

Zwiener, Steven, D.C.

STAYS ON APPEAL

Effect of appeal to Board on Department's order

Where a provider appeals the Department's suspension of authorization to be paid for services to injured workers, the appeal necessarily stays further action and suspends the order pending a decision by the Board. *Citing State ex rel Crabb v. Ollinger*, 191 Wash. 535 (1937). ...***In re Steven Zwiener, D.C., BIIA Dec., 91 P001 (1991)*** [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 91-0-01527-6.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: STEVEN J. ZWIENER, D.C.**) **DOCKET NO. 91 P001**
2)
3) **ORDER ON MOTION BY HEALTH CARE**
4) **PROVIDER TO STAY EFFECT OF**
5 **PROVIDER NO. 18193**) **DEPARTMENT ORDER**
6 _____

7 APPEARANCES:

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9 Health Care Provider, Steven J. Zwiener, D.C., by
10 Hames, Anderson & Whitlow, per
11 Ray R. Whitlow

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Zimmie Caner, Assistant
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17 Health Care Provider, Steven J. Zwiener, D.C., on May 23, 1991, filed a Motion for Preliminary
18 Injunction Or, In The Alternative, Temporary Restraining Order Or, In The Alternative, A Stay
19 accompanied by a Memorandum In Support Of Petitioner's Motion For Stay, affidavits of Dr. Zwiener
20 and his attorney and several exhibits. The Department has filed a Memorandum In Opposition Of
21 Petitioner's Motion For Injunctive Relief. By consent of the parties on May 29, 1991, one of our review
22 and mediation judges held a hearing at which both parties were given an opportunity to provide further
23 background information and argument concerning the motion.
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28 The present motion follows an appeal received on May 17, 1991 from an order of the
29 Department dated April 3, 1991 which affirmed an order dated October 30, 1990. On May 30, 1991,
30 the next day following hearing on Dr. Zwiener's motion, we received the Department record in this
31 matter pursuant to our request under RCW 51.52.070. We have not received written notification from
32 the Department of its intentions with regard to reassumption of jurisdiction as allowed in RCW
33 51.52.060. However, the attorney for the Department has orally indicated that the Department does
34 not intend to reassume jurisdiction. We therefore assume that we have jurisdiction over this matter
35 and that we will issue an order granting the appeal at a later date.
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39 The October 30, 1990 Department order states:

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41 The Department of Labor and Industries conducted a comprehensive
42 evaluation of care provided to 25 industrially injured workers by Steven J.
43 Zwiener, D.C., Provider No. 18193. Based upon that comprehensive
44 evaluation, The Department finds that Dr. Zwiener:

- 45 a. Provided medically unnecessary care to injured
46 workers; and
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- b. Took medically unnecessary x-rays of injured workers; and
- c. Took x-rays of undiagnostic quality of injured workers; and
- d. Provided care that placed workers at minimal to high risk for adverse health outcomes; and
- e. Billed and was paid for services in violation of the Washington Administrative Code.

The Department concludes from the above findings that grounds exist for taking action against Steven J. Zwiener, D.C., under WAC 296- 20-015 section (4)(a), (e), and (1).

THEREFORE IT IS ORDERED that Steven. Zweiner, D.C.'s authorization to be paid for services provided to workers under Revised Code of Washington (RCW) Title 51 for industrial injury or occupational disease conditions accepted by the Department is suspended for at least one year. The suspension is effective the date of this order, if no reconsideration is requested, or, if reconsideration is requested and this order is upheld in whole or in part, on the date of the Department's final order.

IT IS FURTHER ORDERED that reinstatement of Steven J. Zwiener, D.C.'s authorization to be paid for services is contingent upon Dr. Zwiener:

1. Successfully completing continuing education courses specified and approved by the Department; and
2. Refunding the Department of Labor and Industries:
 - a. the amount of \$60,313.78 for medically unnecessary care; and
 - b. the amount of \$521.30 for medically unnecessary x-rays; and
 - c. the amount of \$470.09 for undiagnostic x-rays; and
 - d. the amount of \$882.08 for services billed in violation of the Washington Administrative Code; and
3. Paying interest of \$10,271.73 plus additional \$20.45 of interest for each day after November 1, 1990 until the excess payments, plus interest are refunded.

1 Reinstatement of authorization to be paid will occur upon Dr. Zwiener
2 fulfilling all of the above requirements, or at the end of one year, whichever
3 is later.

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5 THIS DECISION WILL BECOME FINAL 60 DAYS AFTER YOU RECEIVE
6 THIS NOTICE UNLESS YOU FILE A WRITTEN REQUEST FOR
7 RECONSIDERATION OR AN APPEAL WITHIN THAT TIME. YOUR
8 REQUEST OR APPEAL SHOULD INCLUDE THE REASONS YOU
9 BELIEVE THIS DECISION IS WRONG. REQUESTS FOR
10 RECONSIDERATION MUST BE SENT TO THE DEPARTMENT OF
11 LABOR AND INDUSTRIES, NANCY PETERSON, MEDICAL PROGRAM
12 SPECIALIST, CAPITAL VIEW II, MS-HC-251, OLYMPIA, WA. 98504.
13 APPEALS MUST BE SENT TO THE BOARD OF INDUSTRIAL
14 INSURANCE APPEALS, OLYMPIA, WA. 98504.

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16 Dr. Zwiener timely protested the October 30, 1990 Department order, and on April 3, 1991 the
17 Department issued an order affirming the October 30, 1990 order. On May 10, 1991 the Department
18 directed a letter to Dr. Zwiener indicating that the "purpose of this letter is to fully implement the
19 directives contained in the department's [April 3, 1991] Order and Notice." Specifically, the letter
20 informs Dr. Zwiener that: the Department has placed his provider number in suspense; no payment
21 will be made for treatment furnished injured workers after May 24, 1991; he is precluded from charging
22 injured workers for treatment; bills received for treatment after May 24, 1991 will not be paid; claimants
23 for whom Dr. Zwiener billed the Department within the last 90 days have been notified that he is no
24 longer eligible to treat their industrial injuries per copies of letters enclosed; and in order to comply with
25 the directives of the Department's order, Dr. Zwiener is to complete the continuing education courses
26 required by the Department within the one-year suspension or prior to reinstatement of his provider
27 number, that payment of \$72,458.98 plus an additional \$20.45 of interest per day from November 1,
28 1990 is to be made to the Department by May 31, 1991 and that, at the end of one year or completion
29 of the requirements, whichever is later, application for reinstatement of the provider number is to be
30 made to the Department.

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32 Dr. Zwiener, in his affidavit, states that approximately one-third of his chiropractic practice deals
33 with injured workers under this state's workers' compensation system. He has received telephone
34 contacts from former patients as well as present patients, indicating that they have received letters
35 from the Department informing them that he is no longer eligible to treat them for their industrial
36 injuries. The letters issued by the Department have already had a significant impact upon his practice
37 financially, as well as by interfering with his professional relationships with his patients.

1 In support of his motion, Dr. Zwiener argues injunctive relief is appropriate because he is
2 substantially injured by invasion of a clear legal right by implementation of the Department's order
3 pending appeal. He argues a stay of the Department's order is necessary to preserve for him the fruits
4 of a potentially successful appeal -- in short, that his pending appeal becomes a hollow effort if the
5 Department is allowed to implement its order. Dr. Zwiener further argues implementation of the
6 Department order violates state and federal constitutional due process guarantees, as well as the due
7 process requirements of Title 51 RCW.
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11 At hearing, the Department's attorney indicated the Department would not pursue involuntary
12 collection of any monies claimed due it pending appeal. Rather, the Department is more concerned
13 with its finding that continued treatment of its claimants by Dr. Zwiener creates a risk of substantial
14 harm to claimants. This belief is based in part upon findings by the Department in its investigation that
15 Dr. Zwiener provided not only substandard care, but also treatment which actually did physical harm to
16 several of the 25 claimants whose treatment files were targeted for investigation. For instance, the
17 Department's report on its provider evaluation, a copy of which was received by Dr. Zwiener with the
18 October 30, 1990 Department order, characterized issues with regard to Dr. Zwiener's quality of care
19 as falling into the following areas: iatrogenic damage, such as creating hypermobility in frequently
20 manipulated spinal joints; providing chiropractic treatment when it is not the correct type of therapy for
21 a patient's condition; and, inadequate treatment in the form of limiting the patient's therapy to
22 chiropractic treatment that does not permit complete healing and, thus, fostering psychogenic pain
23 syndromes or treatment dependency.
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27 The Department argues that immediate implementation of its order, particularly the prohibition
28 against further treatment of claimants as outlined in the May 10, 1991 letter, is necessary to protect
29 claimants from further harm. The Department further argues that, contrary to Dr. Zwiener's contention,
30 his treatment of workers' compensation claimants is founded upon a privilege, rather than any
31 established legal right. In support of its position, the Department points to its authority in workers'
32 compensation matters to "[s]upervise the medical, surgical, and hospital treatment to the intent that it
33 may be in all cases efficient and up to the recognized standard of modern surgery." RCW
34 51.04.020(4). RCW 51.04.030 again references this supervisory authority and further states the
35 Department "may recommend to an injured worker particular health care services and providers where
36 specialized treatment is indicated or where cost effective payment levels or rates are obtained by the
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1 department". RCW 51.04.030. Finally, the Department is authorized to conduct audits and
2 investigations of health care providers and,
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- 4 (2) Approve or deny applications to participate as a provider of services
5 furnished to industrially injures workers pursuant to Title 51 RCW; and
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- 7 (3) Terminate or suspend eligibility to participate as a provider of services
8 furnished to industrially injured workers pursuant to Title 51 RCW.
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10 RCW 51.36.110.

11 We do not believe proper consideration of Dr. Zwiener's present motion necessarily turns upon
12 a federal or state constitutional due process analysis.¹ Rather, we are not persuaded that the
13 Department has authority to implement the terms of its orders of October 30, 1990 and April 3, 1991
14 pending appeal of these orders to this Board. We agree with Dr. Zwiener that implementation of the
15 Department orders interferes with his established legal right to treat chiropractic patients, including
16 injured workers. This right is established by his licensure under Chapter 18.25 RCW and Chapter
17 114-12 WAC. These provisions provide a comprehensive scheme for initial licensure and relicensure
18 of individuals providing chiropractic treatment in this state. Claimants under our workers'
19 compensation system are generally permitted to receive treatment by a health care provider of the
20 claimant's own choice. RCW 51.36.010 and WAC 296-20-065.
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22 We are mindful that a claimant's right to continue with a particular practitioner is not unlimited.
23 The Department does have broad authority, as referenced in the statute cited by the Department as
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31 ¹ Both parties agree that, after Dr. Zwiener protested the October 30, 1990 order, the
32 Department provided him an opportunity to present any information he desired and to submit briefs
33 and argument on his behalf to the Department's assistant medical director, who was not previously
34 involved in the investigation or issuance of the October 30, 1990 order. Dr. Zwiener took
35 advantage of this opportunity to be heard. The April 3, 1991 order affirming the October 30, 1990
36 order was issued upon recommendation of the assistant medical director who conducted the further
37 review. As argued by the Department, this hearing in response to Dr. Zwiener's protest and
38 request for reconsideration may well have met minimal state and federal constitutional due
39 process requirements. However, none of the state or federal cases cited by the parties on minimal
40 constitutional due process safeguards address the issue of statutorily provided due process or
41 appeal rights relevant to this case. For instance, Sauceda v. Dep't of Labor & Indus., 917 F.2d
42 1216 (9th Cir. 1990) dealt with the constitutional adequacy of due process at the Department prior
43 to the Department's suspension of the benefits of several claimants. However, Sauceda did not
44 address what effect, under our state statutes, an appeal to this Board might have upon the
45 Department's order suspending benefits.
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1 well as in Chapter 296-20 WAC, to exercise significant supervisory control over treatment of workers.
2 This authority includes the power to issue orders suspending a particular practitioner's general right to
3 continue to treat workers, as provided specifically in RCW 51.36.110(3). Nevertheless, when
4 considered as a whole, the statutes governing licensure of health care practitioners and the provisions
5 of our Industrial Insurance Act contemplate that a properly licensed health care provider has the
6 general right to make the provision of health care to workers' compensation claimants a continuing
7 part of his or her practice. RCW 51.36.110(2) does state that the Department has the authority to
8 "[a]pprove or deny applications to participate" as a health care provider to workers. The Department
9 has adopted rules which require health care providers to obtain a provider number in order to treat
10 claimants. WAC 296-20-015(1). At hearing on the present motion, the Department's attorney
11 represented that the practice of the Department is simply to assign a provider number to a practitioner
12 upon receipt of a phone call from the practitioner, indicating that the practitioner for the first time is
13 treating claimants and is requesting a provider number in order to report to and bill the Department.
14 Therefore, we consider Dr. Zwiener to have an established general and continuing right to treat
15 workers' compensation claimants.
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24 The October 30, 1990 and April 3, 1991 Department orders, as well as the letter to Dr. Zwiener
25 of May 10, 1991 and the letters to his claimant patients, would suspend Dr. Zwiener's already
26 established general right to treat workers' compensation claimants. Given the nature of the
27 Department's orders and its further actions in this matter, we agree with Dr. Zwiener that
28 implementation of the Department orders pending his appeal would substantially cause his appeal to
29 become a hollow effort. Such a result is not contemplated within the appeal provisions of Chapter
30 51.52 RCW. This Board has jurisdiction over any appealed action or decision of the Department
31 relating to any phase of the administration of Title 51 RCW. RCW 51.52.050. The April 3, 1991
32 Department order has been appealed to this Board and therefore is not a final order. RCW 51.52.050
33 and .060. Dr. Zwiener's appeal "necessarily suspends the order appealed from and stays further
34 action pending a decision" by this Board. State ex rel Crabb v. Olinger, 191 Wash. 534, 538, 71 P.2d
35 545 (1937).² The appeal provisions of Chapter 51.52 RCW and specifically RCW 51.52.050 and .060
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43 ² We note that RCW 51.52.060 provides that orders making demand from health care
44 providers for repayment of sums paid by the Department shall become final within 20 days from the
45 date the order is communicated, absent a request for reconsideration filed with the Department or
46 an appeal filed with the Board. Generally this 20-day limitation would apply to those portions of the
47 April 3, 1991 order which deal with recoupment of monies paid by the Department to Dr. Zwiener

1 are designed to prevent the kind of harm which would occur to Dr. Zwiener if the Department
2 proceeded as if its orders were final and binding. The Department has not contended that the harm
3 alleged by Dr. Zwiener would not occur.
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6 Finally, there are more appropriate means, other than unauthorized immediate implementation
7 of its appealed order, which may be pursued to make good on the Department's concern for protection
8 of workers' health. The Department has the duty and authority to regulate the medical treatment
9 provided to injured workers. The Department may terminate unnecessary treatment in any particular
10 claim if it believes the treatment is not proper and necessary under RCW 51.36.010 and the various
11 provisions of Chapter 296-20 WAC relating to individual claims.
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14 Under RCW 18.26.028, the Chiropractic Disciplinary Board is vested under RCW 18.26.028
15 with authority to apply the provisions of the Uniform Disciplinary Act, Chapter 18.130 RCW. The
16 Chiropractic Disciplinary Board has clear authority to take emergency action ordering summary
17 suspension of a licensee or restriction or limitation of the licensee's practice pending further
18 proceedings by that board. RCW 18.130.050(7). Hearings in such matters are governed by Chapter
19 34.05 RCW, the Administrative Procedures Act. RCW 18.130.100. RCW 18.130.130 specifically
20 provides that an order of summary suspension under the chapter shall take effect immediately upon
21 being served and that the order shall not be stayed pending appeal unless the disciplinary authority or
22 a court to which appeal has been taken enters an order staying the order of the disciplinary authority.
23 Thus, our Legislature has provided the Chiropractic Disciplinary Board with full authority to take
24 emergency action. In light of RCW 18.130.050 and .130, the Department has other remedies
25 available if it wishes to pursue more immediate curtailment of Dr. Zwiener's right to treat claimants
26 pending appeal of its April 3, 1991 order. Extending the Authority of the Department of Labor and
27 Industries to take emergency action, in derogation of appeal rights provided in Chapter 51.52 RCW, is
28 not necessary to the purposes of RCW 51.36.110(3).³
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38 for health care services. However, the 60-day limitation period contained in RCW 51.52.050
39 appears applicable to other provisions of the order. Nevertheless, the April 3, 1991 order provides
40 that an appeal may be filed within 60 days of receipt of the decision.
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43 ³ Although WAC 296-20-015(5) provides a variety of sanctions available to the Department,
44 the rule does not attempt to suggest that these may be applied while an appeal is pending before
45 this Board under Chapter 51.52 RCW. Furthermore, WAC 296-20-015(6) requires the Department
46 to notify the applicable disciplinary authority.
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1 The April 3, 1991 Department order is stayed pending further decision of this Board. The
2 Department letter dated May 10, 1991 and letters to Dr. Zwiener's claimant patients exceed the
3 Department's statutory authority. The Department is directed to communicate in writing to each of the
4 previously contacted claimant patients of Dr. Zwiener, stating that the letters are rescinded, and also
5 stating that, if otherwise eligible for continuation of his services, the claimants may continue to receive
6 care by Dr. Zwiener and the Department will pay for such services.
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10 It is so ORDERED.

11 Dated this 3rd day of June, 1991.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13 /s/
14 SARA T. HARMON Chairperson

15 /s/
16 FRANK E. FENNERTY, JR. Member

17 /s/
18 PHILLIP T. BORK Member