compartmentalize Dr. Hafezi’s criminal sexual conduct with a minor from his conduct with his patients in the workers’
compensation system – and it is certainly not possible to do so with no evidence to the contrary.” (*Id.*, p. 14.)

1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals
3 Board that the Findings of Fact & Order issued on October 22, 2018 by a workers' compensation
4 administrative law judge is **RESCINDED** and, this matter is **RETURNED** to the trial level for further
5 proceedings consistent with this decision.

6 **WORKERS' COMPENSATION APPEALS BOARD**

7
8 /s/ DEIDRA E. LOWE

9
10 **I CONCUR,**

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12 /s/ JOSÉ H. RAZO

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15 /s/ KATHERINE WILLIAMS DODD



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19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

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