



LAW OFFICES  
of  
McDERMOTT & CLAWSON, LLP

## LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

October 2008

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# MPN TREATMENT OPTIONAL

Ever since Medical Provider Networks became a fixture in California Workers' Compensation cases, we have been plagued by heavy resistance from the applicant's bar and unsettled questions about what remedies the defendant may have when the applicant ignores the MPN and self-procures medical treatment with Dr. Disability. We may now have some guidance from the recent panel decision in *Melvin Lane vs. Big Lots Stores, Inc.*, ADJ 2708349.

In this Opinion and Order Granting Reconsideration and Decision After Reconsideration, a WCAB panel of commissioners expressed two guiding principles. First, if the injured worker wishes to ignore the requirement that treatment be provided through the MPN, he or she may do so and treat wherever he or she wishes. Second, assuming the defendant has complied with all the WCAB notice requirements, the defendant does not have to pay for the self-procured treatment.

In *Lane*, the defendant sought an order to force the applicant to treat within the MPN. The applicant relied on Labor Code 4605, which

states "Nothing contained in this chapter shall limit the right of the employee to provide, at his own expense, a consulting physician or any attending physicians whom he desires."

The panel pointed out that because LC 4605 is within the same chapter as the sections authorizing the use of an MPN, it is apparent that the applicant cannot be ordered to treat within an MPN if he or she chooses to provide a physician at his or her own expense. In further support of their position, the Commissioners cited several published cases referencing application of LC 4605 dating as far back as 1943.

However, the Commissioners further stated as follows: "Because the defendant did not neglect or refuse to provide reasonable medical treatment through its MPN, applicant is liable for any medical treatment he chooses to self-procure pursuant to section 4605 and he is not free to later assert that defendant is liable for the costs of any of that treatment. Nor may the treating physician seek payment from defendant for medical treatment that applicant chose to self-procure from the physician."

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There are some important considerations, however, if you wish to rely on this case. First, it is not authority because it is neither a published decision of the Court of Appeal nor an *en banc* decision of the WCAB. Neither, as far as we know, has it been designated a “Significant Panel Decision”. Similar situations will have to be re-argued on their own merits. Second, in *Lane* there was a finding that the defendant had provided all necessary notices and that finding was not contested on Reconsideration.

Apparently, since the defendant was seeking an affirmative order to compel treatment within the MPN, the defendant prepared and offered an affirmative showing of all evidence supporting the contention that proper notice was given at all times required under the Labor Code. One of the lingering and, so far, unaddressed questions is whether the burden of proof rests with the defendant or the lien claimant as to adequate or defective notice. We believe that, when it comes to defending liability for self-procured liens, the defendant has to at least make a prima-facie showing of the existence of the MPN, but, having done so, the burden should shift to a lien claimant to prove lack of notice (in which case the burden should shift back to defendant to rebut the evidence).

We have no case law yet to support our contention, but we have obtained agreement from some trial level judges. We recommend, however, that the adjuster provide defense counsel with as much detailed information and evidence as possible in support of appropriate notices in every case in which the defense to liens will be self-procured non-MPN treatment.

We also have no case law on the admissibility of the reports of doctors procured outside the MPN. However, we suspect these reports will be found to be admissible based on LC 4605 and also

based on LC 4061(i), and LC 4061.5. Therefore, in some cases where strategically appropriate, the injured worker may opt to treat with Dr. Disability under a private insurance plan, banking on access to much more liberal reporting than might, in theory, be obtained through an MPN physician. Whether private carriers will provide these benefits knowing that alternative treatment is available at the employer’s expense, remains to be seen.

Article by Howard Stevens, Orange Office

## EAMS AND SCREAMS

It’s here, but the road is bumpy. As predicted in our previous newsletters, things are slowing down at the WCAB as the regional offices try to come to grips with life in the digital age. At the end of last month, Workcompcentral published an article alleging the WCAB was “choking” on paperwork. They noted that “Attorneys are complaining that, particularly in larger DWC district offices, thousands of declarations of readiness to proceed (DORs) and hundreds of settlements are not being processed because the Electronic Adjudication Management System (EAMS) is not able to consistently scan documents submitted to the Workers’ Compensation Appeals Board.” The article reports that the California Applicants’ Attorneys Association calls the situation “horrendous.” Former CAAA President Borg was quoted as saying that people who work in the Oakland DWC office told her there are as many as 3,000 DORs dating back to May sitting unprocessed in mail bins. She was also quoted as saying that these same workers told her there are “hundreds” of settlements waiting to be processed. Nonetheless, we are beginning to see some signs that, while perhaps not at normal speed, some of the logjam may be breaking up.

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We did receive the following *e-news* advisory from the *State Bar Workers' Compensation Section* which we thought worth repeating essentially verbatim, as it may assist our clients in avoiding unnecessary delays when attempting to create and file documents to the WCAB.

### TOP 10 USER ERRORS IN EAMS

#### 1. Ignoring the DWC Website

The DWC Website has a wealth of information. It should be checked on a regular basis as new information is added daily. The website is located at: [www.dwc.ca.gov/eams](http://www.dwc.ca.gov/eams). Now featured on the site is a new EAMS and legacy case number lookup tool, which allows parties to search for the EAMS case number with their Legacy case number, and vice versa.

#### 2. Forgetting to read BOTH sets of Regulations (both the DWC & WCAB)

Both the DWC and WCAB have proposed regulations to assist practitioners in navigating EAMS. We expect the regulations to become final sometime in November 2008, but the proposed drafts of both sets of regulations are currently viewable on the DWC website. The proposed DWC regulations range from 8 CCR §10210 to 10297 and cover everything from filing and submitting documents in EAMS to walk through procedures. The proposed DWC regulations can be found at: <http://www.dir.ca.gov/dwc/dwcRulemaking.html>.

The proposed WCAB regulations range from 8 CCR §§10301 to 10957 and cover everything from admissibility of evidence to the Reconsideration process. The proposed WCAB regulations can be found at: [http://www.dir.ca.gov/WCAB/WCABForum/WCAB\\_RulesOfPracticeAndProcedures\\_regs.htm](http://www.dir.ca.gov/WCAB/WCABForum/WCAB_RulesOfPracticeAndProcedures_regs.htm).

**3. FORM SUBMISSION** – Use current forms: The most common error in form submission is the use of old outdated forms, such as legacy forms or OLD versions of EAMS OCR forms. Use only the most current forms available, which can be found on the DWC website. In addition, the EAMS information is updated regularly. So use the most current version of all EAMS instruction guides, such as the OCR Forms Handbook. These guides can also be found on the DWC website. (Check the revision date next to the document on the website to ensure it is the most current version available.)

**4. Form Submission** - Use correct alpha prefix and submit to correct Unit: A Compromise & Release (C&R) settles an underlying case. It must be submitted to the ADJ unit of the DWC. An RU -122 form settles an injured worker's right to vocational rehabilitation. It must be submitted to the VOC unit of the DWC. These documents go to different units in the DWC: The C&R goes to the ADJ unit and the RU-122 to the VOC unit. So the two settlement documents cannot be submitted together using only one document cover sheet, even if they are both dealing with the same injured worker, the same date of injury and the same body part. Each form requires its own document cover sheet, document separator sheets, etc.

**5. Failing to follow the specified format for Data input.** EAMS is rather sensitive as to how it takes in data from the forms submitted, so it is critical to adhere to the specific EAMS format required. PLEASE do not include any "special characters" when inputting data on forms, such as dashes, commas, number signs, periods, etc. For example:

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|                 |              |                   |
|-----------------|--------------|-------------------|
|                 | YES:         | NO:               |
| Soc.Sec. Number | 553121234    | 553-12-1234       |
| Addresses       | JONES ST 204 | JONES ST.<br>#204 |
| Formal Names    | MS P D JAMES | MS. P.D.<br>JAMES |

**6. Do not insert spaces** between the three-letter prefix and the number in case numbers, but do insert a leading “0” if using a legacy case number

|              |               |
|--------------|---------------|
| YES:         | NO:           |
| ADJ999777555 | ADJ 999777555 |
| SFO0997755   | SFO 997755    |

**7. Use the specific calendar/date format required: MM/DD/YYYY**

|            |          |
|------------|----------|
| YES:       | NO:      |
| 05/01/2005 | 5-1-2005 |

**8. The EAMS case number is NOT the same set of numbers as the legacy case number.** SFO0449709 for John Smith will NOT be ADJ449709. Use the case number lookup tool mentioned in number one above to connect the new EAMS case reference number to a legacy case number.

**9. Filling in the “Author” field on the document separator sheet**

The document separator sheet—the form that tells EAMS what document follows it and how to index the document in the file—requires an “author” to be listed. So who is the author? The answer depends on who is filing the form and what kind of form follows the document separator sheet. If someone from a claims administrator or a representative office (such as a claims adjuster or an attorney) is the author of the document following the separator sheet, use the

uniform assigned name of that claims administrator or representative’s office in the author field. If the document following the separator sheet is written by a party who doesn’t have a uniform assigned name, the individual who wrote the report or document, or who is filing the form, is the author. For example, if an applicant attorney submits a DOR with a doctor’s report, the separator sheet that precedes the DOR form has the applicant attorney firm’s uniform assigned name in the author field. The separator sheet preceding the medical report has the name of the medical practitioner who authored the report in the author field, in this format: JOHN SMITH MD (remember, no special characters).

**10. Not realizing that the Central Registration Unit (CRU) is now open for business**

And last, but not least, the number 10 mistake most commonly made by practitioners is not realizing that the DWC’s new Central Registration Unit (CRU) is up and running. When completing EAMS forms, all parties must enter their own uniform name if they are a claims administrator or a representative and they must also enter the correct uniform name for claims administrators or representatives in the case. If those parties are misidentified, or the uniform name is not correctly entered, the document will be accepted for filing, but when it is determined by the clerk that a party has been misidentified it will need to be corrected, which will take additional processing time.

If a party is not in the database, they should register now by sending a letter on letterhead, with a signature from an authorized individual, to DWC’s CRU: The CRU’s e-mail address is: [cru@dir.ca.gov](mailto:cru@dir.ca.gov). The CRU’s fax number is: (888) 822-9309. The DWC database provides both the new EAMS uniform name as well as a numerical identification number. However, always use the name and not the number.

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## **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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