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IDENTIFYING & HANDLING NON-IBR MEDICAL- LEGAL EXPENSE PETITIONS

In the last few years many practitioners have seen an influx in Petitions for Determination of Non-IBR Medical-Legal Disputes pursuant to Title 8 California Code of Regulations §10451.1, filed by copy service providers, interpreters, diagnostic service providers and treating physicians. By filing such a petition, medical-legal providers are not obligated to file a lien or pay a lien filing fee. In addition to the principal value of the services as set forth in the official medical fee schedule, defendant's failure to comply with the procedural requirements for med-legal bill disputes may result in defendant being ordered to pay penalties (10%), interest (7%), sanctions (no less than \$500), costs and attorneys fees.

The purpose of this article is to educate practitioners on how to identify med-legal expenses and the procedures for handling them. Step one is determining whether the services constitute a med-legal expense. If the answer is yes, the second step is determining the proper procedure for handling the bill for those services.

Labor Code §§4620-4628 are the statutory framework for payment of medical-legal services. Title 8, California Code of Regulations §§ 9793-9794 & 9798.5.4-9792.5.15 are the regulations which implement Labor Code §§4620-4628. Title 8, California Code of Regulations §§ 10451.1-10451.3 set



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forth rules for medical-legal expense disputes incurred on or after January 1, 2013.

Labor Code § 4620(a) defines medical-legal expenses as "any costs and expenses incurred by or on behalf of any party, the administrative director, or the board, which expenses may include x-rays, laboratory fees, other diagnostic tests, medical reports, medical records, medical testimony, and, as needed, interpreter's fees... for the purpose of proving or disproving a contested claim."

According to Title 8, California Code of Regulations §10451.1(b) a "medical-legal expense" shall mean any cost or expense incurred by or on behalf of any party for the purpose of proving or disproving a contested claim, including but not limited to:

- Goods or services expressly specified in Labor Code §4620(a)
- Services rendered by a non-medical expert witness
- Services rendered by an interpreter during medical-legal examination
- All costs or expenses for copying and related services

A claim is "contested" when liability for a claimed benefit has been rejected, the claim has become presumptively compensable per Labor Code 5402, defendant has failed to respond to demand for payment of compensation after expiration of statutory time periods, or a "disputed medical fact" exists on a contested claim. According to Title 8, California Code of Regulations §9793, "disputed medical fact" is an issue in dispute, including objections to primary treating physician determinations regarding applicant's medical condition, cause of applicant's medical condition; existence, nature, duration or extent of temporary disability or permanent disability caused by applicant's medical condition or applicant's eligibility for rehabilitation services. Even if the claim is accepted the claim is contested so long as there is a dispute regarding parts of body.

Pursuant to Labor Code §4620(c), costs of medical evaluations, diagnostic tests, and interpreters incidental to the production of a medical report do not constitute medical-legal expenses unless the medical report is capable of proving or disproving a disputed medical fact, the determination of which is essential to an adjudication of the employee's claim for benefits.

There are threshold issues which, if found in defendant's favor, would absolve defendant of liability for the medical-legal charges. According to Title 8, California Code of Regulations §10451.1(c)(1)(A), these issues would include:

- Employment
- Statute of limitations
- Insurance coverage
- Personal or subject matter jurisdiction

The WCAB has found there is no contested claim if the charges were incurred prior to the filing of an Application for Adjudication of Claim. Please note that the issue of injury AOE/COE of applicant's alleged injury and/or parts of body do not constitute threshold issues.

Procedure for Contesting Med-Legal Expense

Whether disputing the amount charged or objecting for any other reason, defendant must comply with general bill review procedures with slight differences depending on the facts. Regardless of the facts or basis for defendant's objection, defendant MUST serve a written objection on the provider within 60 days of receipt of the bill via an Explanation of Review (EOR) or waive any and all defenses outside of Official Medical Fee Schedule (OMFS). There are two different procedures depending on whether the objection is based on an allegation that charges exceed OMFS or an objection based on some other issue.

Procedure if Objection Based on OMFS

When objecting based on the amount charged only, follow standard bill review procedures:

1. Provider submits invoice to defendant
2. Defendant pays undisputed charges and objects to disputed charges within 60 days of receipt. All objections must be set forth in EOR. See Labor Code §4622 and Title 8, California Code of Regulations §9794(c)
3. Provider has 90 days from service of EOR to object and request second review. See Title 8, California Code of Regulations §9792.5.5 & 9794.
4. Defendant must respond to the second request within 14 days. See Title 8, California Code of Regulations §9792.5.5(g).
5. Provider has 30 days from receipt to contest amount paid, request IBR and pay the IBR fee. See Labor Code §4603.6.
6. IBR Determination: additional money owed, defendant pays IBR fee. No additional money owed, IBR fee not reimbursed.

If defendant fails to comply with the deadlines and/or does not submit a valid EOR, defendant is considered to have waived all objections and must pay bill in full, plus penalties (10%) and interest (7%) pursuant to Labor Code §4622(a) and Title 8, California Code of Regulations §10451.1(f).

If provider fails to comply with the deadlines for the initial objection and second request for bill review, they are considered to have waived all objections based on amount paid and the billing is considered satisfied. Title 8, California Code of Regulations §§9792.5.5(e) and 10451.1(f).

Procedure if Objection Not Based on OMFS

Steps one and two above are unchanged. The difference is that when provider objects to defendant's EOR within 90 days, the provider does not request a second bill review. Upon receipt of the provider's objection to the EOR, defendant MUST file a Petition for Determination of Non-IBR Medical-Legal Dispute AND a Declaration of Readiness to Proceed within 60 days of service of the Provider's objection pursuant to Title 8, California Code of Regulations §10451.1(c)(2). If defendant fails to file Petition and DOR

within 60 days of provider's objection to EOR, the provider MAY file a Petition for Determination of Non-IBR Medical-Legal Dispute but is not obligated to do so. Provider is also not required to file a DOR with their Petition per Title 8, California Code of Regulations §10451.1(c)(3).

On a procedural note, defendant's objection and proof of service must be attached to the Petition for Determination of Non-IBR Med-Legal Dispute, the Petition must be verified and the Petition must be served on provider, applicant and any codefendants.

Upon receipt of the Petition, the judge will either make a ruling, defer ruling until case-in-chief has resolved or set the issue for trial.

Basis for Objections must be included in EOR

It is critical to remember that all objections to the provider's billing must be set forth in the EOR and served no later than 60 days from receipt of provider's bill. For that reason, it is essential that you work with the handling attorney and bill review expert to ensure that all objections are set for the first EOR.

Consequences for Defendant's Failure to Comply

If defendant does not object to provider's invoice within 60 days via a fully compliant EOR and/or fails to file a Petition for Determination of Non-IBR Medical-Legal Dispute AND a DOR within 60 days of receipt of provider's objection to EOR, defendant waives all objections to provider's billing except for OMFS and must pay the OMFS balance plus penalties (10%) and interest (7%). Title 8, California Code of Regulations §10451.1(f).

Defendant may also be liable for sanctions, attorney's fees and costs if provider can prove defendant's conduct constitutes "bad faith" pursuant to Rule 10451.1. The amount of sanctions is \$500 minimum. Title 8, California Code of Regulations §10451.1(g) sets forth actions which may constitute bad faith, including but not limited to:

- Failing to timely pay any uncontested portion of a medical-legal provider's billing;
- Failing to make a good faith effort to timely comply with applicable statutory or regulatory medical-legal timelines or procedures;
- Contesting liability for the medical-legal provider's billing based on a dispute over injury, or injury to a particular body part.

The provider may also be found liable for sanctions if they have acted in bad faith. A provider who has acted in bad faith may be ordered to pay costs, sanctions and attorneys fees, if they inappropriately assert that defendant failed to comply with the requirements, timelines and procedures set forth.

A majority of the Petitions for Non-IBR Medical-Legal Dispute filed by providers are boilerplate. Little attention is given to facts of a particular case. There is a high probability that the provider's Petition will contain boilerplate language alleging defendant failed to comply with requirements, timelines and procedures governing medical-legal disputes. Be cognizant of this issue when dealing with a Petition for Determination of Non-IBR Med-Legal dispute.

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