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Handling Liens in 2006

We have some relatively new and helpful tools at our disposal for dealing with disputed lien claims. Of special note is the fact that the initial burden is on the lien claimant to show legal entitlement to reimbursement. See Zenith v. Workers' Comp. Appeals Bd., (Capi) (2006) 71 Cal. Comp. Cases 374, Court of Appeal, 4th District.

Lien claimants have the initial burden of proving they are properly licensed or accredited. In workers' compensation matters, the burden of proof rests on the party or lien claimant "holding the affirmative of the issue." (Lab. Code, §§ 5705, 3202.5.)

Where the injured employee does not prosecute his or her claim, or where the underlying case has been settled with injury in issue, the lien claimant seeking treatment costs bears the burden of establishing the injury, entitlement to benefits and the reasonable value of the services. Although there is not a great deal of case law on this issue, a lien claimant must also prove that its

services were properly provided, meaning it complied with applicable licensure or accreditation requirements. (PM & R Associates v. Workers' Comp. Appeals Bd. (2000) 80 Cal.App.4th 357, 370 [94 Cal. Rptr. 2d 887, 65 Cal. Comp. Cases 347] [lien claimant had the burden to prove its liens were for properly provided services, including whether it had complied with the provisions of Business and Professions Code section 2069 and the attendant regulations governing medical assistants]; Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (1995) 34 Cal.App.4th 1204, 1212-1213 [40 Cal. Rptr. 2d 734, 60 Cal. Comp. Cases 289] [lien claimant had the burden of proving lien was for properly provided services, including documentation that properly licensed personnel supervised the therapy as required by official medical fee schedule]; see Continental Medical Center etc. v. Workers Comp. Appeals Bd. (2000) 65 Cal. Comp. Cases 162, 164-165 [writ denied] [lien claimant medical center was not entitled to

Los Angeles
5990 Sepulveda Blvd. Suite 600
Van Nuys, CA 91411
(818) 997-2100

Orange
1700 West Katella Ave.
Orange, CA 92867
(714) 288-1700

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payment for medical treatment because it was not a professional corporation at the time of applicant's treatment.

With regard to medical treatment, the lien claimant will also have the burden of showing the treatment was within applicable ACOEM Guidelines where the defendant can offer evidence to the contrary. This is true even where the treatment was rendered well before the Guidelines were adopted. Sierra Pacific Industries v WCAB (Chatham) (2006) 71 Cal. Comp. Cases 714, Ct. of Appeal 3rd District (Note: The lien claimant in this case has filed for intervention by the state Supreme Court, which has not yet responded).

There is a time limit for the filing of lien claims. Labor Code 4903.5 addresses lien filings as follows: "Limitations period for filing lien claim: (a) 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 the services were provided, or after one year from the date the services were provided, whichever is later."

The rule of thumb for the statute of limitations on filing a lien is that the lien must be filed within:
A. 6 months from the conclusion of the case;
B. 1 year from the last date services were provided;
C. 5 years from the date of injury whichever is later.

In light of these statutes and corresponding regulations, it may be possible to defeat a lien claim if the case in chief was concluded more than six months prior to the lien filing, if more than 5 years has passed since the date of injury, and if the treatment was rendered more than a year before the lien filing. If any of these defenses apply, an objection to the lien claim should issue and a request be made that the lien be disallowed or withdrawn.

Note however that the last section of LC 4903.5 gives a provider one year from the provision of services to file a lien, even if more than 5 years has elapsed from the injury date and 6 months from the final award/order. In addition, LC 4903.5 (b) allows a lien claim to be filed within 6 months of provider knowledge that an industrial injury has been claimed. Therefore if the lien has been filed after final case disposition, your objection should cite the final disposition of the case (i.e. C&R, Stipulations allowing future medical treatment, or Findings and award) and any evidence you have that the lien claimant was aware of the disposition more than six months before the lien was filed. You may also want to subpoena the lien claimant's file to determine what date they had knowledge of a worker's compensation claim filing.

The procedural requirements for lien filings are delineated in Title 8 CCR 10770, and LC 4903 (and following). If these requirements are not followed, a lien claim may be rejected by WCAB. Title 8 CCR 10770 provides that:

(a) Liens must be accompanied by a full statement or itemized voucher supporting the lien and a Proof of Service. Liens shall be served on the applicant, injured worker, employer,

Los Angeles
5990 Sepulveda Blvd. Suite 600
Van Nuys, CA 91411
(818) 997-2100

Orange
1700 West Katella Ave.
Orange, CA 92867
(714) 288-1700

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insurance carrier, and any attorneys or other representatives of record.

- (b) Liens must have the WCAB case number.
- (c) A lien holder must provide the name, address, and phone number of someone available with authority, to be contacted at time of conference or trial.
- (d) After filing, the lien holder shall continue to serve amendments on the parties. However amendments should be filed only upon service of a Declaration of Readiness, Compromise & Release, Stipulation with Request for Award, or Notice of Hearing.

LC 4903.1 (b) requires that when a Compromise & Release, or Stipulation with Request for Award is submitted to the WCAB for approval, the parties shall file any liens served on them.

We believe attempts to have lien claims disallowed based strictly on procedural errors may not be consistently successful in light of LC 4905 which provides that, where it appears in any pending proceeding, a lien should be allowed if it had been requested, the Appeals Board may order payment directly to the person entitled, even though no lien has been filed. As you can see, the WCAB is given much discretion in addressing liens and potential lien claims.

In order to improve your likelihood of obtaining lien disallowance or withdrawal, we recommend objection letters to include all possible lines of objection including reasonableness, statutes of limitation, and procedural issues. Contact should be made with all known providers before filing settlement documents to negotiate any outstanding balances, not just with those who have filed liens. Any liens served on the defense should be filed along with settlement documents. And all lien claimants should be served with

proposed settlement documents when they are filed with the WCAB (service should be documented via Proof of Service). If the lien has been filed subsequent to settlement approval, subpoena the lien holder's file to determine when they had knowledge of the workers compensation claim and amend your objection as appropriate after review of the records.

In addition to improving lien litigation results, we believe taking the above action will reduce the number of late lien filings and may, therefore, positively impact the amount of work required on closed cases and reduce the number of cases that must be reopened. As always, we are available to assist you with lien handling as well as any other aspects of workers compensation litigation.

Article by [Tim Claiborne](#), Technical Supervisor, Inland Empire

FOCUS ON



JEFF HAMMILL

Jeff Hammill has been the managing attorney of the firm's Inland Empire Office (serving the San Bernardino, Riverside and Pomona WCAB offices) since 2002. Jeff originally joined the firm in 2001. Jeff has been a workers' compensation

Los Angeles
5990 Sepulveda Blvd. Suite 600
Van Nuys, CA 91411
(818) 997-2100

Orange
1700 West Katella Ave.
Orange, CA 92867
(714) 288-1700

Inland Empire
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defense attorney since 1993 and was one of the founding partners of a defense firm in 1998.

On how he came to McDermott & Clawson, Jeff comments, "In 2001, I was presented with an opportunity by Jim McDermott to join the firm, a firm that practiced law in a different way, and I couldn't pass it up".

Jeff is a graduate of Occidental College and Whittier College School of Law. Jeff was a political science major in college and has continued to maintain an active interest and involvement in politics and policy. He has participated in multiple federal, state and local campaigns. He has made one run for political office himself but "the voters apparently wanted me to keep practicing law."

Jeff has continued to monitor and advise clients on legislative developments in the field of workers compensation. "The recently concluded legislative session offered multiple challenges to SB 899 and I expect that those will continue in next year's session. Employers and insurance carriers must continue to be vigilant in monitoring developments in Sacramento as well as in the courts", Jeff states. Jeff has recently joined the Government Affairs Committee of the California Coalition on Workers Compensation, a grassroots organization of employers. Jeff also serves on the Legislative Committee of his local Chamber of Commerce.

A resident of the Inland Empire, Jeff and his wife have been active in their sons' schools, soccer and Little League programs. Jeff and his wife also founded Katie's Hope Fund, in memory of their late daughter, to provide medical and educational scholarships to the clients of the Foothill Family Shelter in Upland, California.

"We are trying to, in our own small way, make a difference in the lives of people who are trying to turn their lives around. We thought it represented the type of work our daughter might have done."

Jeff is an avid baseball fan and enjoys playing golf: "I am trying to determine what will happen first: the Dodgers winning another World Series or my golf game improving. Right now the Dodgers look like a better bet."

Jeff can be reached in the firm's Inland Empire office at (909) 890-4386 or via e-mail: jhammill@mcdermott-clawson.com.

CASE UPDATES

Reasonable Treatment and Liens

With regard to medical treatment, the lien claimant will have the burden of showing the treatment was within applicable ACOEM Guidelines where the defendant can offer evidence to the contrary. This is true even where the treatment was rendered well before the Guidelines were adopted. **Sierra Pacific Industries v Workers' Comp. Appeals Bd.** (Chatham) (2006) 71 Cal. Comp. Cases 714, Ct. of Appeal 3rd District Although the lien claimant in this case is attempting a challenge in the Supreme Court, this decision is persuasive at least for cases in the 3rd Appellate District, and can be argued as citable authority before the judges in Southern California.

No Credit Against VRMA for Wages Earned

While paying attention to the concept that temporary disability is a wage replacement mechanism, the Court of Appeal, 4th District (Orange County) has ruled that an employer is not allowed to take an offset against VRMA liability for earnings obtained on a second job.

Los Angeles
5990 Sepulveda Blvd. Suite 600
Van Nuys, CA 91411
(818) 997-2100

Orange
1700 West Katella Ave.
Orange, CA 92867
(714) 288-1700

Inland Empire
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The Court reasoned that VRMA was limited below the TD ceilings and was intended as part of the old Vocational Rehabilitation Scheme. Entitlement to VRMA is based on Permanent Disability, a P&S status, and status as a Qualified Injured Worker. The case has just been certified for publication, meaning local WCAB judges will use it for guidance in similar disputed cases where the Qualified Injured Worker continues to earn money from a second job while in the rehabilitation process from the job from which he is now precluded. **Gamble v Workers' Comp. Appeals Bd. (2006) 71 Cal. Comp. Cases 1015.**

Calculating Value of Apportioned Awards

The Appellate Courts of California are all over the playing field on this issue, leaving defendants to argue the most favorable of the conflicting DCA opinions as to how they should be given credit for that part of permanent disability apportioned to non-industrial causes. The latest entry in the contest comes from the 1st DCA (San Francisco) in the case of **Brodie v Workers' Comp. Appeals Bd. (2006) 71 Cal. Comp. Cases 1007**, which has ruled that, in cases where there has been a prior overlapping award, the percentage of PD from that award should be translated to its value under current rates applicable to the later injury, and then the updated value of the first injury should be subtracted from the dollar value of the second.

We advocate arguing in favor of the conflicting opinion in **Welcher v Workers' Comp. Appeals Bd. (2006) 71 Cal. Comp. Cases 315**, where the 3rd DCA (Sacramento) maintained defendants should get credit for the percentage of PD previously awarded, since SB 899 was created to save money for defendants and, as opposed to the other approaches, only this method actually accomplishes legislative intent.

Los Angeles
5990 Sepulveda Blvd. Suite 600
Van Nuys, CA 91411
(818) 997-2100

Orange
1700 West Katella Ave.
Orange, CA 92867
(714) 288-1700

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Spinal Surgery Disputes and Utilization Review

A Workers' Compensation Appeals Board significant panel decision released September 7th 2006 overturned a California Division of Workers' Compensation policy that requires insurers or employers who object to spinal surgery to order utilization review before requesting a second opinion.

In **Brasher v. Nationwide Studio Fund** (OAK 0296709), 71 Cal. Comp. Cases ____, the WCAB clarified a provision of the Senate Bill 228 reform measure, passed in 2003, that required disputes over spinal surgery requests to go to a panel of physicians selected by the DWC for second opinions. The panel ruled that employers have four options when a treating physician requests spinal surgery:

1. Authorize the surgery.
2. Object to the surgery, pursuant to section 4062(b) by filing a DWC Form 233 within 10 days of receipt of the doctor's recommendation
3. Submit recommendation to utilization review.
4. Object to the surgery and pursue utilization review simultaneously, or object after utilization review so long as the statutory timelines for both processes are met.

Legal Briefs is a publication of [McDermott & Clawson, LLP](#) [Howard Stevens](#) (Orange office), Editor.

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