ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER MEETS MRS. BAIRD AND MR. GREGORY

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits I took my usual barstool at the bar and ordered my first martini from George the Bartender.

I was then distracted by a commotion at the end of the bar and I noticed that George's attorney, Ron Summers, and his treating doctors, Dr. Nickelsburg and Dr. Rotbar, were trying to revive a bar patron that had apparently passed out.

Dr. Nickelsburg utilizing his best bedside manner finally was able to revive the person who had his head down at the bar.

I suddenly recognized him as Lenny Lien, longtime employee of the 8600 Group.

The 8600 Group is a well known lien collection agency at the Appeals Board, and I know from personal experience that Lenny is one of their better lien collectors.

Lenny specializes in representing group insurance carriers who file liens through the 8600 Group when they feel that they have paid out group medical benefits as a result of an industrial injury or a **"claimed"** industrial injury.

I knew from personal experience that Lenny's favorite case is the Court of Appeal decision in *Granado* which holds that neither temporary disability **nor medical treatment** can be apportioned to non-industrial causes.

When Lenny walks into the Board he announces to the defense attorney that if there is even 1% causation he is entitled to the entire lien of his client plus penalties and interest.

George explained to me that Lenny had been drinking martinis for the last couple of hours complaining about the duplicity of a defense attorney who had the temerity to reduce his lien claim by utilization of something called the **Gregory** formula.

George told me that he was preparing to call a cab for Lenny and although I appreciated the irony of someone from the 8600 Group being **"86'd"** from the bar I convinced George to start making strong coffee as I wanted to talk to Lenny and get the full story of exactly what happened.

While nursing his first cup of coffee Lenny explained that his client, the Silver Cross Insurance Company, had filed a lien for $800,000.00 in a case in which the applicant underwent a heart transplant.

As injury AOE-COE was at issue, the case in chief settled for $75,000.00 and Lenny had been convinced that he could bring in witnesses to establish at least 1% causation with respect to the underlying stress case. Lenny told me that he had counted on either outright victory or a settlement approaching $400.00 to $500.00.

Therefore, Lenny was totally unprepared for the filing of the Compromise and Release Agreement which contained what was referred to as the **Gregory** formula which proposed to reduce the lien of Silver Cross from $800,000.00 down to $5,000.00.

Lenny explained that the formula was predicated on the estimated total value of the case should the applicant prevail versus the reduced settlement of $75,000.00.

When Lenny objected and the case was set down for hearing, the Workers' Compensation Judge, in approving the **Gregory** formula, explained to Lenny that the Court of Appeal in the case of *Kaiser Foundation Hospital v. WCAB (Gregory)*(1978) Cal.App.3d 336; 43 CCC 1300, had ruled that the defendant was entitled to reduce a group medical lien by the same percentage that the applicant's recovery and/or settlement was proportionately reduced when compared to the total value of the case should the applicant prevail.

After Lenny's third cup of coffee I spread out a bar napkin and drew Lenny the following outline of a **"fill-in-the-blanks"** Gregory formula:

REDUCTION OF LIEN CLAIM AND BILLING OF {INSERT LIEN CLAIMANT} BY UTILIZATION OF THE GREGORY FORMULA

The parties propose that the sum of ${insert amount} be allocated to the lien of {insert name of medical lien claimant} .....according to the following computation:

1. *Estimated total value of case if fully compensable:*

Temporary disability	*${insert amount}*
Permanent disability	*${insert amount}*
Past medical expenses not paid for by carrier	*${insert amount}*
Estimated future medical expense	*${insert amount}*
Total	*${insert total}*

2. *Amount of settlement* *${insert amount}*

3. *Amount in No. 2 divided by total amount in No. 1* *.{insert decimal factor}*

4. *Amount of lien of {insert lien claimant}* *${insert amount}*

5. *Amount in No 4 multiplied by decimal factor in No. 3 is sum to be allocated to lien* *${insert amount}*

Lenny remarked that the defendant had also reduced the lien claim of the Employment Development Department in the amount of $25,000.00 down to $1,000.00 by another formula, this time referred to as the **Baird** formula.

Lenny told me that he has been in the industry since 1990 and he has never heard of either the **Gregory** or **Baird** formulas.

I explained to Lenny that the Baird formula was based on a theory similar to the **Gregory** calculations and I flipped over the bar napkin and drew the following proposed Baird formula:

REDUCTION OF LIEN CLAIM BILLING OF EMPLOYMENT DEVELOPMENT DEPARTMENT BY UTILIZATION OF THE BAIRD FORMULA[1]

The parties propose that the sum of ${insert sum} be allocated to the EDD lien according to the following computation:

1. *Estimated total value of case if fully compensable:*

Temporary disability	*${insert amount}*
Permanent disability (approx 30 percent)	*${insert amount}*
Past medical expenses not paid for by carries	*${insert amount}*
Estimated future medical expense	*${insert amount}*
Total	*${insert total}*

2. *Total basic UCD benefits paid by lien claimant* *${insert amount}*

3. *Amount in No. 2 divided by total amount in No. 1* *.{decimal factor}*

4. *Amount of settlement* *${insert amount}*

Less past medical expense to be paid by applicant	*${insert amount}*
Less estimated future medical expense (from No. 1)	*${insert amount}*
	${insert amount}

5. *Remainder in No. 4 multiplied by decimal factor in No. 3 is sum to be allocated to UCD lien* ***${insert total}***

[1]The Baird formula was approved by the Court of Appeal for the reduction of self-procured medical treatment paid for by a medical provider in the case of **California-Western States Life Insurance Co. v. IAC (Baird) (1963) 59 Cal. 2nd 257; 28 CCC 77**

As Lenny was now sobering up, I told him that during the late 1970's and 1980's defendants were quite frequently successful in obtaining huge reductions of the liens of the Employment Development Department (EDD) well as group medical liens by utilization of **Baird** and **Gregory**. I pointed out to Lenny that the Legislature attempted to bail out the Employment Development Department by amending Labor Code Section 4904 as of January 1, 1990.

I am attaching a copy of Labor Code Section 4904 taken from the 1989 Labor Code and you will note that this section dealt with liens **"for unemployment compensation benefits."**

The 1989 version of this section contain the following sentence upon which the Baird formula was predicated:

> **In the case of agreements for Compromise and Release of a disputed claim for compensation, the applicant and defendant may propose to the Appeals Board, as part of the Compromise and Release Agreement, an amount out of the settlement to be paid to any lien claimant claiming under subdivision (f) or (g) of Section 4903. The determination of the Appeals Board, subject to Petition for Reconsideration and the right of judicial review, as to the amount of lien allowed under subdivisions (f) or (g) of Section 4903, whether in connection with an award of compensation or the approval of the Compromise and Release Agreement, shall be binding on the lien claimant ...**[2]

4903 in 1989 dealt with the termination of liens against compensation which included lien claims by the Employment Development Department (**EDD**).

However, compare this to Labor Code Section 4904 which appears in the 1990 Code (the very next year) which contains the following amendment with respect to lien claims by the EDD:

> **If the lien claimant objects to the amount proposed for payment of its lien under a Compromise and Release Settlement or a Stipulation, the Appeals Board shall determine the extent of the lien claimant's entitlement to reimbursement on its lien and can file findings of all facts involved in the controversy . . .**

Thanks to this rather innocuous amendment by the Legislature as of January 1, 1990, the **Baird** formula cannot be utilized to reduce a lien claim of the Employment Development Department if the EDD objects.

I pointed out to Lenny that we can still reduce group medical insurance liens by utilization of the **Gregory** formula notwithstanding Lenny's objection, but a timely objection by the EDD invalidates the **Baird** formula.

[2] Labor Code Section 4903.

The question, of course, is how this amendment was slipped into the Labor Code by the EDD in 1990.

THE BIG GAME THEORY

No, I do not mean the local rivalry between UCLA and USC in football.

Traditionally the big game in California involves the annual meeting of Stanford and California and even though these two football teams are traditionally losing football teams,[3] the **"Big Game"** is always well-attended by not only the student bodies from the respective schools but their alumni.

It is my understanding that a high ranking official with the Employment Development Department out of Sacramento was a graduate of the University of California at Berkeley and his best friend was a graduate of Stanford who happened to be a workers' compensation defense attorney from Southern California.

These two friends had a tradition of getting together on **"Big Game Weekend"** which, of course, involved drinking before, during and after the game.

After each game obviously one of the friends had reason to celebrate and the other one was in despair.

After one of the Stanford victories, the defense attorney, as the story goes, decided to really rub it in to his friend from the EDD and after the game and while indulging in cocktails the defense attorney diagrammed on a bar napkin for his EDD friend just how the defense attorney was taking the EDD to the cleaners by a very liberal utilization of the Baird formula.

The EDD employee kept the bar napkin and hotfooted it back to Sacramento and the law was quickly changed to allow the EDD to object to the utilization of the Baird formula.

Lenny had been sitting at the bar quietly drinking his coffee and listening to my story but when I reached the end he cried out: "This is discriminatory! You mean that we at the 8600 Group could not object to utilization of the Gregory formula but the EDD can object simply because they have the political power?"

I explained to Lenny, as most defendants now know, that Workers' Compensation simply is not fair! [4]

Lenny's spirits were lifted considerably when I pointed out that very few defense attorneys use either the **Gregory** or **Baird** formula anymore.

[3] Remember, we are talking about the 1980s.

DISCLAIMER:

Although the names and events as recited above are fictional, the fact that the **Baird** and **Gregory** formulas are rarely used is unfortunately true.

These formulas can be invaluable tools in our defense arsenal as many times the size of the lien claims from the group medical carriers and the Employment Development Department are many times the amount of the settlement. In the 1980's and late 70's for that matter, defense attorneys would routinely get 30 days to submit a Compromise and Release Agreement and the Compromise and Release Agreement usually contained both a **Baird** and **Gregory** formula proposing the reduction of liens filed by group medical carriers and the EDD.

The Compromise and Release was then served on the lien claimants who would have 15 days to object as to the validity as to the **Baird** and **Gregory** formulas.

Given the daily volume of mail received by the EDD and lien claimant representatives, objections were seldom filed and the lien claims were reduced and paid accordingly.

When I used to conduct the training classes for our attorneys, the **Baird** and **Gregory** cases were mandatory reading and as a test question I always posed the following trivia question: "What is the first name of Mrs. Baird?"

I am enclosing the current 2007 version of Labor Code Section 4909 and you will note that the Employment Development Department is still allowed to object to the Baird formula. However, Labor Code Section 4903.1 entitled Determination of Reimbursement for Benefits Paid for Services Provided still approves the Gregory formula as follows:

> **When the parties propose that the case be disposed of by way of a Compromise and Release Agreement, in the event the lien claimant, other than a health care provider, does not agree to the amount allocated to it, then the referee shall determine the potential recovery and reduce the amount of the lien in the ratio of the applicant's recovery to the potential recovery in full satisfaction of its lien claim . . .**

Even though the Legislature as of January 1, 1990 allows the EDD time to object to the **Gregory** formula, the key word here is **"object."** Both the **Gregory** and **Baird** formulas are served as addendums to the Compromise and Release Agreement and I can almost guarantee that the personnel at the EDD will not read the terms of the Compromise and Release Agreement much less the proposal for reduction of its lien pursuant to the **Baird** formula – much less object.

Anyone wanting to know the answer to my trivia question or more importantly the **Baird** and **Gregory** formulas should make the request by email.

Make mine a double, George.

Joe Truce