

Public Benefits, and Government Entities (California)

Reimbursement Rights, and Settlement Strategies
By Patrick C. Gorman, Esq.



Medical Treatment

Medical Benefits, for industrial injuries, are defined in Article 2 of the California Labor Code, as follows:

LC 4600: [Medical Treatment] that is reasonably required to cure or relieve the injured worker from the effects of his or her injury shall be provided by the employer. In the case of his or her neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment.



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Medical Treatment Limitations

- Generic drug equivalent when available
- Medical Treatment Utilization Schedule (MTUS) shall be presumed correct on the issue of extent and scope of medical treatment (LC 4604.5)
- Reasonableness and Necessity is not subject to the jurisdiction of the WCAB pursuant to LC 4610.5 (Dubon v. World Restoration)
- Any lien stayed upon filing of criminal charges against the provider for workers' compensation, medical billing, insurance, Medicare, or Medi-Cal fraud



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Rights of Medi-Cal Welfare and Institutions Code



There are two types of healthcare coverage identified by the W&I Code, "Public" and "Private".

If a person receives health care furnished or paid for by a publicly funded health care program, the carrier of the person's private health care coverage **shall reimburse** the publicly funded health care program the cost incurred in rendering that care to the extent of the benefits provided under the terms of the policy for the items provided or the services rendered.



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Publicly Funded Health Care Program



“Publicly funded health care program” shall mean care or services rendered by a local government or any facility thereof, or health care services for which payment is made under the California Medical Assistance Program established by Chapter 7 (commencing with Section 14000) of Part 3 of this division by the State Department of Health Services or by its fiscal intermediary, or by a carrier or other organization with which the State Department of Health Services has contracted to furnish those services or to pay providers who furnish those services.

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In Plain English

Medicare, Medi-Cal, IHSS, Healthy Families, any locality operated health center, the California Regional Center, or any other organization that the State Department of Health Services has contracted to furnish those services, or pay for those services.

Must be contracted by the State Department of Health Services!
Non-profits, community clinics, etc do not qualify.



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Private Health Care Coverage

“private health care coverage” means any health insurer, self-insured plan, group health plan, as defined in Section 607(1) of the Employee Retirement Income Security Act of 1974, service benefit plan, managed care organization, including health care service plans as defined in subdivision (f) of Section 1345 of the Health and Safety Code, licensed pursuant to the Knox-Keene Health Care Service Plan Act of 1975 (Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code, pharmacy benefit manager, **or other party that is, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service.**

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In Plain English

Any provider of health care services or payment for services that does not have a contract with the State Department of Health Services to furnish or pay for those services.

For now, private insurance purchased under Covered California, but subsidized by Medi-Cal, are not defined as “publicly funded health care programs”. This is a gray area.

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Medi-Cal Reimbursement

Each publicly funded health care program that furnishes or pays for health care items or services under this division to a person having private health care coverage shall be entitled to be subrogated to the rights that person has against the carrier of the coverage to the extent of the health care items provided or services rendered.



What are Your Obligations?

An entity providing private health care coverage shall do all of the following:

1. Accept the state's right of recovery and the assignment to the state of any right of an individual or other entity to payment from the party for an item or service for which payment has been made under the state plan.
2. Respond to any inquiry by the state or a provider regarding a claim for payment for any health care item or service that is submitted not later than three years after the date of the provision of that health care item or service.
3. Agree not to deny a claim submitted by the state or a provider solely on the basis of the date of submission of the claim, the type or format of the claim form, or a failure to present proper documentation at the point-of-sale that is the basis of the claim if both of the following occur:
 - i. The claim is submitted by the state or a provider within the three-year period beginning on the date on which the item or service was furnished.
 - ii. Any action by the state or a provider to enforce its rights with respect to that claim is commenced within six years of the state's or provider's submission of the claim.

*3 years from date of service claim must be submitted, and then 6 years to take action



In Plain English

Medi-Cal is entitled to reimbursement if they have provided treatment that is:

- Reasonably Necessary to cure or relieve the effects of a compensable industrial injury
- That falls under the MTUS, except for extraordinary circumstances
- That was not subject to LC 4610.5 (timely UR non-certification, and without IMR overturn)
- Payable at the OMFS, absent a rebuttal to presumption of the OMFS (critical care)
- And at the rate for the generic drug equivalent if available.



In Plain English (Cont')

- Medi-Cal must submit a "claim" within 3 years from the date of treatment. A claim may be any notice of a right to recover.
- A "Notice of Potential Medi-Cal Lien" does not constitute a "claim". A "Notice of Lien" or "Notice of Claim" must be communicated.
- Upon receipt of a claim from Medi-Cal, so long as the claim is submitted within 3 years from the date of service, a response to that claim is required.



Notice of Lien vs. Notice of Potential Lien

State of California
 Department of Health Care Services
 Recovery Unit
 P.O. Box 97742
 Sacramento, CA 95899-7425
 (916) 445-9592
 October 17, 2017

DMCS ACCOUNT NUMBER : [REDACTED]
 DMCS CASE NUMBER : [REDACTED]
 HOSPITAL : [REDACTED]
 DATE OF INJURY : 08/31/2013
 WC# NUMBER : [REDACTED]

NOTICE OF POTENTIAL MEDICAL LIEN

The Department of Health Care Services (DHCS) received a notification regarding a potential workers' compensation claim involving the above-named individual. It is confirmed that this individual is a Medi-Cal beneficiary and may have received health care services paid for by Medi-Cal.

State law requires a workers' compensation carrier to make reimbursement to Medi-Cal when the paid medical services were comprehensive medical benefits under the Workers' Compensation Act (WCA) Sections 10000, 10020. State Medi-Cal funds have been requested for reimbursement against the carrier to service California and Federal law requires the State to seek reimbursement from the responsible carrier. Medi-Cal is the party of last resort under the Public Health Law, Sections 14130 of the Health and Safety Code and 14130.5 through 14130.9 of the Health and Safety Code.

Please provide an update on the current status of this claim, including information regarding upcoming trials, hearings or other pertinent case activity, by returning the attached 3199 (Notice of Potential Lien) form to the address below. Please provide "Notice" compensation to provide updates and attach electronic copies of supporting documents.

You may contact the Workers' Compensation Recovery Program at (916) 445-9591 if you have any questions. Thank you for your cooperation.

Workers' Compensation Recovery Program
 WCR990 (06/17)
 19-1185

Office of California
 Department of Health Care Services
 Recovery Unit
 P.O. Box 97742
 Sacramento, CA 95899-7425
 (916) 445-9592
 November 01, 2017

DMCS ACCOUNT NUMBER : [REDACTED]
 DMCS CASE NUMBER : [REDACTED]
 HOSPITAL : [REDACTED]
 DATE OF INJURY : 08/31/2013
 WC# NUMBER : [REDACTED]

NOTICE OF MEDICAL LIEN

The Department of Health Care Services (DHCS) is obligated for covering Medi-Cal expenditures resulting from a workers' compensation claim involving the above-named individual. It is confirmed that this individual is a Medi-Cal beneficiary and may have received health care services paid for by Medi-Cal.

State law requires a workers' compensation carrier to make reimbursement to Medi-Cal when the paid medical services were comprehensive medical benefits under the Workers' Compensation Act (WCA) Sections 10000, 10020. State Medi-Cal funds have been requested for reimbursement against the carrier to service California and Federal law requires the State to seek reimbursement from the responsible carrier. Medi-Cal is the party of last resort under the Public Health Law, Sections 14130 of the Health and Safety Code and 14130.5 through 14130.9 of the Health and Safety Code.

Please provide an update on the current status of this claim, including information regarding upcoming trials, hearings or other pertinent case activity, by returning the attached 3199 (Notice of Potential Lien) form to the address below. Please provide "Notice" compensation to provide updates and attach electronic copies of supporting documents.

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Workers' Compensation Recovery Program
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Thomas v. Sports Chalet (1977) "But I have a Thomas Finding!"

- Pertains to Vocational Rehabilitation Benefits and Supplemental Job Displacement Benefits
- Does not apply to Med-Legal Liens (Chevron Texaco v. WCAB (Ismael Gonzales)(2003) 68 Cal. Comp. Cases 765)
- Invalid or negated if "bare assertions unsupported by the medical reports or other information available to parties." (Kaiser Foundation Hospital v. WCAB (1979) 43 Cal. Comp. Cases 1300)
- The burden may still be on the claimant (Medi-Cal) to prove injury, if the injury or body part are denied, but Thomas Finding does not preclude litigation.



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Protect Yourself from Liability after the case-in chief has resolved

- Ensure that your settlement documents, or stipulations to covered body parts, are very specific (for example: L5-S1, instead of “back”, “low back”. Ulnar nerve instead of “elbow”, etc.)
- Ensure that you always include language stating that all other body parts are denied.
- Medi-Cal does not have an absolute right to recovery. If an injured worker “self procured” treatment not covered under the Labor Code (timely UR Denial, IMR Uphold, overlapping narcotics) object to the lien demand from Medi-Cal.
- While you should include Thomas Language in any C&R, you may want to include specific stipulations that injury or body parts are not compensable.
- Include findings of non-compensability or Addendum in the actual Order Approving C&R, or the Award, in addition to the settlement documents themselves.



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Use Exculpatory Language

The image shows two pages of a settlement document. The left page contains a section with a red circle around the text: "body system, impingement, sprain and strain (C6/7) denied". Below this, there are numbered points 1 through 4. The right page contains a section with a red circle around the text: "The parties hereby agree to settle any and all claims...". Below this, there are numbered points 5 through 7. The document includes fields for names, addresses, and dates, with some handwritten entries.



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Protect Yourself from Liability while the Case-in-Chief is Pending

- If you have knowledge applicant is a Medi-Cal recipient [or recipient of benefits from a Publicly Funded Healthcare Program] (at applicant's depo, treatment reports, etc.), and treating outside of the Labor Code, notify Medi-Cal of your case and body parts covered.
- Admonish applicant and/or their attorney that treatment outside of the comp system is "self procured".
- File for an expedited trial to compel applicant to treat under the comp system.
- Consider the potential Medi-Cal interest in the case. Does it make sense to settle a denied case before a Med-Legal Evaluation?



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Temporary Disability Benefits

Brief Recap of Temporary Disability Benefits:

- 2/3rds of AWW at the time of injury, or when TD is incurred (statutory min and max); OR,
- Actual wage loss, not to exceed 2/3rds of AWW at the time of injury (for TPD)
- Must Commence within 5 years from date of injury (case pending before Cal App regarding TD incurred after 5 years).
- Maximum of 104 Weeks for most injuries.
- Maximum of 240 Weeks for enumerated medical conditions.



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Permanent Disability Benefits

Brief Recap of PD Benefits:

- 2/3rds of AWW at the time of injury (subject to statutory min and max).
- Advances due, 14 days after last day of TD paid (if applicant is not returned to employment at 85% or more of pre-injury earnings or employment somewhere else at 100% of pre-injury earnings. Exception: Refused job offer lasting 12 months or longer at 85% or more of pre-injury earnings).
- Less 15% withholding for attorneys fees.
- Advances up to reasonable estimate of PD award.



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Reimbursement Rights of EDD

Unemployment Insurance Code 2629.1(e):

- An employer or insurance carrier who subsequently assumes liability or is determined to be liable for reimbursement to the department for unemployment compensation disability benefits which the department has paid in lieu of other benefits shall be assessed for this liability by the department. In addition, the employer shall pay the department interest on the disability benefits.
- The employer shall also pay a penalty of 10 percent of the amount reimbursed to the department if the Workers' Compensation Appeals Board finds that the failure of the employer to pay other benefits upon notice by the department under this section was unreasonable and a penalty has not been awarded for the delay under Section 5814 of the Labor Code."
- The rate of interest on EDD liens is governed by Revenue and Taxation Code §19521 as:
 1. The interest is due on the SDI payments at the time the carrier assumes liability for the claim and payment is forthwith reimbursed to EDD; or,
 2. Interest is due when liability for reimbursement to EDD is determined by the WCAB.



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EDD Reimbursement Rights Continued

California Labor Code 4904

- If notice is given in writing to the insurer, or to the employer if uninsured, setting forth the nature and extent of any claim that is allowable as a lien in favor of the Employment Development Department, the claim is a lien against any amount thereafter payable as temporary or permanent disability compensation
- In determining the amount of lien to be allowed for unemployment compensation disability benefits the appeals board shall allow the lien in the amount of benefits which it finds were paid for the same day or days of disability for which an award of compensation for any permanent disability indemnity resulting solely from the same injury or illness or temporary disability indemnity, or both, is made and for which the employer has not reimbursed the Employment Development Department.
- In determining the amount of lien to be allowed for unemployment compensation benefits the appeals board shall allow the lien in the amount of benefits which it finds were paid for the same day or days for which an award of compensation for temporary total disability is made.
- In determining the amount of lien to be allowed for family temporary disability insurance benefits the appeals board shall allow the lien in the amount of benefits that it finds were paid for the same day or days for which an award of compensation for temporary total disability is made and for which the employer has not reimbursed the Employment Development Department.



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Say What?

- Upon receipt of any communication from EDD setting forth a claim to reimbursement, EDD is entitled to recovery against allowable TTD benefits for all benefits paid (SDI, Unemployment, Family Leave); But,
- Only at up to the actual TD rate (EDD calculations are based on highest earning quarter and derived from a different formula)
- Only SDI benefits are reimbursable against PD (no unemployment or Family Leave)



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Your Obligations/Consequences

- When the Employment Development Department has served an insurer or employer with a lien claim, the insurer or employer shall notify EDD, in writing, as soon as possible, but in no event later than 15 working days after commencing disability indemnity payments.
- When a lien has been served on an insurer or an employer by the Employment Development Department, the insurer or employer shall notify the EDD, in writing, within 10 working days of filing an application for adjudication, a stipulated award, or a compromise and release with the appeals board.
- The appeals board shall not be prohibited from approving a compromise and release agreement on all other issues and deferring to subsequent proceedings the determination of a lien claimant's entitlement to reimbursement if the defendant in any of these proceedings agrees to pay the amount subsequently determined to be due under the lien claim.
- The employer shall pay a penalty of 10 percent of the amount reimbursed to the department if failure of the employer to pay other benefits upon notice by the department was unreasonable and a penalty has not been awarded for the delay under Section 5814 of the Labor Code.
- Plus interest discussed above.



Obligations/Consequences Summary

- Upon receipt of written notice from EDD, and upon either admitting injury, or a finding of injury from the WCAB, you must reasonably reimburse EDD for any periods of TD awarded for any benefit, and reimburse EDD for any periods of PD awarded where SDI benefits were paid. Failure to do so may result in interest, plus penalties.
- Upon receipt of written notice from EDD you must, in no longer than 15 business days (but as soon as possible) notify EDD, if you commence TTD or PD payments.
- Upon receipt of written notice from EDD you must, in no longer than 10 days, notify EDD if you file an Application, Stipulated Award, or Compromise and Release with the WCAB.
- You can have your settlement, without EDD involvement, but you must hold the injured worker harmless (even if they received duplicate benefits).
- ****Any differential in TD vs. EDD benefits, that is in favor of the injured worker, needs to be paid to the injured worker. There might be attorneys fees that need to be deducted from this retroactive TD differential.****



Child and Spousal Support

1. Liens against Compensation are allowed pursuant to LC 4903(e), as follows:
 “The reasonable living expenses of the spouse or minor children of the injured employee, or both, subsequent to the date of the injury, where the employee has deserted or is neglecting his or her family.”

LC 4903(e) has been broadly interpreted, see *Messinese v. Automatic Heating and SCIF* (2004): “A lien for “living expenses” may include a wide array of post-injury payments or obligations, not just child support.”

- Employer’s lien for compensation mistakenly paid to employee (*Safway Steel Scaffold Co. v. Industrial Acc. Com. (Helmick)*, 7 Cal.Comp.Cases 284)
- Landlord’s lien for injured employee’s unpaid back rent (*Williams v. WCAB*, 58 Cal.Comp.Cases 534)
- Former spouse’s lien for debts employee owed under a Marriage Settlement Agreement (*Nesmith v. WCAB*, 64 Cal.Comp.Cases 1112)
- Employer’s continuation of injured employee’s room and board (*Ila v. Hardy*, 18 Cal.Comp.Cases 241)
- Employee’s board and maintenance at State mental hospital (*Lewis v. Moore Dry Dock Co.*, 10 Cal.Comp.Cases 254)

Essentially, a “living expenses” lien may be filed by anyone who advanced credit, loaned money or is owed a debt for any post-injury living expenses of an injured employee or his or her dependents. (*Coltherd v. WCAB*, 55 Cal.Comp.Cases 431; *Glass Containers, Inc. v. Industrial Acc. Com. (Hart)*, 18 Cal.Comp.Cases 305)



Means of Recovery Against Benefits for Family Support Orders

- The Department of Child Support Services may obtain an Income Withholding Order (IWO) that may subject a maximum of 25% of ongoing TD to withholdings towards ongoing child support payments, and payment of arrears (Fam Code 5246(b)).
- The Department of Child Support Services may file a lien against any compensation awarded to the Non-Custodial Parent for any arrears accumulated from the date of injury.
- The WCAB concludes that the statutory procedures of Family Code section 5246 and Code of Civil Procedure section 704.160 extend to all child support arrearages, including pre-injury arrearages.



Child Support and other Withholding Orders Against Wage Loss (TD):

Upon receipt of an Income Withholding Order you must withhold up to 25% of applicant's TD benefits, and issue payment of the withheld benefits directly to the Department of Child Support Services, or the entity entitled to payment under the IWO.



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Child Support and Other LC 4903 (e) liens

- There has been little case law interpreting the precise language used in this subdivision since its enactment in 1937, and there is little commentary on it in the treatises. (See, e.g., the brief treatment in 2 Herlick, Cal. Workers' Compensation Law Practice (4th ed. 1992) Liens, §17.29.)
- The question becomes, against what species of compensation award can be recovered pursuant to LC 4903(e), and to what degree?



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Scenario A

Joe, a long time cement finisher, fell down at work, severely injuring his left knee, thigh, and hip. He was transported to the local Emergency Room and underwent surgical repair to his femur. His meniscus is torn, and arthritic changes in his left knee are indicative of a total knee replacement that will have to be performed after the femur heals. He has vascular complications, including DVT at the thigh, the physicians have indicated recovery will be very slow, and you have wisely reserved your file for 104 weeks of TD.

Joe's AWW is \$1200.00, Deriving a TD rate of \$800.00

You receive an Income Withholding Order from the local Department of Child Support Services. Joe's checks at work have already been subject to withholdings in the amount of \$300.00 per week in accord with the IWO. Joe's Child support obligations are \$1785.00 per month, resulting in a monthly arrearage of \$500 before he was injured, and \$900 per month given his earnings reduction due to his work status (TTD).

The Local Department of Child Support Services has also filed a lien pursuant to LC 4903(e).

How much needs to be withheld from TD payments to Joe?

Who do you issue payments to?



More Complicated Scenario

You have been withholding \$200.00 from Joe's TD payments.

Like the doctors predicted, Joe's recovery has been very slow. His femur fracture and DVT both resolved, with a very positive outcome. Joe just had his left total knee replacement, and his TD benefits are about to end.

Because of his obesity related pulmonary/vascular issues, the surgeon and pulmonologist both believe Joe will need at least 12 months to rehabilitate from the surgery.

He will not return to work in any capacity for at least 6 months. The employer always liked Joe and has arranged for a desk Joe to be available upon his return.

Joe's attorney has written to you demanding that PDAs commence upon the expiration of TD benefits.

You conservatively estimate PD at 13%, or \$12,252.00, and \$10,414.20 after attorneys fees. You recall that Joe has been incurring \$900 per month in child support arrears from the date of injury, resulting in \$21,600.00 in child support arrears accrued subsequent to the date of injury.

- Do you pay PDAs?

If arrears accrued before Joe's date of injury, then the Department of Child Support, despite the IWO, would not have a clear right to recovery against PD (or any benefit other than TD); however, in the present case, arrears far in excess of estimated PD have accrued subsequent to the date of injury. In this case, you should not pay PDAs in the face of the child support lien, and file a DOR on this issue.

Spousal Support Orders might be treated similarly, but there is no authority in that regard.



Child Support Liens



- As stated in Williams: “There has been little case law interpreting the precise language used in this subdivision since its enactment in 1937, and there is little commentary on it in the treatises.”
- When in doubt, seek clarification from the WCAB. File a DOR. Make sure you inform Joe’s attorney, in writing, your reason for not issuing payment. Be proactive.
- If you pay PDAs, in the second scenario, in the face of the Child Support Lien, there is a risk that payment is owed to DCSS, in addition to PDAs paid to Joe.



Strategies



- Child Support liens, filed under LC 4903(e) and a IWO are different.
- IWO only attaches to TD and can apply to current obligations, and arrears accrued before the date of injury.
- A Lien filed pursuant to LC 4903(e) attaches to TD and PD, and if applied to PD only applies to arrears subsequent to the date of injury.
- Never settle by stipulation and award, or Compromise and Release in the face of a Child Support Lien (recall that a WCJ can approve a C&R with pending liens, so long as the employer assumes responsibility for those liens)
- If there is an IWO, that may be sufficient notice for you to confirm there are no arrears subsequent to the date of injury.
- Child Support Liens do not apply to awards of Future Medical Care, or settlements of those awards.



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