

Peer Review

Staff Privileges

Hospital Cannot Rely Solely on Findings From Other Hospital's Peer Review of Doctor

Unless the circumstances indicate otherwise, a hospital may not rely solely on the results of peer-review proceedings at another hospital when considering whether to terminate a physician's staff privileges, a California appellate court ruled July 21 (*Smith v. Selma Community Hospital*, Cal. Ct. App., No. F050816, 7/21/08).

The California Court of Appeal, Fifth District, ordered Selma Community Hospital to reinstate Dr. Brenton R. Smith to its staff membership after finding that the hospital's governing board made several errors, including according conclusive weight to previous peer-review proceedings against Smith, in reversing a judicial review committee's decision not to terminate his privileges.

The court emphasized that it was not holding that peer-review materials from a different hospital never can be conclusive in a later proceeding. It said only that a decision cannot be based solely on that information if there was evidence questioning its reliability.

The court also clarified its standard of review of the governing board's decision, saying that, when reviewing the board's interpretation of a particular point, the court must decide the legal question of whether the judicial review committee's decision was ambiguous on that point and, if so, whether the board adopted a correct interpretation when it resolved the ambiguity.

JRC Decision Overturned. Following peer-review proceedings, two related hospitals (the Hanford hospitals) terminated Smith's staff privileges. Based on that decision, officials at Selma Community Hospital (SCH) began investigating Smith to determine whether that hospital, too, should remove him from its medical staff. The medical executive committee (MEC) recommended terminating Smith's medical staff privileges, but the judicial review committee (JRC) rejected the recommendation.

The JRC reviewed the peer-review materials from the Hanford hospitals' proceedings, but decided it was not bound by the result. The JRC said such data may trigger an investigation, but should not be deemed controlling unless independently verified.

SCH's governing board overruled the JRC, holding that the record contained substantial evidence of numerous deficiencies in Smith's practice. It ordered the termination of his staff privileges.

Smith filed a verified petition for a writ of administrative mandamus against SCH in the California Superior Court. The superior court granted the writ and directed SCH to set aside the governing board's decision and reinstate the decision of the JRC. SCH appealed.

Review Standards. As a threshold matter, the court of appeals considered the standards of review applicable to the various rulings at issue.

The court noted that only the actions of the governing board, not the actions or reasoning of the superior court, were subject to its review. Moreover, because the

board did not sit as the trier of fact, but as an appellate body reviewing the JRC's decision, the court's review was limited to whether the board chose the correct legal standards and properly applied them to the JRC's decision, it said.

The court noted that California law is unclear as to whether, in peer-review proceedings, the interpretation of a JRC decision presents a governing board with a question of law or fact. Here, because the JRC's role was akin to that of a trial court, which sits as a trier of fact, the board, like an appellate court, should have looked for errors of law, the court reasoned.

The first issue for review concerned the board's interpretation of the JRC's decision. That decision was subject to interpretation on review only if it was ambiguous or lent itself to more than one interpretation, the court said. Ambiguity is a question of law subject to the court's independent review, it noted.

The court concluded that "when reviewing the governing board's interpretation on a particular point, [it] must decide the legal questions whether the decision of the judicial review committee was ambiguous on that point and, if so, whether the governing board adopted a correct interpretation when resolving that ambiguity."

Hanford Hospitals Findings. The "most significant controversy" between Smith and SCH was the legal effect of the Hanford hospitals' peer-review committee findings, the court said. It noted that neither SCH's bylaws nor California's peer-review statute addresses how the disciplinary actions of one hospital are to be treated in the peer-review process of another.

The board, the court said, accorded the Hanford hospitals' decision the "full force and effect of a final administrative decision," and said the doctrine of collateral estoppel obligated the JRC to accept as true the Hanford peer-review committee's findings. The JRC, on the other hand, held that the Hanford findings were not conclusive.

The doctrine of collateral estoppel applies only if: (1) the issue sought to be precluded was identical in both actions; (2) the issue was actually litigated in the first action; (3) the issue was necessarily decided in the first action; (4) the decision in the first action was final on the merits; and (5) the parties were the same as, or in privity with, the parties to the first action.

Collateral estoppel did not apply to the Hanford hospitals' decision because that decision lacked finality, the court said, noting that Smith had appealed that decision to the state superior court. Therefore, the governing board committed legal error when it stated that the JRC was obligated to accept as true the Hanford hospitals' peer-review committee's findings, it concluded.

Other Factual Findings. The court also found that the governing board incorrectly determined that the JRC made no factual findings. The JRC said more than once that the MEC did not persuade the committee by a preponderance of the evidence that Smith's removal from the staff was reasonable and warranted.

The court concluded that "(1) whether the medical executive committee persuaded the judicial review committee by a preponderance of the evidence that its proposed action was reasonable and warranted was a question of fact and (2) the judicial review committee made an explicit finding on this question. Therefore, the governing board's decision cannot be upheld on the ground that the judicial review committee failed to

make findings of fact as required by the Bylaws or statute.”

According to the court, the governing board also found that the JRC did not provide fair procedure because it considered irrelevant and inappropriate evidence. The court rejected this contention, saying it was perfectly acceptable for the JRC to consider the reliability of the Hanford hospitals' findings and whether those findings should be considered as a predictor of Smith's future behavior at SCH.

The court found relevant evidence of settlement negotiations between Smith and SCH, evidence of the relationship between SCH and the Hanford hospitals and their common corporate owner's unsuccessful attempt to buy Smith's practice, and expert witness testimony regarding accepted standards for peer-review investigations.

As to the latter, the court said SCH improperly interpreted the JRC's statements regarding the expert's testimony as adopting a legal standard different from that contained in the bylaws. The JRC characterized the testimony as setting forth recommendations, not binding standards, the court found. Moreover, the JRC properly applied the bylaws' standard—was the MEC's action reasonable and warranted—to the facts of the case, it concluded.

Substantial Evidence Review. Finally, the court held that the governing board erroneously determined that substantial evidence did not support the JRC's findings. There were two reasons for the board's erroneous conclusion, the court said. First, it wrongfully concluded that certain evidence was irrelevant and, second, it improperly held the Hanford hospitals' decision conclusive.

The evidence deemed irrelevant by the board showed significant conflicts between Smith's interests and those of the Hanford hospitals and their owner, the court found. “This information supports the inference that the Hanford hospitals' findings against Smith [were] less reliable than they would have been had these conflicts not existed,” it said.

Another circumstance that led the court to question the reliability of the Hanford hospitals' proceedings was the fact that SCH could not point to any incidence of substandard care by Smith at its facility that corroborated the findings in the earlier case. Additionally, two other doctors had refuted the evidence presented to the Hanford hospitals' peer-review committee, the court noted.

This evidence, the court concluded, was substantial and adequately supported the JRC's finding that the MEC failed to prove by a preponderance of the evidence that it acted reasonably when it treated the Hanford hospitals' findings as conclusive. The MEC's choice was not justified as a matter of law because the bylaws did not require it and the doctrine of collateral estoppel did not apply, the court said. Further, the MEC's choice was not justified as a matter of fact because the evidence raised questions as to the reliability of the Hanford hospitals' findings, it said.

The court concluded that the governing board misinterpreted the JRC's decision, misapplied the doctrine of collateral estoppel, erroneously decided that certain evidence was irrelevant, and misapplied the substantial evidence test. The appropriate remedy for these errors, it noted, was reinstatement of the JRC's decision.

Justice Betty L. Dawson wrote the opinion, which was joined by acting Presiding Justice Rebecca A. Wiseman and Justice Herbert I. Levy.

Lawrence T. Wayte and Jerry D. Casheros, of McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno, Calif., represented SCH. Barbara J. Hensleigh and John J. Aumer, of Andrews & Hensleigh, Los Angeles, represented Smith.

The full text of the decision is at <http://op.bna.com/hl.nsf/r?Open=mapi-7guhtw>.

Professional Liability

Damages

Massachusetts High Court Adopts Malpractice 'Loss of Chance' Doctrine

Massachusetts law permits recovery for “loss of chance” in medical malpractice cases when a jury finds a physician's negligence deprived a patient of a chance of surviving a deadly disease, regardless of the odds of survival or whether the physician's negligence caused the patient's death, the state high court ruled in two cases decided July 23 (*Matsuyama v. Birnbaum*, Mass., No. SJC-09964, 7/23/08; *Renzi v. Paredes*, Mass., No. SJC-10051, 7/23/08).

In *Matsuyama*, the Massachusetts Supreme Judicial Court said that if a physician's negligence reduces or eliminates a patient's chances for a more favorable medical outcome, the physician has harmed the patient and is liable for damages. The *Renzi* court added that the rule applied even if the patient's prenegligence odds of survival were greater than 50 percent. The court also held that a jury can return a verdict holding a physician liable for loss of chance even if it finds the defendant did not “cause” the patient's death.

The court created a formula for calculating damages for loss of chance that takes into account the patient's odds of survival both before and after the negligent conduct. It also expressly held that the state's wrongful death statute does not preclude a loss of chance cause of action.

The court emphasized that its decision is limited to medical malpractice actions.

Gastric Cancer Misdiagnosed. Kimiyoshi Matsuyama went to Dr. Neil Birnbaum in 1995 for a routine physical examination. He complained at that time of frequent heartburn. Due to his background, Matsuyama had a significantly high risk of developing gastric cancer, yet Birnbaum did not order any tests for cancer. Over the next three years, Birnbaum continued treating Matsuyama for various complaints—some of which, the plaintiff's expert witness testified, were early symptoms of gastric cancer.

Matsuyama's stomach cancer finally was diagnosed in May 1999. He died the following October.

Matsuyama's widow filed a complaint against Birnbaum alleging wrongful death, breach of contract, and negligence. Her expert witness testified at trial that, if Matsuyama's cancer had been diagnosed earlier, his