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 THE MEDICARE SET-ASIDE TRUST DILEMMA OR IS THE C&R ON THE ENDANGERED SPECIES LIST?

FROM THE LOBBY BAR AT THE HYATT:

Ron Summers, George the Bartender's workers' compensation attorney, was seething and his good friend, Dr. Nickelsberg, was trying to calm him down.

I had just arrived at the lobby bar and before I could order my favorite cocktail from Kim, the Hyatt's breathtakingly beautiful cocktail waitress, I was caught up in Ron's latest "rant." The subject of this rant was the obstacle to lump sum settlements by way of Compromise and Release agreement (C&R), which was created by the requirement to consider the interests of Medicare by way of a Medicare Set-Aside Trust (MSA).

George had just served Ron his second cocktail and there appeared to be no end in sight. Ron was complaining bitterly (and loudly) as to how the requirement of an MSA was destroying our system.

Since I knew the background of Ron's complaints about MSA's I knew that he could care less about "our system." The real reason Ron was upset was that the MSA requirement was destroying and/or downsizing his pocketbook.

Ron had been moaning for some weeks that self-insured employers, and even some insurance carriers, were cutting back on lump-sum settlements.

MSA companies, relying on benefit printouts and the ultra liberal opinions of physicians such as Dr. Nickelsberg, were increasing the dollar amount of the future medical exposure substantially.

Self-insured employers and some insurance carriers, faced with the sheer magnitude of the corresponding MSA's, are opting to settle cases by way of Stipulation with Request for Award and relying on Utilization Review to control the award of future medical treatment.

Although I took secret delight in Ron's frustration (as I usually do), I knew that he had a point.

In determining an appropriate Medicare Set-Aside Trust, MSA companies and the Centers for Medicare and Medicaid Services (CMS) will try to predict the future cost of medical care by looking backward at what monies have been paid out to the applicant for medical treatment.

This not only contemplates analysis of the benefit printout, but also the future medical predictions of liberal applicant primary treating physicians, such as Dr. Nicklesberg. Physicians such as Dr. Nickelsberg, selected by applicant attorneys, tend to contemplate a variable bonanza of future medical treatment, which in many cases is simply conjecture in an attempt to build up the settlement value in a particular case.

Unfortunately, using the benefit printout in combination with the predictions of applicant's primary treating physicians does not result in a sound prediction of the applicant's need and/or cost of medical treatment for the balance of the applicant's life.

Medicare Set Aside trusts are usually necessary to settle cases that have been litigated for an extended period of time. During the litigation process there is an intense buildup of medical treatment concurrent with the applicant's attorney's demands for temporary and permanent disability benefits.

In many cases the actual future medical treatment required post settlement bears little or no relationship to the size of the Medicare Set-Aside Trust.

Usually, MSA's are self-administered (by the applicant) trusts and the irony comes in when an injured worker is asked to keep meticulous accounts with respect to monies expended for medical treatment as a requirement of the MSA. Presumably, if and when such an applicant ever comes to the gates of Medicare and requests treatment for his workers' compensation injury, Medicare will demand an accurate accounting of the MSA. This is something I find difficult to contemplate happening.

The goal of a Medicare Set-Aside Trust is certainly laudable. The Medicare law contemplates that Medicare is a secondary payer and only provides Medicare benefits to a beneficiary when one of two following events occurs:

1. CMS approves a Medicare Set-Aside Trust and the cost of medical treatment exceeds the MSA.

2. There is no primary insurance carrier, such as a workers' compensation carrier.

My musings were interrupted by a new rant from Ron. I suddenly realized that Ron's ire was over one of his cases that went to trial today.

CAN A C&R SETTLE A FUTURE CLAIM? YES, SAYS THE COURT OF APPEAL

In listening to Ron explain his frustrating day to Dr. Nickelsberg, a sudden smile came over my face as I realized that the defense attorney on Ron's case had raised the bar of a prior

Compromise and Release Agreement pursuant to the published Court of Appeal decision in *City of Anaheim v. Workers' Compensation Appeals Board Fred Davis*, 47 CCC 52.[1]

This is a case which I have used to my benefit several times.

Ron had been hoisted on his own petard by one of his own prior C&Rs. [2]

Ron was explaining to Dr. Nickelsberg that his client was a long-time employee for the XYZ Corporation, which had been insured by the State Compensation Insurance Fund.

Ron told Dr. Nickelsberg that some years ago he had filed an Application for Adjudication of Claim on behalf of his client, alleging that the stress of the workplace aggravated the applicant's colitis.

Ron settled the case with the State Fund by way of Compromise and Release Agreement for $15,000.00. As of July 1, 2008, the XYZ Corporation became self-insured for its workers' compensation liability, so therefore the State Fund was off the risk.

Ron's case today involved a new continuing trauma Application which covered the period subsequent to the Compromise and Release Agreement to the present. The claim was the same, i.e., an aggravation of the applicant's colitis.

Ron reasoned that the new case could not be barred by the previous Compromise and Release Agreement, as the period alleged as a continuing trauma by Ron was subsequent to the C&R.

Much to Ron's chagrin, the defense attorney representing the XYZ Corporation self-insured claimed that the prior Compromise and Release Agreement between the applicant and the State Compensation Insurance Fund also settled this future claim of the applicant.

Ron complained loudly to both George the Bartender and Dr. Nickelsberg that it is impossible for a Compromise and Release Agreement to settle out a future injury but the Court of Appeal felt otherwise in *City of Anaheim.*

In this case the injured employee's claim for workers' compensation benefits for an alleged cumulative injury was barred by an order approving a compromise and release in a case involving the same injury but for an earlier period where the settlement agreement specifically provided that it applied to all claims including those which could arise in the future.

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[1] Anyone wanting a copy of the *City of Anaheim* case should request one by email.

[2] A petard was a small bomb used to blow up gates and walls when breaching fortifications. The modern phrase "hoist with one's own petard" means to be harmed by one's own plan to harm someone else. It also means to fall into one's own trap, literally implying that one can be lifted up by one's own bomb.

In the *City of Anaheim* case the Court specifically addressed the applicant's contention that the Compromise and Release only applied to those periods covered by the Compromise and Release. The Court stated in relevant part as follows:

> "Second, Board was mistaken in stating that the only question before it was 'whether the stress of applicant's employment after the period covered by the compromise and release aggravated his colitis and contributed to his need for medical treatment for the colitis'."

The next paragraph by the Court makes it clear that the language relied upon by the Court is language already contained in the pre-printed Compromise and Release form:

> "The compromise and release was on the form prescribed by the Board (Form 15, rev. 11/74); it specifically referred to the applicant's claim of injury. . . it specifically stated that the compromise and release was 'to cover all aspects of the applicant's injury' and incorporated the medical record by reference; it specifically purported to settle and release the employer from liability on the account of all claims 'whether now known or ascertained, or which may hereafter arise or develop as a result of said injury'; and it specifically provided that unpaid future medical and hospital expenses to be assumed . . . solely by applicant."

Some years ago I attended an Executive Board meeting of the California Workers' Compensation Defense Attorneys' Association and had my eyes opened by our featured speaker, who happened to be a vice president in charge of a workers' compensation claims program for a large self-insured employer in California.

This speaker reminded us that one of the axioms of workers' compensation is that settlement by way of Compromise and Release Agreement is only valuable after the applicant was no longer employed by the employer. When I first started in this business the golden rule was that the claims of current employees should be settled by way of Stipulated Findings and Award. Compromise and Release Agreements were reserved for those employees that no longer work for the employer. The rationale in not settling a case by way of Compromise and Release with a current employer was that said employee could simply have a recurrence of their injury and collect future medical and also that the Stipulated Findings and Award set a benchmark for apportionment.

However, our speaker used the C&R process with existing employee claims as a cost-containment tool. He had statistics at his fingertips as to the thousands of dollars that were saved by way of future medical costs by settling cases by Compromise and Release, even though the employees were current employees.

The *City of Anaheim* case cited above can be a valuable tool in these types of settlements and we can incorporate reference to this case in our addenda to the C&R.

DISCLAIMER:

More and more of our clients are foregoing Compromise and Release Agreements, reasoning that the current method of preparing Medicare Set-Aside Trusts is not an accurate measure of their liability for future medical costs. When we combine this problem with the lag time between the submission of the MSA to CMS and ultimate approval, the appeal of a C&R wears thin.

The usual disclaimer applies with the additional comment that neither George nor I are experts in the field of Medicare Set-Aside Trusts. However, we do feel that there must be some way that we can improve predicting future medical expenses other than relying on benefit printouts and physicians such as Dr. Nickelsberg. There must be a way to build a better mousetrap.

George, Kim and I and the remainder of the characters of the lobby bar wish everyone a Happy Thanksgiving.

Make mine a double, George.

-Joe Truce