



**How to prepare your case
for Trial:
Top 10 Litigation Tips by
Jamie Spitzer Presiding
Workers' Compensation
Judge – Anaheim DWC -
WCAB**

**2016 DWC EDUCATIONAL
CONFERENCE**

Disclaimer

This material and the opinions expressed are my own and do not represent the position of the DIR, the DWC, the WCAB or any Judge within the DIR or DWC.

This presentation is not intended to be used as legal advice and each case or circumstance is unique. The outcome is dependent on its own set of facts.



Peanuts

How to prepare your case for Trial Top 10 Litigation Tips

General recommendations:

1. Know the issues in your case.
2. Know who has the burden of proof on an issue.
Labor Code section 5705 (a)
3. Complete your discovery before the MSC, Priority
Conference of Lien Conference.
4. Serve your evidence on all parties.
5. List the relevant evidence and your witnesses.
6. File and serve Trial briefs before Trial especially if
the issue or case is one of first impression.

Knowing the issues in your case

Expedited hearing - most common issues
litigated are:

- a. Earnings/TTD
- b. MPN
- c. Need for Medical Treatment – home
health care.

Tip #1: TTD or earnings issue – What do you need?

- Medical report indicating Applicant P&S or greater than 104 weeks of TTD paid.
- Benefit print out.
- Earnings – wage statement.*
 - *Get this from the employer if you can.
- Is testimony of earnings enough?
- Who has the burden of proof on earnings?

Issue: Applicant is treating outside Defendant's MPN.

- Majority of Expedited DOR's are filed on this issue.
- LC section 5502 (b) – if an Expedited hearing is requested and MPN is the issue, no other issue may be heard until the MPN dispute is resolved.

Tip #2: What you need to prove re: MPN Issue

- Provide proof/documentation that:
- ER or Insurance Carrier notified Applicant after injury reported/claim filed, that Defendant has an MPN and how to access it.
- Arrange initial medical evaluation with MPN physician to provide treatment.
- Advise Applicant may choose own physician within MPN after first visit with MPN physician. **Labor Code section 4616.3.***

*However, failure to provide notice required by this section or post the notice required by 3550 shall not be a basis for an employee to treat outside the MPN unless it is shown that the failure to provide notice resulted in a denial of medical care.

Reminder re: MPNs



| Name | Address | City | State | Zip |
|------|---------|------|-------|------|
| 1001 | 1001 | 1001 | 1001 | 1001 |
| 1002 | 1002 | 1002 | 1002 | 1002 |
| 1003 | 1003 | 1003 | 1003 | 1003 |
| 1004 | 1004 | 1004 | 1004 | 1004 |
| 1005 | 1005 | 1005 | 1005 | 1005 |
| 1006 | 1006 | 1006 | 1006 | 1006 |
| 1007 | 1007 | 1007 | 1007 | 1007 |
| 1008 | 1008 | 1008 | 1008 | 1008 |
| 1009 | 1009 | 1009 | 1009 | 1009 |
| 1010 | 1010 | 1010 | 1010 | 1010 |

- IF MPN approved by Administrative Director, there is a conclusive presumption that the MPN was validly formed.
- Labor Code section 4616 (b)(2)

Tip #3: Resolving MPN Disputes

- Go to Trial at Expedited hearing and get a decision from the WCJ.
- Stipulate at Expedited that Applicant will transfer into the MPN.
- Be specific in the stipulations – i.e. state when Applicant was notified of the MPN.*

*Helps avoid lien issues in the future.

Issue: Approval of medical treatment

- If it's medical treatment you will not approve, send to UR immediately upon receipt of Request for Authorization.
- IF UR denial, delay or modification issues, make sure IMR Application is attached to denial.
- If IMR is requested, send all relevant medical reports to IMR Reviewer.

Tip #4: Timing and communication - the keys to success!!

- Remember to not only timely perform UR but timely communicate the UR determination.
- WCJ has jurisdiction to determine medical treatment issue if UR not timely performed or communicated.*
- *Bodam v. San Bernardino County/Dept. Social Services, (2014) 79 Cal.Comp.Cases 1519 (ADJ8120989). (significant panel)

Home Health Care

- Proposed Home Health Care Regs. & Fee schedule.
- AD Rules 9789.90 – 9789.92
- 45 day public comment period and Public Hearing was on 11-30-2015.
- Home health care is subject to UR and IMR process. **9789.91 (b)**

Home Health Care Regs cont.

- In home assessment of need for home health care to be performed by qualified registered nurse. 9789.91 (c)
- Employer or insurer not liable for home health care services provided by an injured workers' spouse or member of the household or other entity IF those home health care services were provided to the injured worker prior to the industrial injury. 9789.91 (d)

Tip # 5: You can always agree.

- Fee schedule does not include family caregivers or individuals who are not employed by a home care organization or home health care agency.
- Claims administrator and injured worker may agree that the injured worker may use, and the claims administrator will pay for, an unregistered provider (not employed by a home care organization or home health care agency and who may be a family member) if the individual has the necessary skills to provide the home health care services needed. 9789.91 (e)

Preparing your case for Trial or . . . Settlement?



How to get what you need?

- SDT - Subpoena Duces Tecum or Subpoena.
- Demand to produce records/documents.
- Panel QME's
 - a. Online Panel requests.
 - b. 2nd Panel QMEs.
 - c. Replacement Panel QMEs.

Tip #6: Start discovery process early.

- If case is being litigated, set Applicant's deposition as quickly as you can to gather information -
- i.e. current treating physician(s), prior injuries, prior Awards or settlements.
- Send medical releases to Applicant or if represented his/her attorney.

- Either subpoena relevant medical records or make a demand on Applicant to produce those records.
- Liberal pre-trial discovery is desirable and beneficial; and Discovery disputes should be brought to a workers' compensation judge for determination on the validity of the claim;
- See *Hardesty v. McCord & Holdren, Inc.* (1976) 41 CCC 111 (Board Panel Decision).

Subpoena Duces Tecum

- *Labor Code* section 130 and 8 *Cal Code of Regs.* section 10530 – allow for SDT of records. Subpoenas and SDT shall issue in accordance with the provision of the CCP section 1985 and 1987.5 and Gov. Code section 68097.1.
- CCP section 1985 (b) - SDT show good cause for the production of the matters and things described in the subpoena, specify exact matters or things to be produced, set forth in full detail why things are material to the issues involved in the case.

Attempting to Quash a SDT or Panel QME assignment

- File a Petition/Motion to Quash SDT or Panel QME assignment.
- Be sure to attach the Subpoena Duces Tecum at issue or the Panel list of physicians.

Requests for Panel QME (Initial, 2nd or Replacement)

- Sample QME forms attached:
- Labor Code section 4062.1 Unrepresented Request for QME Panel. **QME form 105**
- Title 8, CCR section 31.7 Additional Panel Request for Represented and Unrepresented – **QME form 31.7**
- Title 8, CCR section 31.5 Replacement Panel Request – **QME form 31.5.**

Online Panel QME requests

- Mandatory for Initial request for Panel QME only in represented cases for all cases with DOI on or after 1-1-2005. **QME Regs. Section 30 (b)**
- Party requesting must fill out online form and provide all required information. **8 page/step process with on line form.**

Must upload and attach to online request the following:

- Written request for exam for 4060 disputes (to determine compensability);
- Written objection identifying the primary treating physician, date of the report and description of medical determination that requires a medical legal report i.e. 4061/4062 disputes

Tip #8 : Paper still exists

- Remember to print a paper copy of the online request, panel list and a copy of all supporting documentation attached to request and serve on the opposing party within **1 (one) working day** after generating the QME panel list.

****Yes that says 1 working day****

Disputes in QME Panel represented cases

- Guess who decides this? It depends what the issue is.
- Validity of Panel QME - QME Rule 31.1 (a) – Workers' Compensation Administrative Law Judge.
- Specialty designations – QME Rule 31.5 (a)(10) - the Medical Director resolves these issues.

Tip #9: How to get a replacement or 2nd panel QME.

- If you need a 2nd panel QME or Replacement panel and cannot get agreement from other side . . .
- Since it's a disputed issue, should go before WCJ per Rule 31.1 referenced above.
- WCJ may also issue an order if the Medical Unit cannot issue a QME panel in a **represented** case within 30 calendar days of receiving the request.

Serve and Verify Petitions

- Remember to serve the petition on all parties;
- Verify the petition. WCAB Rule 10450;
- Attach any necessary document i.e. letter trying to agree to 2nd or replacement panel.

If all else fails, file a DOR and request a Status Conference

- May file a DOR for Status Conference to get an order or if there is a discovery dispute.
- Make sure you file your petition either before or after filing the DOR and serve on opposing party.

Tip #10: Miscellaneous provisions

- Petition to Determine Non-IBR Medical Legal Disputes.
- What are these? See WCAB Rule 10451.1(c)(2).
- When does the judge see these and what do we do with them?

Non-IBR Medical Legal Expenses

- Defendants or medical legal providers may file these petitions.
- If Defendant files, usually relates to dispute other than amount payable under the fee schedule but have not seen this by a defendant as of this date.
- If by Medical Legal provider . . .

Petition by medical-legal provider

- When defendant fails to perform a timely bill review and then does not pay pursuant to the Official Medical Fee Schedule.
- Medical legal provider may file this petition in lieu of filing a lien.
- Why I am tell you about this?

Supplemental Job Displacement Voucher

- For DOI's after 1-1-13 – cannot commute of settle these benefits.
- Don't check as an issue settled in C&R.
- New SJDV form/notice attached.

Litigation Tips by Hon. Pamela Pulley Presiding Workers' Compensation Judge
Santa Ana



2016 DWC EDUCATIONAL CONFERENCE

Disclaimer

This material and the opinions expressed are my own and do not represent the position of the DIR, the DWC, the WCAB or any Judge within the DIR or DWC.

This presentation is not intended to be used as legal advice and each case or circumstance is unique. The outcome is dependent on its own set of facts.



Tip #1 If You Can't Prove It, Remove It: Narrowing Your Issues

Narrowing your issues at the time of the settlement conference forces you to review your file, helps avoid confusion and duplication of issues and streamlines your case for the trial Judge. It is generally a good idea to thin out your issues. However, there are times when it's prudent to "go big."



When thin is in

Tito Torres v. AJC Sandblasting 77 CCC 1113 (2012):

** The WCAB en banc decision finding that the lien claimant failed to prove by preponderance of the evidence all of the elements necessary to establish the validity of its lien.*

** The Board also held that [Labor Code § 5813](#) sanctions, attorney's fees, and costs for bad faith actions or tactics that are frivolous may be imposed against lien claimant, its attorney(s) and/or hearing representative(s), individually or jointly and severally, when party or lien claimant proceeds to trial with evidence that is indisputably incapable of establishing its claim or affirmative defense*

Good to know

➔ Forget something? Generally speaking, pleadings may be amended at the time of trial. Either party may request leave to amend OR the judge may amend the pleadings to conform with the evidence presented. CCR Section 10492

- ⌘ Beckstead v. WCAB 62 CCC 1646 (1997) the WCAB abused its discretion by **not** construing the applicant's claim as being for a CT and for finding no injury AOE/COE based solely on the fact that the applicant claimed a specific injury instead of a CT, where the medical evidence supported a finding of CT injury.

When bigger is better

It may be prudent to "go big" when listing certain issues, such as affirmative defenses.

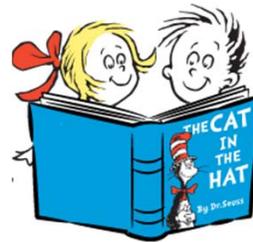
Affirmative defenses, such as Statute of Limitations, are waived if not raised. LC Section 5409.

- ⌘ LC section 5705 lists additional affirmative defenses:
- ⌘ (a) that the applicant is an independent contractor, (b) that the injury was caused by intoxication (c) that the employee's willful misconduct caused the injury, (d) aggravation of an injury caused by employee's unreasonable conduct and (e) prejudice to employer by failure to give notice as required by 5400 and 5401.
- ⌘ Such affirmative defenses should specifically raised or defendant runs the risk of waiver.

Tip #2: What You CCC is What You Get: The Importance of Legal Research

- ∞ A well researched argument or brief can make a case.
- ∞ Failure to know the required elements of a defense or cause of action can and will result in a finding adverse to your client's interests.

DO. THE . RESEARCH.



or not....

- ∞ **Case study: The Sobering Tale of an Intoxication Defense Gone Wrong**
 - Facts: A tree trimmer was up in a tree, performing his U&C when a tree branch broke, causing him to fall over 15 feet, sustaining serious orthopedic injuries. There was evidence that he had been drinking earlier that morning and that his blood alcohol level was sufficient to prove legal intoxication.
 - Question: Is this sufficient for defendant to prevail?

- ∞ Answer: It is not enough to prove that the applicant was intoxicated. Defendant must show that the intoxication was a proximate or substantial cause of injury, not necessarily the sole cause. [Cheryl Smith v. WCAB, 45 CCC 1053 \(1981\)](#).
- ∞ In the case of the tanked tree trimmer, if there was no causal link drawn between the broken tree branch and the applicant's intoxication, then it is unlikely that the defendant would prevail in its affirmative defense.

Tip #3: Know if it's a Cost, a Lien or an In-Between

∞ Costs

∞ Statutory authority:

∞ Title 8 CCR Section 10451.3



What it is

- ∞ A petition for costs is a petition seeking reimbursement of an expense or payment for service that is not allowable as a lien against compensation under Labor Code Section 4903. Title 8 CCR 10451.3(a)

Who may file

- ∞ An employee or a dependent of a deceased employee
- ∞ A defendant
- ∞ An interpreter for services other than those rendered at a medical treatment appointment or a medical-legal examination CCR 10451.3(a)

Good to Know

- ➔ A petition for costs submitted by any person or entity other than set forth in subdivision (a) shall be deemed dismissed by operation of law and shall not toll or extend the statute of limitations. CCR 10451.3(f)
- ➔ If the filing of a petition for costs, or the failure to promptly make good faith payments on the costs sought by the petition, was the result of bad faith actions or tactics, the Board may impose monetary sanctions and allow reasonable fees.

When to file

- ☞ An employee can file to seek reimbursement for payments made directly to the medical legal provider, including payments made to a copy service, a vocational expert, or a physician for testimony or for a medical report
- ☞ An interpreter may petition for costs only for services rendered at a deposition or a WCAB appearance. The petition must contain (1) the name of the interpreter (2) a statement that the services were actually performed and (3) either a certification number or a statement explaining why a non certified interpreter was used and setting forth his/her qualifications CCR 10451.3(a)

Good to know

- ➔ A petition for costs shall not be filed or served until at least 60 days after a written demand for payment has been served on the defendant or the person or entity against whom costs are claimed. The petitioner must attach a copy of the written demand and proof of service of the demand and a copy of the response, if any, to the petition.
- ➔ A petition that fails to comply with these requirements may be dismissed. CCR 10451.3(e)

Costs versus liens

- ☞ Medical treatment providers must file a lien.
- ☞ An interpreter must file a lien for services rendered at a medical treatment appointment



Costs can be claimed by an employee, defendant or interpreter only.

Medical-legal providers are not required to file liens and may elect to file a lien rather than a Petition for Determination of a Non-IBR medical-legal dispute.

Costs versus liens

- ∞ When an employee or his/her attorney directly pays for medical legal goods or services and seeks reimbursement from the employer, the employee cannot file a Petition for Determination of Non-IBR Medical-Legal Dispute, but may instead file a petition for costs CCR 10451.3(c). However, the expense is subject to the OMFS.

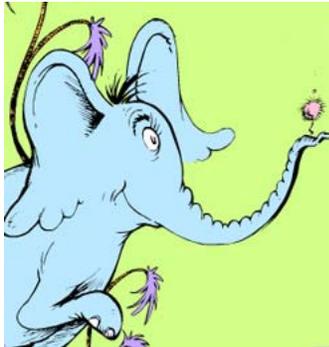
- ∞ An interpreter **must** file a lien for services rendered at a medical treatment appointment.



| Medical treatment expenses | Medical Legal Expenses |
|---|---|
| If the bill is contested, an EOR must be served on provider within 30 days of receipt of bill, setting forth every objection LC 4603.2(b) (2) | Unless the bill is paid in full within 60 days of receipt, an EOR must be served setting forth all objections CCR 9794(b) |
| Failure to timely object constitutes waiver CCR 10451.2 (c)(1)(D) | Provider may assert waiver of objection if defendant fails to timely serve the EOR CCR 10451.1 |
| If only dispute is amount due per OMFS, provider has 90 days to request 2 nd review. LC 4603.2(e), CCR 9792.5.5(a) | If only objection is amount due per OMFS, provider has 90 days to request 2 nd review. LC 4622(b), CCR 9792.5.5 |
| If provider requests a second review, adjuster has 14 days to serve final determination. LC 4603.2(e)(3) | If only dispute is OMFS and provider does not request a 2 nd review within 90 days, the bill is deemed satisfied LC 4622 (b), CCR 9794 (b) |

Tip# 4: Sweat the Small Stuff: Look for the Overlooked Issues, Defenses and Causes of Action

Think outside of the box, advance a novel point of view; spot an issue that everyone else has overlooked. Be Horton.



TIPS

Laches is quite often raised by defendants.

Laches is an equitable doctrine which bars a cause of action when one party unreasonably delays in asserting or diligently pursuing a cause of action and that delay has prejudiced the party raising laches.

➡ Good to know : Prejudice to the party seeking relief must be shown and is never presumed. It must be affirmatively demonstrated. [New Century Chamber Orchestra v. WCAB, \(2003\) 69 CCC 421, 424.](#) [Piscioneri v. City of Ontario, 95 Cal. App. 4th 1037 \(2002\)](#)

Tips

- ∞ Labor Code Section 3600(a)(8) excludes from liability those injuries which occur as a result of the commission of a felony or a misdemeanor for which the IW has been convicted.
- ∞ However, the case law distinguishes between situations where the employee is performing an unlawful act in the course of employment (non-compensable) and when the employee is performing his usual and customary duties in an unlawful manner (compensable).

& MORE TIPS

- ∞ Evidence Code 788 allows the applicant to be questioned about prior felony convictions for the purposes of attacking his/her credibility.
- ∞ The Board has discretion to reopen an award normally barred by Labor Code Section 5803 on the basis of a conviction for insurance fraud and can bar the convicted worker from receiving further benefits stemming from the fraud. Labor Code Section 5804 [Farmers Ins. Group v. WCAB, 104 Cal App 4th 684 \(2002\)](#)

& STILL MORE TIPS

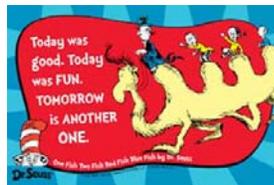
- ∞ An individual who has received a Return-to-Work Supplement may not receive a second or subsequent Return-to Work-Supplement, except where the individual receives a Voucher for an injury which occurs subsequent to receipt of every previous Return to Work Supplement. **CCR Section 17302(b)**

The tips keep coming...

- ∞ An employer or carrier may petition to reduce a final award of permanent disability.
- ∞ Caveat: When a petition to reduce a final award of PD is denied, the WCAB may require the petitioner to pay any costs incurred by the employee for medical evidence. Labor Code Section 4555.5
- ∞ When the employer or carrier unsuccessfully petitions to reduce or terminate an award of continuing benefits or an award for continuing medical treatment, the applicant is entitled to be reimbursed for attorney fees incurred in successfully resisting the petition. Labor Code Section 4651.3

Final thoughts

- Compromise is not failure
- Know your file....and your opponent.
- Be reasonable.
- Be prepared.
- Be professional.
- Keep your perspective.



Medical Treatment and Medical-Legal Expense Disputes Post January 1, 2013 (Cliff Levy, PWCJ, San Diego WCAB)

Overview

Senate Bill 863 (effective January 1, 2013) created Independent Medical Review (IMR), and Independent Bill Review (IBR). When the only dispute is whether requested medical treatment is reasonably medically necessary, the dispute must be resolved by IMR. When the only dispute is how much should be paid pursuant to fee schedule for medical treatment or for medical-legal expenses, the dispute must be resolved by IBR. The WCAB is authorized to hear “non-IMR/non-IBR” medical treatment and medical-legal expense disputes, also known as “threshold” disputes.

“Threshold” disputes are resolved before IMR and/or IBR come into play. Two new pleadings have been created to advance these disputes at the WCAB: the Petition for Costs, and the Petition for Determination of Non-IBR Medical-Legal Dispute.

| Petition for Costs (CCR 10451.3) | Petition for Determination of Non-IBR Medical-Legal Dispute (CCR 10451.1) | Lien Claim |
|--|--|---|
| <p>May be filed <u>only</u> by an <u>employee</u> or dependent of a deceased employee, a <u>defendant</u>, or an <u>interpreter</u>(for services rendered at a WCAB proceeding or deposition);</p> <p>A petition for costs filed by anyone else is deemed dismissed by operation of law and does not toll the statute of limitations;</p> <p>Can be used by the employee to seek reimbursement of payments made to a medical-legal provider.</p> | <p>Medical-Legal providers are no longer required to file a lien;</p> <p>Petition may be filed for any dispute concerning payment of medical-legal expenses other than the amount payable pursuant to fee schedule (which goes to IBR);</p> <p>Can be filed by any provider of medical-legal goods or services, including copy services and vocational experts;</p> <p>Can be filed by an interpreter for services rendered at a medical-legal exam.</p> | <p>Medical treatment providers must file a lien;</p> <p>An interpreter must file a lien for services rendered at medical treatment appointments;</p> <p>Lien claimants can use CCR 10451.2 to adjudicate compliance with the post January 1, 2013 bill payment protocols.</p> |

A Word About IMR and IBR

Independent Medical Review (IMR) was implemented on January 1, 2013 (Labor Code 4610.6). For dates of injury on or after January 1, 2013, and for all dates of injury where a Utilization Review decision is communicated to the requesting physician on or after July 1, 2013, if the UR decision denies, modifies, or delays a treatment recommendation, and the only dispute is whether the requested treatment is reasonably medically necessary, the dispute must be resolved by use of independent medical review (Labor Code 4610.5). “In no event shall a workers’ compensation administrative law judge, the appeals board, or any higher court make a determination of medical necessity contrary to the determination of the independent medical review organization” (Labor Code 4610.6(i)).

Independent Bill Review (IBR) went into effect on January 1, 2013 (Labor Code 4603.6). When the only dispute is how much should be paid pursuant to a fee schedule for medical treatment or for medical-legal goods and services, the dispute must be resolved by way of independent bill review.

Unlike IMR, the statutes implementing IBR are ambiguous about whether IBR applies prospectively only, or has retrospective application. Labor Code 139.5 suggests that IBR pertains only to injuries occurring on or after January 1, 2013, however section 84 of SB 863 (found at the end of Labor Code 62.5) provides that “this act shall apply to all pending matters, regardless of date of injury, unless otherwise specified in this act...” The Administrative Director decided that IBR should apply to medical treatment rendered on or after January 1, 2013 and to medical-legal expenses incurred on or after January 1, 2013 (CCR 9792.5.5).

The WCAB is authorized to hear and decide all other disputes relating to medical treatment and to medical-legal expenses. Even when IMR and IBR are necessary, there can be a host of disputes that must first be determined by the WCAB. These disputes are known as “threshold” disputes.

Threshold Disputes

Traditional threshold disputes are those that if resolved against the injured worker completely absolve the employer from any liability to pay for medical treatment expenses and/or for medical-legal expenses. These disputes are typically litigated by the injured worker and the employer and are only brought forward by a provider when the injured worker has settled or abandoned the underlying case:

| Threshold Medical Treatment Expense Disputes | Threshold Medical-Legal Expense Disputes |
|--|--|
| Injury AOE/COE Employment Statute of Limitations Insurance Coverage Jurisdiction Whether the treatment was for an industrially injured body party | Employment Statute of Limitations Insurance Coverage Jurisdiction Whether the medical-legal expense was reasonably incurred to prove a contested claim |

Examples of more recent threshold disputes within the domain of the WCAB include those resulting from the creation of Utilization Review, effective January 1, 2003 (Labor Code 4610), and the creation of Medical Provider Networks following passage of SB 899 on April 19, 2004, which went into effect for MPNs on January 1, 2005 (Labor Code 4616):

| Threshold Medical Treatment Expense Disputes | | Threshold Medical-Legal Expense Disputes |
|--|--|--|
| <p>The timeliness of the UR decision</p> <p>Whether the UR decision was communicated to the requesting physician in a timely manner</p> <p>Whether the requested treatment is consistent with the Administrative Director’s Treatment Guidelines</p> <p>Whether the employer has liability for medical treatment rendered outside of the employer’s Medical Provider Network</p> | | <p>Whether the medical-legal exam was properly obtained pursuant to Labor Code Sections 4060, 4061, and 4062</p> |

Following the enactment of SB 863, Labor Code 4603.2 was amended and Labor Code 4603.3 was implemented to create a highly detailed set of bill payment protocols for medical treatment expenses.

For medical-legal expenses, Labor Code 4622 was amended to create a highly detailed set of bill payment protocols.

The WCAB enacted rules of practice and procedure to give the new laws practical effectiveness (CCR 10451.1 and 10451.2, effective October 23, 2013), thus creating new “threshold” disputes for resolution by the WCAB:

| Threshold Medical Treatment Expense Disputes | | Threshold Medical-Legal Expense Disputes |
|---|--|---|
| <p>Did the defendant <u>waive any objection to the amount of the bill</u> for failing to follow treatment bill payment protocols established in Labor Code 4603.2 or 4603.3? (CCR 10451.2(c))</p> <p>Did the <u>provider waive</u> any claim to payment for failure to follow the bill payment and objection protocols contained in Labor Code 4603.2?</p> <p>Was an interpreter reasonably required at a medical treatment appointment? (CCR 10451.2(c))</p> | | <p>Did the <u>defendant waive any objection to the amount of the bill</u> by failing to comply with the bill payment procedures and timeliness set forth in Labor Code 4622? (CCR 10451.1(c))</p> <p>Did the <u>provider waive</u> any claim to payment by failing to comply with the timelines and procedures set forth in Labor Code 4622? (CCR 10451.1(c))</p> <p>Was it necessary to have an interpreter at a medical-legal examination? (CCR 10451.1(c))</p> |

| | | |
|--|--|--|
| <p>Was the interpreter at a treatment appointment properly certified? (CCR 10451.2(b))</p> | | <p>Was the interpreter properly certified? (CCR 10451.1(c))</p> <p>Was it necessary to incur copy service costs? (CCR 10451.1(c))</p> <p>Was it necessary to incur vocational expert witness costs? (CCR 10451.1(c))</p> |
|--|--|--|

Post January 1, 2013 medical treatment and medical-legal bill payment protocols are highly detailed. In order to implement CCR 10451.1 (for medical-legal expenses) or CCR 10451.2 (for medical treatment expenses), it is necessary to be familiar with the following:

| Medical Treatment Expenses | Medical-Legal Expenses |
|--|--|
| <p>1. The medical treatment provider serves the itemized bill, report and related documentation on the claims adjuster. (Labor Code 4603.2, CCR 9792.5.0)</p> <p>2. If the claims adjuster contests any portion of the bill, an “Explanation of Review” (EOR) must be served on the provider within 30 days of receipt of the bill setting forth each and every objection. (Labor Code 4603.2(b)(2))</p> <p>3. If the claims adjuster fails to timely serve the EOR, the provider can assert that the defendant has waived any objection to the amount billed. (CCR 10451.2(c)(1)(D))</p> <p>4. If the only objection in the EOR is the amount payable pursuant to a fee schedule, the medical treatment provider has <u>90 days</u> to request a <u>second review</u>. (Labor Code 4603.2(e), CCR 9792.5.5(a))</p> <p>5. If the only dispute is the amount to be paid pursuant to a fee schedule, and the medical treatment provider does not request a second review within 90 days, the bill is deemed satisfied. (Labor Code 4603.2(e)(2), CCR 9792.5.5(e))</p> <p>6. If the employer denies payment for any</p> | <p>1. The medical-legal provider serves the bill, report, and related documentation on the claims adjuster. (Labor Code 4622, CCR 9793)</p> <p>2. Unless the bill is paid in full, within <u>60 days</u> of receipt of the bill the claims adjuster must serve an “Explanation of Review” (EOR) on the provider, setting forth all objections. (CCR 9794(b))</p> <p>3. If the claims adjuster fails to timely serve the EOR, the provider may assert that the defendant has waived any objection to the amount of the bill. (CCR 10451.1)</p> <p>4. If the only objection raised in the EOR is the amount payable pursuant to a fee schedule, the med-legal provider has <u>90 days</u> to request a <u>second review</u> by the claims adjuster. (Labor Code 4622(b), CCR 9794(b), CCR 9792.5.4(i), CCR 9792.5.5)</p> <p>5. If the only dispute is the amount to be paid pursuant to a fee schedule, and the med-legal provider does not request a second review within 90 days, the bill is deemed satisfied. (Labor Code 4622(b)(2) CCR 9792.5.5(e))</p> <p>6. If the employer denies payment for any reason other than the amount to be paid pursuant to a fee schedule, the med-legal</p> |

| | |
|---|--|
| <p>reason other than the amount to be paid pursuant to a fee schedule, the need to request a second review is deferred until the threshold issues are resolved at the WCAB. (Labor Code 4603.2(e)(1))</p> <p>7. Where the only dispute is the amount billed, if the medical treatment provider requests a second review, the claims adjuster has <u>14 days</u> to serve a final written determination on the provider. (Labor Code 4603.2(e)(3), CCR 9792.5.5(g))</p> <p>8. If the medical treatment provider contests the amount paid after receipt of the final written determination following the second review, the provider may request IBR. (CCR 9792.5.5(i))</p> <p>9. The time limit for the provider to request IBR is <u>30 calendar days</u> from service of the final written determination. (Labor Code 4603.6(a))</p> | <p>provider has <u>90 days</u> from service of the EOR to <u>object</u>. (Labor Code 4622(c), CCR 9794(g))</p> <p>7. If the med-legal provider timely objects to an EOR that denies payment for reasons other than the amount to be paid per fee schedule, the <u>defendant must file a “Petition for Determination of Non-IBR Medical-Legal Dispute,”</u> along with a DOR, within <u>60 days</u> of service of the providers objection. (CCR 10451.1(c)(2)(A), CCR 9794(g))</p> <p>8. If the defendant fails to file a Petition for Determination of Non-IBR Medical-Legal Dispute, the provider may file it, with or without a DOR. (CCR 10451.1(c)(3))</p> <p>9. If it is determined that either the defendant or the med-legal provider engaged in bad faith tactics, the WCAB may award attorney fees, costs, and sanctions under Labor Code 5813. (CCR 10451.1(g))</p> <p>10. Any dispute requiring IBR is suspended while the WCAB resolves the threshold dispute. (CCR 10451.1(d))</p> <p>11. The med-legal provider has 90 days from the date of service of an order of the WCAB resolving any threshold dispute to request a second review of the bill, if the amount of the bill is in dispute. (CCR 9792.5.5(b)(2))</p> |
|---|--|

The Dispute Resolution Process (CCR 10451.1 – 10451.3)

I. CCR 10451.1 (Determination of Medical-Legal Expenses Dispute)

WCAB Rule of Practice and Procedure, section 10451.1, applies to the adjudication of threshold medical-legal disputes between the employer and medical-legal provider:

1. A “Petition for Determination on Non-IBR Medical-Legal Dispute” can be filed instead of a lien (10451.1(c)(3)(D)); the defendant has the primary duty to file it (10451.1(c)(2)(A));
2. The petition can be filed by the med-legal provider if the employer fails to file it;
3. The medical-legal provider becomes a “party” when the petition is filed (CCR 10301(dd)). The provider is added to the WCAB official address record;
4. Threshold issues are those that are determinative of whether the employer has liability for the medical-legal expense. Threshold issues include employment, statute of limitations, insurance coverage, jurisdiction, whether the expense was reasonably incurred to prove a contested claim, and whether a party waived any objection for failure to comply with the billing and objection timelines and procedures set forth in Labor Code Section § 4622(10451.1(c)(1)(A), CCR 10451.1(c));
5. A threshold dispute can be adjudicated before the case in chief is settled or decided, however the judge may defer hearing the threshold dispute if appropriate (CCR 10451.1(c)(4));
6. IBR is put on hold until the threshold dispute is resolved (CCR 10451.1(d)(2));
7. A medical-legal provider can elect to file a lien, rather than a petition under CCR 10451.1(CCR 10451.1(c)(3)(D)), however, the lien must be filed electronically (Labor Code 4903.05(b), CCR 10207(b), CCR 10770(b)(1)(A)), and the provider must pay the \$150 lien filing fee (Labor Code 4903.05(c), CCR 10207(d), CCR 10207(m), CCR 10451.1(c)(3)(D), CCR 10770(a)(3));
8. Medical-legal liens filed prior to January 1, 2013 are subject to regular lien procedures, and payment of the lien activation fee (CCR 10451.1(e));
9. When the employee or his/her attorney directly pays for the medical-legal goods or services and seeks reimbursement from the employer, the employee cannot file a “Petition for Determination for Non-IBR Medical-Legal Dispute” because the employee is not a “medical-legal provider” (CCR 10451.1(b)(2)). Instead, a Petition for Costs can be filed (CCR 10451.3);
10. “Medical-Legal expenses” include vocational expert fees, interpreters fees for services rendered at a medical-legal exam, copy service fees, and goods and services specified in

Labor Code § 4620(a) (e.g. x-rays, diagnostic tests, medical reports, medical testimony...) (10451.1(b)(1));

11. The defendant is obligated to file the Petition and a Declaration of Readiness if the defendant has denied payment of the med-legal bill for any reason other than the amount to be paid per fee schedule and the medical-legal provider has objected to the denial within 90 days of service of the denial on the provider. The denial letter is known as the “Explanation of Review,” or EOR. The defendant must file the petition along with a DOR within 60 days of the date of service of the provider’s objection to the EOR (CCR 10451.1 (c)(2)(A));
12. The EOR must set forth each and every reason for the denial of payment and the basis for any adjustment or partial payment, and advise the provider of the 90 day time limit to request a second review (Labor Code 4603.3, 4622, CCR 10451.1(c)(D));
13. Failure by the defendant to timely serve the EOR or to comply with any of the relevant requirements and timeliness set forth in Labor Code sections 4622, 4603.3 and 4603.6 operates as a waiver of any objection to the amount of the bill (CCR 10451.1(c)(1)(D)). Failure of the medical-legal provider to follow the procedures and timelines operates as a waiver of any claim to further payment (CCR 10451.1(c)(1)(E));
14. If the defendant fails to file the petition and DOR, the medical-legal provider may do so, with or without a DOR (CCR 10451.1(c)(3));
15. If the defendant engages in bad faith action or tactics, the judge can award reasonable attorney fees and costs to the med-legal provider, and issue sanctions not less than \$500. Bad faith actions include failing to timely pay any uncontested portion of the bill, and failing to timely comply with the Labor Code 4622 procedures to object to the bill. The defendant can also seek payment of attorney fees and cost from the provider, and sanctions (10541.1(g)).

Note: A “Petition for Determination of Non-IBR Medical-Legal Dispute” is a non-action document, meaning the WCJ does not take any action until a party files a DOR and the matter is on-calendar. The medical-legal provider is a party, and can be heard at any proceeding.

Procedurally, some providers have reported that their DORs for lien conference have been rejected because they do not have a lien on file, even though no lien claim is required. And it’s not unusual for parties to instinctively object to a lien conference being set before the case in chief is concluded, even though this may or may not be good cause to defer the medical-legal cost issue.

Hopefully most medical-legal expenses are being timely and properly paid. But if not, CCR 10451.1 provides an excellent mechanism for the judge to expeditiously determine liability for medical-legal expenses, especially where the claims adjustor or medical-legal provider has failed to follow the highly detailed bill pay/objection timelines and procedures set forth in Labor Code Section 4622.

II. CCR 10451.3 (Petition for Costs)

WCAB Rule of Practice and Procedure, section 10451.3 essentially allows the attorney for the injured worker to file a petition instead of a lien to seek reimbursement from the employer and for payments made directly to a medical-legal provider. It also allows an interpreter to file a petition, instead of a lien, to collect payment for services rendered at a deposition or at a WCAB proceeding:

1. A “Petition for Costs” can be filed instead of a lien to litigate threshold disputes concerning the employer liability for the medical-legal expense (CCR 10451.3(a));
2. Only the employee, the defendant, or an interpreter is allowed to file a Petition for Cost, and no one else (10451.3(f)); Question – can you think of a circumstance where the defendant would file a petition for costs?
3. An employee can file a Petition for Costs to seek reimbursement for payments made directly to a medical-legal provider, including payments made to a copy service, vocational expert, or to a physician for medical testimony or for a report. If it is determined that the employer has liability to reimburse the expense, the amount to be paid is still subject to IBR if there is an applicable fee schedule (10451.3(c));
4. An interpreter can file a Petition for Costs only for services rendered at a deposition or at a WCAB proceeding, and subject to any applicable official fee schedule. The interpreter becomes a “party” to the case (CCR 10301(dd)), and is added to the Official Address Record;
5. A Petition for Costs filed by an interpreter must contain the name and certification number of the interpreter who performed the service along with a statement of what services were performed (10451.3(d));
6. A Petition for Costs shall not be filed or served until at least 60 days after a written demand for payment, a copy of which must be attached to the petition along with a copy of its proof of service and any response. A Petition for Costs may be dismissed for failure to comply (10451.3(e));
7. Medical-legal costs that can be claimed by filing a petition can also be claimed by filing a lien (Labor Code 4903.05(b), CCR 10301(h), 10301(v), 10770(a)(3)).

However, after January 1, 2013, if a lien is filed instead of a petition, the person filing the lien is deemed to be a “lien claimant” (CCR 10301(x)), and must file the lien electronically (Labor Code 4903.05(b), CCR 10207(b), 10770(b)(1)(A)), unless the lien is filed by an unrepresented employee or uninsured employer (CCR 10206.2), and the filer must pay the lien filing fee (Labor Code 4903.05(c), CCR 10301(Y), 10770(c)(6)).

8. A “Petition for Costs” is an “action” document, meaning the judge may act on the petition with or without a DOR being filed. The judge can issue a 15 day notice of intention to allow or to disallow the cost, and issue an order if no timely objection is

filed. The matter can be set on-calendar on the judge's own motion, or action can be deferred on the petition if appropriate (CCR 10451.3(g)).

Note: All petitions (and answers) must be verified under penalty of perjury. Failure to comply constitutes a valid ground for dismissing or denying the petition or summarily rejecting the answer (CCR 10450(e)).

Caveat!

Labor Code Section 4903 (Determination of liens payable against compensation) was amended by SB 863 (effective January 1, 2013) to remove medical-legal costs from the list of expenses allowable as a lien against compensation. This makes sense because medical-legal expenses, when valid, are assessed against the employer. They are not deducted from the employee's compensation benefits.

The WCAB implemented CCR 10451.3 to allow a broad range of litigation related medical-legal costs to be claimed by way of a petition for costs, rather than a lien, when these costs are directly paid for by the attorney for the applicant, or claimed by an interpreter for service rendered at a deposition or WCAB proceeding. However, by its terms, CCR 10451.3 specifically limits the expenses that can be claimed by a "Petition for Costs" to those that are "not allowable as a lien against compensation under Labor Code section 4903" (10451.3(a)).

Here is the problem: effective August 19, 2014, Assembly Bill 2732 amended Labor Code 4903 and reinstated medical-legal expenses to the list of expenses allowable as a lien against compensation (4903(b)). This is not a problem for petitions for costs filed prior to August 19, 2014. But what about petitions for costs filed on and after August 19, 2014?

There is regulatory authority in the Administrative Director Rules, section 10205 (Definitions and General Provision), and in the WCAB Rules of Practice and Procedure, section 10301 (Definitions) for the proposition that the employee, the defendant and an interpreter may claim medical-legal expenses by filing a Petition for Costs even after the August 19, 2014 amendment of Labor Code section 4903(b):

1. CCR 10770(a)(3) provides that "claims for medical-legal costs and other claims of costs are not allowable as a lien against compensation";
2. CCR 10301(ii) defines a Labor Code 4903(b) lien to mean a lien for medical treatment expenses, (not medical-legal expenses);
3. CCR 10205(hh) also defines a Labor Code 4903(b) lien to mean a lien claim for medical treatment expenses;
4. CCR 10205(h) defines a "cost" to include medical legal expenses (10205(h)(3));
5. CCR 10301(h) also defines "costs" to include medical-legal expenses, and specifically authorizes the employee, the defendant and an interpreter to seek payment of medical-legal costs by filing a petition for costs pursuant to CCR 10451.3.

The fact remains that this may be a point of contention until Labor Code 4903(b) is amended, once again, to remove medical-legal expenses from the list of expenses allowable as a lien against compensation.

Incidentally, there is also authority for the proposition that when a lien is filed by the employee for medical legal costs the employee is exempt from paying the \$150 lien filing fee. CCR 10207(c)(2)(H) specifically exempts a “lien claimant or party” from paying the lien filing fee if the filer is “a party who is not a lien claimant,” and the lien is not for medical costs.”

However, note CCR 10770(c)(6): “Any person or entity filing a section 4903(b) lien and/or a claim of costs lien shall not file any such lien unless it has paid the requisite lien filing fee.”

Also, 10770(c)(6): “Any lien claim filed in violation of this provision shall be deemed dismissed by operation of law.”

III. CCR 10451.2 (Determination of Medical Treatment Disputes)

Prior to January 1, 2013, the WCAB had authority to weigh the evidence and make determinations whether recommended medical treatment was reasonably necessary. Labor Code section 4610.5 (Review of utilization review decision) changed this.

For dates of injury on and after January 1, 2013, and for all dates of injury where the UR decision is communicated to the requesting physician on or after July 1, 2013, medical necessity disputes must be resolved by “Independent Medical Review” (Labor Code 4610.5, 4610.6; CCR 9792.10.1 through 9792.10.9). Labor Code 4610.5(i) prohibits a workers’ compensation judge, the Appeals Board, or any higher court from making a determination of medical necessity contrary to the determination of the independent review organization. The determination of the IMR organization (Maximus Federal Services, Inc, a private contractor), is deemed to be the determination of the state agency, DWC, by the DWC Administrative Director (Labor Code 4610.5(g)).

IMR is a “new state function” pursuant to Gov. Code section 19130(b)(2). The state defines what treatment is appropriate for employees injured at work (Labor Code 4600(b)), and the frequency, duration and intensity of the treatment available to them (Labor Code 5307.27; CCR 9792.20-9792.26). Medical treatment disputes are no longer resolved by “the often cumbersome and costly court system” (DIR, DWC, IMR Home Page, www.dir.ca.gov).

CCR 10451.2

There are many disputes that relate to medical treatment other than those subject to Independent Medical Review and/or Independent Bill Review. CCR 10451.2, effective October 23, 2013, sets forth the procedures to resolve these disputes:

1. If the medical treatment dispute is between the employer and the employee, the procedures for claims for ordinary benefits are used, including Expedited Hearing (10451.2(c)(2)(A));
2. If the medical treatment dispute is between the employer and the medical provider, the procedures for lien claims are used, including filing of a lien claim and payment of applicable lien filing or lien activation fee (10451.2 (c)(2)(B));
3. If the employer is disputing liability for medical treatment for any reason other than medical necessity, the time to request IMR is extended to 30 days after service of notice to the employee that the liability dispute has been resolved (Labor Code 4610.5(h)(2));
4. If the employee is disputing liability for payment of a medical treatment bill for some reason other than the amount charged, the reason for denial of payment must be set forth in the EOR (Labor Code 4603.3(a)(5)). If the EOR sets forth a threshold dispute that must be resolved by the WCAB prior to Independent Bill Review, the time to request a “second review” of the bill is within 90 days of service of an order of the appeals board resolving the threshold dispute (Labor Code 4603.2(e)(1), 4603.3, CCR 10451.2(c)(3)).

Non-IMR/Non-IBR Medical Treatment Disputes

The WCAB is authorized to hear and decide the following medical treatment disputes:

1. Disputes over the timelines of a UR decision are resolved by the WCAB (Dubon v. World Restoration, Inc (Dubon II) en banc decision, 79 Cal. Comp. Cases 1298, CCR 10451.2(c)(1)(C));
2. Any threshold issue that would entirely defeat a medical treatment claim (e.g. injury AOE/COE, parts of body injured, employment, statute of limitations, insurance coverage, jurisdiction...) (CCR 10451.2(c)(1)(A)) are heard by the WCAB;
3. UR disputes for dates of injury prior to January 1, 2013 where the UR decision was communicated to the requesting physician prior to July 1, 2013 (CCR 10451.2(c)(1)(B)) are determined by the WCAB;
4. An assertion by the medical treatment provider that the defendant waived any objection to the amount of the bill because of failure to follow the bill paying procedures or timeliness contained in Labor Code 4603.2 and 4603.3 (CCR 10451.2(c)(1)(D)) are decided by the WCAB;

5. An assertion by the defendant that the medical treatment provider waived any claim to further payment because the provider failed to follow the bill paying procedures or timeliness contained in Labor Code 4603.2 (CCR 10451.2(c)(1)(E)) are decided by the WCAB;
6. A dispute over whether the employee was entitled to select a treating physician outside of the defendant's MPN (CCR 10451.2(c)(1)(F)) are decided by the WCAB;
7. A dispute whether an interpreter who rendered services at a medical treatment appointment was properly certified (CCR 10451.2(c)(1)(G)) and/or needed (CCR 10451.2(c)(1)(H)) are decided by the WCAB;

QUESTIONS

If you can answer these questions, you have an advanced understanding of the post 1/1/2013 laws.

1. A copy service files a Petition for Costs for services rendered in 2013. Two years later the case in chief resolves. The defendant files a DOR for a lien conference. Is the copy service a party? What if the copy service files a lien after the DOR is filed? (See Labor Code 4903.5 and CCR 10451.3(f)).
2. The attorney for the injured worker files a Petition for Costs to recover the money he paid to the PQME to take the doctor's deposition. He paid \$800 to the QME, and \$350 to the court reporting service. What would you need to know before doing a notice of intention to order payment of costs?
3. Assume the facts above, and that the defendant files a timely objection to a notice of intention to order payment. The defendant claims that a check was previously sent to counsel for applicant to reimburse him in accordance with fee schedule. What do you do?
4. An AME files a Petition for Determination of Non-IBR Dispute seeking payment of his fee for an exam and report prepared in 2014, and he files a DOR for a lien conference. The defendant objects that the case in chief is not resolved, and requests that the lien conference be taken off calendar. Furthermore, the defendant represents that a timely objection letter was sent to the AME informing him that the injury has been denied and/or there is a dispute concerning which parts of the body were injured. What do you do?
5. An interpreter files a Petition for Costs for services rendered at medical treatment appointments. The interpreter is charging \$70 per appointment for Spanish language interpreting services rendered in early 2015. What do you do?
6. An attorney for the injured worker files a Petition for Costs requesting an order that the defendant pay his vocational expert the sum of \$1,250 for the exam and report and trial testimony of the vocational expert. What do you do?

DWC 2016 Annual Conference Top Tips for Trial



By Colleen S. Casey
Copyright © 2016

1

DISCLAIMER



The following material and any opinions contained herein are solely those of the author and are not the positions of the Division of Workers' Compensation, Department of Industrial Relations, the WCAB or any other entity or individual.

The materials are intended to be a reference tool only and are not meant to be relied upon as legal advice.

2

Top Tips for Trial



1. Two Types of IMR
2. Issues re Expedited Hearings
3. New Regs re MPNs
4. Attorney's Fees
5. Avoid Sanctionable Conduct
6. Make sure IW's Address is Correct on Settlement Documents
7. Orders to Dismiss
8. Misc Checklists

3

1. Two Types of IMR



(1) IMR within the MPN:

SB899 (2004 reform) added LC § 4616.4 to define an IMR process for **IWs who objected to MPN's PTP MT request.**

IW is entitled to 3 opinions and then IMR.

See 8 CCR § § 9768.1 – 9768.17.

4

1. Two Types of IMR



(2) IMR as Appeal from UR

SB863 (2012 reform) added LC §4610.6 to provide IMR process to be **used by all parties** as the sole appeals process from a UR decision for all MT disputes for all dates of injury.

See 8 CCR §9792.10.3 – 9792.10.9.

5

2. Expedited Hearings - LC 5502(b)

Permissible Issues:

- MT except per LC 4610 & 4610.5
- MPN issues
- MT appointment or med-legal exam
- TD
- IW' s entitlement to compensation from 1 or more Ds, when 2 or more Ds dispute liability.
- Any other issues requiring an EH and per rules of the AD.**



6

2. Expedited Hearings - LC 5502(b)



Eun Jae Kim v. BCD Tofu House, (2014)
79 CCC 140; **(Significant Panel
Decision - SPD)**

DOR filed by D after IW, a waitress, filed WC claim.

“Claim is in delay mode. IW has been advised of MT within the MPN...IW has selected a non-MPN physician as her PTP. D seeks an order for transfer of care into the MPN, and an order regarding no liability for non-MPN treatment.

7

2. Expedited Hearings - LC 5502(b)



Eun Jae Kim v. BCD Tofu House, (2014)
79 CCC 140; **(Significant Panel
Decision - SPD)**

WCJ OTOC' d matter even though LC 5502(b)(2) includes issue as to whether IW can be required to treat within the MPN.

WCAB overturned WCJ and explained that **expedited hearings may be held on whether IW must treat within the MPN**, EVEN during the 90 day LC 5402(b) delay period.

8

2. Expedited Hearings - LC 5502(b)



Eun Jae Kim v. BCD Tofu House, (2014) 79 CCC 140; (Significant Panel Decision SPD)

WCAB explained,

“LC 4616.3(a) which is one of the MPN statutes, requires a D to commence treatment within its MPN when the employer receives notice of the injury from the employee, even if the claim has not been accepted or denied and is within the 90-day delay period allowed by LC 5402(b).”

9

CALIFORNIA WORKERS' COMPENSATION REPORTER

A Monthly Bulletin of Key Developments in Workers' Compensation Law / vol. 25, no. 7, August 1997

NEWS BRIEFS

WCAB RELEASES SIGNIFICANT PANEL DECISIONS FOR PUBLICATION

On July 21, 1997, Chairman Diana Marshall of the Workers' Compensation Appeals Board announced that the Board has adopted a policy of releasing for publication significant panel decisions of general interest to the workers' compensation community. Concurrent with her panel decisions that she said would provide information and guidance to practitioners in the field.

Marshall explained that publication of significant panel decisions will augment the current body of published appellate opinions and WCAB en banc decisions on novel or recurring issues about which there is little available case law. Each member of the Board believes the issue in these cases to be of general interest and has agreed that the decisions are significant and merit general dissemination. The initial four panel decisions designated to be significant cover an employer's liability to pay for more than one medical/legal evaluation under *Labor Code §4060*, the effective date of *§5813*'s sanctions provisions, how WCAB jurisdiction is invoked under the "carve out" provisions of *§201.5*, and the extent of a medical lien claimant's right to participate in discovery and trial of a workers' compensation case.

Marshall anticipates that a limited number of significant panel decisions will be submitted for publication from time to time in the future. She expects that circulation of these opinions will contribute to a more efficient processing of workers' compensation cases.

Editor's Note: In one of the significant panel decisions, Green-Brown v. Nat'l American Ins. Co., RID# 60772, July 17, 1997, a panel of Commissioners Casey, Glendon, and Heath held that §5813 sanctions can be applied only in cases where the injury occurred after 1994. The Reporter previously reported Ward v. State of Calif., Calif. Youth Authority (1996) 24 CWCR 176, in which a panel

continued on page 27.

COURT ACTIONS

COURTS OF APPEAL: KEY OPINIONS

WCAB Rejects Psychiatric AME's Opinion Against, and Neurologist's For, Compensability; Finds No Power to Develop Medical Record; Denies Claim Court Annals; Reform Laws Did Not Negate Board's Power to Obtain Further Evidence

[*Tyler v. WCAB*, Court of Appeal, 2d App. Dist., Div. 4, July 15, 1997, No. B099392, certified for publication]

The court of appeal has annulled a WCAB decision that found applicant's claim of psychiatric injury for lack of any psychiatric opinion to support the claim. The workers' compensation judge had found unimpressive the opinion of both an agreed medical examiner in psychiatry and the carrier's psychiatrist that applicant did not

HIGHLIGHTS

197 *California Courts of Appeal*: Opinions on Board's power to develop medical record, \$7,000 penalty for clerical error, failure to automatically increase untimely PD payment to one or two penalties, penalties for delay of advances and serious and willful misconduct, and more

213 *Writs Granted* on due process for medical lien claimant

214 *WCAB Decisions* on full participation for lien claimants, multiple evaluations under §4060, Board jurisdiction in §209.2 "carve out" case, failure to file lien

220 *AD Decisions* on charge of physician for conduct of interest or failure to submit treatment plan, need for QMEL to explain subjective complaints that for second objective findings

223 *Chief Managers'* Opinions on attorney fees from judgments, waiver of employer's credit

226 *1997 Legislative* New statutes, progress on bills

197 *News Briefs*: Board to designate selected panel decisions as "significant"

228 *Educational Events*

©1997 California Workers' Compensation Reporter

197

Birth of the Significant Panel Decision: August 1997

See also Larch v. WCAB, (1999) 64 CCC 1098 (Writ Denied.)

For a list of all WCAB en banc & SPD click on:
<http://www.dir.ca.gov/WCAB/wcab.htm>

10

3. Medical Provider Networks (MPN)

MPN Regs 9767.1 - 9767.19

In compliance with changes per SB863

Effective 8.27.2014

1. **Facilitate access** to MT for IWs w/in the MPN.
2. Tighten the **burden of proof** for IW' s attempting to treat o/s the MPN.



http://www.dir.ca.gov/DWC/DWCPropRegs/MPNRegulations/MPN_Regulations.htm

11

3. Medical Provider Networks (MPN)

SB863 added LC 4616(a)(3)-(5):



MPNs are required to:

- **Reg. 9767.12(a)(2)(B) & (C)** - List their doctors on their website for ease of access by all.
- **Reg 9767.12 (a)(2)** - Provide MPN contacts and medical assistants to **help IWs find a doctor in the MPN** and to help them make appointments.

12

3. Medical Provider Networks (MPN)



- **Reg 9767.5(f)** - For non-emergency services, the MPN shall ensure that an **appointment for the first treatment visit** under the MPN is available within 3 business days of a covered employee's notice to an MPN medical access assistant that treatment is needed.

13

3. Medical Provider Networks



"MPN" must ensure MT appointment w/in 3 business days

Lim v. Torrance BCD, Inc., 2014 Cal. Wrk. Comp. P.D. LEXIS 125

“While the D did timely notify IW of their MPN and the procedures for choosing a PTP within the MPN, **they did not timely schedule an initial evaluation** for the IW within the MPN. Additionally there was no evidence presented at the EH that D directed the IW to MPN doctor when she advised the employer of her neck complaints in May and July 2013.” Therefore, IW’s SPMT costs for MT o/s the MPN were awarded and IW was entitled to continue MT o/s MPN until proper transfer of care has taken place.

14

3. Medical Provider Networks (MPN)



Reg 9767.1(a)(16) - “MPN Medical Access Assistant” (MAA) person (in the US) to help IWs find Drs and schedule appointments.

Reg 9767.1(a)(20) - “MPN Contact” = responds to complaints, and answers IWs’ questions about the MPN and assists the IW in arranging for an MPN IMR per LC 4616.4.

15

3. Medical Provider Networks (MPN)



- **Reg 9767.5 (h) MPN medical access assistants (MAA)** must be available, Mon – Sat (7am to 8pm) both in English and Spanish.
- **Reg 9767.5 (h) (1)** There shall be enough **MAAs** to respond to calls, faxes or messages by the next day.
- **Reg 9767.5(h)(2)** MPN **MAAs** have different duties than CS. They work in coordination with the MPN Contact and CS to ensure timely MT for IW. **If CS = MAA, the MAA contacts must be separately and accurately logged.**

16

3. Medical Provider Networks (MPN)

Designation of MPN Contact Person is Mandatory

Cantabrana v. Superior Sod, 2014 Cal. Wrk. Comp. P.D. LEXIS 47

IW treated o/s of the MPN, despite warning from D to select an MPN provider.

IW's non-MPN provider (LC) argued D failed to provide MPN notices, including the name and telephone number of the MAA and MPN contact person.

The WCJ held, "The MPN pamphlet... includes a toll-free telephone number, but it appears to be the telephone number for the claims examiner, and **there is no reference to an MPN contact person**. The only means for accessing the MPN **provider** directory is a website."



MPN notice was deemed non-compliant & the LC was allowed.

17

3. Medical Provider Networks (MPN)



POP QUIZ:

IW, an ironworker, has a "serious chronic back condition" after falling off a 30 foot scaffolding on 8.14.2014.

His MPN neurosurgeon has suggested IW may need back surgery.

His MPN PTP (chiro) was terminated from e'er's MPN on 10.1.2014. PTP is no longer authorized to treat IW.

IW files for EH and requests continued MT with PTP (chiro):

18

3. Medical Provider Networks (MPN)



POP QUIZ:

- (a) WCJ should allow MT w/terminated chiro, since IW has established a bond with the terminated MPN chiro.
- (b) WCJ should mandate that employer follow “**continuity of care policy**” per 9767.9 & 9767.10, which allows IW to treat with terminated PTP up to 1 year.
- (c) WCJ should order the IW to select a PTP within the MPN, since he would not be able to treat with the chiro anyway, once he reaches the 24 visit cap.

19

3. Medical Provider Networks (MPN)



Reg 9767.9 & 9767.10 - “Continuity of Care Policy”

Baker v. Hilton La Jolla Torrey Pines, 2014 Cal. Wrk. Comp. P.D. LEXIS 165

IW is allowed to continue MT with terminated PTP (chiro) and Employer must follow “**continuity of care policy**” and allow the PTP to complete a treatment plan.

In this case, the “PTP could not complete a ‘treatment plan’ *until* the MPN neurosurgeon determined whether or not back surgery was appropriate --- something which has not yet occurred. Once that determination has been made, the PTP can draft a treatment plan and continue MT for up to one year.”

20

4. LC 5710 -Attorney's Fees

LC 5710 provides: “A **reasonable** ...attorney's fee for deponent if represented by member of State Bar...”

POP QUIZ: Can AA get LC 5710 fees for attending a **defense** VR expert evaluation of the IW?

- (a) Yes, if AA has properly documented the billable hours, since this situation is consistent with the established regulatory methods of discovery.
- (b) Yes, if AA has obtained an VR expert report.
- (c) No, since LC 5710 is silent regarding extending its parameters to other discovery events.

See *Fetner v. Long Beach Fire Dept*, 2014 CWC PD LEXIS 91



21

5. Avoid Sanctionable Conduct

Beneficial Services v. WCAB (See), (2013) 78 CCC 219

“Under **Rule 10842(c)**, copies of documents already received in evidence... may not be submitted with a pet'n for recon...”



Under prior **Rule 10232(a)(10)**, **(and current Rule 10205.12(a)(10*)** no document filed with the WCAB may > 25 pages without prior permission of WCAB...”

****Always confirm you are using the most current set of WCAB Rules of Practice and Procedure.*** 22

5. Avoid Sanctionable Conduct

Beneficial Services v. WCAB (See), (2013) 78 CCC 219



“Defendant violated Rule 10842(c) because the medical evaluation reports, consisting of 97 pages, attached to Defendant’s Petition for Reconsideration, were already part of the adjudication file.

Defendant violated Rules 10232(a)(10) and 10845 since Defendant’s Petition for Reconsideration, with the attachments, was 107 pages long.”

Sanctions imposed per LC 5813 for \$500. 23

5. Avoid Sanctionable Conduct

Frivolous litigation may = sanctions



Bowlds v. SD Dev; SCIF, 2014 Cal Wrk Comp PD LEXIS 669

"Proceeding to trial without any evidence or with evidence that is utterly incapable of meeting its burden of proof is frivolous and constitutes bad faith within the meaning of LC 5813 justifying an award of **sanctions**, attorney's fees and costs against the party or lien claimant, its attorney(s) or hearing representative(s), individually or jointly and severally." (See *Torres v. AJC Sandblasting* (2012) 77 CCC 1113 WCAB en banc)

24

5. Avoid Sanctionable Conduct

Callegas v. Candice, 2014 Cal Wrk
Comp PD LEXIS 671

“The record supports the WCJ's finding that the LC's pursuit of its claim through trial, more than 10 years after a C&R with a *Thomas* finding, was **"patently unmeritorious"**, since without evidence that there was an industrial injury, it could not prove compensable injury, and in turn recover anything on its claim.



25

5. Avoid Sanctionable Conduct

Callegas v. Candice, 2014 Cal Wrk
Comp PD LEXIS 671

“Additionally, there was no evidence as to diligence and/or an explanation as to why LC sat on its lien for more than a decade after the matter was taken off calendar in Dec 2001, following lien proceedings subsequent to settlement of the underlying claim.

The defense of laches can apply to lien claims that are excessively delayed.”



26

5. Avoiding Sanctionable Conduct

Hearing reps for LC must file letter of representation 8 CCR 10774.5(e)

Castellejos v. TeamQuest, 2014 Cal Wrk Comp PD LEXIS 674

“This court has never received a letter of representation for hearing representation as mandated by CCR § 10774.5 (e). This court also concluded that the demand for this trial was both frivolous and in bad faith.”

“On 5/7/2014, defense counsel filed a petition for \$4,686.70 in costs and sanctions. Lien claimant filed no response or opposition. Therefore, on 6/16/2014 this court served a 10 day Notice of Intention to order sanctions of up to \$2,500.00 and costs of \$4,686.70.”



27

5. Avoiding Sanctionable Conduct

8 CCR 10773:

- (a) Non-attorneys may appear if:
- (1) the client has been fully informed...
 - (2) in all proceedings... the person is identified...and it is fully disclosed that the person is not licensed to practice law in the State of California;
 - (3) the attorney directly responsible... is identified.



28

5. Avoid Sanctionable Conduct

De Ramos v. 99 Cents Only Stores, 2014 Cal. Wrk. Comp. P.D. LEXIS 644



"Petitioner's successive petition contains remarks that are disrespectful and impugn the integrity of the Appeals Board, the trial level Workers' Compensation Appeals Board (WCAB) and the WCJ.

"For example, petitioner accuses the Appeals Board of abuse "in the intent to avoid bad faith from defense..."

"Further, petitioner alleges game playing and "abuse and dirty tactics" on the part of the WCAB against lien claimants.

"Additionally, petitioner suggests that WCJs and the WCAB "can manipulate EAMS to justify unfair decisions."

29

6. Make Sure IW's Address is Correct on Settlements

Barrett Business Services v. WCAB (Rivas),
(2012), 77 Cal Comp Cases 213 (2nd DCA)

Applicant's attorney advised defendant of IW's change of address. Defendant drafted a compromise and release and entered the old address for the IW instead of his new address. Defendant sent the settlement check of \$17,000 check to IW's old the **incorrect** address.



30

6. Make Sure IW's Address is Correct on Settlements

Barrett Business Services v. WCAB (Rivas),
(2012), 77 Cal Comp Cases 213

Rivas never received the check, which was stolen and cashed by someone else. The DCA held that **since defendant prepared the C&R & entered the incorrect address** for the IW, when they were on **notice of his new** correct address, defendant remained liable to the IW for payment of the C&R amount of \$17,000.



31

7. Orders to Dismiss



No Self-Destruct Orders to Dismiss a Case

8 CCR 10780 states: The Order to Dismiss can **NOT** be "...by an order with a clause rendering the order null and void if an objection showing good cause is filed."

WCJ must issue a NIT to Dismiss. If no objection filed within the time period of NIT, then WCJ may issue an Order to Dismiss.

32

7. Orders to Dismiss

WCAB Must Serve Orders To Dismiss a Case



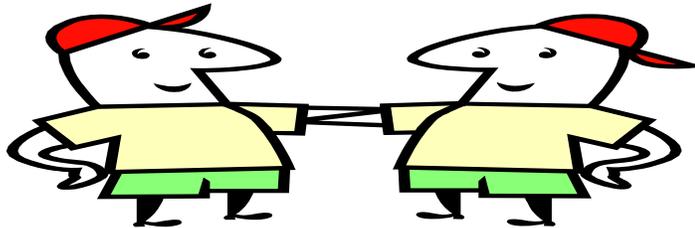
The final dismissal order needs to be served on all parties on the OAR by the WCAB, service cannot be designated.

Reg 10500(a) “WCAB may...designate a party... to make service of notices of the time and place of hearing, orders approving compromise and release, awards based upon stipulations with request for award and any interim or procedural orders.

Reg 10500(b) The WCAB shall serve all...final orders...The WCAB shall not designate (service of) any final order...”

33

8. Checklists

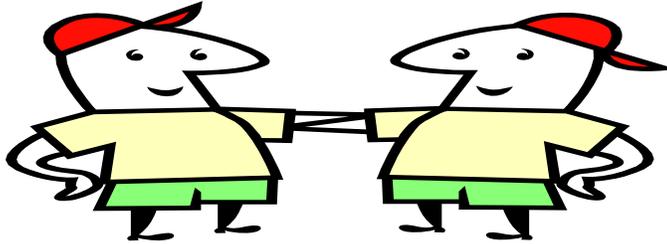


Issues to consider before submitting a settlement doc:

- Are medical reports in file? Bring extra copies of P&S report, and the one that supports the settlement
- Is PD indicated and accurate
- If no QME, include proof that IW got notice of QME option
- Extent of FMT? Is surgery recommended?

34

8. Checklists



Issues to consider before submitting a settlement doc:

- If C&R – Is amount sufficient for FMT?
- If Stip – has FMT box (yes or no) been checked?
- Has IW RTW? w/ or w/o restrictions?
- Document – properly signed? (See *Marchese v. Home Depot*, (2009) 37 CWCR 282.)

35