



Getting Lean with Liens

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DISCLAIMER

- This information is general in nature and is not meant to apply to any particular case. Please feel free to contact us with specific questions.
- Also, please note that this presentation is not exhaustive. Rather, it is meant to provide you with a useful information related to certain topics in order to help you determine with your lawyer on a case-by-case basis whether it might be more useful to either try liens or settle them.
- There are exceptions to these general rules; note that statutes, case law, and regulations change with frequency.

Overview

- Why you should care about liens?
- To Get a Bill Review or Not to Get a Bill Review?
 - Special issue with med-legal bill reviews
- SB 1160 – Tell Me More (lien provisions effective 1/1/17)
- What's up with the filing fees?
- When to Hold 'Em (considerations for trial)
- When to Fold 'Em (considerations for settlement)
- Dismissal for Lack of Prosecution
- Service of Medicals

Why You \$hould Care

- Money (liens are often more costly than the case-in-chief)
- Time (need to close files)
- Pressure from higher-ups (to be aggressive, to close files, etc.)

Talking to Your Attorneys

- Love your attorney? Great! (Feel free to ignore.)
- Getting to know you:
 - Attitudes: Settle Everything vs. Try Everything
 - “I’m aggressive.” This can mean multiple things:
 - Aggressive closer? → Negotiate
 - Aggressive fighter? → Try cases
 - Attorneys are not psychic
 - Many attorneys fear liens

Bill Review

- When liens are valid
- When balances are high (back-up plan)
- Getting a good deal via the bill-review/IBR process (beware of med-legal liens and understand the risk of IBR)
- Not needed if deferring value at trial (strategy)
- NOTE: If you think that the lien(s) in question will eventually be tried, you will want to get your own bill reviews, even if the client already did so in the past. Reason?:
 - A lot of times, our clients' EOBs/EORs will be for \$0 based upon a *legal* reason, which is not valid.
 - Good luck trying to get a witness to authenticate those EOBs (often out-of-state or out-of-touch).

Bill Review = Jurisdictional Issue

- Treatment Issues (RFAs):

- PTP

- → UR

- » → IMR

- WCAB only has jurisdiction in limited circumstances (e.g., untimely UR or improper IMR)



- Value Issues (Bills):

- Bill Review (EOB/EOR)

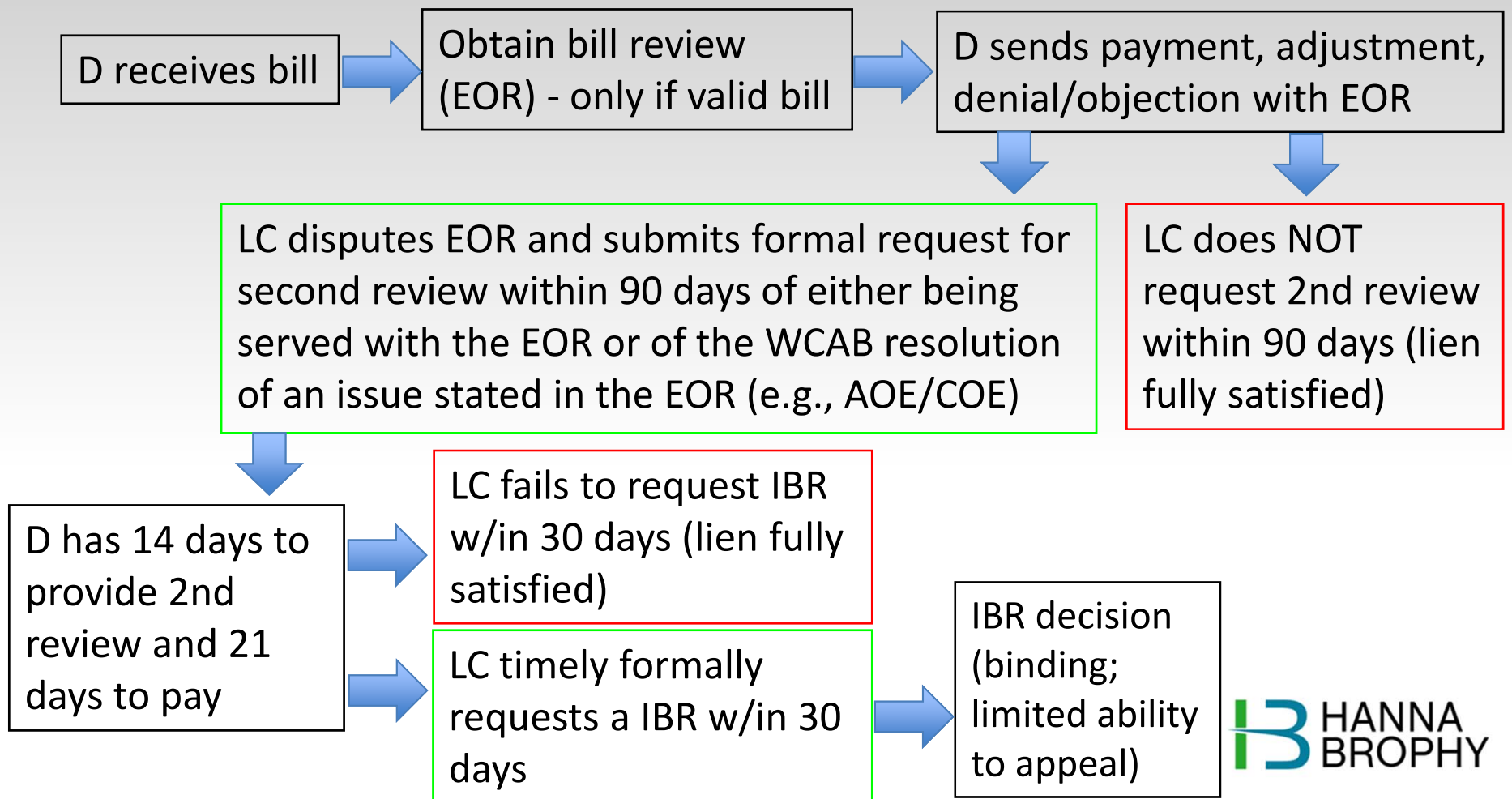
- → Second Bill Review

- » → IBR

- WCAB only has jurisdiction in limited circumstances (e.g., untimely bill review or improper IBR)

IBR PROCESS

(LC § 4603.6, which applies to treatment & med-legal liens)



WAIT! What About Med-Legal Bills?

- 8 CCR § 10451.1(f)(1) provides:
 - **A defendant 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, if:
 - (i) the provider submitted a properly documented billing to the defendant and, **within 60 days thereafter, the defendant either (I) failed to serve an explanation of review (EOR) that complies with Labor Code section 4603.3 and any applicable regulations adopted by the Administrative Director and/or (II) failed to make payment consistent with that EOR;** or
 - (ii) the provider submitted a timely and proper request for a second review to the defendant in accordance with Labor Code section 4622(b)(1) and, **within 14 days thereafter, the defendant either (I) failed to serve a final written determination that complies with any applicable regulations adopted by the Administrative Director and/or (II) failed to make payment consistent with that final written determination.**
- Initial
bill/EOR
- Second
EOR

EOB/EOR Requirements

- Payment, adjustment, or denial of bill
- EOB/EOR must:
 - State the items billed and how much provider sought to be paid.
 - State the amount being paid.
 - Explain adjustment, change or denial of the item or procedure billed;
 - State whether additional information is required to make a decision for an incomplete itemization.
 - Explain the denial of payment (note special procedures - fee dispute)
 - Identify employer representative to contact for dispute resolution
- Must inform claimant of:
 - time limit to raise any objection regarding the items or procedures paid or disputed
 - how to obtain an independent review of the medical bill per LC 4603.6.



SB 1160: The Declaration

- LC § 4903.05(c): Liens filed on/after 1/1/17 must file a **declaration**:
 - Not subject to IMR *and* IBR and
 - Satisfaction of one of the following:
 - Physician is in the MPN
 - AME/QME (arguably, any med-legal service [e.g., diagnostics])
 - Treatment was authorized
 - Determined after “diligent” search that there is no MPN
 - Tx was “neglected/unreasonably refused” - *We'll likely see this a lot.*
 - Ex.: Denied case that was later accepted (*de jure* or *de facto*)
 - What about an accepted case where treatment was not provided per UR (that was not appealed to IMR)? Does “neglect” simply mean that the tx wasn't authorized? How can an LC *declare* that treatment was “unreasonably” refused with any certainty? This is just a subjective belief; needs a decision by a judge, but that would clearly occur well after a LC's declaration.
 - Expenses were for an emergency medical condition
 - Misc.: Certified interpreter for a med-legal exam, copy service w/med-legal services, or the expense is allowed per AD rules

SB 1160: The Declaration

“Not subject to (both) IMR *and* IBR – let’s break it down:

- Not subject to IMR =
 - Denied case
 - UR certified the tx/claims examiner authorized the tx
 - UR decertified the tx and there was no appeal to IMR
- Not subject to IBR =
 - Bill disputed for an issue other than value (*Kunz*)
 - Amount billed is not contested by Defendant
 - Initial bill review w/partial payment was not timely contested by LC
 - Second bill review w/partial payment was not timely contested by LC

SB 1160: The Declaration

Let's clarify:

- The actual language – *The LC can file* if it is not subject to (both) IMR and IBR (at the time of filing).
- The inverse language (to clear up the meaning) – *The LC can file* if it is subject to:
 - (a) either IMR or IBR (not both together) or
 - (b) neither IMR nor IBR [e.g., a denied case]

Point:

- If the treatment & value have already been decided by the entity with proper jurisdiction (Maximus), then the lien claimant has no business in filing with the WCAB; after all, there is nothing for the judge to decide. (Treatment is reasonable + price is set)

Rationale:

- Judges should not decide issues over which they are not experts. They are not doctors (reasonable medical necessity), and they are not bill review experts (value).

SB 1160: The Declaration

Problem with “both IMR & IBR” language: Goes too far (neglects UR & bill review)

- What happens on accepted cases when UR decided?
 - If UR de-certified w/no appeal, the tx is “not subject” to IMR
 - UR should still have jurisdiction over reasonableness!
- What happens with bill review (initial or 2nd) that was not appealed?
 - If the LC didn’t timely ask for a second EOR, the bill is “not subject” to IBR
 - If the LC didn’t timely appeal a second EOR, the bill is “not subject” to IBR
 - Bill review/2nd bill review should still have jurisdiction over the value!

The Fix:

- Jurisdiction re: reasonableness of treatment lies with UR/IMR.
- Jurisdiction re: value lies with bill review/2nd bill review/IBR.
- Tip: Don’t auto-send all bills to your bill review company.

SB 1160: The Declaration

- LC § 4903.05(c) Declaration Requirements
 - Applicable to all liens filed on/after 1/1/17 in order for lien to be valid
 - If lien filed prior to 1/1/17, the LC has until 7/1/17 to comply w/the declaration requirements
 - Remedy (if either failure to provide or providing a false declaration) = dismissal with prejudice as a matter of law

SB 1160: Misc.

- AD to create regulations establishing criteria to verify the identity and credentials of interpreters. (Perhaps through DWC website?)
- LC §§ 4603.2(b) [treatment] & 4625 [med-legal] billing timelines:
 - For 2017+ DOS liens, 12 months to submit bill
 - Remedy: Barred if not timely
- Automatic stays for any physician/lien claimant upon filing of criminal charges involving medical fraud. (LC § 4615(a).)
 - Meaning: No action & no accrued interest until criminal disposition
 - Note: AD must show on website, and EAMS seems to include
- Filing Requirements (LC § 4903.05(a): Lien *must be filed with*:
 - Eh-hem... evidence (with a POS)
 - Original bill if on/after 1/1/17
 - Full statement of itemized voucher supporting the lien
 - Medical records, if relevant

FEES

- Now: Filing fees = \$150
 - Generally, applies to treatment, med-legal, and costs
 - LC § 4903.05(b); *Martinez v. Ana Terrazas, et al.* (2013) ADJ7613459, *en banc.*
 - Burden on LC to prove timely payment of fee
 - LC § 4903.05(c)(1)-(2)
 - Dismissal as a matter of law:
 - For failure to provide proof of timely payment
 - Exempt liens:
 - Health care service plan
 - Group disability insurer
 - Self-insured employee welfare benefit plan
 - Taft-Hartley health and welfare fund
 - Publicly funded program providing benefits on a non-industrial basis
- Activation fees = \$100 (pre-2013 liens)

When to Hold 'Em or Fold 'Em

- Considerations for trying or settling liens:
 - Know your venue (and judge)!
 - What is the *total* amount in lien balances?
 - Determine whether liens are invalid.
 - Determine whether you need a bill review.

When to Hold 'Em

- What are “invalid” treatment liens?
 - Filed past the statute of limitations (now, 18 months post-DOS)
 - Non-industrial parts treated (beware of medications)
 - No referral by PTP (who is the PTP?)
 - LC § 4603.2(b)(1)
 - No proper request for authorization by the PTP (also, format)
 - CCR § 9792.6(o)
 - *Cf. Klein v. Warner Bros. Studio* (2016) Cal. Wrk. Comp. LEXIS 236 and *Lopez v. City and County of San Francisco* (2016) Cal. Wrk. Comp. LEXIS 206.
 - Not reasonably medically necessary (treatment liens)
 - Outside of MPN (accepted cases & body parts only)
 - Lacks authentication (signature of provider - penalty of perjury)
 - LC §§ 4603.2(a)-(b), 4903.8(a), 5703(a)(1); CCR §§ 10770 & 10770.5; *Barrientos v. Alamo Motor Lodge* (2013) ADJ7878614
 - Assigned liens (next slide)
 - LC § 4903.8
 - *Guitron* (interpreter liens [can also be applied to transportation])
 - Claimed med-legal liens are really treatment (What about copy services?)

Assigned Liens

- **How to spot:** Ask to whom payment should be made
- “Any order or award for payment of a lien . . . shall be made for payment *only to the person who was entitled to payment for the expenses . . . at the time the expenses were incurred, and not to an assignee . . .*”
- Applies to all treatment liens
- Exception: The provider has
 - 1. assigned all accounts receivable to the assignee and
 - 2. ceased doing such business
 - LC § 4903.8(a)
- If the lien claimant (e.g., PharmaFinance) proves that there was a valid assignment (e.g., from Curt’s Pharmacy) does PF have to prove that CP was no longer engaged in the dispensing of medications?
 - *Herenia Barrientos v. Alamo Motor Lodge et al.* (2013) ADJ7878614. 2013 Cal. Wrk. Comp. P.D. LEXIS 245.

Assigned Liens – SB 1160

- Liens filed on/after 1/1/7 – No assignments unless the provider:
 - Ceased doing business when expenses incurred *and*
 - Assigned all right, title, & interest in remaining accounts receivable
 - **Remedy**: Invalid by operation of law
- If assignment occurs *prior to* the lien filing, documentation of assignment must be included in filing.
- If assignment occurs *after* the lien filing, documentation of assignment must be served within 20 days of the assignment.

Interpreters

- If IW does not speak English well enough to effectively communicate with his/her treating physician, he/she is allowed to have a qualified interpreter present at medical treatment appointments and medical exams.
 - LC § 4600(g)
- “Qualified” now means *certified*.
 - LC § 4600(f)
- If not the interpreter is not certified, the employer doesn’t have to pay.
 - LC § 4600(g)

Interpreters

- List of certified interpreters
- “Blessed” services:
 - Depositions
 - WCAB hearings
 - Treatment appointments
 - Med-Legal exams
 - Other settings:
 - Determining validity of EE’s claim
 - Determining to what extent he/she was actually injured.
 - LC § 5811(b)(2)

Interpreters - *Guitron*

- Interpretation takes on the characteristic of the underlying service(s).
- Interpretation for treatment should be handled like a treatment lien.
 - “Although no statutory or regulatory provision specifically provides for interpretation services during medical *treatment* appointments, we hold that, pursuant to the employer’s obligation under section 4600 to provide medical treatment reasonably required to cure or relieve the injured worker from the effects of his or her injury, the employer is required to provide reasonably required interpreter services during medical treatment appointments for an injured worker who is unable to speak, understand, or communicate in English.”
 - *Guitron v. Santa Fe Extruders* (2011) 76 CCC 228, *en banc*.
 - Analogy to case law regarding transportation: “While section 4600 does not specifically list interpreter services as an element of medical treatment, section 4600 has been construed to include the costs of transportation to obtain treatment and medication, even though such transportation costs also are not specifically listed in section 4600”
 - *Guitron*, citing to *Avalon Bay Foods v. WCAB (Moore)* (1998) 18 Cal.4th 1165 (“derivative of” the benefit).
- Burden of Proof (4-part, non-exhaustive test) – Interpreters must prove:
 - Necessity - Services were reasonably required
 - Services were actually provided
 - Qualifications (now, certification)
 - Reasonableness of fees

Copy Services

- We finally have a fee schedule!
- Requires specific billing
- EE must request records from ER then wait 30 days before issuing subpoena.
 - LC § 5307.9
- Legal Requirements:
 - Discovery Standard (reasonably calculated to lead to admissible evidence)
 - Med-legal Standard (evidence to prove or disprove a contested claim)
 - What about post-DOI treatment records?
 - What about pre-DOI records on an admitted claim? Who's proving apportionment?
 - Affidavit attached to the subpoena (must show good cause for the production of any records sought)
 - CCR § 10530; *Johnson vs. Superior Court* (1968) 258 Cal. App. 2d. 829, 835.
- Do you need to quash?

When to Fold 'Em

- UR Scenario:
 - RFA from PTP on denied case
 - Eventually accepted
 - No UR denial
- MPN Scenario:
 - MPN problems with proof (affirmative defense)
 - No objection to treatment outside MPN?
- No timely objection to *valid* bill
- Actual med-legal (even if finding = no injury or non-industrial)
- “Blessed” treatment by QME/AME?
- Venues and judges
- Low overall balance

Lack of Prosecution

- Effectuated in Aug. 2012: 8 CCR § 10582.5
- So far, mostly unsuccessful
 - Improper procedure by attorneys
 - Potential for success vs. risk of DOR
 - Judges sometimes set the matter for conference
- Possibly good for aggressive negotiations
 - Withdrawal
 - 10% (or other nuisance value)

Serving Medical Records

- We are NOT permitted to serve any medical records without an order to any lien claimant, unless the lien claimant's services were provided by a physician.
 - LC 4903.6(d)
 - Physician = physicians & surgeons (M.D. or D.O.), psychologists, acupuncturists, optometrists, dentists, podiatrists, and chiropractors licensed in California
 - LC 3209.3
- HYPOS:
 - Dr. Khalid Ahmed?
 - Foundation Medical?
 - Buena Vista (pharmacy)?
 - Joyce Altman Interpreting Services?
 - EDD?

Wrap-Up

- Don't auto-bill-review
- Weigh the factors:
 - Get to know your attorney; tell him/her your goals
 - Venue/judges (talk to your attorney)
 - Overall balances on case
 - Avoiding DOR (need closed files)
 - Valid vs. Invalid liens
- Goal = cost efficiency
- Other considerations:
 - Petitioning for lack of prosecution (possible settlement strategy)
 - Remember! No serving medical records to non-physicians without an order!



Thank You For Joining Us!

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