A tempest appears to be brewing in the California workers' compensation system regarding so-called "Silent PPOs." PPOs refer to preferred provider organizations. This expert commentary discusses general Silent PPO arrangements, analyzes their impact on the California workers' compensation system, and suggests ways in which health care providers may protect themselves from Silent PPOs.

Important Note: This commentary cites several WCAB panel decisions. The majority of written decisions issued regarding the application of “Silent PPOs” are WCAB panel decisions that are not designated as “significant panel decisions” but are available on www.lexis.com because of the general interest in the topic and lack of published decisions. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffin v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236].

Background on PPOs. A feature of the medical insurance landscape for several years, PPOs are entities that enter into contracts with health care providers (e.g., physicians, hospitals) that require the PPOs (Blue Cross is a prominent example in California) to structure their insurance products in such a way as to direct their insureds to the contracting providers, who in return for the increased volume of patients accept reduced rates of payment for their services. The mechanisms by which insureds are directed to in-network providers include lower co-payments, lower deductibles, and lower premiums. Typically, a PPO creator distributes a provider directory that identifies the preferred providers in its network.

Creation of Silent PPOs. A Silent PPO is created when a PPO sells its reduced provider rates to others, such as workers' compensation insurers and self-insured employers without proper disclosure to the medical provider.

As a result, physicians, hospitals, and others who have contracted with PPOs unexpectedly find themselves treating patients, including injured workers, who are not di-
rectly insured by the PPO at the reduced billing rates called for in their contract with the PPO.

In the case of patients in the workers' compensation system, this means that the medical providers are paid far less than the rates set out in the Division of Workers' Compensation's Official Medical Fee Schedule (OMFS) [see Cal. Lab. Code § 5307.1; 8 CCR 9789.10 through 8 CCR 9789.111; see generally 2-22 CA Law of Employee Injuries & Workers' Comp § 22.05[2]]. For example, Blue Cross has contracted with the State Compensation Insurance Fund (SCIF) to sell SCIF the discounted rates Blue Cross has negotiated with medical providers. Thus, SCIF pays heavily discounted Blue Cross rates, substantially below the OMFS, for medical services provided to injured workers: (1) who are not members of Blue Cross; and (2) whose employers are insured by SCIF.

**Effects of Silent PPOs.** While these arrangements would appear to contribute to furthering the goal of containing the costs of workers' compensation coverage, they have generated legislation, litigation, and a fair amount of resentment among medical providers, resentment that appears set to translate itself into physicians and hospitals leaving the workers' compensation system. Even absent Silent PPOs, California's workers' compensation system is losing physicians. The state's OMFS is among the very lowest in the nation. Add the rise of Silent PPOs, and the result is potentially disastrous. One knowledgeable observer has reported that over 50 percent of the physicians in the City and County of San Francisco Medical Provider Network list refuse to take workers' compensation cases.

In *Woodruff v. Greenfield Trucking*, 2007 Cal. Wrk. Comp. P.D. LEXIS 93 (Appeals Board panel decision), it was noted that, if the PPO discount were applied, this would equate to approximately one half of the OMFS. Addressing the public policy concerns, the WCJ in *Woodruff* observed that, “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 becoming more and more difficult to find doctors and medical providers willing to provide treatment to injured workers.” It was concluded that to allow such deeply discounted rates would only add to this looming crisis.

**Cal. Labor Code § 4609.** In 1999, the California Legislature addressed the topic of PPOs [see Stats. 1999, ch 545, § 4, operative July 1, 2000, codified as Cal. Labor Code § 4609].

The basic statutory approach, expressed as "the intent of the Legislature," is that every arrangement that results in a "payor" (e.g., SCIF, another workers' compensation insurer, a self-insured employer) [see Cal. Lab. Code § 4609(d)(3)(A), (B)="payor" defined] paying a health care provider a reduced rate based on the health care provider's participation in a network must be disclosed by "the contracting agent," that is, the creator of the "Silent PPO" (e.g., Blue Cross or other organizer of the original PPO network) [see Cal. Lab. Code § 4609(d)(1)="contracting agent" defined], to the health care provider in advance, and the contracting agent is required to "actively encourage employees to use the network," unless the health care provider agrees to provide discounts without that active encouragement [Cal. Lab. Code § 4609(a)].

Any contracting agent that conveys its list of health care providers and their reimbursement rates to a workers' compensation insurer or a self-insured employer must, when entering or renewing a provider contract, make a series of disclosures, including whether the list of contracted providers may be conveyed to workers' compensation insurers, what specific practices, if any, those workers' compensation insurers utilize to actively encourage employees to use the list of contracted providers, whether those workers' compensation insurers may be permitted to pay the PPO contracted reduced rate without actively encouraging employees to use that list, and, upon receipt of a timely written request from a provider, a summary of all payors eligible to claim a provider's contracted rate due to the provider's and the payor's respective written contracts with the contracting agent [Cal. Lab. Code § 4609(b)(1)-(4)].

Moreover, importantly, the contracting agent, when entering, renewing, or amending a provider contract, must allow providers to decline to be included in any list of contracted providers that is conveyed to workers' compensation insurers or self-insured employers that do not actively encourage employees to use the list of contracted providers [Cal. Lab. Code § 4609(b)(5); see Cal. Lab. Code § 4609(b)(2)―when workers' compensation insurers or self-insured employers are deemed to have actively encouraged employees to use list of contracted providers].

Workers' compensation insurers, self-insured employers, and third-party administrators have obligations under the statute. They must provide an explanation of benefits or explanation of review that identifies the network with which they have an agreement that
entitles them to pay a preferred rate for the services rendered, and, within 30 business days of receipt of a written request from a provider who has received a claim payment from them, they must demonstrate that they are entitled to pay a contracted rate [Cal. Lab. Code § 4609(c)].

**Cal. Labor Code § 4611.** As noted above, in 2003, the Legislature strengthened its restrictions on Silent PPOs. Specifically, it enacted a statute that provides that, when a contracting agent sells, leases, or transfers a health care provider's contract to a payor, the rights and obligations of the provider are to be governed by the underlying contract between the provider and the contracting agent [Cal. Lab. Code § 4611(a); see Cal. Lab. Code § 4611(b) (“contracting agent” and “payor” defined)]. The precise effect of this language remains to be seen, since no case has been found that interprets it.

For purposes of this section, the following terms have the following meanings [Cal. Lab. Code § 4611(b)]:

1. "Contracting agent" has the meaning set forth in paragraph (2) of subdivision (d) of Section 4609.

2. "Payor" has the meaning set forth in paragraph (3) of subdivision (d) of Section 4609.

**Appeals Board Jurisdiction.** Somewhat surprisingly, no case implicating these statutes has, so far, been reported in the official reports. Within the California workers' compensation system, however, litigation has mushroomed.

A threshold issue has arisen, i.e., whether the Appeals Board has jurisdiction over disputes regarding Silent PPOs. Cal. Lab. Code § 5304 provides that, when faced with "an express agreement fixing the amounts to be paid for medical, surgical or hospital treatment . . . made between the persons or institutions rendering such treatment and the employer or insurer," the Board has no jurisdiction. The decisions are in conflict.

In one case, the Board held that it had no jurisdiction over a medical treatment lien because there was an "express agreement" between the employer's insurer and the lien claimant/medical provider created through the chain of contracts between the lien claimant and the PPO and between the PPO and the insurer. The Board found that there need not be a single contract between two parties to create an "express agreement" within the meaning of Cal. Lab.Code § 5304 [Ferguson v. Handee Market, 2005 Cal. Wrk. Comp. P.D. LEXIS 22 (Appeals Board panel decision)]. In another case, the
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Appeals Board held that, although it had jurisdiction to determine that a valid series of contracts among a lien claimant/medical provider, its PPO, and an employer's insurer linked the medical provider and the insurer so as to create a binding contract between the two entities under Cal. Lab. Code § 5304, it did not have jurisdiction to render a decision regarding the rate of payment to the medical provider because of an arbitration clause in one of the contracts between the medical provider and its PPO [Waters v. Los Angeles Clippers Basketball Club, Inc., 2005 Cal. Wrk. Comp. P.D. LEXIS 15 (Appeals Board panel decision)].

However, in another case, the Appeals Board held that it had jurisdiction to resolve a lien dispute pursuant to Cal. Lab. Code § 5304, grounding its decision on the absence of an agreement between the lien claimant/medical provider and the insurer that fixed the amounts to be paid. Since there was no agreement between those two parties that required the insurer to pay the rates set forth in the medical provider's PPO contract with Blue Cross, rates that the insurer argued the provider was obliged to accept because these were the rates the insurer agreed to pay under a workers' compensation management care service agreement between itself and Blue Cross, and since the insurer presented no evidence showing that the provider's fees were unreasonable, the Appeals Board held that the provider was entitled to payment for its services as billed [Molina v. Best Western Park Place Inn, 2005 Cal. Wrk. Comp. P.D. LEXIS 19 (Appeals Board panel decision); see Olsufka v. County of Sacramento, 2005 Cal. Wrk. Comp. P.D. LEXIS 27 (Appeals Board panel decision) (lien claimant entitled to usual and customary charges since no contract between lien claimant and third party hired by self-insured employer to reprice medical provider bills pursuant to PPO fees was introduced into evidence); Zuniga v. Herb Stewart, 2002 Cal. Wrk. Comp. P.D. LEXIS 104 (Appeals Board panel decision)]. In yet another case, the Appeals Board again found that it had jurisdiction to determine the reasonable cost of medical treatment rendered to an employee by a lien claimant, when the employer had reduced its fee payment to the lien claimant based on the reduced rate set forth in the lien claimant's PPO contract but failed to establish that it was a "payor" or "beneficiary" under that PPO contract for purposes of establishing an "express agreement" pursuant to Cal. Lab. Code § 5304, which would entitle it to pay the reduced rate [Balzano v. City of Los Angeles, 2005 Cal. Wrk. Comp. P.D. LEXIS 16 (Appeals Board panel decision); see Miranda v. The Pacific Lumber Co., 2004 Cal. Wrk. Comp. P.D. LEXIS 90 (Appeals Board panel decision); Hoy v. Northrop Grumman Corp., 2006 Cal. Wrk. Comp. P.D. LEXIS 1 (Appeals Board panel decision)].
More recently, two additional Appeals Board decisions have reached the conclusion that the chains of contracts creating (or attempting to create) Silent PPOs did not deprive the Board of jurisdiction.

In Woodruff v. Greenfield Trucking, 2007 Cal. Wrk. Comp. P.D. LEXIS 93 (Appeals Board panel decision), the Appeals Board not only rejected the argument that it lacked jurisdiction, but it specifically rejected the notion, urged by SCIF, that SCIF should be regarded as an "other payor" within the terms of the contract between Blue Cross and the medical provider/lien claimant, Good Samaritan Hospital. Good Samaritan argued that "other payor" in its contract with Blue Cross referred to card-carrying members of Blue Cross and that there was no evidence that either SCIF or the injured worker whom Good Samaritan had treated was a member of Blue Cross. This situation, noted the WCJ in his report and recommendation on reconsideration, meant that the Blue Cross-Good Samaritan contract was ambiguous on the question of whether SCIF could be considered an "other payor." The WCJ stated: "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." The WCJ went on to state that he was "troubled by the very nature of the extreme discount that SCIF wishes to impose on the provider Good Samaritan. Cal. Lab. 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 WCJ closed by making what may be the only reference to Cal. Lab. Code § 4609 (discussed above) in any case, stating: "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 Cal. Lab. Code § 4609 and that such a so called ‘Silent PPO’ is statutorily prohibited. In this case, contrary to the provisions of Cal. Lab. Code § 4609, Blue Cross appears to have sold its PPO Discount to SCIF in contravention of this labor code provision."

Less than a month and a half after Woodruff, the Appeals Board in Baldridge v. Pacific Lumber Co., 2007 Cal. Wrk. Comp. P.D. LEXIS 132 (Appeals Board panel decision) again held that the alleged chain of contracts linking an employer and a lien claim-
ant/hospital by way of a benefit and risk management service did not suffice to defeat Board jurisdiction pursuant to Cal. Lab. Code § 5304. In fact, the Board drew attention to the benefit and risk management service's Explanation of Review of lien claimant's bill, which stated that the bill "has been reviewed in accordance with the California State Workers' Comp Medical Fee Schedule. This review constitutes the claims payor's objection to fees in excess of the Official Medical Fee Schedule and/or LC9795." This representation that the OMFS was the basis for review, the Board held, estopped the employer from asserting a differing basis for review and payment.

Protection From Silent PPOs. In California, at present, the ability of physicians, hospitals, and other health care providers to protect themselves from Silent PPOs, as well as the ability of parties such as Blue Cross, who create PPOs by contracting with such providers, and workers' compensation insurers such as SCIF, who contract with PPO creators, to impose PPO rates on providers who treat workers' compensation insureds who are not members of a PPO, are unclear.

Certainly, all parties need to become familiar with the requirements (and the limits to those requirements) of Cal. Lab. Code § 4609, discussed above.

California health care providers may protect themselves by invoking the following provisions of the statute:

- The requirement that every arrangement that purports to authorize a workers' compensation insurer or a self-insured employer to pay the provider a reduced rate based on the provider's participation in a network must be disclosed by the creator of the Silent PPO to the provider in advance, and the creator of the Silent PPO is required to "actively encourage employees to use the network," unless the provider agrees to provide discounts without that active encouragement [Cal. Lab. Code § 4609(a)].

- The requirement that every PPO creator that conveys its list of health care providers and their reimbursement rates to a workers' compensation insurer or a self-insured employer must, when entering or renewing a provider contract, make a series of disclosures, including whether its list of contracted providers may be conveyed to workers' compensation insurers, what specific practices, if any, those workers' compensation insurers utilize to actively encourage employees to use its list of contracted providers, whether those workers' compensation insurers may be permitted to pay the PPO contracted reduced rate without actively
encouraging employees to use that list, and, upon receipt of a timely written request from a provider, a summary of all payors eligible to claim the provider's contracted rate due to the provider's and the payor's respective written contracts with the PPO creator [Cal. Lab. Code § 4609(b)(1)-(4)].

- Importantly, the requirement that the PPO creator, when entering, renewing, or amending a provider contract, must allow providers to decline to be included in any list of contracted providers that is conveyed to workers' compensation insurers or self-insured employers that do not actively encourage employees to use the list of contracted providers [Cal. Lab. Code § 4609(b)(5); see Cal. Lab. Code § 4609(b)(2)]—when workers' compensation insurers or self-insured employers are deemed to have actively encouraged employees to use list of contracted providers.

Thus, California workers' compensation health care providers may take steps against having to accept substantially discounted fees in situations they never anticipated by inserting a clause in any contract they sign with a PPO creator that states, in substance, that any party desiring access to the provider's discounts must actively encourage its insureds to use the PPO network and to accept all other terms and conditions of the provider's contract with the PPO creator. In fact, providers may insert into their PPO contracts a clause that forbids the PPO from disclosing the provider's discounts until the prospectively contracting insurer/self-insured employer has agreed to offer a PPO plan that complies with the provider's contract with the PPO creator. Providers who prefer that none of their proprietary discount information be disclosed, regardless of what a prospectively contracting insurer/self-insured employer might agree to, may demand that all provisions allowing such disclosures be deleted from any contract offer the PPO creator presents to them. In the event that a PPO creator with whom a provider has already contracted informs the provider that it intends to amend that contract to permit other payors, such as workers' compensation insurers, to take advantage of the PPO discounted billing rates, the provider may inform the PPO creator that the provider will continue to receive patients who were enrolled in the PPO at the time the provider signed the contract with the PPO creator but will not receive patients of any subsequent subsidiary or allied plan.

For general discussion of medical treatment liens, see 2-30 CA Law of Employee Injuries & Workers' Comp § 30.04.
About the Author. David Bryan Leonard practices with David Bryan Leonard, A Law Corporation in Los Angeles. He represents medical providers in the area of workers' compensation. He has written numerous articles, appeared before the California Courts of Appeal and Supreme Court, and lectured extensively on legal issues affecting medical providers and injured workers. He obtained his undergraduate and Masters degree from Loyola Marymount University and his law degree from Loyola Law School. He is a member of the California Bar Association, Los Angeles County Bar Association, California Society of Industrial Medicine and Surgery, California Applicants' Attorney's Association, and Cowboy Lawyers' Association.