



New Case Brief
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The 4607 Myth:
a commonly entered Order for attorneys fees is usually not appropriate

Legend has it that whenever an applicant's attorney files a petition to enforce an award of medical treatment, attorney's fees must be awarded under Labor Code § 4907 if the applicant prevails. As with most legends, it ain't necessarily so: one 2003 Supreme Court case makes it clear that the WCAB has no jurisdiction to award attorney's fees more than five years after the date of injury.

In addition, the clear language of L.C. § 4607 only allows for such an award if the defendants have filed a petition to *terminate* liability for all medical treatments, and because recent cases have repeatedly emphasized that where "the statutory language is clear and unambiguous, its plain meaning must prevail," there seems to be little basis for an award of attorney's fees unless such a petition has actually been filed. Certainly, as one recent Board level case has held, a reasonable dispute over what treatment is appropriate does not entitle an applicant to an award of attorneys' fees.

The history of our myth begins with Labor Code Section 4607, enacted in 1973, which states that:

"Where a party to a proceeding *institutes proceedings to terminate an award*¹ made by the appeals board to an applicant for continuing medical treatment¹ and is unsuccessful in such proceedings, the appeals board may determine the amount of attorney's fees reasonably incurred by the applicant in resisting the proceeding to terminate the medical treatment, and may assess such reasonable attorney's fees as a cost upon the party instituting the proceedings to terminate the award of the appeals board." [emphasis added]

Although the clear, unambiguous language of 4607 required that defendants attempt to terminate liability for medical treatment, presumably by filing appropriate pleadings, this requirement was ultimately ignored by Board decisions which created the legal fiction that by delaying or denying benefits, defendants

¹ Since it makes no sense to discuss an applicant filing a petition to terminate an award for medical treatment, we assume it will always be defendants resisting an award of attorney's fees.

had forced the applicant to file a petition to enforce a medical award, and had thus “constructively” filed a petition to terminate benefits.

For example, in *Coach House Gifts v. Workers’ Compensation Appeals Board (Marshall)* 1997, 62 CCC 969, (writ den.), the WCAB noted that “It appears reasonable to recognize that the actions of the defendant constituted the institution of proceedings before the Board, as the applicant had to file a declaration of readiness and request that awarded medical benefits be provided by defendant.” This theory was repeated in another opinion just three pages later, *County of Sonoma v. Workers’ Compensation Appeals Board (Callahan)*, (1997) 62 CCC 973 (writ den.), which held that the “WCAB did not err in awarding attorney’s fees pursuant to Labor Code §4607 based on finding that defendant unreasonably refused to provide further medical treatment requiring [the] applicant to institute proceedings to enforce [an] award, even though defendant did not file petition to terminate award of continuing medical treatment.” [sic]

This theory reached its peak in *United Airlines v. Workers’ Compensation Appeals Board (Dickerson)* (1999) 64 CCC 1511 (writ den.), where reason for awarding attorney’s fees under L.C. § 4607 was found simply because there was no other source of attorneys fees for the present applicant’s attorney. In reaching this conclusion, the Board noted that (1) the applicant had represented himself when the prior stipulated award was filed, thus the present attorney had not previously been paid; (2) the defendants actions were not unreasonable, so no 5814 fees were awarded and therefore, there was no source of fees under that section; (3) since the injury was more than five years old, a petition to reopen would not lie, so no attorneys fees could have been awarded for increased disability.²

The *Dickerson* reasoning clearly flies in the face of the language of § 4607 and common sense: had the Legislature intended applicant’s attorneys to be awarded fees under such circumstances, the Legislature would have said so, but it did not.

The Board retreated significantly from *Dickerson* following the Supreme Court’s decision in *Barnes v. Workers’ Comp. Appeals Bd.* (2000), 23 Cal. 4th 679, 2 P.3d 1180, 97 Cal. Rptr. 2d 638, 65 Cal. Comp. Cases 780, which held that the five year period of limitation under L.C. § 5804 deprived the Workers’ Compensation Appeals Board of jurisdiction over an employer’s petition to terminate future liability for medical treatment if the petition was filed more than five years from the date of the injury.

² One is left to wonder if, had the injury occurred less than five years earlier, there may have been a finding of increased disability simply to award attorney’s fees.

Three years later, the Board issued its decision in *Marriott Internat'l v. Workers' Compensation Appeals Board (Slemmons)* (2003), 68 CCC 506 (writ den.), which, in reliance on *Barnes*, reversed a WCJ's award for attorney's fees under 4607 where a dispute over medical treatment arose more than five years after the date of injury. In doing so, the Board pointed out that since the WCAB had no jurisdiction over an employer's petition to terminate medical benefits if the petition was filed more than five years from the date of injury, then it could have no jurisdiction over a "constructive petition to terminate benefits."

More significantly, the Board recognized that earlier decisions had exceeded the statutory language of § 4607, and the *Slemmons* panel concluded that *where the defendants had not filed a petition to terminate liability for medical treatment, there was no statutory basis for an assessment of attorney's fees.*

This agrees with recent cases which have allowed far less "creative freedom" to the WCAB when interpreting statutory language. For example, *see California Ins. Guarantee Assoc. v Workers' Comp. App. Bd. (Weitzman)* 2005, 128 Cal. App. 4th 307; 26 Cal. Rptr. 3d 845 70 Cal. Comp. Cas. (MB) 556, quoting *Honeywell v. WCAB (Wagner)* (2005) 35 Cal. 4th 24; 105 P.3d 544; 24 Cal. Rptr. 3d 179; 67 Cal. Comp. Cas. (MB) 1557, where the Supreme Court disapproved of the WCAB's liberal interpretation of the notice requirements of 5402.

Disputing the medical treatment to be provided does not give rise to attorney's fees

While it should be clear from the discussion above that merely *disputing* the nature and extent of medical treatment under an award of treatment does not give rise to a right of attorney's fees under L.C. § 4607, many applicant's attorneys and judges still believe otherwise. But in *Hernandez v. Workers' Compensation Appeals Board* (2000), 65 CCC 859, (writ den.), the Board addressed just that issue, stating that "The applicant seems to have confused a spirited and lengthy disagreement over the appropriate form and amount of treatment for a petition to terminate an award of medical treatment. Any award of medical treatment extends only to treatment that is necessary to cure or relieve the effects of the industrial injury. The dispute in this case has been what treatment, and how much treatment, is needed to cure or relieve the effects of the industrial injury."

Conclusion

Since the clear language of Labor Code § 4607 only allows for attorneys fees when defendants file a petition to terminate all medical benefits and lose, a reasonable dispute over the nature and extent of treatments to be provided under an award does not allow an award of attorneys' fees -- only a petition to terminate benefits does. And since there is no jurisdiction to modify an award after five years, there is no statutory authority whatsoever to award attorney's fees under L.C. § 4607 five years or more after the date of injury.