ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER FIGHTS THE BATTLE OF THE MEDICAL PROVIDER NETWORKS OR "DO WE REALLY HAVE MEDICAL CONTROL?"

FROM THE LOBBY BAR AT THE HYATT:

Both Dr. Nickelsberg and Ron Summers, George the Bartender's workers' compensation attorney, were in good spirits tonight when I walked into the lobby bar.

Ron had just started talking about his day in court which involved his Petition to Reopen on George's case in which George had previously received a Findings and Award for carpal tunnel syndrome.

George's original case was predicated on a theory of compensability involving the repetitive serving of martinis to me over a lengthy period of time. Unfortunately, I was the percipient witness that proved George's case.

The good bartender had received a 15% Findings and Award for his carpal tunnel syndrome predicated on the report of the panel QME.

As a result of George's injury, the Hyatt had taken precautions against a re-injury by providing George with wrist splints and also with assistance in polishing and/or washing cocktail glasses.

Last year Ron had unsuccessfully tried to reopen George's case, but the panel QME was not buying this as the QME was provided with a history of the safeguards taken by the Hyatt.

Accordingly, the panel QME found that George had not suffered any new and further disability.

Therefore, any reopening was blocked by the QME report and also George's treating doctors, as the Hyatt had a very good Medical Provider Network (MPN).

I knew that George's original primary treating physician in this case had been none other than the infamous Dr. Nickelsberg, who acted as the PTP in all of Ron's cases.

However, as soon as the Hyatt had obtained its Medical Provider Network status from the Administrative Director George was brought into the MPN and was limited to treating with MPN doctors.

Ron Summers had come up with the idea of George treating outside the MPN, with none other than Dr. Nickelsberg.

Labor Code §4605 provides that an applicant may treat with an attending physician of his own choice at his own expense. In a panel decision entitled *Melvin Lane v. Big Lots Stores* (2008) ADJ2708349[1] the Board took this to mean that the applicant can treat outside the MPN as long as he pays for it. However, it is still an open question as to whether such an "attending physician" report is admissible on the issue of disability.

In telling his story of what happened at trial today, Ron gave me a background of the case.

Dr. Nickelsberg had again taken over as George's primary treating physician (PTP) and began treating George and sending his PR-2 reports to the defendant's carrier.

The carrier objected to these billings and reports on the basis that Dr. Nickelsberg was not within the MPN and refused to make any payments.

At this point Ron advised me that although the insurance carrier for the Hyatt advised the applicant as to the website of the MPN, the applicant and later Ron replied by directing multiple letters to the insurance carrier requesting that the adjuster advise as to the appropriate doctors and their contact information within the MPN within George's geographical area.

The adjuster refused to do so taking the position that advising the applicant as to the MPN website was all that was legally required. Ron happily told me, "This is when I knew I had them."

Ron explained that the Board had held in the panel decision of *Andrade v. Union Framing, Inc.* (2009) 37CWCR121[2], that a defendant, aside from sending an applicant a website address for the MPN, has an affirmative duty to respond to a letter requesting information as to the specific physicians available within the MPN with their contact information.

In the *Andrade* case the Board went on to note that the failure to provide the names and contact information for physicians within the MPN is a breach of the defendant's duty to offer medical treatment to cure or relieve from the effects of the injury. The applicant was thus free to obtain treatment outside the MPN at the employer's expense. Enter Dr. Nickelsberg, stage right.

At today's trial, Ron gleefully told me that the Workers' Compensation Judge (WCJ) had ruled that the adjuster's failure to provide the applicant with information as to his MPN doctors constituted a breach of the defendant's obligation to provide medical treatment. The

[1] Anyone requesting a copy of the Board's panel decision in *Lane* can do so by email
[2] Ditto for *Andrade*

Reports of Dr. Nickelsberg were not only deemed admissible but the defendant was now obligated to pay Dr. Nickelsberg's charges pursuant to the Official Medical Fee Schedule, plus penalties and interest.

Ron told me in confidence that he does have some cases in which the adjusters have been burned on this theory once and now do provide the necessary information as to the doctors within the MPN.

As I knew that applicants seldom if ever pay for their own medical treatment in workers' compensation cases, I turned to Dr. Nickelsberg and asked him how he got paid in these types of situations as the decision of the Board indicated that his charges would be self-procured and the defendant would have no liability for payment.

Dr. Nickelsberg smiled and advised that once a case is settled by way of Compromise and Release or Stipulated Findings and Award with the applicant most carriers refer the case to non-attorneys to negotiate the liens and these companies would routinely pay 50% to 70% on the dollar to resolve the liens notwithstanding the MPN issue.

CREATION OF THE MEDICAL PROVIDER NETWORK:

The framers of Senate Bill 899 handed an early Christmas present to employers and carriers of this State in the form of the Medical Provider Network pursuant to Labor Code §4616. Unfortunately, for many employers this present is unopened and remains under the tree.

The game of "theory**"** versus "reality" then took over as follows:

Theory: The framers of SB 899 envisioned that each carrier and employer in the State would build an MPN from the ground up. They would interview and retain competent physicians in various specialties for the MPN so as to provide timely and effective medical treatment to injured employees with the goal of returning the employee to work.

Reality: Although some employers and/or carriers have crafted a few custom-made MPN's, a great many have opted to retain the services of large existing PPO Networks which include upwards of 50,000 to 70,000 physicians in this State. This list includes the names of infamous applicant treating physicians which the MPN was supposed to replace.

PPO Networks, also called Preferred Provider Networks or Preferred Provider Organizations, have their roots in Labor Code §5304, which provides as follows:

> The appeals board has jurisdiction over any controversy relating to or arising out of Sections 4600 to 4605 inclusive, unless an express agreement fixing the amounts to be paid for medical, surgical or hospital treatment such as treatment

> described in those sections has been made between the persons or institutions rendering such treatment and the employer or insurer. (emphasis added)

In crafting Labor Code §5304 the legislature contemplated that employers and/or insurance companies could "avoid liens altogether" by divesting the Appeals Board of jurisdiction over the charges of medical providers.

In other words, if an insurance carrier enters into an "express agreement fixing the amounts to be paid for medical, surgical or hospital treatment" then the Appeals Board would not have jurisdiction to entertain a lien claim filed by said medical providers.

Just think, in a case where our client has an express agreement with a lien claimant we can take the position that the lien claimant can pound sand and that the Board has no jurisdiction. Most "express agreements" with medical providers have a very short statute of limitations for the provider to complain about being underpaid (usually 30 to 60 days) and all disputes must be resolved by way of arbitration rather than at the Appeals Board.

Unfortunately Labor Code §5304 does not work the way it was supposed to. Very few, if any, insurance carriers and/or claims administrators directly contract with medical providers any more as this would require a whole department to draft and negotiate these contracts.

To fill this vacuum PPO Networks sprang up across the United States and specifically in California.

PPO Networks over the years have contracted with a great majority of medical providers in this state, including physicians and hospitals. These PPO contracts generally provide that the medical provider agrees to take approximately 20% below fee schedule in return for an employer and/or carrier funneling business to said medical provider and for paying promptly (30 days as opposed to 45 to 60 days). In essence, the medical providers agree to take less in exchange for expedited payment and a volume of business.

For example, a large insurance company will negotiate a contractual agreement with one of the PPO Networks and in any given workers' compensation claim the carrier's bill review company will go to their computer to find out whether or not the medical provider is under a PPO discount contract.

If the medical provider is under contract then payment will be made pursuant to the contract (20% below fee schedule). If the provider is not in the network then payment will be made pursuant to fee schedule.

Over the years this has been a very good arrangement for employers and carriers, contributing to a great savings in medical treatment expense.

Unfortunately, these existing huge PPO Networks are not what was envisioned by the legislature in creating MPN's.

The name of Dr. Nickelsberg appears in most of these large PPO Networks. The only difference between a non-MPN doc and an MPN physician is that the employer/carrier that offers an MPN forfeits the right to petition the Administrative Director for a change of physician pursuant to AD 9786.

In creating the MPN the legislature reasoned that the employer/carrier would have no reason to petition for a change of physicians as the defendant would carefully craft their MPN with competent and objective physicians.

PPO Networks have served an important place in our battle for cost containment.

With somewhere between 50,000 to 70,000 physicians these large PPO networks have contributed to a real irony in the system. Most of the physicians in these vast MPN's have no idea that they are in an MPN for a specific claims administrator and/or carrier or as to their obligations as MPN physicians. These physicians also have no clue about the requirements of the Rules and Regulations of the Administrative Director as to the responsibilities of the Primary Treating Physician.

I recall that some years ago I talked with a supervisor of a large insurance company who had retained a large PPO Network and she told me after two or three years she thinks that they have gotten rid of the physicians who are "dead."

Often these physicians will refuse to take certain cases when they are selected by the applicant thereby giving the applicant's attorney a perfect opportunity to claim a denial of treatment within the MPN and to start treating with a non-MPN doc.

I ask you: "Why in the world would we want to put a doctor in an MPN who refuses to accept workers' comp cases?'

Applicant attorneys will attempt anything to get out of one of these MPN's until they discover that the very doctors they wanted to use anyway are in the MPN.

Let's face it! The concept of the MPN is never going to work unless employers and/or carriers personally nominate and train physicians for the Medical Provider Network.

Many applicant attorneys are taking the position pursuant to the *Lane* case that they can choose any physician they want, even though it is a non-MPN physician, by claiming that the applicant will pay for his own treatment. In such a case we routinely take the deposition of the applicant and when asked whether or not they have agreed to pay the non-MPN physician, a look of amazement comes over their face and they reply: "Absolutely not."

NOTICE REQUIREMENT:

Administrative Rule 9767.12 provides that we must give notice on three separate occasions to an injured worker as to our Medical Provider Network as follows:

1. Thirty days prior to the implementation of an approved MPN (assuming that the applicant is employed by the employer at that time):

2. At the commencement of the applicant's employment.

3. At the time of injury.

Recent WCAB panel decisions seem to suggest that any technical violation of the notice provisions of Administrative Rule 9767.12 may be cured by a timely provision of medical treatment to the applicant thru the MPN.

DISCLAIMER:

Aside from Kim, George and I the above characters at the lobby bar are a product of my overwrought imagination. The story is also my own creation, as is my theory on PPO Networks and the "theory" and "reality" of the application of the MPN law.

However, the reality of a claims administrator refusing to comply with a request of an applicant's attorney to provide the names and contact information for MPN providers within an applicant's geographical area is not.

Case law has repeatedly indicated that a refusal of the claims administrator to provide this information (even though the website was previously provided) can be fatal to maintaining control through the MPN.

The best practice would be to provide this information to the applicant and to the applicant's attorney as to the providers, their addresses, their telephone numbers, etc., within the geographical area of the applicant's residence.

Make mine a double, George.

-Joe Truce