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California Official Medical Fee Schedule: The Death of the Extraordinary Circumstances Exception Post-2004

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In what appears to be a case of first impression, the WCAB panel in *Jaime Torres Tavera v. T and P Farms, Zenith Insurance Company*, 2015 Cal. Wrk. Comp. P.D. LEXIS --, reversed the WCJ's finding and held instead that the extraordinary circumstances exception to the fee schedule applies only to dates of services before 1/1/2004.

(Publisher's Note: Citation link to [lexis.com](#). Bracketed citations link to [Lexis Advance](#).)

Facts

The applicant was employed as a farm laborer by T and P Farms, insured for workers' compensation by Zenith Pleasanton. The applicant sustained an injury to his left leg, back, and psyche on July 5, 2010, when he was thrown off a tractor and his left foot became trapped between the rear tractor wheel and the body of the tractor. The accident was exacerbated by a prolonged extrication process (30 minutes) resulting in near complete amputation as well as loss of sensation or motor activity.

The applicant was initially taken to a local hospital, which was unable to render proper care because his condition was so severe. He was then airlifted to Mercy San Juan Rancho Cordova where, upon admission to the ER, he was x-rayed and then taken immediately to the operating room for a below-knee amputation. He remained in the hospital until July 9, 2010.

The lien claimant billed \$110,337.00 for services rendered, and the defendant paid \$11,701.52 consistent with the 2004 OMFS, leaving a balance of \$98,635.48.

The lien claimant filed a lien on December 9, 2011. Meanwhile, the underlying case settled by way of Compromise & Release on March 18, 2013.

At trial on February 23, 2014, the lien claimant stipulated that it has been completely compensated for all services rendered in this case if the lien claimant is not exempt from the 2004 OMFS.



WCJ's Findings, Award and Order

On August 4, 2014, the WCJ found that the lien claimant, a level II trauma center (inpatient health facility), was exempt from the OMFS and could be paid in excess of the reasonable maximum fee set forth in the fee schedule on the basis that the services rendered to the applicant by the lien claimant in 2010, including a below-knee amputation, were life threatening or urgent within the meaning of [8 Cal. Code Reg. § 9792.1](#) (c)(2) ([8 CCR 9792.1](#)).

Defendant's Petition for Reconsideration

Defendant Zenith Insurance Company sought reconsideration, contending that the 2004 OMFS, specifically [8 Cal. Code Reg. § 9789.20](#) et seq. ([8 CCR 9789.20](#)) applies to all hospitalizations with a discharge date after January 1, 2004, and that the pre-2004 OMFS does not apply to any dates of admission after December 31, 2003, when Senate Bill 228 repealed the prior fee schedule in [Labor Code § 5307.1](#) ([LC 5307.1](#)) and enacted an entirely new section 5307.1 with a new fee schedule. Here, the applicant's discharge date occurred in 2010.

According to the defendant, in repealing the pre-2004 version of Labor Code § 5307.1, it was the Legislature's intent to eliminate the statutory provisions that governed the old fee schedule and to require an entirely new fee schedule. Because the statutory authority, i.e. the old version of Labor Code § 5307.1, for the pre-2004 fee schedule was repealed and replaced by a new authorizing statute requiring the AD to adopt a new OMFS, the pre-2004 schedule and regulations governing that schedule were automatically invalidated for dates of service or discharge after 1/1/2004.

As explained by the defendant:

"The old fee schedule permitted an exemption for extraordinary circumstances. This language does not appear in the new statute and in fact the Legislature made it clear that there would be no exceptions. Rather the new fee schedule intended to be a maximum fee schedule limited by 120 percent of Medicare. Under these circumstances, 8 CCR 9792 and 9792.1, which were adopted in connection with the version of Labor Code § 5307.1 that was repealed, could not possibly be valid as to a 2010 date of service although they will govern pre-2004 dates of service under the pre-2004 fee schedule."

The defendant further pointed out that [8 Cal. Code Reg. § 9792](#) ([8 CCR 9792](#)) was superseded by [8 Cal. Code Reg. § 9789.10](#) ([8 CCR 9789.10](#)), which essentially covers the same information contained in § 9792, "but eliminates the language allowing for payment in excess of the reasonable maximum fees with a showing of extraordinary circumstances in order to be consistent with the statutory language of new Labor Code § 5307.1."

The defendant concluded that "[a]pplying the pre-2004 regulations to dates of service after January 1, 2004 would conflict with the statutory authority for the 2004 fee schedule which is devoid of any exceptions to the fee schedule and indeed makes it clear that the fee schedule reflects the maximum reimbursement value for medical treatment rendered after January 1, 2004." Therefore, the WCJ erred in applying the pre-2004 OMFS to an inpatient hospitalization with a discharge date in 2010.

WCJ's Report

The WCJ recommended that the defendant's petition be denied. The WCJ stated that the lien claimant should not be bound by the OMFS and may be paid a fee in excess of the reasonable maximum fee as defined in the OMFS, consistent with 8 Cal. Code Reg. § 9792(c). The WCJ reasoned, in part, that the Legislature's failure to delete the language in 8 Cal. Code Reg. § 9792.1(c)(2) when the OMFS was revised in 2004 as mandated by Labor Code 5307.1, was indicative of the Legislature's intent that the exemption for services dealing with extraordinary circumstances and/or life threatening injuries remain intact.



exempting inpatient services provided by Level I or Level II trauma center to patients with immediately life-threatening injuries applicable to services rendered by the lien claimant in this case because the formula for maximum reimbursement for

inpatient medical services was changed in the 2004 OMFS (which is the fee schedule authorized by Labor Code § 5307.1) and now appears in [8 Cal. Code Reg. § 9789.22](#) (a) [[8 CCR 9789.22](#)]. The WCAB further held that 8 Cal. Code Reg. § 9792.1(c)(2) is part of the OMFS in effect on 12/31/2003 and only addresses an exception to the *pre*-2004 fee schedule. Therefore, the WCAB concluded that the lien claimant is entitled to payment pursuant to the 2004 OMFS in the amount of \$11,701.52, which amount the parties stipulated was already paid by the defendant, and that the lien claimant is entitled to no further payments on its lien.

*** CAUTION:** This decision has not been designated a “significant panel decision” by the Workers’ Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see *Griffith v. WCAB* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers’ compensation judges [see *Gee v. Workers’ Comp.*

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1