California Workers' Compensation Institute

Significant Decision

No. 19-04 November 15, 2019

ASHLEY COLAMONICO V. SECURE TRANSPORTATION

WCAB EN BANC DECISION
(ADJ 9542328)

FILED: NOVEMBER 14, 2019

Defendant's failure to issue an Explanation of Review in response to a med-legal billing does not constitute a waiver of objections under Labor Code §§4620 and 4621.

Significance: A lien claimant has the initial burden to prove all elements necessary to establish entitlement to payment for a medical-legal service, and only after having done so may the lien claimant proceed to address the reasonable value of those services pursuant to the framework under §4622.

Facts: Applicant utilized Med-Legal Photocopy Services to obtain records at multiple locations between 2014 and 2015, and the invoices were submitted to Sedgwick, the employer's third party administrator. In 2018, Sedgwick issued Explanations of Review (EOR) for the 2014-2015 services. Following trial on the necessity and value of the copy services, WCJ Jeffrey Morgan (LBO) ruled that defendant's failure to timely comply with the statutory framework for reimbursement of med-legal expenses under §4622 had resulted in a waiver of all objections to the unpaid portions of the lien claimant's billings. The WCJ held that the lien claimant was entitled to full payment plus penalty and interest, and defendant appealed.

Holding: In an en banc decision, the Appeals Board reversed the WCJ and held instead that a defendant's obligations to comply with the framework for reimbursement of med-legal expenses under Labor Code §4622 do not arise until and unless a lien claimant has complied with §§4620 and 4621. In other words, the lien claimant must first establish that: 1) a contested claim existed at the time the expenses were incurred; 2) the expenses were incurred for the purpose of proving or disproving the contested claim; and 3) the expenses were reasonable and necessary at the time they were incurred. The case was remanded to the trial level for a determination of whether the lien claimant has satisfied its burden of proof on these issues.

Discussion: Inasmuch as the plain language of §4622(f) states that "[t]his section is not applicable unless there has been compliance with Sections 4620 and 4621," and given that the applicable regulation (8 CCR §10451.1(f)(1)(A)) states that a defendant who fails to respond to a provider's billing as required "shall be deemed to have finally waived all objections to a medical-legal provider's billing, *other than compliance with Labor Code sections 4620 and 4621*" – the decision in this case seems foreordained. "[C]ompliance with both sections [4620 and 4621] is necessary before section 4622 is applicable."

And yet, the Appeals Board issued this as an en banc decision, underscoring the importance and significance of the case. Which begs the question, Why is such an obvious result worthy of en banc status?

Sadly, the answer to this question lies in the reality that many judges, particularly in Southern California, continue to rely on the outdated rationale set forth in *Otis v. City of Los Angeles*, an en banc decision from 1980 in which it was held that a defendant's failure to timely object to the reasonableness and necessity of the copy services constituted a waiver of those objections. But, as the new en banc decision here carefully explains, *Otis* was based on statutes that have been repealed and replaced several times over. As part of the 1993 reforms, the Legislature changed things altogether:

> [T]he Legislature explicitly shifted the burden from the employer to the provider: the burden was no longer on the defendant to object to the reasonableness or necessity of the provider's services. Instead, the initial burden was on the provider to show its services were reasonable and necessary.

The decision here expressly disapproves of previous panel decisions that have applied the *Otis* rationale to the new statutory framework set out in §§4620, 4621, and 4622.

As the new decision carefully lays out, a lien claimant's initial burden in proving entitlement to reimbursement for a medical-legal expense is to show that a "contested claim" existed at the time the service was performed. Under §4620(b), a contested claim exists when the employer knows or should know of a claim for compensation, and the employer denied the claim or failed to act within a reasonable time regarding the claim. And simply put, a defendant does not waive its objections under §§4620 or 4621 by failing to raise those objections in an EOR pursuant to §4622.

However, the Appeals Board provided a closing admonishment to defendants who might interpret the result in this case as permission to routinely ignore obligations to submit an EOR in objection to a med-legal expense. The decision pointedly refers to the potential exposure under §4622(a) for penalty and interest retroactive to the date of receipt of the billing, and to the opportunity for a discretionary award of sanctions for bad faith tactics designed to delay resolution of the lien claim under §5813.

As an en banc decision, the *Colamonico* case represents the current statutory interpretation by the administrative agency charged with implementing the law, and the decision is binding on all WCJs and any future Appeals Boards (both en banc and panels).

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