TROUBLING THOMAS DILEMMA

Questions & Answers

Question: When an applicant s case is settled with a Thomas C&R, what is the effect on the lien claimants?

Answer: The employer offers them 10 cents on the dollar. If the lien claimants refuse to accept this frivolous offer, the burden to prove the threshold issue of the case-in-chief (establishing industrial causation) shifts to, and falls squarely upon, the lien claimant s shoulders, prior to consideration of the necessity of the services, or the reasonableness of the charges.

Question: Can the lien claimant persuade the WCAB to order treatment charges paid by the employer, without establishing industrial causation?

Answer: No. Once the applicant has forever abandoned his claim to further benefits via a Thomas C&R, prevailing on the issue of industrial causation by the lien claimant is a prerequisite to the WCJ considering payment of the lien claimant s bills for treatment. LC§3202.5. Please see Williams v. Liberty Mutual, (1998) 26 CWCR 228. Although dicta in Kaiser v. WCAB, (Keifer) (1974) 39 CCC 857, may be to the contrary, subsequent case law established that the lien claimant was not relieved of the burden of proving industrial causation simply by the approval of a Thomas C&R. In Sidle v. Zurich Ins. Co., (1994) 22 CWCR 164, the lien claimant prevailed on the case-in-chief, thereby establishing industrial causation, and was properly awarded its lien claim; however this may be due to the fact the WCJ refused to allow adverse defense medicals to be entered into evidence because of a violation of CCR §10609. In the absence of the WCJ s consideration of adverse defense medical evidence, the defendant in Sidle was left, in essence, without a defense. In Abera v. Beverly Hilton, (1991) 19 CWCR 234, the WCJ made a determination of no industrial causation, absent testimony, and based solely on the PTP s medical reports, the defense medical reports, and the report of the AME. The lien claimant in Abera failed to prove the threshold issue of industrial causation, and accordingly its lien was not allowed.

Question: What happens if the lien claimant fails to establish industrial causation at the lien trial?

Answer: The WCJ will rule that there was no industrial causation; all treatment is considered self-procured and the defendant is not liable for payment.

Question: Once the WCJ has ruled there was no industrial causation and all treatment is considered self-procured, can the lien claimant pursue the applicant outside the WCAB for payment of treatment bills?

Answer: Yes, but only after a finding of no industrial causation. Once the WCJ has made a finding there was no industrial causation, the WCAB has removed itself as the exclusive venue for (1) litigating liability on the part of the defendant to provide or pay for medical care, (2) the necessity of services furnished an industrially injured patient to cure or relieve, and (3) the reasonableness of the charges. The WCAB only has jurisdiction over industrial injuries.

Question: When a healthcare provider furnishes services to an applicant who has claimed an industrial injury, isn t the healthcare provider forbidden by the labor codes from billing, and collecting from, the injured worker?

Answer: Yes, with exceptions. (See LC §3751) However, once a WCJ has made a finding of no industrial causation, the applicant is transformed into nothing more than a patient with a past due balance. If, in addition to a DWC Form 6 (green lien), the patient also signed a contract with the healthcare provider, which promised to ensure the healthcare provider s bills were to be paid upon settlement of the case-in-chief, the patient remains]iable. If this contract also states that in the event litigation is required to collect the balance due, “the prevailing party is entitled to court costs, filing fees, and

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reasonable attorney fees at trial and all levels of appeal," the patient with a past due balance (previously an applicant) may find himself responsible for a lot more than just the medical charges.

Question: If an applicant can be held liable for a medical provider s charges outside the WCAB, is the applicant s attorney also vulnerable to a legal malpractice claim?

Answer: Yes. An applicant s attorney can prevent legal malpractice exposure by insisting the applicant sign a document which states that by agreeing to settle via a Thomas C&R, the applicant knowingly, voluntarily, and intelligently acknowledges he may be exposed to medical treatment charges. However, as a practical matter, few applicants will be foolish enough to make a fully informed, knowledgeable, and voluntary decision to enter into a Thomas C&R if the applicant knows in advance that he may have to pay, out-of-pocket, for his medical trbatment bills.

Question: How can an applicant s attorney protect his client from a judgment in civil court for treatment charges, possible garnishment of wages, an adverse credit report lodged with Esperian, Equifax, and/or Trans-Union, and at the same time protect himself from a malpractice action?

Answer: In paragraph 7 of the C&R, where it usually states, "defendant to pay, adjust, or litigate all outstanding liens of record" ensure that it also states, "applicant to be held harmless."

Question: What is the effect of "applicant to be held harmless" on the lien claimants?

Answer: It creates a contractual obligation on the defendant to indemnify the applicant outside the WCAB. If litigation against the applicant is initiated outside the WCAB, the defendant has a legal contractual responsibility to defend the applicant. After all, the indemnification of the applicant is indeed a part of the consideration furnished the applicant, in exchange for the release of the worker s claim for compensation. Additionally, the lien claimant can name the employer as a co-defendant in-interest.

Question: If the WCJ has ruled adversely on the issue of industrial causation, and the lien claimant(s) initiate proceedings outside the WCAB to collect for medical treatment charges, does the OMES apply, or are the labor codes relevant?

Answer: No. The OMFS and the labor codes become inapplicable, as does the concept of medical necessity. The sole issue to be decided by the civil court is the legality of the contractual arrangement between the healthcare provider and his patient.

"It is not reasonable to believe that a medical provider should be left without any remedy at all merely because it was misled Into submitting to the exclusive jurisdiction of a tribunal which ultimately determines that it has no jurisdiction after all." "Once the applicant s liability for the debt has been established by the issuance of a civil judgment, either the applicant or the lien claimant would have the right to demand that the defendant indemnify the applicant under the hold harmless agreement which was part of the consideration for the release of the workers compensation claim."

Lien Claims in Workers Compensation, Third Edition (1999), Hold Harmless Agreements, pp. 29-30, Pamela Foust, WCJ.

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