

SCIF, BLUE CROSS AND THE SILENT PPO

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Virginia Woodruff worked as a hay bailer and tractor driver for Greenfield Trucking. In May 2002, she suffered life-threatening injuries as a result of an on the job accident. On at least two occasions, she required extensive surgery that was performed at Good Samaritan (hereinafter “Good Samaritan”) in Los Angeles. For the protection of its employees, Greenfield Trucking had paid for a policy of workers’ compensation insurance through the State Compensation Insurance Fund, (hereinafter “SCIF”). Accordingly, Good Samaritan billed SCIF the sum of \$69,624.04 for covered services that it rendered to Ms. Woodruff that were necessitated by her industrial injury. Nonetheless, SCIF only paid \$9,307.76 of the billed amount after asserting that it was entitled to a PPO discount based upon a contract it had previously entered into with Blue Cross of California to purchase a discounted rate for Blue Cross patients treated by the hospital.

Now, of course, the contract between SCIF and Blue Cross had absolutely nothing to do with Good Samaritan’s provision of medical services to Ms. Woodruff. Ms Woodruff did not select Good Samaritan and its doctors to perform her surgeries in reliance on an agreement between SCIF and Blue Cross. In the context of Ms. Woodruff’s industrial injury, she was a workers’ compensation patient and not a Blue Cross patient. Therefore, it should have been totally understandable why the hospital did not believe it had been properly paid and why it subsequently filed a lien in Ms. Woodruff’s workers’ compensation case to recover the balance.

In order to understand SCIF’s strategy and why Good Samaritan reacted as it did, one must understand the concept of PPO contracts. Preferred Provider Organizations, known as PPOs, are a network of health care providers organized to offer medical services at discounted rates. The PPO providers furnish their services at discounted rates because they expect to receive a higher volume of patients through steerage. A Silent PPO is created when the PPO gains additional revenue by selling its reduced provider rates to payors such as workers compensation insurers who are not parties to the preferred rate agreement with provider panels and who do not provide incentives for their beneficiaries to utilize the member providers.

The selling of discount contract rates has plagued the medical community to the point that a serious problem has been created. Hospitals that are sorely needed by the surrounding communities are going out of business or are having to be subsidized by the federal, state and local government because of payors taking unwarranted PPO discounts.

For years, providers treating workers compensation patients have been underpaid as a result of the relationship between Blue Cross and SCIF. When SCIF and Blue Cross have entered into a contract, it has been for the purpose of enabling SCIF to pay below the workers’ compensation fee schedule as if SCIF, not the patient, were a Blue Cross member. However, SCIF is not a Blue Cross member and the purpose of workers’ compensation to benefit the patient and not an insurance company

The reader may reasonably ask how something like this can happen? Well, the answer is simple. All you have to do is take the largest insurance company in the state of California, Blue Cross, and the largest workers compensation carrier in the state of California, State Compensation Insurance Fund, and allow them to join forces.

Hospitals enter into contracts with Blue Cross in order to treat Blue Cross members. However these hospitals do not enter into contracts with SCIF. There is no advantage to them to contract with SCIF. Therefore, there is no legal basis for SCIF to pay Blue Cross rates for injured workers who are not even members of Blue Cross. The fact that SCIF has issued a policy of worker compensation insurance to the companies that employ workers who are injured on the job does not imply that the hospitals that treat those injured workers are now required to provide a discount to which the hospital did not agree and from which it did not derive a benefit.

Blue Cross is a medical insurer and not a workers compensation insurer in the State of California. It was Blue Cross that came up with a scheme that allowed it to enter into the workers compensation arena. It is important to note that Blue Cross is a licensed insurance company and the only reason that a hospital would enter into a contract with Blue Cross was to treat its members who would have been identified by a Blue Cross Membership Card. Nonetheless, this did not describe Ms. Woodruff who was not a Blue Cross member and did not have a Blue Cross membership card.

So, how did Blue Cross manage to pull this off? Well, for one thing, they entered into contracts with hospitals to treat Blue Cross members who were insured by Blue Cross. Several years later, unbeknownst to the hospitals, Blue Cross contracted with SCIF to sell their contract discounts to SCIF, thus creating a silent PPO in the case of any injured worker for whom SCIF was obligated pay benefits, regardless of whether or not the individual was a member of Blue Cross.

When SCIF insures an injured workers' employer, it accesses the hospitals' Blue Cross contract wherein the hospital receives a reduced rate. Blue Cross is so large that when the hospital objects to the improper payment, made by SCIF, Blue Cross requests that the hospital seek no further funds. Blue Cross then operates as a bill review service for SCIF reducing bills as much as 90% below fee schedule.

That being said, let's get back to Ms. Woodruff's case. It was on May 11, 2007, that the case of *Woodruff v. Greenfield Trucking*, BAK0141023, finally came on for trial before the Honorable Judge Terrence E. McEvoy at the Bakersfield District Office of the Workers Compensation Appeals Board. As generally happens in cases presenting this issue, the insurance company asserted that payment was made pursuant to a PPO contract, Therefore, it was also predictable that SCIF would argue that the Court lacked jurisdiction to adjudicate the dispute because Labor Code § 5304 excludes from the jurisdiction of the Workers' Compensation Appeals Board those cases in which there is an "express agreement" between the medical provider and the payor.

The problem that SCIF encountered here was that it was not able to present any evidence that it enjoyed a contractual relationship with Good Samaritan. The reason it could not produce this evidence was very simple. It was because no such contract between Good Samaritan and SCIF existed. Thus, the Court saw through that smokescreen very quickly.

Not having had success with its initial argument, SCIF then tried another approach. It argued that although Blue Cross was admittedly not a party to the workers' compensation litigation, SCIF could claim it was entitled to benefit from the contract between Blue Cross and Good Samaritan in that it should be considered an "other payor." Fortunately for the hospital, Judge McEvoy did not buy that argument either and was quick to conclude that since there was no "meeting of the minds" between Good Samaritan and SCIF, neither there was any contractual relationship between the two.

The dispute proceeded to trial and the judge found in favor of Good Samaritan, awarding payment in accordance with the Official Medical Fee Schedule, which is the standard of compensation for medical providers in workers' compensation cases. SCIF filed a Petition for Reconsideration, and once again, after reviewing Good Samaritan's response to SCIF's appeal, Judge McEvoy expressed the opinion that SCIF's arguments were not legally tenable. His analysis of the issues in his Report and Recommendation on Reconsideration is so well reasoned and instructive that it will be repeated verbatim in this article.

I. DISCUSSION

JURISDICTION

Labor Code § 5304 provides:

"The appeals board has jurisdiction over any controversy relating to or arising out of Sections 4600 to 4605 inclusive, unless an express agreement fixing the amounts to be paid for medical, surgical or hospital treatment as such treatment is described in those sections has been made between the persons or institutions rendering such treatment and the employer or insurer."

*In this case, there is no evidence of an **express agreement** between the rendering institution, Good Samaritan and the insurer State Compensation Insurance Fund (SCIF). The only **express agreements** in evidence are between Good Samaritan and Blue Cross, and a separate agreement between Blue Cross and SCIF. Two year separates the two agreements. At best, SCIF is a third party beneficiary, in a contractual sense, to the Good Samaritan/Blue Cross agreement. Since there is no **express agreement** between the institution rendering treatment (Good Samaritan) and the insurer (SCIF), the appeals board has proper jurisdiction over the matter under **Labor Code § 5304**.*

SCIF argues on reconsideration that the WCJ should have read the two separate contracts together to find one express agreement between the provider Good Samaritan and SCIF, particularly citing paragraph 2.21 of the agreement between Good Samaritan and Blue Cross contending that SCIF is an "other

payor”. This term “other payor” is ambiguous at best as to whether SCIF could be considered another payor. The term “other payor” as argued by the lien claimant is meant to refer to Blue Cross (card carrying) members, and there is no evidence that SCIF, an insurance company in and of itself was a member of Blue Cross or that applicant was a member of Blue Cross. SCIF or Blue Cross could have easily cleared up this ambiguity in the terms of the contracts by obtaining a contemporaneous addendum to the Blue Cross SCIF agreement signed on behalf of Good Samaritan agreeing to be bound by the deep PPO discount. The parties failed to do this, leaving the ambiguous language in place. Obviously Good Samaritan does not consider itself an “other payor” or it would not be litigating the matter. If the basic definition for a contract is that of a meeting of the minds between the contracting parties then no such meeting of the minds is demonstrated in this case.

*Also, the undersigned WCJ is troubled by the very nature of the extreme discount that SCIF wishes to impose on the provider Good Samaritan. **Labor Code 5307.1** provides for reasonable maximum rates to be paid for services provided. In this case, the parties stipulated that the OMFS for the services provided by Good Samaritan was \$21,237.00. Yet, SCIF proposes to pay only less than half this amount and a sum, which is only about 13% of the billed amount. It would appear to this WCJ that it is (or should be) against public policy to allow such deeply discounted fees, unless there are clear and unambiguous facts present that the parties have agreed to such deep discounts. The next “crisis” that appears to be looming in workers’ compensation will be that of a failure of providers to offer services to injured workers. Already it is getting more and more difficult to find doctors and medical providers willing to provide treatment to injured workers. To allow such deeply discounted rates will only add to this looming crisis. Thus, it would appear that as a matter of public policy, that unless there is an absolutely clear and unambiguous agreement to the contrary, the OMFS amount should apply. There is no clear and unambiguous agreement between the provider Good Samaritan and SCIF in this case. As such, all else being equal, the OMFS should prevail.*

*The undersigned WCJ agrees with the general proposition asserted by Good Samaritan in its Response to SCIF’s Petition for Reconsideration that there is no showing that SCIF has complied with the provision of **Labor Code 4609** and that such a so called Silent PPO is statutorily prohibited. In this case, contrary to the provisions of **Labor Code 4609**, Blue Cross appears to have sold its PPO Discount to SCIF in contravention of this labor code provision.*

II. RECOMMENDATION

The undersigned WCJ recommends that SCIF’s petition for reconsideration be denied

The purpose of this article has been to explain how “Silent PPOs” are used by the insurance industry to take advantage of hospitals. These insurers would have one believe

that it is simply a matter of greedy hospitals trying to avoid their contractual obligations. On the contrary, it is the insurance companies who are trying to extricate themselves from their legal obligations under the workers' compensation laws.

One Workers' Compensation Judge in the Bakersfield area saw through all the smoke and mirrors and decided to confront, head on, the serious problem of "Silent PPOs," created by two major insurance carriers in the State of California.

When a worker is injured on the job, the employers' workers' compensation insurance company swings into action, and since the employer pays a great deal of money for this type of insurance, getting effective medical treatment ensures a swift return to work, reducing the employer's costs

Hospitals and other medical providers are in the business of providing medical treatment to cure and relieve the effects of injury and sickness, and to maintain the health of their patients. The process is simple: If the medical provider does the work, it is entitled to reasonable payment in a competitive amount that will guarantee the best equipment and staff to serve its patients.

To this end, the Division of Workers' Compensation has adopted a state mandated Official Medical Fee Schedule (OFMS), based on Medicare rates, in order to ensure just and consistent payment to providers of medical services to industrially injured workers. This schedule is straightforward and easy to calculate, and is designed to provide reasonable payment for the medical services rendered.

When a hospital is underpaid by the creation of a Silent PPO, it either makes a claim for additional money or does nothing because it mistakenly believes that the payment is based upon a contractual discount. When the hospital seeks to obtain payment per the OMFS, Blue Cross often steps in and tells the hospital to back off as its continued demands may jeopardize their contractual relationship.

Insurance companies that engage in the Silent PPO scheme are making hundreds of millions of dollars off the backs of medical providers. The misuse of PPO contracts shortchanges the hospitals, provides the insurers with an undeserved windfall, and thwarts the regulatory purpose of encouraging medical providers to treat injured workers.

In the final analysis, what threatens to destroy the Workers Compensation industry is greed. Everybody wants to make as much money as possible. However, the system was created to ameliorate the harmful effects of workplace injuries; not to line the pockets of the insurance industry.

Good Samaritan's long saga finally reached a happy conclusion on September 4, 2007 when the Workers' Compensation Appeals Board issued its Order denying SCIF's Petition for Reconsideration for the reasons set forth in Judge McEvoy's report which the Board adopted and incorporated as its own opinion. The time has passed for SCIF to

appeal the decision further. In fact SCIF informed the hospital that they would not appeal the decision and have paid the Good Samaritan, pursuant to the underlying judgment.

The workers' compensation system currently faces a crisis that has arisen out of the reluctance of medical providers to offer services to injured workers. The source of this reluctance is the difficulties that providers face in obtaining just payment in a timely manner. This crisis has been greatly exacerbated by the use of Silent PPOs. Although most states, including California, have laws prohibiting Silent PPOs (see Labor Code §4609), the costs of litigation and the complexities of multiple contracts, have unfortunately made these abuses more prevalent than ever.

As Judge McEvoy so succinctly stated, *“To allow such deeply discounted rates will only add to this looming crisis. Therefore as a matter of public policy, unless there is an absolutely clear and unambiguous agreement to the contrary, the OMFS amounts should apply.”*

Ultimately, Ms. Woodruff's case stands for the proposition that hospitals no longer need to be victimized by SCIF and or by Blue Cross in connection with the payment of work related injuries. With the clarity of Judge McEvoy's decision and the understanding of how “Silent PPOs” operate, this inequity will hopefully become a thing of the past.