



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

March 2008

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# MEDICAL BILLS AND LIENS: AVOIDING THE BIG "GOTCHA" WHEN RESOLVING CASES

Labor Code 4903.5(a) provides a statute of limitations on lien claimants. "No lien claim for expenses as provided in subdivision (b) of Section 4903 may be filed after six months from the date on which the appeals board or a workers' compensation administrative law judge issues a final decision, findings, order, including an order approving compromise and release, or award, on the merits of the claim, after five years from the date of the injury for which he services were provided, or after one year from the date the services were provided, whichever is later."

The above would seem to be straightforward, but maybe not so much after combining this statute with other applicable provisions of the code, old appellate decisions and recent decisions of the WCAB on reconsideration. New questions have emerged which affect your duties upon resolving cases. Who, exactly, is a lien claimant affected by LC 4903.5? What duty does the defendant have, if any, toward lien claimants or *potential* lien claimants when a case is tried or resolved by stipulated Award or C&R? When can we safely consider the statute to have run?

First, let's consider the question of exactly "who" a lien claimant is. Surely, it means a provider of benefits or services who has followed WCAB procedure and, either electronically or in person, filed a "green lien" with supporting documentation with the WCAB (and hopefully served the documents as well). But are there others that will be given the same considerations as the green lien filers, even though they have not followed the procedure of filing?

Apparently, the answer to the above is "yes." First, let's look at a Labor Code Section that has been little utilized but which has been sitting quietly since 1966 like the proverbial eight hundred pound gorilla in the room, Labor Code 4905: "Where it appears in any proceeding pending before the appeals board that a lien should be allowed if it had been duly requested by the party entitled thereto, the appeals board may, without any request for such lien having been made, order the payment of the claim to be made directly to the person entitled, in the same manner and with the same effect as though the lien had been regularly requested, and the Award

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to such person shall constitute a lien against unpaid compensation due at the time of service of the Award.” Thus, if a WCAB judge at trial determines that Doctor Disability has been treating the injured worker in a disputed case and injury is found, the judge can order that medical bills be adjusted and paid even though no lien is on file. Dr. Disability becomes a *de facto* lien claimant (sometimes referred to as a “shadow lien claimant”), sans lien.

Does the defendant therefore have an obligation toward those “shadow lien claimants” that might be the recipients of WCAB beneficence even though they have not filed a lien? Apparently we do, and the obligations are the same as those that we have toward those who have actually filed liens, primarily service of documents and notice of events that affect the statutory rights of lien claimant.

Case law indicates that a medical or medical-legal lien claimant has a right to participate in a workers' compensation hearing in the worker's case-in-chief. A lien claimant's statutory right to petition for reconsideration because it is indirectly aggrieved by a finding of the workers' compensation judge (Lab. Code, § 5900) implies a corollary right of the lien claimant to participate at the trial of the worker's case. Beverly Hills Multi-Specialty Group, Inc. v. Workers' Comp. Appeals Bd. (1994), 59 CCC 461.

Clearly, if the lien claimant has a right to participate in a hearing, they have the right to notice and service of documents. “A failure to serve documents in a WCAB proceeding in the manner required by statute or the board's regulations is not a “mere irregularity” but rather an omission of substance which denies a fundamental right.” Lyydikainen v. Industrial Acc. Com. (1939) 4 Cal. Comp. Cases 264

Thus, it stands to reason that the defendant has an obligation to serve settlement documents and Awards, since these orders are among the legal events cited by Labor Code 4903.5(a) that start the running of the statute of limitations against the lien claimant.

How much of this applies to providers that have not filed liens? While we still may have a strong argument that *de facto* lien claimants should not be allowed to prosecute a case or participate in the injured workers' case due to lack of WCAB jurisdiction when no actual lien is filed, it seems very clear that the statute of limitations will not be running on their right to file a lien and win jurisdiction even after the 6 months has run following the settlement date. Unless, that is, they have been served with the documents that would start the clock running against them.

Administrative Director's Rule 10886 states: “Where a lien claim is on file with the Workers' Compensation Appeals Board or where a party has been served with a lien, and a Compromise and Release agreement or stipulations with request for Award or order is filed, a copy of the Compromise and Release agreement or stipulations shall be served on the lien claimant. **No lien claim shall be disallowed or reduced unless the lien claimant has been given notice and opportunity to be heard.**” (emphasis added)

So, does this apply to known providers who have not filed liens at time of settlement? Labor Code 4904(a) would apparently mandate that it does: “If notice is given in writing to the insurer, or to the employer if uninsured, setting forth the nature and extent of any claim that is allowable as a lien, the claim is a lien against any amount thereafter payable as compensation, subject to the determination of the amount and approval of the lien by the appeals board.” (emphasis added).

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These theories regarding the rights of shadow lien claimants have not gone untested, and have been the subject of recent WCAB panel decisions finding, in one manner or another, that *any* notice to the defendant that someone may be entitled to file a lien will be sufficient notice to trigger the obligation to serve settlement documents on that person or entity, or the 6 month limitation under LC 4903.5 will never begin to run. This is the potential “gotcha” referred to in the title of this month’s article. In the case of Loc Tran v Viet Nguyen Trucking and AARLA, (July 2007) AHM 0080703, a panel opinion on reconsideration found that “To the extent that the defendant was required to comply with WCAB Rule 10886...and failed to do so, we find that the statute of limitations contained in Labor Code 4903.5(a) [sic] was tolled until the Compromise and Release was served on the lien claimant.” The panel relied on the principles discussed in historic decisions dealing with the statute of limitations and failure of notice to injured workers, and applied the same result.

Even if the defendant has not received a bill from a potential lien claimant by the time the case is settled, there may exist a duty on the part of the defendant to investigate and provide notice to a potential lien claimant. Thus, the receipt of a report from a treating doctor may be sufficient. K-Mart v. WCAB (Acevedo) (2003) 68 CCC 494. In a subsequent panel decision citing Acevedo, Commissioner Brass wrote: “Prior to settling applicant’s claim by Compromise and Release agreement in 2006, defendant had a duty to determine the extent of applicant’s medical treatment and potential lien claims arising there from. Defendant was on notice of the claim...for medical treatment expenses...when it received Dr. Gross’ surgical reports....” Ruben Balcon v Radiant Services and SCIF (Sept. 2007) LAO 799279.

So, let’s go back and answer the original questions with which we started. 1) Who, exactly is a lien claimant? Any person or entity which we, as defendants, have reason to know has an actual lien on file or the potential right to file a lien. 2) What duty do we as defendants have to these people or entities? To serve notice of all conferences and trials which gives them opportunity to participate pursuant to the *Beverly Hills Multi-Specialty* case, and to serve them with any and all orders and documents which would have legal effect on their potential rights, especially orders and awards. 3) When can we safely presume the statute has run? When each of the three of the specified time limits have run pursuant to LC 4903.5(a) and we have a Proof-of-Service showing we have placed them on notice: lien claimants, shadows and *de factos* alike!

*Article by Howard Stevens, Orange Office*

## NEW NAMES AND NEW FACES

*McDermott & Clawson, LLP is pleased and proud to welcome [Amy Rivera](#) and [Howard Stevens](#) as new Partners in the firm, reflecting the continued professional growth and development of our management team. Amy has served as a Managing Attorney in the Los Angeles/Van Nuys/Encino offices since 2004. Howard has been the firm’s Director of Training since 2003.*

*[Reem Nazo](#) joined the firm as an Associate Attorney in the Encino office on 3-3-08. She was formerly an Associate Attorney with Bradford and Barthel. Reem attended Loyola Law School after obtaining her undergraduate degree from UCLA.*

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## **ARE YOUR FORMS FITTING?**

The Division of Workers' Compensation (DWC) has posted a revised benefit notice manual and sample benefit notices to its Web site. The manual and samples reflect amendments to the workers' compensation benefit notice regulations found in Title 8, California Code of Regulations, sections 9810, 9811, 9812, 9813, 9813.1 and 9813.2. The amended benefit notice regulations take effect April 9, 2008.

California's regulations provide that benefit notices, except those notices whose language or format are set forth in statute or those specific notice forms adopted by regulation, may be produced in any format developed by the claims administrator. The regulations require that each benefit notice contain all relevant elements required by either statute or regulation. They also require the DWC administrative director to make sample notices that comply with these requirements available on the DWC Web site.

The sample notices posted provide examples for: payment, nonpayment or delay in payment of temporary disability, permanent disability and death benefits; the provision of vocational rehabilitation services; any change in the amount or type of benefits being provided; the termination of benefits; the rejection of any liability for compensation; and the requirement to provide an accounting of benefits paid.

The benefit notice manual offers guidance for claims administrators in providing injured workers with notices that comply with the benefit notice regulations. The sample notices are not intended to be used verbatim in lieu of individual notices tailored to the specific facts of each claim. Every claims administrator is responsible for drafting notices in compliance with the regulations that become effective April 9.

The revised benefit notice manual and sample benefit notices can be found on the DWC Web site at <http://www.dir.ca.gov/dwc/audit.html>.

*Reprinted from DWC Newsline*

## **WANT INPUT ON NEW PAPERLESS FORMS?**

The Division of Workers' Compensation (DWC) has posted its proposed court administrator regulations and amended Disability Evaluation Unit (DEU) and Retraining and Return to Work Unit (RRTW) regulations to an online forum where members of the public may review and comment on the proposal. The proposed regulations address filing documents in the Electronic Adjudication Management System (EAMS). The court administrator regulations were previously posted to a forum in November of 2007. The version currently being posted reflects changes to the implementation plan for EAMS.

EAMS is a computer based system that will simplify and improve the DWC's case management process to more efficiently resolve claims, improve the ability to schedule and manage court calendars, allow files to be shared between multiple users and transform paper files into secure electronic files, reducing the need for physical storage space at local DWC offices and the State Records Center. EAMS will replace the current workers' compensation court technology and supporting infrastructure.

The proposed court administrator regulations are in Title 8, California Code of Regulations, sections 10210 through 10296. The proposed amended DEU regulations are in California Code of Regulations, title 8, sections 10150 through 10167. The proposed amended RRTW regulations are in Title 8, California Code of Regulations, sections 10116 through 10133.587.

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The RRTW regulations will be reorganized and include regulations relating to the supplemental job displacement benefit (SJDB) and vocational rehabilitation.

*Reprinted from DWC Newsline*

### **Need Assistance with Training?**

McDermott & Clawson, LLP is happy to assist with the training needs of your organization. Our education committee has extensive experience in providing seminars and discussions on Workers' Compensation topics of concern to adjusters and employers. We have worked with numerous carriers, third party administrators, and brokers to provide educational assistance, and would be happy to discuss your needs. Call or email [Howard Stevens](#) at (714) 288- 1700 or feel free to speak with any of our attorneys for further information.

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