

## Sutter Health Wins Trial Over \$519M Double-Billing Claims

By **Dorothy Atkins**

*Law360 (June 20, 2024, 6:43 PM EDT)* -- A California state judge has handed Sutter Health a win following a weeks-long bench trial last year over a whistleblower's claims that the nonprofit hospital network violated the state's insurance fraud prevention statutes and owes \$519 million for allegedly double-billing for certain operating-room services without documentation.

In a 33-page decision Monday, Alameda Superior Court Judge Stephen D. Kaus concluded that whistleblower Dr. Gregory Duncan and patient Gary Hulbert of Crescent City, California, have not shown Sutter Health's billing practices were fraudulent or that the payors expected to be charged differently.

"There was no showing that the treatment was not medically ordered, appropriate, and supervised or that the room in which the treatment occurred was likely material to insurers," the decision said.

The decision marks an end to a qui tam action brought by Duncan — a retired orthopedic surgeon who worked at Sutter Coast Hospital from 1992 until 2020 and served as its chief of surgery from 2013 to 2019 — and Hulbert against the nonprofit hospital network, which controls roughly two dozen hospitals in Northern California.

The bench trial kicked off Sept. 20 in Oakland over the relators' claims that Sutter violated multiple provisions of the California Insurance Fraud Prevention Act since November 2013 by unnecessarily having anesthesiologists perform expensive nerve-blocking procedures in operating rooms — which allegedly results in double-billing patients — and by overcharging patients as they recover from surgery.

During opening statements, the relators' counsel, Christopher L. Lebsack of Hausfeld LLP, explained that nerve-blocking procedures come with a specific billing code and price, which are submitted to health insurers, such as Aetna, and that the procedure to numb certain areas and reduce pain can be done by an anesthesiologist before a patient goes into the operating room.

Once that patient is inside the operating room, however, a "very expensive time clock" starts with Sutter charging operating room fees that begin with a single charge, which can be more than \$1,690 for the first 30 minutes, followed by additional charges of up to \$645 every 15 minutes, Lebsack said.

The attorney argued that Sutter has regularly charged patients for nerve-blocking services performed in operating rooms without appropriately documenting the need for performing the procedure in the operating room. As a result, patients and insurance companies have paid much more than they otherwise would have, he said.

However, during Sutter's openings, the hospital's counsel disputed the relators' depiction of Sutter's billing practices as illegitimate, saying the theory of the case is essentially advocating for a policy "of medical malpractice" and requiring hospital administrators to second-guess medical professional standards by requiring them to make calls regarding medical care treatment that should be reserved for doctors.

The seven-week trial featured testimony from compliance and billing experts and Sutter employees, along with internal Sutter emails showing the hospital systems' personnel regularly asking Sutter compliance administrators how they should charge patients and insurers for certain recovery room and operating room services and expressing concern over potentially inconsistent billing practices.

However, during the trial, Judge Kaus doubted the plaintiffs' experts. In his decision, the judge ruled that there is no evidence to support the conclusion that it is fraudulent to charge patients more for Phase II care in a "step down unit" outside of Post Anesthesia Care Units, or PACU.

The judge noted that plaintiff expert witness Charlotte Kohler's "evasive reply" to his question about whether there's written guidance that indicates hospitals can bill under certain codes with higher rates for recovery from anesthesia, but not recovery from surgery, "can only mean that this rubric is not memorialized, or at least that Kohler cannot direct the court to it."

"I am not doubting that Kohler advises hospitals in accordance with her testimony, or that it may be widely followed, but she did not establish that the rule is so established that it is fraudulent to do otherwise," the decision said.

The judge also found Sutter expert's testimony defending Sutter's billing practices was "authoritative and consistent with common sense" and concluded that Sutter showed at trial that even the whistleblower Duncan "followed this loose usage" regarding where post-anesthesia recovery should occur in his own operating notes.

He additionally found that Sutter's medical expert, who reviewed patient records, provided convincing testimony that the more expensive care was medically necessary for those patients and that the relators hadn't shown Sutter intended to defraud payors with its billing practices.

A Sutter spokesperson said in a statement Wednesday that the company is pleased the court found Sutter's actions comply with the law. Sutter also noted that the California Department of Insurance declined to intervene in the case.

"As the evidence at trial showed, Sutter's bills accurately reflect the services provided to patients and are consistent with the national billing guidelines," the statement said. "At its core, [the court's] ruling preserves the integrity of our physicians' clinical decision-making as we deliver the highest quality care and meet the unique needs of our patients across northern California."

Sutter's counsel, Sharif Jacob of Keker Van Nest & Peters LLP, also said in a statement Wednesday that the plaintiffs had argued patients recovering from the serious effects of surgery and anesthesia should be discharged before they were ready to safely return home. However, at trial, Sutter stood firmly behind the position that patients' medical care — including when and where they receive treatment — should be determined by their doctors.

Counsel for the relators didn't immediately respond to requests for comment Thursday.

The relators are represented by Christopher L. Lebsack and Arthur N. Bailey Jr. of Hausfeld LLP, Frank R. Schirripa, Daniel B. Rehns and Scott R. Jacobsen of Hach Rose Schirripa & Cheverie LLP and Michael Christian.

Sutter is represented by Sharif E. Jacob, Erin E. Meyer, Anjali Srinivasan, Dan Jackson, Victor Yu, Ryan Hayward, Maile Yeats-Rowe, Michael Deamer, Imara McMillan and Niharika Sachdeva of Kecker Van Nest & Peters LLP.

The case is State of California ex. rel., Duncan and Hulbert v. Sutter Health et al., case number RG17846895, in the Superior Court of the State of California, County of Alameda.

--Editing by Drashti Mehta.