S156986

IN THE SUPREME COURT OF CALIFORNIA

GIL N. MILEIKOWSKY, M.D.,

Plaintiff and Appellant,

vs.

WEST HILLS HOSPITAL MEDICAL CENTER, ET AL.

Defendants and Respondents,

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION EIGHT
CASE NO. B186238

BRIEF OF AMICUS KAISER FOUNDATION HEALTH PLAN, INC.; KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.; AND THE SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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ISSUE PRESENTED

Does the hearing officer presiding over a medical peer review proceeding under Business and Professions Code sections 809 et seq. have authority to terminate the proceeding for party misconduct, in this case the flagrant and repeated refusal to comply with the hearing officer's discovery orders?

I.
INTRODUCTION

This *amicus curiae* brief is submitted in support of the defendants and respondents in the matter of *Mileikowsky v. West Hills Hospital Medical Center* (2007) 154 Cal.App.4th 752, review granted Dec. 12, 2007, No. S156986 ("West Hills").

The organization known as Kaiser Permanente ("Kaiser") is California's largest integrated healthcare delivery system and managed care organization, serving over 6.5 million patient members in the state. In other words, one of every six Californians is a Kaiser member.

Although Kaiser is generally understood to be monolithic, it is in fact a complex and sophisticated organization that is unlike any other member of the California healthcare community. Comprised of four distinct legal entities, Kaiser in California includes Kaiser Foundation Health Plan, Inc., a nonprofit corporation ("Health Plan"); Kaiser Foundation Hospitals, a separate nonprofit public benefit corporation

("Kaiser Hospitals"); and the two independent Permanente Medical Groups in California, The Permanente Medical Group, Inc. ("TPMG"), a professional corporation, serving Health Plan members ("Members") in Northern California; and the Southern California Permanente Medical Group ("SCPMG"), a general partnership, serving Health Plan members in Southern California. Kaiser Hospitals operates 27 hospitals in California. The Health Plan, TPMG, SCPMG and Kaiser Hospitals (collectively, "Kaiser") credential and privilege over 13,000 physicians to serve Kaiser's California patients.

II.
KAISER'S INTEREST IN THE MILEIKOWSKY CASE.

If allowed to stand, the Court of Appeal's holding in *West Hills* will create a substantial and needless burden for all four of Kaiser's California peer review bodies. Because Kaiser's unique integrated structure requires a different approach to peer review hearings than that used by other California peer review bodies, that burden will have a cascading effect throughout the organization and will seriously hamper Kaiser's ability to oversee the quality of care Kaiser physicians provide.

Kaiser in California is an integrated healthcare delivery system, meaning generally that it provides to its members all three essential healthcare services – physician care, hospital care, and payor services –

through an integrated arrangement. It is widely considered the only successful such system in the United States.

Kaiser's interest in the present case is therefore unique. Although hospitals, multi-specialty medical groups, and health plans may each have an interest in the overarching issue presented here, none has the interest of Kaiser's integrated system, which combines the obligations of all three provider types.

In particular, each Kaiser entity is a peer review body as defined in California Business and Professions Code[1] section 805 subdivision (a) subpart (1). As such, they all have an individual and collective interest in the procedural and substantive legal requirements governing fair and efficient peer review in California – requirements lying at the heart of this case.

III. KAISER'S INTEGRATED CREDENTIALING, PRIVILEGING AND PEER REVIEW SYSTEM.

Nowhere is Kaiser's non-monolithic nature more demonstrable than in its medical peer review activities. Under federal and state laws and regulations, independent accreditation standards, and the organization's own self-governance documents, each Kaiser entity has independent and

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[1] Unless otherwise specified, all statutory references in this brief are to the California Business and Professions Code.

collective credentialing, privileging and peer review responsibilities. The Health Plan is required to credential and conduct peer review of physicians who provide care to its members, and by agreement, does so jointly with TPMG and SCPMG. Kaiser Hospital facilities, like all California hospitals, are responsible for the quality of care provided to their patients and are required to credential and privilege physicians who seek or wish to maintain Professional Staff membership and/or hospital privileges. SCPMG and TPMG conduct peer review of physicians who are or seek to be affiliated with SCPMG or TPMG, respectively, as partners, employees, or independent contractors.

Thus a single Kaiser physician can be, and often is, simultaneously subject to credentialing and/or peer review by three separate Kaiser entities. For example, a Kaiser Obstetrics/Gynecology physician ("OB/GYN") practicing in Southern California typically sees Health Plan members in an outpatient setting and also has staff privileges to deliver members' babies at one or more Kaiser Hospitals. The OB/GYN must be: (i) credentialed by the Health Plan to provide services to the member; (ii) engaged as an employee or contract physician authorized to provide patient care services in the outpatient setting in SCPMG medical offices; and (iii) credentialed and privileged by the Kaiser Hospital facility where the OB/GYN delivers babies. The OB/GYN is subject to ongoing review and approval by all

three entities. If quality of care issues arise respecting the OB/GYN's practice for which the Health Plan, SCPMG and a Kaiser Hospital all take action that is reportable under section 805 subdivision (b), then all three Kaiser entities have separate and distinct responsibilities under section 809.2 to provide a formal hearing to the OB/GYN respecting such action.

Providing three separate hearings to a single practitioner respecting the same facts and circumstances is extremely costly, inefficient and duplicative for the physician and the organization. What is more, parallel hearings raise the very real possibility of conflicting scheduling of witnesses and parties and of conflicting outcomes. Provisions exist, therefore, in each Kaiser entity's peer review governing documents allowing for consolidation of peer review hearing matters. If the same facts that led one Kaiser entity to take or recommend certain adverse actions have led another Kaiser entity also to recommend or impose an action, and both actions are grounds for a hearing, those two entities (and a third, if applicable) may then consolidate their respective hearing processes. Streamlining the hearing process through consolidation allows the subject physician and the entities to review a matter efficiently and minimize disruption to the physician's practice and the delivery of patient care. Consolidation also recognizes the common responsibilities of all the involved entities to perform effective credentialing, privileging and peer

review; maximizes the opportunities for eliminating duplicative efforts; establishes uniform standards and practices on behalf of all Kaiser entities; and allows the benefits of appropriate sharing of confidential information among Kaiser entities.

A. Physicians Frequently Have No Incentive To Proceed Expeditiously In A Hearing.

When California peer review bodies decide to take action that triggers hearing rights, they generally have only two options: a *summary* action or a *recommended* action.

Summary actions take effect immediately, subject to the hearing's outcome. Presumably because of the drastic impact a summary action can have on a physician's livelihood, Section 809.5 subdivision (a) allows such action only in exigent circumstances, "where the failure to take that action may result in an *imminent danger* to the health of any individual." (Emphasis added.)

Recommended actions, in contrast, do not take effect until the administrative hearing process, including internal appeals, is concluded. That hearing process typically takes many months or even years. There is no intermediate discipline available; actions generally must be either summary or recommended.

In most cases where adverse action is only recommended, a physician who has requested a hearing has no incentive to move the matter

forward. During the pendency of the hearing and appeal process, the physician's practice remains unrestricted, leaving him or her with full privileges to treat Kaiser members. The longer the hearing takes, the greater the chance the affected physician can delay discipline or escape it altogether. This removes any incentive for the physician to move expeditiously through the hearing process; after all, a final adverse decision often results in an abrupt end to his or her practice with a Kaiser Hospital facility, medical group or the Health Plan.

B. **Kaiser Is Uniquely Vulnerable To Procedural Delays In Peer Review Hearings.**

Because of Kaiser's frequent use of consolidation in the peer review hearing arena, it is uniquely vulnerable to the adverse effects created when physicians engage in delaying tactics.

At issue in the *West Hills* case is whether a hearing officer had authority to control the misconduct of a physician who obstructed the pre-hearing procedural process by repeatedly refusing to comply with the physician's document production requirements and the hearing officer's orders to do so. If the *West Hills* decision is upheld, then the hearing officer's only recourse when a physician delays the proceedings by failing to produce documents or comply with the procedural requirements is to issue a continuance and further stall the hearing process.

This places all Kaiser entities in a difficult position. Paradoxically, the physician's practice has been found deficient enough to justify a recommended termination or reduction of privileges, but not so deficient as to constitute the imminent danger that would justify summary action. All California peer review bodies face this problem, but within Kaiser, during the time when a physician subject to recommended adverse action continues to practice, he or she does so not just in one setting, but usually in several hospitals and outpatient settings, all the while draining the resources of the Health Plan, Kaiser Hospitals, and either SCPMG or TPMG. The physician's colleagues find themselves obligated to watch his or her practice carefully during the pendency of a lengthy hearing. The costs of doing so include the devotion of resources to legal fees as well as mentoring, educating, and monitoring the physician. If additional problems crop up, or the "imminent danger" arises that section 805.5 subdivision (a) requires for summary action, further action must be taken. Meanwhile, patients are being cared for by a physician whose professional abilities are in serious question.

Dr. Mileikowsky suggests that a peer review body can overcome this problem simply by suspending a physician mid-hearing. (ABOM at 58.) His argument fails to recognize that without imminent danger, no summary action is lawful under section 805.5 subdivision (a).

Issuing a continuance to control obstructionist behavior only makes the problem worse. Pushing the matter out on the calendar will not make the process more fair or enhance quality of care and patient safety. Meanwhile, the Kaiser peer review body is left with no effective tool to protect either patients or the hearing process against dilatory tactics.

Because of the peer review hearing consolidation processes Kaiser entities utilize, if the *West Hills* decision is left standing the impact on them will be exponentially greater than on most other peer review organizations in California. A physician who engages in procedural gamesmanship adversely impacts all three separate Kaiser peer review systems and the members they serve.

Kaiser devotes the remainder of this brief to discussing why it believes the Court of Appeal in *West Hills* erred in its holding that a hearing officer may not terminate a peer review hearing for a participant's pre-hearing misconduct. We also address several inaccuracies in Dr. Mileikowsky's assertions about how peer review hearings are conducted in California, including Dr. Mileikowsky's entirely mistaken argument that because the Legislature limited the conduct of peer review hearings to licentiates, only licentiates may terminate peer review hearings.

IV.
PEER REVIEW HEARINGS ARE NOT THE EXCLUSIVE DOMAIN OF LICENTIATES.

Dr. Mileikowsky devotes much of his argument to the premise that the Legislature intended that dispositive decisions in peer review hearings are exclusively within the purview of licentiates – in his case, physicians. Kaiser agrees that licentiates serve a central and essential role in the peer review process but disagrees that all decision-making in the hearing process is their exclusive domain.

A. Appellant's Brief Misstates California Law Regarding "Opting Out" of HCQIA.

Dr. Mileikowsky argues forcefully that the California Legislature expressly rejected the Health Care Quality Improvement Act of 1986 ("HCQIA"), 42 U.S.C. §§ 11101 et seq. He insists that the Legislature "opted out" of HCQIA, preferring instead to promulgate its own peer review system "[b]ecause of deficiencies in the federal act and the possible adverse interpretations by the courts of the federal act." (Bus. & Prof. Code § 809, subd. (a) subp. (2).) He is mistaken.

To begin with, nowhere in the findings or declarations set forth in section 809 does the Legislature announce that licentiates are to have exclusive control over peer review or the peer review hearing process. Moreover, Dr. Mileikowsky's assertion that the California Legislature *opted out* of HCQIA is simply incorrect. The "opt-out" provisions in

HCQIA were repealed in 1989 because, as the Honorable Henry A. Waxman explained in his November 21, 1989 remarks in the United States House of Representatives, the "opt-out" provision was "widely misunderstood and thought by some to be broader than was intended." (Remarks of Rep. Waxman, 135 Cong. Rec. (1989) 31835 - 31836.) Instead, Congressman Waxman explained, the original intent of the opt-out provision was to address Congress's concern that:

> Some States might want to adopt a formal policy against providing substantial immunities granted in the act with respect to causes of action against peer reviewers under State laws. This 'opt out' provision was extremely limited, and only related to the immunities otherwise provided under the act for causes of action brought under State laws. (*Id.*)

Congressman Waxman went on to say "to end this confusion and assure a uniform national minimum level of protection for peer review, the opt-out has been eliminated." (*Id.*) As a result, one now searches HCQIA in vain for any "opt-out" provisions.

Dr. Mileikowsky further contends that California chose its own course for the purpose of preserving the unilateral power of licentiates to control the process:

> The Legislature began with a guiding principle not found in the federal statute: "It is the policy of this state that peer review be performed by licentiates." (Bus. & Prof. Code § 809.05.) *To accomplish this end,* the Legislature curtailed

> the power of the hearing officer and the hospital, making the expertise of the hearing panel of licentiates the central feature of peer review adjudications. [Emphasis added.] (ABOM 34.)

This argument lacks any basis in the law. Moreover, the hearing panel provision set forth in section 809.2 subdivision (a) does not at all limit membership to licentiates and is strikingly similar to that provided in HCQIA.[2]

B. Section 809.05 Recognizes Some Limitations on The Role of Licentiates in the Peer Review Process.

Dr. Mileikowsky takes certain language in section 809.05 wildly out of context. Although section 809.05 sets forth the *general* peer review policy in California, the statute focuses on *exceptions* to this general rule and never even addresses peer review hearings or the role of the hearing officer. Rather, the five important limitations to the general policy articulated in section 809.05 emphasize the fact that the Legislature did *not* intend licentiates to have unilateral control of the peer review process. The peer review process, to which this portion of section 809.05 refers, begins long before its ultimate (and rare) culmination in any peer review hearing. Section 809.05 describes, for example, the "legitimate function" the governing body has in the peer review process, highlighting the fact that it

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[2] See footnote 3, *infra*.

is the governing body, and not licentiates, that has the ultimate responsibility to ensure that questionable patient care is investigated and disciplinary actions are taken when the peer review body fails in its duty to act. (Bus. & Prof. Code § 809.05, subd. (a) – (c).)

It is not, as Dr. Mileikowsky argues, that the Legislature limited the role of the hearing officer to accomplish its stated policy goal. Instead, the Legislature limited the role of *licentiates* to ensure that the "governing body and the medical staff shall act exclusively in the interest of maintaining and enhancing quality patient care." (*Id.* § 809.05, subd. (d).)

Peer review conducted by licentiates, though important, is subordinate to the state's paramount goal of achieving quality patient care through a robust and fair process. For this reason alone, the Legislature created a system of checks and balances wherein the governing body acts as a safety net when the peer review body fails to act. The governing body has authority to "*direct the peer review body to act*" but only after consulting about such action with the peer review body. (Bus. & Prof. Code § 809.05 subd. (b).) If the peer review body still fails to act as directed by the governing body, only then may the governing body itself take action against a licentiate. (Bus. & Prof. Code § 809.05 subd. (c).) Thus, quality care and patient safety were the Legislature's principal policy focus, not the creation of a peer review process controlled entirely by licentiates.

C. **Section 809.2 Allows For Non-Licentiates To Function As Presiding Officer.**

Section 809.2 subdivision (a) expressly provides that where a licentiate has timely requested a hearing for which a report must be filed with the Medical Board of California pursuant to section 805, there is a variety of options regarding the finding of fact:

> [t]he hearing shall be held, as determined by the peer review body, before a trier of fact, *which shall be an arbitrator* or *arbitrators* selected by a process mutually acceptable to the licentiate and the peer review body, or before a panel of unbiased individuals who shall gain no direct financial benefit from the outcome, who have not acted as an accuser, investigator, factfinder, or initial decisionmaker in the same matter, and which shall include, where feasible, an individual practicing the same specialty as the licentiate[3].

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[3] We call the Court's attention to the similarities between § 809.2 subd. (a)'s factfinder options and those required by the federal Health Care Quality Improvement Act of 1986 ("HCQIA") (42 U.S.C. §§ 11101 et seq.). 809.2 subd. (a) simply combined alternatives (ii) and (iii) of the HCQIA into the second of its two options. 42 U.S.C. § 11112 subdivision (b) subpart (3) Conduct of hearing and notice

> If a hearing is requested on a timely basis under paragraph (1)(B)—
> (A) subject to subparagraph (B), the hearing shall be held (as determined by the health care entity)—
> (i) before an arbitrator mutually acceptable to the physician and the health care entity,
> (ii) before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved, or
> (iii) before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved.

(Emphasis added.)

The Legislature provided for *two* factfinding options: an arbitrator and a panel of unbiased individuals. Conspicuously absent in this requirement is that any of the factfinders – arbitrator or hearing panel - be licentiates. Only the second of the two options mentions the Legislature's preference that licentiates be included in the panel at all, stating that "*where feasible, an individual practicing the same specialty as the licentiate*" will be included. (§ 809.2 subd. (a).) In the second factfinder option, although the inclusion of a licentiate was the Legislature's preference, it is not a requirement if doing so is not feasible. Indeed, based on the plain language of the statute, the parties could stipulate that a group of non-physicians be empanelled as the factfinders in a matter where it is not feasible to include a physician peer.

The Legislature provided for an exceedingly limited "peer" option and also a "non-peer" factfinding option. This demolishes Dr. Mileikowsky's premise that the Legislature intended to limit the process to licentiates, leaving attorneys with only a ministerial role to play, as a "purely optional assistant" to the hearing panel. (ABOM 34.)
Dr. Mileikowsky breezes past the non-peer factfinder option, baldly asserting that

> [t]he option of mutually agreed arbitrators does not appear to have been used with much frequency, if ever. (ABOM at p. 34 fn.6.)

This is simply not true. The experience of Kaiser in Southern California is instructive, establishing that California peer review organizations regularly utilize both factfinding alternatives provided by the Legislature and that attorneys play an important role in this well established process.

D. SCPMG and the Southern California Health Plan and Kaiser Hospitals Facilities Use Only Arbitrators In Peer Review Hearings.

Kaiser was established in Southern California in 1943 to serve the workers of the Kaiser steel mill in Fontana. In 1945, program enrollment was opened to the public and in 1950, at the invitation of the International Longshoremen's and Warehousemen's Union and the Pacific Maritime Association, the program was expanded to the Los Angeles Harbor area. Today, the Southern California Kaiser entities serve over 3 million Health Plan members in that region. Health Plan and SCPMG jointly cooperate in credentialing approximately 7,000 physicians (3,500 of whom are SCPMG partners) who provide care at 11 Kaiser Hospital medical center facilities and numerous medical offices supporting all medical specialties and most sub-specialties.

Since 1990, the peer review fair hearing plan at each of the three Southern California Kaiser entities has provided exclusively for the use of

arbitrators to adjudicate peer review hearing matters. No physician panel is used. In all cases, the arbitrator must be an attorney-at-law qualified to preside over a quasi-judicial hearing with experience in medical staff matters selected by a process mutually agreeable to the parties. This attorney arbitrator decides all of the procedural and substantive issues related to the peer review questions in controversy.

Over the last 18 years, SCPMG and the Kaiser entities serving the Southern California region have consistently used arbitrators to adjudicate these matters. They decided collectively, long ago, that physician time was better spent caring for patients and not using them as factfinders in drawn-out quasi-judicial hearings. SCPMG and the Kaiser entities serving the Southern California region believe that it is not an efficient use of member resources to empanel a physician judicial review committee *and* retain a hearing officer when, in its place, an arbitrator can be used with no imposition on physician time.

E. Qualified Non-Licentiates Are Appropriately Suited To Oversee And Decide The Quasi-Judicial Aspect Of Peer Review Controversies And Decide Ultimate Questions.

Dr. Mileikokwsky asserts that "there is little incentive for a prosecuting medical staff to share the otherwise unilateral power it enjoys to choose the decision maker." (ABOM 34 fn. 6.) Kaiser has decided otherwise. As discussed above, peer review begins long before a

controversy finds its way to a quasi-judicial hearing. Regardless of the ultimate factfinding process used (arbitrator or hearing panel), licentiate peer reviewers are involved throughout the long road that leads to such hearings: analyzing and reviewing cases, meeting with the subject practitioner and making recommendations. To ensure objectivity, outside expert peer reviewers are often used as a follow-up to internal focused peer reviews. Given the countless physician hours already devoted to a peer review controversy before it ever reaches a hearing, the integrated health system and the thousands of physicians providing care to millions of patient members in Southern California are satisfied that a non-licentiate attorney is best suited to arbitrate the peer review hearing itself.

Contrary to Dr. Mileikowsky's assertion, attorneys specializing in health law who are well versed in peer review matters are competent to handle this *legal* proceeding even though they also make dispositive decisions on the ultimate substantive clinical questions in the case. The California Legislature clearly agreed with this view by providing the non-licentiate arbitrator option in section 809.2 subdivision (a).

F. Even Where Hearing Panels Are Used To Decide The Matter, The Hearing Officer Should Have Authority To Impose Terminating Sanctions.

In contrast to Kaiser's Southern California peer review hearings, the Northern California Kaiser entities are satisfied with using the judicial

review panel and hearing officer option provided in section 809. Nonetheless, the Kaiser entities throughout California, with more than 13,000 physicians, have all decided that either a non-licentiate hearing officer or an arbitrator must control the orderly conduct of the proceedings. This includes the authority to issue terminating sanctions when a party uses legal gamesmanship to stall the process by flagrantly ignoring statutorily required procedures, including discovery obligations.

Arguably, when such gamesmanship is employed, the ultimate decision could be left to the hearing panel members. Presumably, when a physician refuses to provide relevant evidence, the hearing panel would draw negative inferences from that refusal and would very likely find against him on the related charges.

Neither the hearing panel nor the peer review body, however, should be forced to sit through a hearing process that is essentially a charade. Nor should a panel of non-attorney physicians be forced to decide on the *legal* effect of the absence of evidence and the disciplined physician's reasons for failing to produce the evidence – which are essentially legal conclusions. The attorney hearing officer is much better situated to make those decisions.

V.
A PARTY CAN WAIVE ITS RIGHT TO A HEARING BY ITS CONDUCT AT ANY STAGE OF THE PROCEEDINGS.

A. West Hills Created An Artificial And Ambiguous Threshold For Waiver Of Rights.

The *West Hills* Court is not the first appellate panel to review the scope of a peer review hearing officer's authority. When that court's sister panel in the same judicial district analyzed a hearing officer's authority in another case and examined section 809 et seq., the holding was that nothing in the statute suggests that the hearing committee rather than the hearing officer must decide procedural questions. (*Mileikowsky v. Tenet HealthSystem* (2005) 128 Cal.App.4th 531, 561-562 ("*Tenet HealthSystems*").) In *Tenet HealthSystems*, the court upheld the terminating sanctions imposed by the hearing officer for discovery and other abuses. Ironically, the *Tenet HealthSystem* and *West Hills* cases involve the same physician – Dr. Mileikowsky – and, among other things, his delay and ultimate refusal to produce the very same Cedars Sinai Medical Center documents. (*West Hills*, *supra*, 154 Cal.App.4th 752, 771.)

West Hills distinguished its holding from *Tenet HealthSystem's,* but not before it fully concurred with *Tenet HealthSystem* "that a party may well forfeit by its conduct the rights set forth in section 809.3 subdivision (a)." (*West Hills*, *supra*, 154 Cal.App.4th 752, 771.) Section 809.3

subdivision (a)[4] sets forth the procedural rights of each party to the action. The *West Hills* court, however, established what might be called a "threshold" test for forfeiture of those rights: Forfeiture may not occur until the hearing has progressed to the evidentiary stage, in which certain enumerated rights are available. Section 809.3 subdivision (a) provides:

> During a hearing concerning a final proposed action for which reporting is required to be filed under section 805, both parties shall have all of the following rights:
> (1) To be provided with all of the information made available to the trier of fact.
> (2) To have a record made of the proceedings, copies of which may be obtained by the licentiate upon payment of any reasonable charges associated with the preparation thereof.
> (3) To call, examine, and cross-examine witnesses.
> (4) To present and rebut evidence determined by the arbitrator or presiding officer to be relevant.
> (5) To submit a written statement at the close of the hearing.

West Hills agreed with *Tenet HealthSystem's* finding that by his conduct in that earlier case, Dr. Mileikowsky had waived his section 809.3 subdivision (a) rights (*West Hills*, *supra*, 154 Cal.App.4th 752, 770 – 771).

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[4] We refer to the phase of the hearing in which pre-hearing discovery has completed, and the parties have begun the procedural steps set forth in section 809.3 subdivision (a) of the hearing, as the "evidentiary stage of the hearing."

In distinguishing the two cases, however, *West Hills* held that only the trier of fact had the authority to determine a waiver had occurred. (*West Hills*, *supra*, 154 Cal.App.4th 752, 772.) *West Hills* further faulted the hearing officer's decision in the case at bar for not proceeding to the evidentiary stage of the hearing. The court thus created a requirement that (i) only the trier of fact can terminate a peer review hearing based on a finding that a party has waived its evidentiary hearing rights; and (ii) such a termination can be imposed only after the evidentiary stage of the hearing has begun.

Although the *West Hills* court described the different stages to which the present case and the *Tenet HealthSystem* hearing progressed, the court stated only that Dr. Mileikowsky had enjoyed the opportunity to avail himself of his 809.3 subdivision (a) rights in *Tenet HealthSystem*, but not in *West Hills*. Unfortunately, the court never set forth a definitive threshold to guide finders of fact as to when the line has been crossed by which a party is eligible to forfeit rights. For example, Dr. Mileikowsky, in *Tenet HealthSystems*, had certainly *begun* to avail himself of his section 809.3 subdivision (a) rights, but he had not concluded his examination or cross-examination of witnesses, his presentation and rebuttal of evidence, or submitted any closing statement. Indeed, he could not have finished doing any of these things because the hearing was terminated early.

West Hills does not explain why mere passage into the evidentiary stage of the hearing suddenly makes terminating sanctions by the hearing officer appropriate. The court did reason that in *Tenet HealthSystem*, "multiple sessions of the hearing actually took place over the span of nearly one year." (*West Hills*, *supra*, 154 Cal.App.4th 752, 771). That statement only begs the question: How far into that evidentiary stage of the hearing must the matter go? If only three sessions had taken place in a year, or even two years, would that be sufficient? Is it the number of sessions or the length of time that the evidentiary phase of the hearing has been underway that controls? The *West Hills* court never tells us, thus creating an artificial and ambiguous threshold for when a hearing can be terminated for party misconduct.

When, as here, discovery is incomplete because of the flagrant disregard of the hearing process, how much of its case must one party present, without the benefit of the information it has been wrongfully denied, before the hearing can be terminated? Why would any part of the process be considered fair if one party receives the discovery it has rightfully sought but the other does not?

B. <u>West Hills' Holding Is Demonstrably Unsound In Cases Where An Arbitrator Acts As Factfinder.</u>

Kaiser disagrees with the *West Hills* artificial threshold. Because an arbitrator acts both as presiding officer and factfinder, the harm to the

proceedings from a party's misconduct occurs far earlier in the process than the artificial threshold established in *West Hills*. It is unclear under the *West Hills* holding whether or not the arbitrator must wait until the evidentiary stage of the hearing for the disruptive party to have a change of heart and begins to "avail" itself of its section 809.3 subdivision (a) rights.

Consider, for example, Dr. Mileikowsky's behavior in the current case. We ask the Court to substitute, hypothetically, an arbitrator for the hearing officer in the *West Hills* facts, and to assume that no judicial review panel was convened:

In June 2002, Dr. Mileikowsky demands that West Hills produce the statutorily required documents to him, and, when it does not respond, Dr. Mileikowsky asks the arbitrator to impose terminating sanctions on West Hills for its delay in production. (OBOM 16.) Shortly thereafter, the arbitrator orders both parties to produce the required documents. West Hills produces its documents but Dr. Mileikowsky does not. Over nine months later, after multiple requests for documents by West Hills and multiple orders issued by the arbitrator instructing Dr. Mileikowsky to produce the documents, the arbitrator terminates the hearing. Further, the arbitrator's order makes plain that Dr. Mileikowsky flouted not only the discovery orders, but the entire hearing process and the hearing officer's authority. He finds:

> Dr. Mileikowsky failed to comply with many orders made by the [arbitrator] in this matter, involving such disparate issues as improper *ex parte* communications, manner and delivery of notices, motions and briefs and other procedural, substantive and orders seeking civility and courtesy. Dr. Mileikowsky advised the [arbitrator] on several occasions that he had a right to ignore the [arbitrator's] order. (OBOM 22, fn. 9.)

How would the *West Hills* rule apply under these circumstances? The court there stated that there is "no provision" in section 809.2 . . . or any of its companion sections that empowers *anyone*, including the trier of fact," to terminate the hearing before it has entered the evidentiary stage. (*West Hills*, *supra*, 154 Cal.App.4th 752, 765 (emphasis added).) Even the arbitrator in the hypothetical above, then, could not terminate the hearing based on the same facts.

The unsoundness of the *West Hills* rule seems clear. In this hypothetical, after the nine-month delay caused by the physician and his stated belief that he can ignore the arbitrator's orders, the process can reasonably be seen as prejudiced. By limiting the ability of any factfinder to impose terminating sanctions, the *West Hills* court opens the door to egregious abuses.

Kaiser believes that *West Hills'* arbitrary threshold should be discarded. Dr. Mileikowsky had every opportunity to avail himself of his section 809 et seq. procedural rights, including those set forth in section

809.3 subdivision (a), but by his own pre-hearing conduct he chose not to exercise those rights. Instead, he stalled and delayed the process at the document production level of the process, preventing the parties from even reaching the evidentiary stage. No one in his position should be rewarded for such misconduct.

The *Tenet HealthSystem* court struck the right balance when it recognized that a hearing officer has implicit power to control the proceedings and the authority to impose the ultimate sanction in a matter, provided an extensive record of misconduct exists, as in the present case. (*Tenet HealthSystem, supra*, 128 Cal.App.4th 531, 562.) The *Tenet HealthSystem* court emphasized that terminating sanctions will be reserved for truly exceptional cases:

> [H]earing officer decisions to terminate proceedings due to the alleged violation of procedural rules will always be reviewable in court. Courts are reluctant to deprive a litigant of their opportunity to have the substantive merits of his or her case be heard except in egregious circumstances. An extensive record of misbehavior would have to exist to justify a decision to deprive a practitioner of the peer review afforded by statute. (*Id.*)

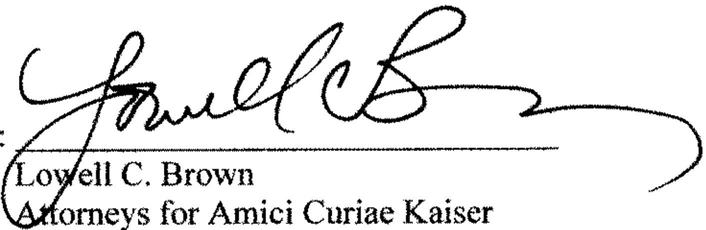
The authority to impose terminating sanctions should not depend on the stage to which the proceedings have progressed. Such artificial thresholds only create new opportunities and incentives to abuse the process.

VI.
CONCLUSION

For the above reasons, this Court should reverse the Court of Appeal's decision in *West Hills*, *supra*, 154 Cal.App.4th 752.

Dated: August ___, 2008

ARENT FOX LLP
Lowell C. Brown
Patricia M. Kosich



By: ______________________
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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; The Permanente Medical Group, Inc.; and The Southern California Permanente Medical Group is produced using 13-point Roman type, including footnotes, and contains 5,690 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program, Microsoft Office Word 2003, used to prepare this brief.

Dated: August 27, 2008

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Attorneys for Amicus Curiae
California Hospital Association

PROOF OF SERVICE

I, Ann Mierisch, declare:

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. I am employed by Arent Fox LLP, and my business address is 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. I am readily familiar with the practice of Arent Fox LLP for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. On August 27, 2008, I served the within document entitled **BRIEF OF AMICUS KAISER FOUNDATION HEALTH PLAN, INC.; KAISER FOUNDATION HOSPITALS; THE PERMANENTE MEDICAL GROUP, INC.; AND THE SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP IN SUPPORT OF DEFENDANTS AND RESPONDENTS** on the parties in the action by placing a true copy thereof in an envelope addressed as follows:

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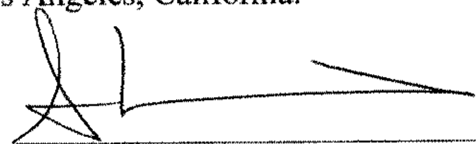
and, following ordinary business practices of Arent Fox LLP, by sealing said envelope and depositing the envelope for collection and mailing on the aforesaid date by placement for deposit on the same day in the United States Postal Service at 555 West Fifth Street, Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on August 27, 2008, at Los Angeles, California.



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