August 17, 2016

Hon. Tom Daly, Chair
Assembly Insurance Committee
State Capitol
Sacramento, California 95814

RE: Senate Bill 1160 (Mendoza), as proposed to be amended
Oppose Unless Amended

Dear Assembly Member Daly:

Our clients, the California Society of Industrial Medicine and Surgery, the California Society of Physical Medicine and Rehabilitation, the California Neurology Society, the California Workers' Compensation Interpreters Association, and the California Workers' Compensation Services Association, are very concerned that some of the recently-announced proposed amendments to Senate Bill 1160 will severely restrict access to care for many injured workers in California. While the provisions dealing with utilization review are constructive and should expedite treatment, the other provisions dealing with the filing and assignment of liens are egregious and go far beyond what changes are necessary to combat fraud and abuse.

All of our clients vehemently oppose workers' compensation fraud and we support rational efforts to eradicate it. Unfortunately, in its zeal to fight fraud, the amendments being advanced by the Department of Industrial Relations will have a substantial and adverse impact on many bona fide injured workers.

Liens have been an inherent part of the workers' compensation system for more than 100 years. Early on, the Legislature recognized the need to provide a safety net for workers in situations where their employers properly or improperly failed to provide necessary care for a claimed industrial injury. Fortunately for injured workers, there are physicians and other providers who are willing to provide goods and services when the liability for payment is in dispute. If the ability to file a lien is significantly hindered or outright prevented, injured workers will lose a valuable safety net. In some cases, the costs of treatment will be shifted to private hospital emergency departments, county hospitals, and private health insurance programs; but even in those situations, some care such as physical therapy or necessary medications will not be provided.

<u>Labor Code Section 4903.05</u>. According to the Department of Industrial Relations, the amendments to this section will require that all liens for medical treatment must be accompanied by a declaration signed under penalty of perjury affirming that the dispute is not subject to independent bill review and verifying that the lien claimant in qualified to file that lien. Unfortunately, the list of qualifications is incomplete, thereby precluding the filing of many legitimate liens. For example, there is no mechanism for an interpreter or professional photocopy service to file a lien.

Subdivision (c)(1)(E) is particularly troublesome. Although a denial letter from an adjuster should be adequate "documentation" that the employer is contesting its liability to provide treatment, it is unclear whether such a letter would be proof "that medical treatment has been neglected or unreasonably refused." The employer would likely argue that there is no negligence because it has no duty to the employee to pay for injuries that the employer considers to be nonindustrial. Furthermore, what constitutes an unreasonable refusal of treatment? What the lienholder considers to be unreasonable may seem very reasonable to the employer. The ambiguous drafting of this subdivision is bound to cause unnecessary litigation. The subdivision should be revised to specify clearly that if the employer has explicitly or constructively denied liability for the injury, then the claimant may file a lien.

Finally, Subdivision (c)(2) makes the declaration mandate retroactive, giving lienholders until July 1, 2017, to file declarations on all existing liens. Although these lienholders have already paid either a filing fee or an activation fee, their liens are subject to dismissal (with no refund of fees previously paid) if they are unable to meet one of the criteria for qualifying the lien. The law should abhor a forfeiture, but this is exactly what this subdivision does.

<u>Labor Code Section 4615.1</u>. According to the Department, this new section provides that liens, and any related accrual of interest, filed by a physician or provider who is criminally charged with workers' compensation fraud, medical billing fraud, insurance fraud, and Medicare or MediCal fraud, shall be automatically stayed pending the disposition of the criminal case. This language is a marked departure from the principle of American jurisprudence that one is presumed innocent until proven guilty. Although combating fraud calls for tough measures, the language proposed by DIR goes unnecessarily beyond that which is necessary to address the fraudulent behavior. We are of the opinion that there ought to be a nexus between the stayed lien and the alleged criminal conduct.

For example, assume a physician has an active workers' compensation treatment practice and a significant portion of those cases are "injury denied" so that the treatment is provided "on

a lien." The physician may also be a qualified medical evaluator (QME) and write a few medical-legal reports a month. If, for some unexplained reason, the physician improperly billed above the Medical-Legal Fee Schedule on one or a few reports, a district attorney could charge the physician with misdemeanor billing fraud. As drafted, Labor Code Section 4615.1 would impose an automatic stay on the physician's entire lien portfolio even though the alleged misconduct only involved a small portion of the physician's overall practice.

Many physicians rely on their lien collections to assist with their cash flow needs. If a large portion of their accounts receivable are represented by liens, any across-the-board stay on collection efforts will cause immediate financial hardship including the inability to pay employees, rent, leases, overhead, etc. Section 4615.1 should be revised to impose the stay only on any liens involved in the criminal prosecution. This could be addressed by adding the following clause after "MediCal fraud": "; provided that the lien is related to the fraud alleged in the criminal proceeding."

Since the provisions of Section 4615.1 appear to apply to any liens whenever filed, it is unclear how they would apply to liens that have already been hypothecated. How will this section affect the bona fide purchaser for value of a lien where the provider is subsequently charged with a crime? This issue should be addressed in the bill.

Labor Code Section 4903.8. The DIR alleges that the amendment to this section "clarifies that a lien for medical treatment services cannot be assigned unless the provider has ceased doing business." This allegation is incorrect as the legislative history of Senate Bill 863 (which originally added this section to the Labor Code) clearly demonstrates that the Legislature did not intend to prevent the assignment of any liens. In fact, recently in *Kancilia v. Brown, et. al.*, Case No. DVI3-02737HWVG, the Attorney General of the State of California, representing DIR Director Christine Baker and DWC Administrative Director Destie Overpeck, made the following statement concerning Labor Code §4903.8: "[T]his provision does not 'ban' assignments nor does it 'cancel contracts to assign medical accounts receivable.' . . . A health care provider can still assign liens to a third party. . . ."

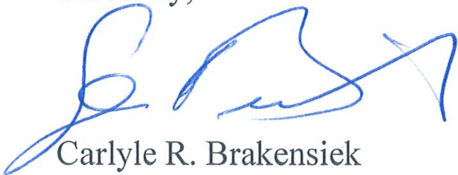
In workers' compensation, physicians and other providers accumulate many accounts receivable secured by liens because several years may pass between the delivery of the goods and services and the payment therefor. Often, providers will either sell or pledge their liens to generate working capital. This type of financing is commonplace, not only with physicians and other providers but throughout many industries. It makes no sense to abolish the assignment of liens, particularly when the *Lien Report* issued by the Commission on

Health and Safety and Workers' Compensation in 2011 stated, "We find no evidence that the practice of assigning lien rights is a problem in and of itself. Nor have we encountered evidence that the practice of employing collection agents is inherently detrimental to the workers' compensation system." If the assignment of liens is prohibited, this will be one more disincentive to providing services to injured workers.

Furthermore, the proposed prohibition against assignments appears to be retroactive, calling into question the status of many liens that have already been assigned lawfully. Although we oppose any effort to preclude the assignment of liens, at a minimum, any prohibition should not be imposed retroactively on previously concluded financial transactions. We express no opinion whether such a prohibition may violate the interstate commerce clause of the U.S. Constitution or the federal Banking Act.

We would very much like to support the utilization review and interpreter reforms contained in SB 1160 but cannot do so as long as the defective lien provisions remain uncorrected. Should you have any questions concerning our position on SB 1160, please do not hesitate to contact me.

Sincerely,



Carlyle R. Brakensiek
Legislative Advocate

CRB:moi

cc: Senator Tony Mendoza
DIR Director Christine Baker
Members of the Legislature