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WORKERS' COMPENSATION NEWSLETTER

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NOT GETTING WHAT YOU PAID FOR –
An Examination of Compromise & Release Language After *Morales* & *Whitson*

By: Matthew Lee, LFLM San Francisco

An Applicant has agreed to settle a case by Compromise and Release ("C&R"). You dutifully add in language to Paragraph 9 that the settlement resolves any and all claims for liability and injury during the period of employment. You've protected the employer from all future claims based on the claimed injuries and dates of injury right? Not so fast. After the recent Panel Decisions in *Morales v. Universal Furniture* (2017) 45 CWCR 262 and *Whitson v. Department of Social Services* (2017) 45 CWCR 286, defendants must pay particular attention to Paragraphs 1 and 3 in drafting their C&Rs to ensure that their clients are truly getting the release they paid for.

Morales v. Universal Furniture

In *Morales*, the WCAB was asked to determine whether the language in a C&R released a cumulative injury claim for internal systems. Applicant had filed an application alleging a specific injury and a second application alleging a cumulative trauma ("CT") with a date range that included the specific injury date. Parties prepared a single C&R to resolve both cases. In Paragraph 1, the parties listed various body parts under the specific and CT injuries. However, internal injury was only listed under the specific injury, not under the CT. Additionally, parties handwrote under Paragraph 9: "Resolves all liability/claims against [defendant]."

After the C&R was approved, applicant filed a new CT claim for internal injury using the same, previously claimed CT period. Defendants objected and the WCJ agreed that the C&R resolved the internal injury CT claim.

On appeal, the WCAB reversed the decision of the WCJ. The WCAB determined that the C&R, when read as a whole document, did not settle an internal injury claim as part of the CT. They noted internal injury was missing from the list of CT body parts in Paragraph 1 and specifically referenced the language of Paragraph 3, which states that a C&R "is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph 1 and further explained in Paragraph No. 9 **despite any language to the contrary** elsewhere in this document or any addendum." (emphasis added) Because the C&R included internal injury as a body part on the specific, but not on the CT, the WCAB found this evidenced intent to exclude internal from the settlement of the CT claim, irrespective of the contrary "resolves all liability/claims" language included under Paragraph 9. Applicant was allowed to proceed with the new CT claim for internal injury.

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CALIFORNIA'S LIEN PROBLEM:

Comparing Northern California and Southern California Lien Litigation and a General Refresher on Lien Defenses in Denied Claims

By: Kay Evenson, LFLM Anaheim

Having just recently transferred from LFLM's San Jose office to our Anaheim office, one difference was immediately apparent. There are a lot of lien issues in Southern California. While we still have liens and lien conferences in Northern California, typically, one could expect liens from one or two treating doctors (usually a pain management doctor or chiropractor), a diagnostics provider, and an interpreter, as well as EDD.

Prior to transferring to Southern California, I was warned that while we are still in the same state, it was like practicing in an entirely new legal system, especially when it came to liens. It is not uncommon to see 15, 20 even 30 lien claimants on a single case in Southern California. According to the California Commission on Health and Safety's 2011 lien report, the presiding Judge of the Los Angeles WCAB estimated that liens take up 35% of the court's calendar (*CHSWC Liens Report, January 5, 2011, page 1*).

Why more liens are filed in Southern California as compared to Northern California seems to still be somewhat of a mystery. According to the studies referenced by the RAND Corporation, 40% of all cumulative trauma claims are filed after leaving employment and these types of claims are extremely common in Sothern California. Employers are more likely to deny post-termination CT claims, despite an often insurmountable burden to prove the defense with respect to cumulative trauma claims. Furthermore, the number of CT claims filed has more than doubled over the last decade.

The RAND report also notes another critical difference between the liens in Southern California and those in Northern California, specifically the value of the liens as pled versus the amount paid to resolve those liens. In Southern California, the liens in denied CT claims often settle for 10% of the total balance. However, in Northern California, the total lien balance was approximately two to three times as much as the amount paid to resolve the lien.

As the researchers at RAND point out, if faced with often losing up to 90% of the value of their services in these cases, one would assume that these providers would cease to provide services to applicants in these claims. However, in practice, these high value liens do not seem to be going anywhere, evidencing a potential fraudulent scheme as opposed to legitimate treatment practices. (*Provider Fraud in California Workers' Compensation: Selected Issues by Nicholas M. Pace, Julia Pollak RAND, 2017 page. Xiii*).

Whatever the reason for the higher number of lien claims in Southern California, it may be indicative of what the future of liens may look like in Northern California. Attorneys and adjusters should keep in mind that with denied cases, uncontrolled levels of treatment and diagnostic testing may follow.

That all being said, even though there are differences when it comes to liens in Northern and Southern California, we are still in the same state and the same rules apply. As a refresher, here is a breakdown of how to litigate liens when a case has settled with an AOE/COE dispute.

Statute of Limitations

In the split panel decision in *Guerrerro v. Easy Staffing 2016 Cal. Wrk. Comp. P.D. Lexis 123*, the WCAB held that under Labor Code section 4903, liens for dates of service which occurred prior to 7/1/13 must be filed within 3 years of those services. Liens for dates of service after 7/1/13 must be filed within 18 months of those services.

Pay close attention to the dates of services to determine if a lien claimant is barred from pursuing their lien based on a statute of limitations defense.

Filing Fees and Labor Code Section 4903.05 Supplemental Declaration

For all liens filed after 1/1/13 for reasonable medical expenses incurred by the injured worker, the lien claimant must pay a $150.00 filing fee.

Senate Bill 1160 brought with it some sweeping changes to the California Workers' Compensation lien system. Arguably the most notable changes were the requirements regarding supplemental lien declaration forms under Labor Code section 4903.05(c).

If a lien was filed before 1/1/13, no declaration is required. For liens filed 1/1/13 to 12/31/16, lien

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claimants must file a supplemental lien declaration. For liens filed after 1/1/17, there is a new DWC lien form.

Liens filed without a Labor Code Section 4903.05(c) Declaration will be dismissed by operation of law with prejudice, meaning that the lien claimant cannot come back and file a another lien to seek payment for the same service.

To determine if a lien has been dismissed, the DWC has provided a convenient searchable website at the following link:

https://www.dir.ca.gov/DWC/DismissedLiens.asp

Liens Stayed When the Provider Charged With a Criminal Offense Involving Medical Fraud and Provider Suspensions

Another change brought about by Senate Bill 1160 and Assembly Bill 1244 was codified by Labor Code Section 4615 which automatically stays any lien filed by a physician, provider of medical treatment or medical-legal provider, as well as any accrued interest related to their lien, upon the filing of criminal charges for an offense involving fraud against "the workers' compensation system, medical billing fraud, insurance fraud, or fraud against the Medicare or Medi-Cal programs."

The stay remains in effect "from the time of filing of the criminal charges until the disposition of the criminal proceedings." (*California Labor Code Section 4615(a)*).
To determine whether a lien is stayed under this section, please refer to the following link provided by the WCAB:

http://www.dir.ca.gov/Fraud_Prevention/List-of-Criminally-Charged-Providers.pdf

In addition to stayed liens, under Labor Code Section 139.21(a)(1), providers are suspended from participation in the workers' compensation system when they have been have been convicted of a medically-related felony or misdemeanor that fits the within the descriptions of activities as outlined in the statute. After a special lien proceeding, if is it determined that the particular lien of the suspended provider does not arise out of the conduct which subjected the provider to the suspension, a workers' compensation judge has discretion over where to adjudicate the lien or transfer it back to the district office where the claim is venued. (*Labor Code Section 139.21(i)*). For a list of suspended physicians/providers, please refer to the following link:

http://www.dir.ca.gov/Fraud_Prevention/Suspension-List.htm

Burden of Proof

The WCAB provided a detailed explanation of the obligations with respect to the burden of lien claimants to prove the legitimately of their claims and right to reimbursement for treatment provided in the 2012 decision *Torres (Tito) v. AJC Sandblasting (ADJ909554 (LAO 0824849), ADJ1856854 (LAO 0837910)), 77 Cal. Comp. Cases 1113*. There, the WCAB held that under Labor Code Sections 3202.5 and 5705, "a lien claimant must prove by a preponderance of the evidence all elements necessary to establish the validity of their lien before the burden of proof shifts to the defendant."

In that claim, the WCAB held that a lien claimant that proceeds to trial without any evidence or with evidence that will be unable of establishing its burden of proof constitutes frivolous and bad faith action within the meaning of Labor Code Section 5813, and gives rise to the imposition of an award of sanctions, fees and costs.

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COMPROMISE & RELEASE LANGUAGE

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Whitson v. Department of Social Services

In *Whitson*, applicant resolved a CT claim for various body parts by C&R. In Paragraph 9, parties added "Applicant stipulates that there are no other unfiled injuries during the period of employment with [**wrong employer's name**] and that no issues remain." An addendum to the C&R stated:

> "Employee acknowledges and represents that at the time of the execution of this Compromise and Release the employee is unaware of any industrial injuries or industrially related medical conditions other than those which are released by the Order Approving the Compromise and Release.
>
> As part of the consideration of the settlement, it is understood that the entire period of employment with this employer is covered by this Compromise and Release agreement whether an Application or Claim Form has been filed or not filed (8 CCR Section 10401)."

After the C&R was approved, applicant filed a new application alleging a specific injury that occurred on a date that was: 1) after the prior claimed CT period, but 2) before the date the C&R was executed and approved. Defendant filed a Petition for Dismissal, claiming the specific injury was covered by the C&R. The WCJ denied the petition and, on appeal, the WCAB affirmed.

The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Matthew Lee (San Francisco) and Kay Evenson (Anaheim).

Should you have any questions or comments regarding the Laughlin, Falbo, Levy & Moresi newsletter, or would like to suggest a topic or recent case you think would be of interest, please contact:

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The WCAB again cited to Paragraph 3, stating that a C&R "limits resolution to only those claims listed in paragraph 1 notwithstanding an addendum with contrary language." Even though the addendum here purported to cover "the entire period of employment … whether an Application or Claim Form [had] been filed or not filed," the WCAB indicated this language was ineffective because "[b]y its express terms, paragraph 3 cannot be superseded by [Paragraph 9 or any addendum]." The WCAB noted in dicta that if applicant had wanted to resolve all claims against the defendant and not have the agreement limited by Paragraph 3, "parties could have deleted paragraph 3 from the form settlement." The WCAB also noted the stipulation included in paragraph 9 was ineffective because it referenced an employer applicant did not work for and who was not a party to the case. Applicant was allowed to proceed with the new specific injury claim.

Why the WCAB Made These Decisions

Labor Code Section 3202 provides that Workers' Compensation rules and regulations "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." Though this was never directly cited to by the WCAB in *Morales* and *Whitson*, these cases show the WCAB will even apply the principle of liberal construction to contract interpretation.

In both cases, the WCAB chose to ignore the contract principle of specific vs. general – specifically negotiated and written terms are normally given deference over boilerplate language. Instead, the WCAB appeared to use the liberal construction principle of Labor Code Section 3202 along with another general contract principle – that contract ambiguities are generally held against the drafter – to find in favor of the injured worker. The WCAB seemingly will not intervene and side with a defendant to resolve a contract dispute if they determine there is some ambiguity or error in the document.

Can Parties Really Delete Paragraph 3 From A C&R, As Suggested by *Whitson*?

On its face, *Whitson* seemingly provides a simple solution to allow parties to broaden the scope of C&Rs – delete Paragraph 3. However, California Code of Regulations Section 10408(a) states that compromise and release agreements "**shall be** on a form prescribed

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and approved by the Appeals Board." (emphasis added.) Arguably, removing Paragraph 3 from a C&R would alter the form approved by the Appeals Board. In fact, at a recent Department of Workers Compensation educational conference, a panel of WCJs unanimously stated (with the caveat that they were only speaking for themselves) they would not approve any C&R that attempted to delete or remove Paragraph 3 as not meeting the requirements of CCR Section 10408(a). Defendants cannot assume that the Board will approve and allow a settlement that modifies of changes the approved form language of a C&R.

Ways to Strengthen C&R Language

There are a couple of things defendants can do to improve their C&Rs and minimize the risk of a comeback claim for injuries an employer thought was being settled:

1) Avoid simple drafting errors. Errors such as identifying the wrong name of an employer or a wrong body part may seem like mutual mistakes that can and should be corrected to preserve the integrity of a C&R. However, the WCAB does not appear to be willing to intercede in situations like this and will instead construe any and all contract ambiguities against the defendant drafter.

2) Clearly identify all of the body parts and injuries intended to be released in Paragraph 1. Although *Morales* and *Whitson* discuss Paragraph 3 in depth, Paragraph 1 is the driving force of a C&R, as it limits "settlement of the body parts, conditions, or systems and for the dates of injury." If a body part and/or an injury type is not listed in Paragraph 1, the WCAB will not deem it to be released by a C&R. Defendants should also note that Paragraph 1 states "body parts, conditions and systems **may not be** incorporated by reference to medical reports."

Notwithstanding the suggestions above, how each settlement is crafted to address this issue should be dealt with on a case-by-case basis. While the decisions in *Morales* and *Whitson* may appear surprising at first glance, they are consistent with prior WCAB decisions and the liberal construction mandate of Labor Code Section 3202. The WCAB will not excuse erroneous or ineffective C&R drafting after the fact. It is the responsibility of the defense attorney to indubitably state all of the injuries and body parts being resolved and all of the conditions of the resolution in a C&R so that an employer receives the release they seek. ⌘

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In the case of a denied claim, the lien claimant holds the burden of proving that applicant suffered an injury in the course of and arising out of their employment. They must also prove that the treatment provided was reasonable and necessary to cure and relieve the effects of the industrial injury. In practice, in absence of a medical-legal opinion establishing industrial injury and any testimony from the applicant, this burden may be insurmountable for the lien claimant at trial.

However, it would not be wise for a defendant to depend on a lien claimant's failure to meet an AOE/COE burden. As a part of good practice, defense counsel should appear at any lien conference and trial with evidence that supports the denial of the claim. This evidence includes listing employer statements and witnesses, investigation reporting and authentication witnesses, medical reporting which refutes a claim of industrial injury, as well as any objection documentation with respect to the lien at issue.

At the end of the day, no matter where the lien is filed, if a case is settled while still denied, defendants have an arsenal of defenses have at their disposal to defeat lien claims and negotiate discounted settlements. Lien claimants will go blue in the face arguing about whether a denial is valid and why their lien should be paid. However, at the end of the day they know that they will face an uphill battle at trial without evidence to support industrial injury as well as the reasonableness of treatment. ⌘

UPCOMING CONFERENCES

2018 RIMS Annual Conference
Risk Management Society
April 15-18, 2018
Henry B. Gonzalez Convention Center
San Antonio, Texas

2018 CAAA Summer Convention
California Applicants' Attorneys Association
June 28 – July 1
Disneyland Hotel - Anaheim
*At the conference, **Jeff Lowe** (LFLM Oakland) is a panelist on a session titled, "Litigating Lien and Credit Issues in PI/WC Crossover Cases".*

2018 CCWC Annual Conference
California Coalition of Workers' Compensation
July 11 – July 13
Disney's Grand Californian Hotel & Spa - Anaheim
LFLM is sponsoring the conference registration bags and lanyards.

2018 California Workers' Compensation & Risk Conference
September 4 – September 7
Monarch Beach Resort – Dana Point
LFLM is sponsoring the confernece registration bags.
*Stop by the LFLM Exhibit Space - **Booth #TT110**.*

2018 CAJPA Conference
California Association of Joint Powers Authorities
September 11 – September 14
South Lake Tahoe
*At the conference, **Marc Leibowitz** (LFLM San Diego) will be presenting a session on the risks of entanglement between Workers' Compensation, Risk Management and Human Resources: "Why Can't I Share This With My Other Departments".*
***Susan Hastings** (LFLM Oakland) will also be presenting an interactive session on the issues of injury presumptions, 4850 benefits and industrial disability retirement: "What You Don't Know WILL Hurt You".*
*Come by to see LFLM at **Booth #P515** or the **LFLM Tasting Table during the Thursday (9/13) Night Reception**.*

2018 National Workers' Compensation & Disability Conference
December 5 – December 7
Mandalay Bay – Las Vegas