ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

For past installments of the *George the Bartender* series, please visit our web site at http://www.kttlaw.us/memos.html

RE: GEORGE THE BARTENDER AND HELPING TO END THE ATTACKS ON MEDICAL PROVIDER NETWORKS OR *"YOU DON'T NEED A DOCTOR TO HELP IDENTIFY YOUR NOSE"*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar only to be greeted by cries of outrage by Ron Summers, George the Bartender's workers' compensation attorney, and his sidekick, Dr. Nickelsberg, George's primary treating physician. No, these cries were not directed at me and my arrival at the Lobby Bar but rather were due to recent developments in the wonderful world of workers' comp. [2]

Larry and Lenny Lien of the 8600 Group were with them, exuding just as much indignation (maybe a little directed at me).[3]

I finally got the attention of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, who served me my cocktail of choice, a Beefeater's martini, straight up with two olives.[4]

Normally I would have bought cocktails for the cartel of chicanery to loosen their tongues and to learn the subject of their misfortune. I was already ahead of the game though as I knew what was so irksome to this dastardly group as they had been in anguish for several days.

The crux of the problem (some might say blessing) lay in the disintegration of Dr. Nickelsberg's empire which was fed through Larry and Lenny Lien of the 8600 Group.

Dr. Nickelsberg received the majority of his work on referral from Ron Summers but the referrals had dried up in the recent year due to the fact that many of the employers of Ron's clients had established legitimate Medical Provider Networks.

Before this happened, the strategy of Ron and Dr. Nickelsberg was quite simple:

1. Ron would refer his clients directly to Dr. Nickelsberg and he would begin treating up a storm, referring them to chiropractors, pain management doctors, acupuncturists, chiropractors again, etc.

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[1] For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] I usually get cries of joy and adulation. Once I even had a standing ovation, but that's a story for a different time.

[3] I explored many numbers for this lien company and after many un-billable hours at the Lobby Bar I finally concluded that the number "86" best described a lien claimant company at a bar.

[4] A Beefeaters martini, straight up, is best served at 38° Fahrenheit.

2. All of this treatment would be billed directly to the insurance carrier and/or third party administrator.

3. In this type of situation the defendant would issue a denial on the basis that Dr. Nickelsberg was not within their Medical Provider Network.

4. When the case came to trial Ron would simply challenge the viability of the Medical Provider Network and claim that the defendant had not established proof that they had in place a viable Medical Provider Network.

5. The Workers' Compensation Judge (WCJ) would then make a finding that since defendants had not submitted any evidence as to the legitimacy and viability of its Medical Provider Network, the reports of Dr. Nickelsberg were admissible and Dr. Nickelsberg should be paid.

Everyone was happy in this scenario (especially Ron and Dr. Nickelsberg) with the sole exception of the defendant.

However, the current outrage by Ron, Dr. Nickelsberg and Larry and Lenny Lien was over a recent panel decision by the Board in *Breanna Clifton v. Sears Holding Corporation (Kmart Corporation)* (ADJ7660641) filed on January 12, 2012.[5]

In *Clifton* the applicant's attorney tried the same strategy as Ron and persuaded the Workers' Compensation Judge (WCJ) to find that the defendant did not have a legally established Medical Provider Network as no evidence had been submitted by the defendant on this point.

In other words, the applicant's attorney, like Ron, was arguing that the defendant had not sustained the burden of proof in establishing a legally viable Medical Provider Network pursuant to Labor Code §4616 and also that defendant had not provided the required notices to the applicant.

In cutting to the chase the Board, on defendant's Petition for Reconsideration, reversed the WCJ and stated in relevant part as follows:

> Contrary to the implication in the WCJ's Report, defendant is not required, as part of its burden, to offer witnesses to testify that applicant received the notices addressed to her, or to obtain a stipulation from applicant that she received them. Defendant met its initial burden by offering proof of the notices. Applicant did not testify or offer any other evidence that she did not receive them.

[5] A copy of the *Clifton* case may be obtained by an email request.

Tossing a bombshell on Ron's theory of how to get out of the MPN, the Board went on to note as follows:

> If the WCJ's decision in this case was based on defendant's failure to meet its burden of proving that it has a properly established MPN, the WCJ's general conclusion was an insufficient explanation of his reasoning. We also note that applicant's rigorous interpretation of defendant's burden on this issue is not justified by statute, regulation, or case law. In her Answer, applicant proposes a vast and often vague array of requirements for defendant's evidence that has not been recognized by the AD, the Appeals Board, the courts, or the Legislature.

In my opinion the above language commenting on applicant's attorney's Petition is a real "zinger."

The Board went further in commenting on the WCJ's decision:

> The WCJ appears to have been persuaded to follow applicant's interpretation of defendant's burden, despite its lack of authority and outrageous reach. For example, there is no evidence, or even a hint, in this case that any of defendant's MPN evidence is anything other than what it appears to be on its face, yet the WCJ now says in his Report that the evidence is insufficient because it is not "authenticated." Authentication is not a requirement ordinarily applied to evidence such as this.[6]

The Board added:

> The WCJ's acceptance of applicant's hypervigilant interpretation of defendant's burden was unwarranted and inconsistent with the informality of WCAB proceedings.

As far as the viability of any specific MPN the Board offered the following remedy to the WCJ:

> The list of MPNs approved by the Division of Workers' Compensation is available on the AD's Web site, and a WCJ may simply take judicial notice of the inclusion of a defendant's MPN on that official and publicly available list.

DISCLAIMER:

All characters at the Lobby Bar aside from George, Kim and I are fictional as is the story line.

However, the ongoing issues with Medical Provider Networks are not. In *Clifton* the Board has served notice on the workers' compensation community that frivolous objections to validly

[6] The fact that the Board used the word outrageous is not only a red flag to the WCJ but also the workers' compensation community that what is apparent on its face should be accepted unless there is contrary evidence.

established Medical Provider Networks will not be tolerated and that the reform legislation as implemented by Senate Bill 899 will be enforced.

Make mine a double, George.

-Joe Truce