



WORKERS' COMPENSATION COMMENTARY



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The New and "Empowered" Lien Claimant

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Long time readers of our newsletter will undoubtedly recall an earlier article on this subject entitled "Lien Claimants Are People Too." (August 1994) Well, that was shocking for its time but, darn it, after that pronouncement, not only has that become generally recognized, but they're getting to be considered downright important too!

During my 11 years of dealing with lien claimants I have witnessed this distressing evolution. The lien claimant has evolved from the lowest rank in the pecking order at the WCAB to that of a credible party to a claim. This statement unfortunately applies to the legitimate lien claimants as well as the new "mills" that are rearing their ugly heads and are less than credible. These entities are usually "designated treating facilities" and are quite aggravating to deal with. To reduce the damages asserted by these treating facilities, a good deal of attention must be given as to the content of their reports, the number of pages billed and whether the report satisfies the proper criteria as promulgated by the Administrative Director, etc. Defendants must be ever alert to the charges billed for treatment, for example, charges for physical therapy—has the provider adhered to the sliding scale for multiple modalities?

There is really nothing new and startling that I can share with you to enhance your chances of success in negotiating lien claims beyond the maxim "the best defense is a good offense". Here is a quick reference list to follow to help you be as "offensive" as possible:

- Labor Code §4621(b): "No comprehensive medical-legal evaluations, except those at the request of the employer should be performed during the first 60 days after the notice of claim... neither the employer nor the employee shall be liable for any expenses incurred for a comprehensive medical-legal evaluations..."

This Labor Code section in conjunction with a delay letter and eventually a denial, if appropriate, is the best defense against unnecessary payment of medical-legal evaluations and diagnostic tests acquired by an employee prior to the employer's decision to accept or deny a claim. This Labor Code section, in conjunction with the case law of *Del Rio v Quality Hardware*, 58 CCC 147, is the best defense and one that is upheld by the majority of the workers' compensation judges.

- Labor Code §4621(c): "Comprehensive medical-legal evaluations may be performed at any time after the claim form has been filed... if the employer has rejected the claim."

While this Labor Code section is ostensibly giving the employer 90 days wherein no comprehensive medical-legal evaluations may be performed or charged for, the word "may" is a matter of interpretation by the workers' compensation judges. Many times I have heard the opinion that a reasonable amount of time to accept or deny

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claim is 60 days and to stretch the limit to the full 90 days is viewed by some judges as unreasonable. I have yet to see any ruling on the reasonableness or unreasonableness of not paying medical-legal evaluation charges during the 90 day decision period for accepting or denying a claim. I will assume that the opinion has not been challenged. However, the *Del Rio* case is still the best argument against paying medical-legal evaluation charges within the 90 day period.

- Labor Code §4620: “Medical-legal expenses mean any costs and expenses... for x-rays, laboratory fees, diagnostic tests, medical reports, medical records, medical testimony and interpretation fees.”

There are some lien claimants, who claim charges for diagnostic tests as treatment. Their reasoning is that the tests were ordered by the primary treating physician. This argument is flawed. But, a claim that is found to be without merit, a “take nothing” would bar the lien claimant from recovering fees for diagnostic tests. If their argument is to be believed, that these services are under the heading of treatment, then this is a real coup for the employer.

- Labor Code §4620(c): “Medical evaluations, diagnostics tests and interpretation incidental to the production of a medical report do not constitute medical-legal expenses unless the medical report is capable of proving or disproving a disputed medical fact.”

Given the above argument by certain lien claimants that diagnostic tests are treatment charges, did they perhaps read this code section with the misconception that if the diagnostic tests and interpreta-

tion of the tests do not constitute a medical-legal expense, then the diagnostic tests must be treatment. This code section is merely stating that any medical evaluations, diagnostic tests, and interpretation of the tests must aid the doctor in writing a medical-legal report capable of proving or disproving a claim. This code section does not miraculously change a medical-legal expense to a treatment expense. Diagnostic tests have no value standing alone and the charges are not payable by the defendant.

- Labor Code §4622: “Medical-legal expenses for which the employer is liable shall be paid within 60 days of receipt by the employer as deemed reasonable with an objection to the unreasonable portion... any unreasonably unpaid amount shall be increased by 10% together with interest at 7% per annum retroactive to the date of receipt by the employer”.

This Labor Code section has given great fodder to lien claimant representatives and especially attorneys representing lien claimants. They attend hearings salivating and spewing forth this code section as well as Labor Code §5814, which states in part “when any compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision, or award shall be increased by 10%”. The argument, especially by attorneys representing lien claimants, is “if the employer does not voluntarily agree to the 10% penalty under Labor Code §4622 then the total amount of the lien claim shall be increased by a second 10% penalty under Labor Code §5814. Again, this argument has validity with some workers’ compensation judges. The best defense against such double penalties is prompt payment of

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medical-legal expenses and treatment expenses "for an accepted claim" within 60 days from receipt of the lien claim and billing statement with an objection letter addressing any unreasonable charges. The language used in the objection letter is of great importance and should clearly express that the charges exceed the Official Medical Fee Schedule and it should give a concise reason for objecting to any services and charges that do not pertain to the claimed injury.

The best defense to overcome Labor Code §5814 is the language to be asserted in Paragraph 10 of a Compromise and Release agreement and Paragraph 8 of the Stipulations with Request for Award. That language should waive all claims for penalties on benefits or "compensation" of any kind. This will stop overzealous lien claim representative dead in his or her tracks. See, for guidance, the case of *Sycamore Pharmacy, Inc. v WCAB (Angelo Reynoso)* 62 CCC 1322

- Labor Code §4625(a): "...all charges for medical-legal expenses for which the employer is liable that are not in excess of those set forth in the OMFS... 'adopted by the Administrative Director pursuant to Labor Code §§5307.1 and 5307.6' shall be paid. (b) If the employer contests the reasonableness of the charges paid, the employer may file a petition with the Appeals Board for reimbursement."

While reviewing payments made for medical-legal expenses, where there has been an oversight and payments have been made to a medical facility in excess of the Official Medical Fee Schedule, then this section may allow the employer to recover the monies paid in excess of the fee schedule by filing a petition for reimbursement.

The employer may also recover payment

for charges for failed medical appointments by filing a petition for reimbursement pursuant to Labor Code §5811 and the dictates in the case of, *City of Oxnard v WCAB (Hammonds)* 52 CCC 394, which states in part "...costs for missed medical appointments are not a lien provided for under Labor Code §4903... missed medical appointments do not include an allowable lien". I find this case to be very satisfying because it limits the circumstances under which a defendant may be a "lien claimant". There is a great deal of satisfaction in that.

- Labor Code Section 4603.2(b): "Payment for medical treatment provided or authorized by the treating physician...shall be made by the employer within 60 days after receipt...of itemized billing, together with any required reports...if the billing is contested, denied, or considered incomplete, the physician shall be notified in writing...any properly documented amount not paid within the 60-day period shall be increased by 10 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the bill, unless the employer does both of the following: pays the uncontested amount within the 60-day period and advises...as to the reasons for contesting these items...."

Any charges that are in excess of the OMFS for treatment should be handled in the same manner as excessive medical-legal charges as stated above. If by some error, treatment charges have fallen off diary or if the employer has challenged liability and liability is later established and where the employer did not pay the charges, then interest starts to accrue 60 days after the employer or carrier receives the statement. See the case of *Boehm & Associates v WCAB (Florencio Lopez)* 64 CCC 1350

Lien claimants will challenge the OMFS when there has been a denial of liability and where li-

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ability is established at a later time. On reading the decision rendered in *CNA Insurance Companies v WCAB (Valdez) 62 CCC 1145*, lien claimants appear to be under the impression that they have the employer over a barrel and the sky is the limit when it comes to treatment charges. Regardless of the wording in that decision, I have found that the majority of workers' compensation judges will not allow excessive charges for treatment as the OMFS is deemed reasonable following the 1994 updated fee schedule.

Prior to 1994, the case of *Gould v WCAB (1992) 57 CCC 157*, established that physicians were allowed to charge their usual and customary fees when liability had been denied and was later found. With the advent of the 1994 updates to the fee schedule, however, any physician charging in excess of the fee schedule must prove that there is some extraordinary reason for the allowance of additional fees. The physician must provide, as part of his or her report, a detailed explanation of why they should be awarded any fee in excess of the fee schedule pursuant to Labor code §5307.1(2).

If the defendant holds the applicant harmless from treatment liens as part of a compromise and release where no industrial injury has been found (Thomas Waiver), this could be problematic to the defendant. Such a finding would mean that no allowance would be due the lien claimant in the compensation case since the WCAB only has jurisdiction over industrial injuries. This being the case, a lien claimant might well file a suit in civil court to obtain a judgment against the applicant. A hold harmless would then mean that the defendant would find itself defending a civil suit in Superior Court. The defendant should be "well advised to draft any hold harmless agreement carefully to make entirely clear what they are agreeing to do", see *Williams v Liberty Mutual Insurance, 1998, 26 CWCR 229* for a brief discussion of potential pitfalls.

Our firm is very appreciative of the experi-

ence and skill of our clients, particularly with regard to this subject. We recognize that you deal with a far greater number of lien claims than we do. We therefore request that if there are negotiation tactics, case decisions, obscure statutes or any other information that any of our clients would be kind enough to share, we will be happy to pass them on in our newsletter (with appropriate credit, to be sure!).

Next Month:

Discovery, Disclosure and Drunks.

Where is Rick Secia and what is he doing?

We've received a number of questions concerning Rick's whereabouts and whether or not he would be actively resuming law practice with the firm. We have been carrying Rick on our rolls while he contemplated his options but he has determined that he will remain permanently retired from the practice of law but may get involved with another field of endeavor.

This being the case, we have mutually agreed to remove his name from the firm effective this month. Rick is currently exploring the possibility of permanently moving to the suburbs of Boston, Massachusetts and can be found at any given time in Orange County or back east.

We certainly wish him the very best in the future.

This newsletter contains only personal opinions and suggestions by the writer which may be of general application in the subject area being discussed. This letter is not intended as specific legal advice as applied to any fact situation and it is recommended that if legal advice is desired concerning the application of any of the information contained herein to a particular factual situation that direct contact with an attorney be sought.