LAW OFFICES of McDERMOTT & CLAWSON, LLP

LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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THE TROUBLE WITH TRIBBLES

"The Trouble With Tribbles" is a second-season episode of Star Trek: The Original Series, first broadcast on December 29, 1967 and repeated June 21, 1968. The "trouble" with the Tribbles is that they reproduce far too quickly and are capable of eating a planet barren if their breeding is not controlled. In the words of Dr. McCoy, "they are born pregnant" and threaten to consume all the onboard supplies. The problem is aggravated when it is discovered that the creatures are entering essential ship systems, interfering with their functions and consuming any edible contents present.

Sounds like lien claims to us. At first it was just a few here and there, but then the population of liens began to multiply exponentially, and now they threaten to bring down essential WCAB functions to the point where crates full of unresolved liens from the Los Angeles WCAB are reportedly being deported to Oxnard along with the lien claimants' representatives, and Los Angeles defendants are being told to pay up or be forced to litigate the liens in another County.

Maybe not the same as another planet, but still a long way to go.

So, if there really are significant issues to litigate on the liens (and very often there are) we thought it would be a good time to do some serious review of just what the rules are in proving up (or disproving) entitlement to lien reimbursement. Perhaps a better understanding of how the burdens of proof shake out may ultimately result in a more controlled population of our own version of Tribbles.

A medical lien claimant's rights are governed by Labor Code §4903. This section provides that the WCAB may determine, and allow as liens against any sum to be paid as compensation, reasonable medical expenses incurred by or on behalf of an injured employee, as provided by article 2 (commencing with §4600). However, a lien claimant's rights are derivative of the injured employee's rights. (*Beverly Hills Multispecialty Group, Inc. v. WCAB* (1994), 26 Cal. App. 4th 789, 803 [32 Cal. Rptr. 2d 293]; *Fox v. WCAB*. (1992) 4 Cal. App. 4th 1196, 1204 [6 Cal. Rptr. 2d 252].)

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The first thing to consider is that it is the *lien claimant* that has the burden of proof on a lien, and merely handing the judge a bill, lien and some reports may not be sufficient. As an example, in one case, following a review of the salient facts and procedural context, the WCJ indicated in relevant part that, pursuant to Labor Code § 4600, the lien claimant had the burden of proving that the treatment provided was reasonably required to cure or relieve the Applicant from the effects of the industrial injuries. However, the lien claimant had not complied with the reporting requirements of Labor Code § 4061.5 and 8 Cal. Code Reg. § 9785(e)(3), (4) and did not establish the medical necessity of the treatment. The lien claimant provided treatment as a secondary treating physician on referral from Applicant's primary treating physician, and the primary treating physician did not mention the referral or a review of the secondary treating physician's reports, and did not incorporate or adopt the secondary treating physician's reports On top of that there were no reports from lien claimant in evidence. Optima Health Institute, *Dr. Henry Kan v. WCAB* (2008) 74 CCC 64.

If we carefully analyze this opinion , we see there are multiple elements the lien claimant has to prove, among them: 1) that the treatment was reasonable and necessary; 2) that treatment was for a condition that resulted from industrial injury (meaning causation and parts of the body are issues to be proved) and 3) that the medical reports establishing these elements must be from the primary treating physician, not a secondary treating physician. The doctor who is elected or assigned as "PTP" must review and incorporate the reports of the other doctors or their liens should be denied. We believe this is not just a perfunctory demand for magic words. We know of a doctor who uses a stock paragraph simply saying he has reviewed reports and incorporates and adopts the opinions therein without even saying why or exactly what it is he agrees with! We don't think this actually complies with the spirit or intent of the law.

Labor Code §4603.2 mandates payment for medical treatment and specifies how and when such payment is to be made. It also makes provision for objections to such charges in total or in part. However, the provisions of §4603.2 do not apply unless the prerequisites to the section's application have been met, i.e., the medical treatment in question must have been "provided or authorized by the treating physician selected by the employee or designated by the employer [pursuant to §4600]" and the medical provider's billing to the defendant must have been "properly documented" with an "itemized billing, together with any required reports and any written authorization for services that may have been received." *Kunz v. Pattterson Floor Coverings*, *Inc.* (2002) 67 Cal. Comp. Cases 1588)

Despite protestations to the contrary by lien claimant representatives, if would appear that failure to object to a bill or lien may not be fatal to a later defense. A defendant's failure to specifically object to a lien on the basis of reasonable medical necessity (or on any other basis) does not result in a waiver of that objection under §4603.2. It is true that §4603.2(b)(2) requires a defendant to advise the medical provider "of the items being contested [and] the reasons for contesting these items." Yet, nothing in §4603.2 states or implies that the consequence of a defendant's failure to make any particular specific objection is that the defendant is thereafter precluded from raising that objection, or that the lien claimant is relieved of any portion of its obligation to prove by preponderance of the evidence all of the elements necessary to the establishment of its lien. *Kunz v. Pattterson Floor Coverings*, *Inc.* (2002) 67 Cal. Comp. Cases 1588

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Another problem that comes up from time to time is proper licensing of a lien claimant's operation. A common context is transportation liens. The Board relied upon the Supreme Court decision in *Avalon Bay Foods v. WCAB* (Moore) (1998) 63 CCC 902 where the Court held that transportation costs are an appropriate adjunct of medical treatment despite the lack of statutory language authorizing the payment of transportation costs. In addition, the Board relied upon *Hutchinson v. WCAB* (1989), 54 CCC 124 where the appellate court held that an injured worker is entitled to transportation expenses in order to obtain prescribed medication.

Aside from questions as to whether transportation (as opposed to simple mileage reimbursement) is necessary and reasonable, we have come to find out that many transportation companies do not have the proper licensing. Before you get too excited about this sticking point, however, we should point out the rather amazing fact (to us, anyway) that drivers who are paid to drive (chauffeurs, taxicab drivers, etc) are not required by the state to have anything more than a regular class C driver's license unless they are driving something significantly bigger and heavier than a passenger car or small van (consult the vehicle code if this is a suspected issue). However, in most geographic areas they are required to comply with business licensing requirements.

Under *Zenith Insurance Co. v. W.C.A.B.* (Capi) (2006) 71 CCC 374, the lien claimant has the burden of proving that it complied with applicable licensure or accreditation requirements. These requirements, although not specifically discussed in *Capi*, were addressed by the WCAB in *Stokes v. Patton State Hospital* (2007) 72 CCC 996 (Appeals Board Significant Panel Decision). In *Stokes*, the WCAB explained that, if a lien claimant provided medical services to an injured worker, it must prove that it was licensed by the Medical Board to provide such medical treatment or that it met the requirements of Business and Professions Code § 1248.1.

Interpreter's liens have been a vexatious problem in some cases, especially regarding medical treatment, with prior case decisions producing conflicting case law on the subject. *Guitron v. State Compensation Insurance Fund* (2011) 76 CCC 228 (WCAB *en banc* decision) was a unanimous and comprehensive decision by the WCAB that held:

(1) Labor Code §4600 requires the furnishing of reasonable medical treatment, including interpreter services during the course of treatment for an injured worker who is unable to speak, understand, or communicate in English.

(2) As a lien claimant, the interpreter has the burden of establishing the following elements to prefect the lien: (a) The services were reasonable; (b) the services were actually performed; (c) the interpreter is qualified to provide the services; and (d) the fees charged are reasonable.

The Board maintains that effective communication between an injured employee and a medical provider is an essential element of medical treatment. Refusal to award interpreter services deprives an injured worker of necessary benefits, defeating the fundamental purpose of extending benefits, including medical care for the protection of injured workers.

The Board stated that interpreter services are permitted where the injured worker receives chiropractic treatment, physical therapy and work conditioning. The determination is that there is no distinction between types of medical treatment as far as the need for interpreters goes.

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The first element of the burden is whether the injured worker actually required the use of an interpreter. An injured worker's need for an interpreter could be demonstrated in many ways. If, for example, an interpreter was used during the deposition of the worker (see Lab. Code, §§ 5710(b)(5), 5811(b)(1)) or at an agreed or qualified medical evaluation (see Lab. Code, §§ 4600(f), 4620(a) & (c), 4621(a); Cal. Code Regs., tit. 8, § 9795.3(a)), although not conclusive, it might be reasonable to infer that the worker needed interpreting services during medical treatment. A physician's statement that an interpreter was required, an interpreter's testimony or sworn statement that he or she confirmed with the physician that interpreting services were needed, or the worker's testimony through an interpreter that he or she needed an interpreter to communicate with a medical provider could all constitute evidence of the need for an interpreter. If the defendant authorized interpreter services for some medical treatment appointments, it should not be necessary for the interpreter lien claimant to prove that interpreter services were required for each individual appointment.

On the other hand, in *Guitron,* reference was made that evidence that the doctor or members of his staff spoke the injured worker's language could be probative as to the lack of need for an interpreter. If the physician speaks the injured worker's language, or if the physician chooses to use a member of his or her staff to interpret, then it is unlikely that other interpreter services would be reasonably required, according to the Board.

Next, the interpreter must be either a certified interpreter or deemed certified pursuant to the Government Code and the AD Rule 9795.1 However, an interpreter may establish that the services may be provisionally furnished despite a lack of certification.

Next, absent agreement, the interpreter has the burden of establishing that the actual injury arose out of the employment. This is no different than any other lien claimant's burden.

The reasonable amount of the interpreter's services must be established. This may include the usual fees accepted by the provider, other fees accepted by other medical providers or other relevant economic circumstances such as the reasonable charges of interpreters in the community. Further a minimum rate for reimbursement would be necessary in order to provide sufficient incentive for interpreters to provide them with a specific time limit in attending to the injured worker at the medical appointment.

Finally, the Board observed that the interpreter services must be decided on the evidence of each specific case rather than a geographic area. The mere fact that the services provided in a predominantly Spanish community, such as East Los Angeles as an example, is insufficient to deny the lien.

The Board also warned that lien claims for services should not be frivolously ignored by the carriers. Failure to properly adjust a lien may subject the carrier to a potential penalty under Labor Code §5814 and 5813.

Then, of course, with any type of lien there is the question of the reasonableness of the amounts being charged. Like the pregnant Tribbles, charges are often inflated because it is a compensation case and lien claimants know from the outset that there are going to be negotiations and reductions. Under Labor Code §§ 3202.5 and 5705, *Kunz v. Pattterson Floor Coverings, Inc.* (2002) 67 Cal. Comp. Cases 1588 (Appeals Board en banc opinion), and *Tapia v. Skills Masters Staffing* (2008) 73 Cal. Comp. Cases 1338 (Appeals Board *en banc* opinion), the lien

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claimant has the burden of proving that the amount charged is reasonable. The WCAB has pointed out that the prima facie reasonableness of the Official Medical Fee Schedule is established by 8 Cal. Code Reg. § 9792(c), and it is not the defendant's burden to prove that fees allowed by the Official Medical Fee Schedule are reasonable. Rather, it is the lien claimants' burden to prove that there are extraordinary circumstances related to the unusual nature of services rendered by each lien claimant that justify a reasonable fee that exceeds that allowed by the Schedule.

While the lien claimant has the burdens of proof, the defendant must also be meticulous in examining the supporting documentation to determine whether an argument should be made as to sufficiency of the lien claimant's evidence. Interpreter's bills must identify the interpreter by name and license number, and the medical reports should be cross-referenced to the bills to determine whether documentation supports the contention that the services were actually used. Pharmacy bills should identify how and where the medication was dispensed, as it often is disclosed that the bills are for repackaged medications dispensed directly by the treating doctor. The doctor's bills should be cross-referenced to the pharmacy bills as we have found instances where the doctor and the pharmacy have both billed for dispensing the same medication (double billing). The medical reports should make reference to the prescriptions being dispensed, and the reasons for them.

In a criminal act, Cyrano Jones, who introduced the Tribbles to the space station, is ordered to remove the Tribbles (a clean-up task that Spock estimates will take 17.9 years) or be imprisoned for 20 years for transporting a dangerous life form off its native planet.

In a weird foretelling of what the Los Angeles WCAB has now done, all Tribbles that were on the Starship *Enterprise* are somehow beamed onto a Klingon ship as a retaliation for the troubles the Klingons have caused, where, in Scotty's words, "they'll be no tribble at all." While nothing in this should be interpreted as meaning the Oxnard WCAB is akin to a Klingon warship, we do think paying close attention to what the lien claimants must do to prove up their liens should make analysis of lien exposures less "tribble" for you.

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