

OSAMAH EL-ATTAR, Plaintiff and Appellant, v. HOLLYWOOD PRESBYTERIAN
MEDICAL CENTER, Defendant and Respondent.

S196830

SUPREME COURT OF CALIFORNIA

2011 CA S. Ct. Briefs 96830; 2011 CA S. Ct. Briefs LEXIS 1518

September 29, 2011

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE
DISTRICT, DIVISION FOUR. CASE NO. B209056.

Petition for Appeal

VIEW OTHER AVAILABLE CONTENT RELATED TO THIS DOCUMENT: CA Supreme Court: Brief(s)

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TITLE: Petition for Review

TEXT: ISSUE PRESENTED

When formal peer review is needed to determine whether a physician is competent to continue practicing in a hospital, may the hospital's governing board initiate the peer review by selecting the medical staff physician reviewers and a hearing officer if the medical staff does not, where the medical staff's bylaws specify the medical staff as the selecting body?

INTRODUCTION

WHY REVIEW SHOULD BE GRANTED

Dr. Osamah El-Attar, a physician with staff privileges to practice at Hollywood Presbyterian Medical Center (Hospital), was accused of providing unnecessary and substandard care. The unnecessary and substandard care

threatened not only patient health, but also the Hospital's eligibility for Medicare and Medi-Cal funding that was essential to the Hospital's very existence. The Hospital thus recommended the denial of Dr. [*2] El-Attar's application for readmission to the medical staff.

To prevent Dr. El-Attar from treating patients at the Hospital if the charges were accurate, formal peer review of his practice had to be conducted by the Hospital's medical staff. The medical staff's bylaws specified that the Medical Executive Committee (MEC) - the medical staff's leadership - initiate the peer review process by appointing the necessary physician reviewers and a hearing officer.

Instead of appointing the reviewers and hearing officer, the MEC told the Hospital's governing board to do it. The board responded by appointing 5 physician members of the medical staff and a hearing officer who conducted 30 peer review sessions over a two-year period, examining thousands of exhibits and hospital records and hearing testimony from percipient and 7 expert witnesses. The physician reviewers then concluded that Dr. El-Attar should not be practicing at the Hospital.

The trial court denied Dr. El-Attar's petition for writ relief, but the Court of Appeal reversed. The appellate court did not find that the peer review conclusions were substantively flawed, but held that the medical staff's bylaws prohibited the Hospital's [*3] board from initiating the needed peer review even though the medical staff's MEC didn't do so. (*El-Attar v. Hollywood Presbyterian Medical Center (2011) 198 Cal.App.4th 664*, typed opn., 12-18.)

Review by this court is necessary both "to secure uniformity of decision" and "to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

Before the Court of Appeal's published decision here, it seemed settled that a hospital's governing board could arrange for peer review when the medical staff failed to do so. (See, e.g., Bus. & Prof. Code, § 809.05, subd. (c) ["i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate".) And it seemed settled that the board's necessary deviation from the medical staff's bylaws did not violate a physician's fair procedure rights even though it might have affected the composition of the peer review panel. (See *Hongsathavij v. Queen of Angels etc. Medical Center (1998) 62 Cal.App.4th 1123, 1142-1144 (Hongsathavij)* [holding that, because the Hospital's governing [*4] board has ultimate responsibility for peer review decisions, the common-law rule of necessity requires the board to "align its authority with its responsibility" regarding peer review proceedings, and such actions are not "a material deviation from the bylaws"]; *Weinberg v. Cedars-Sinai Medical Center (2004) 119 Cal.App.4th 1098, 1112-1114 (Weinberg)* [hospital's governing board is permitted, under the rule of necessity and Business and Professions Code section 809.05, to terminate a physician's medical staff privileges regardless of an alleged conflict of interest and the MEC's contrary recommendation]; *Rhee v. El Camino Hospital Dist. (1988) 201 Cal.App.3d 477, 497-501 (Rhee)* [hospital's violation of bylaws by failing to provide physician with the decision of an initial peer review panel did not infringe on the doctor's fair procedure rights, even though he claimed it deprived him of an opportunity to reject certain members of a subsequent peer review panel]; see also *Kaiser Foundation Hospitals v. Superior Court (2005) 128 Cal.App.4th 85, 107-109 (Kaiser)* [physician's claim that a hospital's "unilateral selection [*5] of a hearing officer and the [peer review panel] violates due process" was insufficient to excuse his duty to exhaust that administrative remedy before filing suit].)

However, the Court of Appeal's published opinion here creates uncertainty as to the circumstances when a hospital's governing board may act in place of the medical staff. The Court of Appeal's opinion hamstring the Hospital. The Hospital's governing board, faced with a threat to patient health and to Medicare and other funding necessary to keep the Hospital's doors open, acted only after the medical staff's MEC specifically told the board that the board and not the MEC should appoint the peer review panel and hearing officer. Yet, regardless of the medical staff's directions, the Court of Appeal deemed the board's action inconsistent with the medical staff's bylaws and a violation of Dr. El-Attar's right to fair procedure. (Typed opn., 15 ["Allowing the Governing Board to select the hearing officer and [peer review] panel is not an inconsequential violation of the Bylaws. Rather, it undermines the purpose of the peer

review mechanism"], 17 [the Court of Appeal refused to allow "the Governing Board to turn the [*6] peer review process on its head, which would be the result if the MEC were permitted to abrogate its right and duty with respect to the peer review procedure".])

The Court of Appeal's opinion exalts form over substance, to the detriment of the public health. Instead of voiding the detailed peer review proceedings, the opinion should have concluded, as the *Hongsathavij* court did, "the hospital did what was appropriate. It provided a [peer review] hearing, and the governing body reviewed the results of that hearing to determine whether the conclusions were supported by substantial evidence. Given the peculiar dynamics and procedural posture of the situation, the governing body fairly interpreted the bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the medical staff and the hospital." (*Hongsathavij, supra*, 62 *Cal.App.4th* at p. 1144.)

The issue about a hospital's authority to act when the medical staff does not is not only suddenly unsettled by the Court of Appeal's opinion, but it is also an important one affecting the public welfare. As this court has explained, "peer review of physicians . . . serves an important [*7] public interest. Hospital peer review, in the words of the Legislature, 'is essential to preserving the highest standards of medical practice' throughout California." (*Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 *Cal.4th* 192, 199 (*Kibler*), quoting Bus. & Prof. Code, § 809, subd. (a)(3); see *Kibler*, at p. 200 ["peer review procedure plays a significant role in protecting the public against incompetent, impaired, or negligent physicians"].) And the Legislature has expressly stated its goal to use "efficient[]" peer review to protect the public from "those healing arts practitioners who provide substandard care or who engage in professional misconduct." (Bus. & Prof. Code, § 809, subd. (a)(6) & (7); see *Medical Staff of Sharp Memorial Hospital v. Superior Court* (2004) 121 *Cal.App.4th* 173, 181-182 ["the overriding goal of the state-mandated peer review process is protection of the public"].)

The issue is not an isolated one. In 2010 the California Medical Association (CMA) published a new version of its model medical staff bylaws, which conditions the initiation of a peer review hearing on the MEC recommending appointments [*8] to the peer review panel. (See typed opn., 14 [citing the CMA model bylaws as support for its conclusion that, even when the MEC has expressly declined to do so, "the power to appoint the JRC panel remains in the hands of the MEC"].) Under the Court of Appeal's opinion, the governing board of any hospital whose medical staff adopts the CMA's model bylaws could be stymied from acting on peer review matters if, as happened here, the MEC declines to act. And that is true even where, as here, the peer review proceedings are critical to patient protection and the Hospital's continued viability.

The Court of Appeal's opinion in this case creates uncertainty regarding the scope of hospital authority and, given the crucial importance of peer review to the public health, the issue needs to be definitively resolved one way or the other by the Supreme Court. Otherwise, hospitals and their governing boards may face unnecessary liability - and a loss of critical federal funding - because of dysfunctional peer review systems. That is not a just outcome for hospitals, or the patients they serve.

STATEMENT OF THE CASE n1

n1 This Statement of the Case includes uncontradicted evidence in the record on appeal that was not mentioned in the Court of Appeal's opinion. The Hospital discussed the evidence in its respondents brief and filed a rehearing petition calling to the court's attention the opinion's omission of the evidence. (See RB 1-4; PFRH 7-11; see also Cal. Rules of Court, rule 8.500(c)(2) [Supreme Court normally will accept the Court of Appeal opinion's statement of facts "unless the party has called the Court of Appeal's attention to any alleged omission . . . of a[] . . . fact in a petition for rehearing" (emphasis added)].)

[*9]

A. A federal investigation identifies serious deficiencies in the Hospital's peer review process, which threaten the Hospital's eligibility to receive Medicare and other funding it needs to stay in business. The Hospital's governing board and its medical staff disagree about how to respond to the audit.

In 2002, representatives of the Center for Medicare and Medicaid Services (CMS) - the administrator for the federal Medicare and Medi-Cal programs - conducted an unannounced investigation of the *Hospital*. (21 AR 4478-4479; 27 AR 5795.) The CMS investigation would determine whether the Hospital could continue participating in the Medicare and Medi-Cal programs, and continue serving managed healthcare patients. (21AR4479; 27 AR 5796.) Without payments from Medicare, Medi-Cal, and managed healthcare providers, the Hospital would lose 90 percent of its funding and could not stay in business. (27 AR 5796-5797; see 21 AR 4480.) The CMS investigators found deficiencies in the Hospital's peer review process and concluded that the process needed to be restructured. (21 AR 4482-4483.) In particular, the [*10] audit criticized the Hospital's governing board for failing to adequately oversee the peer review programs. (21 AR 4483; 27 AR 5799.)

In meetings with the Hospital's administrators and physician medical staff leaders, the head CMS physician stated that he would recommend the Hospital be removed from the Medicare and Medi-Cal programs unless immediate corrective actions were taken. (27 AR 5798-5799.) The investigator also said he would strongly recommend to Medicare that outside reviews be conducted of the Hospital's peer review cases. (27 AR 5799.)

CMS required the Hospital's governing board to submit a written plan of correction in order to maintain its Medicare and Medi-Cal eligibility. (27 AR 5800.) In preparing its corrective plan, the Hospital, among other things, followed the CMS recommendation and retained outside review companies to look at the Hospital's peer review processes and assess how it could be improved. (21 AR 4484.)

The medical staff at the Hospital, however, objected to the entire assessment procedure. The MEC - comprised of the medical staff's leadership - complained that the CMS investigators [*11] were biased and demanded that the Hospital's governing board file an objection with the federal government regarding the nature of the CMS investigation and the qualifications of the investigators. (27 AR 5801.) The governing board declined to do so. (*Ibid.*) The MEC then demanded that no outside reviewers be used, but the board determined that was not a viable option. (*Ibid.*) The MEC then demanded that it have exclusive control over the selection of any outside auditors. (*Ibid.*) The board responded that the MEC was free to retain whatever outside auditors it wanted, but the board was likewise going to select its own outside auditors. (27 AR 5801-5802.)

B. After later audits uncover unnecessary and substandard care by Dr. El-Attar, the Hospital's governing board recommends denial of his application for reappointment to the medical staff.

In September 2002, the Hospital's board formed an ad hoc committee (AHC), headed by the Hospital's CEO, to oversee the review process and assist the Hospital in reforming the peer review system. n2 (27 AR 5806; see 21 AR 4484; 27 AR 5818.) The board directed the [*12] AHC to obtain outside audits. (21 AR 4485.) The AHC retained two different review organizations to assess the Hospital's quality management department and audit medical cases that had been subjected to peer review. n3 (21 AR 4485-4487; 27 AR 5802.)

n2 At this point, there was an extremely high level of friction, and no degree of cooperation, between the MEC and the governing board. (27 AR 5802.) Indeed, about a week after the board formed its AHC and refused to allow the MEC to control the outside auditors, the medical staff voted that it had no confidence in the CEO and called for his firing. (12 AR 2505; 27 AR 5833-5834.)

n3 The Court of Appeal's opinion states incorrectly that the Hospital's board formed the AHC to "review and make recommendations relating to the quality of care by certain medical staff members" and that the AHC

retained the auditors "to review [Dr. *El-Attar's*] practice." (Typed opn., 5.) In fact, the auditors were not directed to review any particular physicians initially; that focused review only came later, after the initial audits identified physicians whose practices required closer scrutiny. (See PFRH 7-11; pp. 11-13, *post*.)

[*13]

Reports both from the outside auditors and from the Hospital's compliance department identified problems with the peer review system. The auditors' conclusions about various specific cases differed dramatically from the peer review results. (21 AR 4487-4488; see 27 AR 5804 [one of the auditors said that, if the Hospital's peer review process were operating correctly, the audit and the peer review results should agree about 80 percent of the time].)

The auditors also raised significant concerns about the quality of care provided in certain departments, including the emergency department. One auditor's report identified a pattern of unnecessary consultations where emergency on-call physicians referred patients to each other despite a lack of documented need. (27 AR 5809-5810; see 21 AR 4489-4490 [the Hospital's quality management department independently reviewed the consultations and procedures performed on emergency patients, and likewise found an overuse of consultants].)

Based on the auditor's report, the AHC identified Dr. Osamah El-Attar, a cardiologist, as one of the on-call physicians who regularly did unnecessary consultations. [*14] (21 AR 4489; 27 AR 5811, 5816; see 21 AR 4490 [the Hospital's quality management department's independent review likewise identified a pattern of unnecessary consultations by Dr. El-Attar].) The vast majority of Dr. El-Attar's patients in 2002 came from his emergency room consultations and in 41 percent of these cases there was no documentation of any need for a cardiology consultation. (27 AR 5812, 5816.)

The AHC was very concerned about this pattern of unjustified emergency consultations, because it unnecessarily put patients at risk during invasive procedures, and because it created potential problems with third-party payers such as Medicare and Medi-Cal. n4 (27 AR 5812-5813; see 27 AR 5823.) The AHC therefore requested that the auditors review Dr. El-Attar's practice, as well as the practices of several other emergency on-call physicians identified by the initial audits. (21 AR 4488-4489, 4491; 27 AR 5816.)

n4 A sister hospital had recently paid a \$ 54 million fine to the federal government after auditors identified a pattern of unnecessary cardiac procedures and threatened to revoke the Hospital's Medicare eligibility status. (27 AR 5813.)

[*15]

The AHC did not participate in the selection of the physician reviewers used by the auditors, other than to request that at least two reviewers be used and that reviewers from Southern California not be used, in order to minimize the chance of a reviewer knowing the doctor being reviewed. n5 (27 AR 5817, 5819.)

n5 The reviewers the auditor selected to investigate Dr. El-Attar's practice included three board-certified cardiologists, including (a) the director of cardiology at University of California, San Francisco, (b) a professor of cardiology a Vanderbilt University Medical Center, and (c) the chief of cardiology at *San Francisco General Hospital*. (10 AR 2158-2159.) The fourth reviewer was an internal medicine physician holding three board certifications who teaches as a clinical professor at the *University of Arizona College of Medicine*. (10 AR 2159.)

The outside auditors' reports on Dr. El-Attar, completed in January 2003, were highly negative. (10 AR 2149-2160; [*16] 27 AR 5818-5819.) All 17 of Dr. El-Attar's cases that were reviewed by one auditor were found "below generally accepted practice standards," including 11 which exhibited "major deficienc[ies] in care." (27 AR 5819; accord, 9 AR 1822-1824; typed opn., 5.)

The report also identified 31 instances of medically unnecessary services performed or ordered by *Dr. El-Attar* (27 AR 5822), and it identified charting deficiencies in 16 of the 17 cases (27 AR 5824; see 27 AR 5825 [the federal government and other third-party payers will not authorize payment for medical services unless the medical record documents a need for such services]). It also confirmed continual behavior problems by *Dr. El-Attar*. (27 AR 5826; see 27 AR 5783, 5789, 5839 [in 1997-1998, Dr. El-Attar had gone through disciplinary proceedings and a peer review hearing at the Hospital involving a long list of documented behavioral issues].)

The other auditor's report made similar findings. (27 AR 5827.) It was critical of Dr. El-Attar's cardiologic care and found his behavior to be unacceptable and unprofessional. [*17] (9 AR 1828; 27 AR 5829.) The report stated that Dr. El-Attar's patients were undergoing risky procedures needlessly, which put the Hospital at risk for being a part of a conspiracy to cheat *Medicare and Medi-Cal*. (27 AR 5829.)

Based on the auditors' reports, the AHC unanimously decided that the only way to protect patients and the Hospital was to summarily suspend Dr. El-Attar and have him removed from the medical staff. (27 AR 5827, 5831-5832.) Following the AHC's recommendation, the Hospital board recommended the denial of Dr. El-Attar's application for reappointment and summarily suspended his clinical privileges. (9 AR 1829, 1835; 27 AR 5831; typed opn., 6.)

C. The MEC grants Dr. El-Attar a judicial review hearing regarding the board's recommendation, but delegates to the Hospital board the responsibility for conducting that hearing.

The Hospital's CEO asked the MEC to confirm the Hospital board's summary suspension of Dr. El-Attar, but the MEC refused and the suspension thus ended. (9 AR 1860; 27 AR 5831; see 9 AR 1836 [the MEC questioned why it was [*18] not consulted during the selection of outside auditors]; 11 AR 2350 [under the bylaws, the board's summary suspension of Dr. El-Attar's privileges terminated when the MEC refused to ratify that decision]; see also 3 CT 2744 [hospital's letter to Dr. El-Attar stating that his medical staff membership and clinical privileges would continue during his administrative hearing]; typed opn., 6.) The MEC then formed its own ad hoc committee to review 16 of the cases reviewed by one of the auditors. (9 AR 1890.)

On March 12, 2003, the MEC reviewed the findings of its ad hoc committee, which agreed with the board's outside reviewers that there were documentation problems in Dr. El-Attar's cases but did not recommend any adverse peer review action. (9 AR 1890.) The MEC then granted Dr. El-Attar's request for a judicial review hearing regarding the board's recommended denial of his application for reappointment to, the medical staff. (*Ibid.*, typed opn., 6.)

The Hospital's medical staff bylaws state it is the MEC that appoints the members of a judicial review committee (JRC) and the hearing officer. n6 (11 AR 2358, 2361.) The [*19] MEC concluded, however, that, "since the MEC did not summarily suspend [Dr. El-Attar's] privileges, did not recommend any adverse action relating to [Dr. El-Attar] and has not filed any Section 805 report relating to [Dr. El-Attar]; n7 and since the requested hearing would be to review actions by the Governing Board; *it should be the Governing Board and not the MEC which arranges and prosecutes the requested hearing.*" (9 AR 1890-1891, emphasis added; accord, 9 AR 1890 ["the Medical Executive Committee leaves the actions relating to the Judicial Review Hearing procedures to the Governing Board" (emphasis added)].)

n6 The JRC acts as the trier of fact for peer review. (See Bus. & Prof. Code, § 809.2, subd. (a); 11 AR 2355.)

n7 Business and Professions Code section 805, subdivision (b), "requires that hospitals report certain disciplinary actions, including denial of staff privileges, to the [State's] Medical Board . . . [and usually] to the

National Practitioner Data Bank" (*Mileikowsky v. West Hills Hospital & Medical Center* (2009) 45 Cal.4th 1259, 1268 (*Mileikowsky*).

[*20]

D. Acting in place of the MEC, the Hospital board's ad hoc committee initiates the judicial review hearing, which affirms the board's decision to deny staff privileges to Dr. El-Attar. The Hospital's appeals board affirms.

After the MEC left further action to the board, the board's AHC arranged for Dr. El-Attar's judicial review hearing. It issued a Notice of Hearing Charges, appointed six members of the medical staff to serve on the JRC, and appointed an attorney to act as the hearing officer. (9 AR 1895-1907; 11 AR 2358-2359, 2361; see typed opn., 6; 27 AR 5864.)

Following voir dire, n8 the JRC held 30 sessions over the next two years, at which it examined thousands of exhibits and medical records and heard testimony from percipient and seven expert witnesses. (16 AR 3505-3543; 17 AR 3550-3731; see 1 CT 85; 8 CT 1725; typed opn., 7-8.) The JRC then issued its decision, finding patterns by Dr. El-Attar of dangerous, substandard medical practice, of inadequate, substandard medical record documentation, and of inappropriate interpersonal relations with staff members. (17 AR 3737-3743.) [*21] The JRC unanimously ruled that the board's recommendation to deny Dr. El-Attar reappointment to the medical staff was reasonable and warranted. (*Ibid.*)

n8 The bylaws provide that the "member shall be entitled to a reasonable opportunity to question and challenge the impartiality of Judicial Review Committee members and the hearing officer." (11 AR 2360.) Following Dr. El-Attar's voir dire of the hearing officer and JRC members appointed by the AHC, "[o]ne member [of the JRC] was excused and two other members resigned prior to the commencement of the evidentiary hearings. Subsequently, in July 2003, [two new physicians] were appointed by the Governing Board to serve on the JRC as replacements, bringing the number of panel members to five." (Typed opn., at 7.)

Dr. El-Attar had yet another hearing when he appealed the JRC's ruling to the Hospital's appeal board. (35 AR 7746-7846.) After reviewing the record of the JRC hearing, the appeal board concluded Dr. El-Attar had received [*22] a fair hearing that substantially complied with the bylaws and applicable law. (19 AR 4110-4113.) In particular, the appeal board ruled that "[t]he appointment of the JRC and Hearing Officer by the [board] was not specifically authorized by the Bylaws but did not violate any rule of fair procedure and was approved by the MEC. The appointment of the JRC and the Hearing Officer by the [board] was also in substantial compliance with the Bylaws and resulted in no demonstrable prejudice to Dr. El-Attar, because he had the right to voir dire these appointees for bias and lack of impartiality in the same manner as if they had been appointed by the MEC." (19 AR 4111 [Conclusions And Recommendations, P 2].)

On the merits, the appeal board concluded that substantial evidence supported the JRC's findings, that the JRC's decision was not arbitrary or capricious but reasonable and warranted, and that the board should uphold the JRC decision. (19 AR 4111-4113.) The board followed the appeal board's recommendation, affirming the JRC's ruling and terminating Dr. El-Attar's medical staff membership. (19 AR 4109.)

E. The trial court [*23] denies Dr. El-Attar's petition for writ relief. The Court of Appeal reverses, holding that only the ME C could appoint the members of the peer review committee and its hearing officer.

"Following a lengthy hearing on the merits, the trial court denied [Dr. El-Attar's] petition" for writ relief. (Typed opn., 8; accord, 8 CT 1718-1770 [trial court's statement of decision].) The Court of Appeal reversed, holding that the 2-year peer review regarding Dr. El-Attar's loss of privileges must be redone because the board's AHC, rather than the

MEC, appointed the JRC panel and hearing officer. (Typed opn., 12-18.)

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT CONCERNING THE IMPORTANT ISSUE OF A HOSPITAL GOVERNING BOARD'S AUTHORITY TO INITIATE NECESSARY PEER REVIEW PROCEEDINGS WHEN THE HOSPITAL'S MEDICAL STAFF DOES NOT.

A. The conduct of necessary medical peer review proceedings presents an important public health issue.

This is the quintessential case for Supreme Court review, presenting an issue of statewide importance about which the Courts of Appeal are in disagreement.

Before a physician can be barred from practicing at a hospital, [*24] his competence must be reviewed by his peers. In this case, a hospital's organized medical staff did not want to arrange for the review of a physician who had been accused of providing unnecessary and substandard care. Although the medical staff's bylaws provides that the medical staff - through its MEC - is to initiate the review by appointing the reviewing physicians and the hearing officer, the MEC decided that the Hospital's governing board should do it. The board then did so, although the review itself was nonetheless still conducted by medical staff physicians.

The Court of Appeal here concluded that the Hospital board's action is a structural defect in the peer review proceedings that is inconsistent with the physician's fair procedure rights. (Typed opn., 12-18.) As we explain, this decision conflicts with other Court of Appeal opinions. This court should resolve the conflict.

The issue concerning a hospital board's authority with respect to peer review is vitally important. Hospital peer review is critical to, and the legislatively chosen method for, maintaining quality healthcare at every hospital in the state. (See *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 11-12; [*25] *Kaiser, supra*, 128 Cal.App.4th at pp. 96-98; *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 616-617; Bus. & Prof. Code, §§ 805, 809, 809.05, subd. (d).) It is thus not surprising that this court has frequently granted review to address hospital peer review issues. (E.g., *Mileikowsky, supra*, 45 Cal.4th 1259; *Kibler, supra*, 39 Cal.4th 192; *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709; *Arnett*, at p. 4; *Alexander v. Superior Court* (1993) 5 Cal.4th 1218; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614; *Anton v. San Antonio Community Hosp.* (1977) 19 Cal.3d 802; *Rosner v. Eden Township Hospital Dist.* (1962) 58 Cal.2d 592.)

"[T]he peer review process serves the important social interest in public health and safety by continually scrutinizing medical and health care operations in order to correct any potential problems with procedure or staff which might threaten the individual patient with disproportionate risk of danger." (*People v. Superior Court (Memorial Medical Center)* (1991) 234 Cal.App.3d 363, 373 [*26] [the peer review committee serves "as a quasi-public functionary"(emphasis added)]; *Ellison u. Sequoia Health Services* (2010) 183 Cal.App.4th 1486, 1494, 1498 (*Ellison*) [the primary purpose of peer review is to protect public health; the protection of a physician's right to practice medicine is secondary].)

A hospital's governing board has a legitimate need to participate in the peer review process in addition to the medical staff. (*Ellison, supra*, 183 Cal.App.4th at p. 1499; *Weinberg, supra*, 119 Cal.App.4th at p. 1114; see Stats. 2001, ch. 614, § 1, p. 361 [Legislative finding that " [p]eer review is an essential component' " of health care regulation, and both "health care practitioners and the administrators of the facilities within which these licentiates practice are in the best position to observe the quality of health care services being provided to the public" (emphasis added)].) The Hospital's governing board makes the final decision regarding peer review matters (*Mileikowsky, supra*, 45 Cal.4th at p. 1272), and the Hospital may be liable to its patients if it fails to adequately oversee [*27] medical staff peer review (*Rhee, supra*, 201 Cal.App.3d at p. 489 [the "hospital has 'a direct and independent responsibility to its patients of insuring the competency of its medical staff and the quality of medical care provided' "]; accord, *Elam v. College Park*

Hospital (1982) 132 Cal.App.3d 332, 346 (*Elam*)).

Accordingly, an "important public interest exists in preserving a hospital's ability to make managerial and policy determinations and to retain control over the general management of the hospital's business. A hospital is under an obligation to remedy any situation which threatens or jeopardizes patient care." (*Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169, 1184-1185; see also *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 811.)

It follows that the issue presented here is an important one which warrants this court's attention.

B. This court should resolve the conflict in the Court of Appeal decisions by holding that the Hospital governing board may act in place of the medical staff to initiate peer review proceedings when appropriate [*28] under the common law rule of necessity.

This case presents the ideal vehicle for resolving the circumstances under which hospital governing boards have the authority to arrange medical staff peer review proceedings under the common law rule of necessity.

This court has explained that the common law rule of necessity allows an officer or administrative body, who would otherwise be disqualified from proceeding, to act whenever a "failure to act would necessarily result in a failure of justice." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 482, fn. 5; see also *Olson v. Cory* (1980) 27 Cal.3d 532, 537; *Caminetti v. Pac. Mutual L. Ins. Co.* (1943) 22 Cal.2d 344, 365-366.)

Consistent with the common-law rule of necessity, the Legislature has provided that, "[i]n the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate." (Bus. & Prof. Code, § 809.05, subd. (c).)

Two Court of Appeal opinions have expressly applied the rule of necessity to validate action by a hospital governing board with respect to medical [*29] staff peer review proceedings. (*Hongsathavij, supra*, 62 Cal.App.4th at pp. 1142-1143; *Weinberg, supra*, 119 Cal.App.4th at pp. 1112-1113.)

The *Hongsathavij* court explained that, under *Elam, supra*, 132 Cal.App.3d at page 346, a "hospital itself may be responsible for negligently failing to ensure the competency of its medical staff and the adequacy of medical care rendered to patients at its facility." (62 Cal.App.4th at p. 1143.) Accordingly, a "hospital has a duty to ensure the competence of the medical staff by appropriately overseeing the peer review process." (*Ibid.*, citing *Elam*, at pp. 338, 341-342, 347.) Because the Hospital "assets are on the line" the "hospital's governing body must remain empowered to render a final medical practice decision which could affect those assets." (*Ibid.*) For this reason, a "hospital's governing body must be permitted to align its authority with its responsibility and to render the final decision in the hospital administrative context." (*Ibid.*, emphasis added; accord, *Weinberg, supra*, 119 Cal.App.4th at pp. 1112-1113.)

Also, until the Court [*30] of Appeal decision in this case, a hospital's governing board's authority to take necessary action in connection with the peer review process was not limited by the terms of the medical staff's bylaws. In *Hongsathavij*, the court noted that "[f]or whatever reason, the medical staff bylaws [there] provide no specific right [for the Hospital] to appeal [the results of] actions initiated by the governing body. Nonetheless, we find the review sought by the Medical Center in the present case did not constitute a material deviation from the bylaws." (*Hongsathavij, supra*, 62 Cal.App.4th at p. 1143.) The court explained:

The Medical Center's medical staff bylaws apparently did not envision a situation, as occurred here, where the superior court directed the hospital to conduct a hearing, but where the tension between the hospital and its medical staff was such that the MEC would not assume a role in such proceedings. Under such circumstances, the hospital did what was appropriate. It provided a JRC hearing, and the governing body reviewed the results of that hearing to determine whether the conclusions were supported by

substantial evidence. *Given the* [*31] *peculiar dynamics and procedural posture of the situation, the governing body fairly interpreted the bylaws and dealt with the matter consistent with its ultimate responsibility for the activities of the medical staff and the hospital.*

(*Id.* at pp. 1143-1144, emphasis added.)

The physician seeking to overturn an adverse peer review decision in *Hongsathavij* argued that, if the Hospital's "governing body believes an action against a physician is necessary, and if the medical staff disagrees, then the medical staff gets to make the final decision, since the governing body is tainted by its initial position on the matter." (62 *Cal.App.4th* at p. 1143.) The Court of Appeal rejected the physician's argument as "untenable" because "[u]ltimate responsibility [for peer review decisions] is not with the medical staff, but with the governing body of the hospital." (*Ibid.*; see *id.* at pp. 1142-1143 ["where an administrative body has a duty to act, and is the only entity capable of acting, the fact that the body may have an interest in the result does not disqualify it from acting"].) *Weinberg, supra*, 119 *Cal.App.4th* at pages 1112-1113, [*32] reached the same conclusion, holding that a hospital's governing board is permitted under the rule of necessity to terminate a physician's medical staff privileges regardless of an alleged conflict of interest and the MEC's contrary recommendation.

The Court of Appeal opinion here cannot be squared with the decisions in *Hongsathavij* and *Weinberg*. Here, the Hospital was threatened with potential liability for harm to patients and the loss of federal funding needed to stay in business due to flaws in the MEC's peer review proceedings and the governing board's past failure to more actively police those proceedings. When the MEC declined to arrange peer review proceedings for a physician whose misconduct threatened patient health and necessary hospital funding, the governing board had to make those arrangements. This was no usurpation of medical staff power by the governing board (as the Court of Appeal paints it), but an abdication of responsibility by the medical staff to the governing board. The appellate court should have presumed - as the trial court apparently did - that the board had accurately determined, based on the realities of the situation, that the MEC was unwilling [*33] to initiate the peer review proceeding (see 8 CT 1723, 1728-1730), and affirmed the results of the two-year peer review proceeding, holding there was substantial compliance with the bylaws that did not materially affect Dr. El-Attar's fair proceeding rights. n9

n9 In a footnote, the Court of Appeal claims the minutes of the MEC's March 12 meeting do "not demonstrate an active refusal on the part of the MEC to fulfill its duties under the Bylaws" to appoint the hearing officer and JRC members for Dr. El-Attar's peer review. (Typed opn., 18, fn. 10.) But there was nothing equivocal about the MEC's express refusal to make arrangements for the peer review proceedings, or its express direction that those proceedings were to be arranged by the governing board. (9 AR 1890; see *ante*, pp. 14-15.) In essence, the Court of Appeal's opinion unwinds two years of peer review proceedings, representing a significant time commitment for numerous physicians and attorneys, all because the Hospital allegedly failed to adequately document the obvious fact that the MEC would not arrange for Dr. El-Attar's peer review. The court should have deferred to the governing board regarding that issue. (See *Weinberg, supra*, 119 *Cal.App.4th* at pp. 1108-1109 [courts should defer to hospital administrators regarding issues within their area of expertise].)

[*34]

Instead, the court held that, because a peer review panel selected by the board is presumed to be biased, physicians have an inherent right to have the MEC select JRC members and the hearing officer. (Typed opn., 15 ["Allowing the Governing Board to select the hearing officer and JRC panel . . . undermines the purpose of the peer review mechanism"], 17-18 [allowing the MEC to delegate the selection of JRC members to the Hospital's governing board would "turn the peer review process on its head" because a "procedure that enables the Governing Board to tip the scales in its favor, leaving the physician to uncover and cure any potential inequality on his or her own, does not comport with the fair procedure envisioned in the statute and Bylaws"].)

Contrary to the Court of Appeal's premise, fair procedure is not denied when the body initiating adverse peer review action is involved in the peer review proceedings. (*Hongsathavij, supra*, 62 Cal.App.4th at p. 1142 ["bias in an administrative hearing context can never be implied, and the mere suggestion or appearance of bias is not sufficient. [Citation.] It is also well established that a party is not denied an impartial [*35] adjudicator merely because an administrative entity performs both the functions of prosecutor and judge. [Citation.] Overlapping investigatory, prosecutorial and adjudicatory functions do not necessarily deny a fair hearing and are common before most administrative boards".]) Otherwise, *the MEC* could never initiate peer review proceedings after recommending adverse peer review action against a physician. That argument was rejected years ago. (See *Rhee, supra*, 201 Cal.App.3d at pp. 490-494.)

The Court of Appeal also rejected the Hospital's argument that the board's action, at the MEC's request, was consistent with statutes governing medical staff peer review. (See Bus. & Prof. Code, §§ 809, subd. (b) ["'peer review body' means a peer review body as specified in paragraph (1) of subdivision (a) of Section 805, n10 and includes any designee of the peer review body" (emphasis added)], 809.05, subd. (c) ["In the event the peer review body fails to take action in response to a direction from the governing body, the governing body shall have the authority to take action against a licentiate"].) The court stated that, while section 809.05 authorized the board [*36] to "initiate a corrective action" against Dr. El-Attar, it did not allow the board "to appoint the hearing officer and JRC" (Typed opn., 12.) And the court narrowly construed Business and Professions Code section 809 as not allowing the MEC to "delegate its appointment powers to the Governing Board . . ." (Typed opn., 14.) In sum, the court concluded that allowing the Hospital's governing board to select the hearing officer and JRC members was inconsistent with the peer review statutes, "undermines the purpose of the peer review mechanism" and "turn[s] the peer review process on its head." (Typed opn., 12-18.)

n10 Business and Professions Code section 805, subdivision (a)(1)(B)(iv), states: the term " '[p]eer review body' includes . . . [a] committee organized by any entity consisting of or employing more than 25 licentiates of the same class that functions for the purpose of reviewing the quality of professional care provided by members of that entity."

But when the MEC fails to act, Business [*37] and Professions Code section 809.05, subdivision (c), expressly authorizes the board to take action, so long as it "fully complies] with the procedures and rules applicable to peer review proceedings established by Sections 809.1 to 809.6, inclusive." The only one of those statutes discussing the appointment of the hearing officer and JRC members is section 809.2, which requires only that the appointees be unbiased individuals who do not directly benefit from the outcome of the proceeding. However, the statute does not prohibit the board from appointing the hearing officer or JRC members, any more than it prohibits the MEC from doing so. (See *Hongsathavij, supra*, 62 Cal.App.4th at p. 1142; *Rhee, supra*, 201 Cal.App.3d at p. 490.)

The Court of Appeal should have construed the peer review statutes consistent with the Legislature's expressed intent that hospitals take action to ensure needed peer review is not thwarted by the medical staff's failure to act. (See *Mileikowsky, supra*, 45 Cal.4th at pp. 1270-1271; *Weinberg, supra*, 119 Cal.App.4th at p. 1114; see also *People v. Shabazz* (2006) 38 Cal.4th 55, 67-68 [*38] [courts should construe statutes in a manner that furthers legislative intent].) Had it done so, it would have affirmed the trial court's decision to deny Dr. El-Attar writ relief.

CONCLUSION

For the reasons explained above, this court should grant review and reverse the Court of Appeal's judgment.

September 28, 2011

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 6,705 words as counted by the Microsoft Word version 2007 word processing program, used to generate the petition.

Dated: September 28, 2011

/s/ [Signature]
H. Thomas Watson

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th [*39] Floor, Encino, California 91436-3000.

On September 28, 2011, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 28, 2011, at Encino, California.

/s/ [Signature]
Robin Steiner

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