

ROAD MAP TO QUICK RESOLUTION OF PETITIONS FOR NON-IBR DISPUTES FOR MEDICAL- LEGAL EXPENSES

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Happy New Year Everyone!

My name is Zain Khan, and I am a proud seasoned senior associate at MSKW LLP. Although I handle both case in chief and lien WC files on behalf of the firm, **unlike the majority** of defense attorneys who practice in this field, I have a unique, distinct passion litigating lien matters (sounds crazy, but it's true)!

This passion is derived from my numerous years of experience as a lien claimant attorney, on behalf of medical providers, prior to practicing as a defense WC litigation attorney. I take pride in utilizing my contacts, aggressively combating "tricks of the trade" lien claimants attempt to tactfully utilize to extract increased settlements, while concurrently expediting file closure on a multitude of claims kept open simply because medical entities drag on claims post case in chief resolution.

Unfortunately, there has been a litigation trend, occurring more frequently during the past year, whereby certain medical providers/vendors file for a hearing **PRIOR TO** resolution of WC case in chief claims and are able to circumvent the routine process of lien claimants of address record, who generally have to await case in chief resolution prior to filing a DOR to resolve their lien.

Below, I have provided a **detailed strategic approach** on how to expedite resolution of liens/costs brought by specific medical entities and vendors, who continue to file DORs for Cost via Petition and thereafter setting matters for conferences PRIOR to case in chief resolution.

A. WHO CAN FILE PETITIONS FOR NON-IBR DISPUTES FOR MEDICAL-LEGAL EXPENSES?

Medical Legal Expense Providers with dates of service on or after **1/1/13** do **NOT** have to file a lien.

Labor Code 4620 defines a medical-legal expense as:

“... any costs and expenses incurred [...] which may include x-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and as needed, interpreter’s fees by a certified interpreter [...] for the purpose of proving or disproving a contested claim...”

Common examples of Medical Legal Expense routinely filing these Petitions include:

- A. Qualified Medical Examiners,
- B. Diagnostic testing service providers,
- C. Interpreters and most commonly,
- D. Copy services.

Again, these providers routinely file Petitions for non IBR expenses PRIOR to the case in chief resolving. Your attorney must **analyze each claim separately**, and thereafter provide direction as to whether, post analysis, these providers can file a petition for cost and DOR prior to case in chief resolution.

B. WHAT TO LOOK FOR: COMBATting NON-IBR DISPUTES MEDICAL-LEGAL PROVIDERS

Below, I have provided my “**STEP by STEP**” **approach** analyzing/litigating NON IBR alleged costs.

Your defense attorney should address the following questions when determining whether an alleged NON IBR cost should be reimbursed, and/or objected to.

You must analyze the following issues below, when analyzing alleged Non – IBR Petitions:

1. **WAS THE DATE OF SERVICE PRIOR TO 1/1/13?** If the services were prior to 1/1/13, the provider still has to file a lien within the statute of limitations.

2. **WAS THE EXPENSE PRIOR TO APPLICATION BEING FILED?** Note, this would generally apply to subpoena services at issues. Note, a Subpoena has to be issued **after** the Application for Adjudication has been filed.
3. **ARE SERVICES DUPLICATIVE OR ALREADY PROVIDED?** Previously received records are not reasonable, whether previously sent or subpoenaed. **AA has a duty** to check (see Taylor v. WCAB). This generally occurs when there is a new AA who was retained as attorney of record. It is important to determine whether AA already have copies of the records.
4. **DOES THE ALLEGE SERVICE CONSTITUTE A MEDICAL LEGAL EXPENSE?** (NOTE: The provider has the burden of proof- **3 REQUIREMENTS** discussed in detail below)

LC 4620(a) defines a medical-legal expense as a cost or expense that a party incurs “for the purpose of proving or disproving a contested **claim**.”

The provider **has the burden of proof** to satisfy the following **3 REQUIREMENTS** (*Ashley Colamonico v. Secure Transportation*):

1. **A “contested claim” existed** at the time the service was performed. i.e.:
 - 1) the **employer knows or reasonably should know** of an employee’s claim for workers’ compensation benefits; **AND**
 - 2) the employer **denies the employee’s claim outright or fails to act within a reasonable time** regarding the claim. (§ 4620(b).)
2. The expenses were incurred **for the purpose of proving or disproving** the contested claim.
3. Med-legal expense must be **reasonably, actually, and necessarily incurred**. This requirement focuses **on the time period** when the service was actually performed.

C. RESOLVE VALID MED LEGAL EXPENSES-ADDRESS IMMEDIATELY- AVOID COSTS, PENALTIES AND INTERESTS ON VALID DATES OF SERVICE

It is important to understand that valid medical-legal expenses **NEED to be addressed as soon as possible** to avoid, a separate hearing, petition for costs, penalties and accrued interest.

Rather than allowing the penalties and interest to accrue on the actual dates of service considered “medical-legal expenses,” claims can lower exposure by issuing payment towards the uncontested dates of service immediately. In turn, defense attorneys can litigate the remaining portion of the bill **without the fear of penalties and interest accruing** on valid medical-legal dates of service. It is important to note that penalties and interest continue to accrue.

The WCAB has awarded penalties, interest and Costs when valid medical-legal expenses were unpaid. However, these Costs generally are not as high as Providers routinely allege (sometimes \$1,000.00 to \$2,000.00), but more commonly between \$150.00-\$250.00.

These costs can increase depending on whether Bad Faith is proven on the part of Defense and in the alternative, can be decreased by showing Good Faith actions by defense (i.e., sending an offer letter within a reasonable time).

CONCLUSION

IN SUMMARY:

1. **MEDICAL LEGAL EXPENSE PROVIDERS MUST ESTABLISH THAT THE EXPENSE IS A VALID MEDICAL LEGAL EXPENSE**, INCLUDING PROOF THAT:
 - a. A “**CONTESTED CLAIM**” **EXISTED** AT THE TIME THE SERVICE WAS PERFORMED,
 - b. THE EXPENSES WERE INCURRED FOR THE PURPOSE OF **PROVING OR DISPROVING THE CONTESTED CLAIM**,

AND

- c. MED- LEGAL EXPENSE **MUST BE REASONABLY, ACTUALLY, AND NECESSARILY** INCURRED. (This requirement focuses on time requirement services were actually performed).
2. **MAKE SURE YOUR DEFENSE ATTORNEY IS UPDATED CASE LAW ON THIS ISSUE.**

OF NOTE: THE SERVICE PROVIDER HAS THE BURDEN OF PROOF THAT ITS SERVICES WERE REASONABLE AND NECESSARY AT THE TIME THEY WERE INCURRED AND DEFENDANT DID NOT WAIVE THIS OBJECTION BY FAILING TO ADDRESS THIS ISSUE IN AN EOR (See- Ashley Colamonico v. Secure Transportation).

3. **IF THE SERVICES ARE VALID MEDICAL LEGAL EXPENSES, ADDRESS THEM IMMEDIATELY.**

Please feel free to contact MSKW at any time to assist in litigating/ resolving your IBR/lien disputes.

Zain Khan is a senior litigation associate at MSKW LLP. You can contact Zain at zkhan@mskwlaw.com should you have any questions/issues regarding IBR/lien issues.

Learn more about our firm at www.mskwlaw.com