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 HOME HEALTHCARE CONUNDRUM OR *IS FLIPPING THE MATTRESS AND FLUFFING THE PILLOW REALLY CONSIDERED MEDICAL TREATMENT?*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I arrived at the Lobby Bar tired and in much need of a cocktail. The first thing I observed was Mr. Pat Pennipincher, VP in charge of claims for the Integrity Insurance Company, in a deep and studied conversation with his defense attorney, Frank Falls.

After ordering my cocktail of choice, a Beefeater's martini straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress, I turned my attention to the conversation down at the end of the bar.

Frank, a noted workers' compensation defense attorney, was gesturing wildly and pulling at his hair. To say he was flustered would have been an understatement. Mr. Pennipincher had the anguished look of someone forced to raise his reserves.

My curiosity got the better of me and I made my way down to the end of the bar, drink in tow, to join in their rather animated conversation.

Frank told me he and Mr. Pennipincher had just received a horrendous (Frank's words) Findings and Award by a Workers' Compensation Judge (WCJ) which awarded the applicant 24/7 attendant care at the rate of $27.00 per hour for performing such activities as doing the applicant's accounting (writing checks to pay bills), taking care of his cat, making his bed and turning his mattress, as well as weeding his garden and other household chores.

In his decision the WCJ indicated that all of these "activities" of the home care aide were considered Labor Code §4600 expenses.

As Frank spoke his voice kept going up to different pitches. He finally squeaked out that he had prepared a Petition for Reconsideration which he wanted me to look over.

Frank then produced a document which I first mistook for Victor Hugo's Les Misérables.[2]

Although Frank pleaded with me to read his "masterpiece" (again his words) I told him that I was not going to read his Petition unless it complied with the 18-1/2 minute rule.

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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] Actually, miserable was a very apt description of Frank's mood.

THE PETITION FOR RECONSIDERATION AND THE GOOD OLD 18-1/2 MINUTE RULE

I was hired by this law firm on November 7, 1973, and as a green horn my training included an introduction to the 18-1/2 minute rule.

My mentor at the time, Jim Tobin, figured that WCAB commissioners received 12 to 13 petitions every day and considering that they slept like everyone else, any given commissioner would have 18-1/2 minutes to read our petitions.

I then told Frank my theory as to how a Petition for Reconsideration should be crafted:

1. Tell the Board how you have been "screwed."[3]

2. Explain why the "screwing" is illegal.

3. Most importantly, tell the Board how you want them to make the world safe for employers again.

I asked Frank whether or not I could read his Petition in 18-1/2 minutes, understand the facts, the issues, the applicable law and the proposed solution.

Judging from the crestfallen look on Frank's face I knew that this was not the case with his "masterpiece."

Frank promised me that he would go back to the drawing board and present me with a revised Petition.

I told Frank that one thing he might consider is giving his revised Petition to one of his associates to read and if the associate could immediately grasp what Frank was trying to say in 18-1/2 minutes then it was probably a viable Petition.[4]

[3] The legal definition escapes me at the moment.

[4] Factually, the 18-1/2 minute rule was probably true in 1973 when the Board had six commissioners plus a chairman. The Board now has five commissioners and two vacancies and some extremely hardworking deputy commissioners. If we add to the mix that the law has become more complicated since 1973 the 18-1/2 minute rule may have to be revised downward.

THE LAW WITH REGARD TO HOME HEALTHCARE

Not only the Board, but the appellate courts have struggled with this concept for years.

Labor Code §4600 mandates that the employer shall be liable for medical treatment "that is reasonably required to cure or relieve the injured worker from the effects of his or her injury."

In the case of a medical modality such as physical therapy, aqua therapy, medication, etc., this rule is easy to understand.

Physical therapy certainly can help relieve from the effects of the industrial injury pursuant to Labor Code §4600 and in some cases can cure the injury entirely.[5]

In Frank's case, the fact that the WCJ mandated a home healthcare aide to help turn the applicant's mattress, vacuum his floors, mop the kitchen, do his accounting, etc., theoretically does not "cure or relieve the injured worker from the effects of his or her injury."

Clearly, Frank's applicant watching someone else perform household chores is not going to lessen back pain, leg pain, etc., so the logical question is whether this type of "treatment" is included within the scope of Labor Code §4600?

The courts long ago addressed this type of predicament in cases of catastrophic injuries (quadriplegics), holding that these catastrophically injured employees were entitled to modified vehicles and/or home modifications to accommodate their disabilities.

However, the housekeeping issue has been a persistent problem for the Board. The Board attempted to address this issue head on in their July 2, 1981, *en banc* decision of *Carolyn Keil v. State of California and Employment Development Department*, 46 Cal. Comp. Cas 696. The Board held in *Keil* that housekeeping services unrelated to nursing services were not reimbursable.

Employers and carriers breathed a sigh of relief as this issue had been settled once and for all—or so they thought.

On June 12, 1984, a short three years later with the dust barely settling on the *Keil* decision, a disturbance in the force was felt as the Court of Appeal issued a decision in *Susan Smyers v Workers' Compensation Appeals Board*, 157 Cal. App. 3d 36; 203 Cal. Rptr. 521; 1984 Cal. App. LEXIS 2175; 49 Cal. Comp. Cas 454. The Court in *Symers* overruled the Board in *Kiel* and allowed reimbursement for housekeeping services unrelated to nursing services.

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[5] Okay, okay -- I realize this concept is a bit of a stretch and I promise to stop daydreaming.

WHY DOES OUR DEFENSE COMMUNITY CONTINUE TO SLEEP ON THE GIFT GIVEN TO US BY SENATE BILL 899?

Senate Bill 899 not only gave us a drastic change in the calculation of permanent disability by way of the American Medical Association (AMA) Guides to the Evaluation of Permanent

Impairment (Fifth Edition), but also delivered another present to the defense community which has largely been ignored. Then Governor Schwarzenegger, in crafting the then new reform law, tried to address the dilemma of Labor Code §4600 and the ambiguity surrounding the word "relieve."

Over the years, both the Board and Workers' Compensation Judges have struggled with the meaning of the word "relieve" and what constitutes "medical treatment."

For example, applicants traditionally testify at their depositions that ongoing therapy and/or massage sessions relieve their pain for a short period of time and then the pain goes back to its original level. Clearly, it would not be practical to delete the word "relieve" from the statute so Labor Code §4600(b) was added as follows:

> As used in this division and notwithstanding any other provision of law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines. (emphasis added)

Pursuant to the mandate of Labor Code §5307.27, the Administrative Director did, in fact, adopt medical treatment guidelines which incorporated the ACOEM Guidelines and are now known as the Medical Treatment Utilization Schedule, or MTUS.

Please note there is no limiting language in Labor Code §4600(b). It says "medical treatment"– not "some medical treatment." I think it is reasonable to conclude that the mandate as contained in Labor Code §4600(b) in fact means "all medical treatment."

Therefore, a request for housekeeping services would be denied pursuant to the MTUS as the schedule does not contain a provision for housekeeping services as actual treatment, or for that matter modified vehicles, modification to a home, etc.

A Utilization Review denial certainly can be appealed but the injured worker must comply with Labor Code §4604.5(a) which states that "preponderance of the scientific medical evidence establishing that a variance from the guidelines reasonably is required to cure or relieve the injured worker from the effects of his or her injury." (emphasis added)

Based on the clear language of Labor Code §4600(b), I think a valid argument can be made that the California legislature intended to limit the scope of "medical treatment" to treatment that complies with evidence-based guidelines, i.e., either the Medical Treatment Utilization Schedule (MTUS) or other evidence-based guidelines.

Yes, yes I know! Administrative Rule §9792.8 declares that treatment may not be denied on the "sole basis that the treatment is not addressed by the ACOEM Practice Guidelines" or the MTUS as promulgated by the Administrative Director. However, Administrative Rule §9792.8 also mandates that if a specific modality of treatment is not contained in the ACOEM Guidelines or the MTUS then other evidence-based guidelines should be consulted. Administrative Rule §9792.8(2) provides that medical treatment shall be in "accordance with other evidence-based medical treatment guidelines that are generally recognized by the national medical community and are scientifically based."[6]

Hence, it can be argued that Labor Code 4600(b) has defined "medical treatment" as treatment that is supported by evidence-based guidelines that are "recognized by the national medical community and are scientifically based."

With the passage of SB899 and the amendment to Labor Code §4600, housekeeping services, in my opinion, must be consistent with evidence-based guidelines and specifically the MTUS Guidelines or such request will be denied pursuant to Labor Code §4610 Utilization Review.

With the AMA Guides we brought in the concept of activities of daily living (ADLs) and certainly modified vehicles and home renovations in cases of catastrophic injuries certainly do help the applicant in his activities of daily living.

The courts some time ago brought in the first exception to the cure or relieve rule and paved the way to accommodate the disability of a catastrophically injured worker.

The question then becomes, how far do we go?

In the case of an injured worker who sustains carpal tunnel syndrome (bilateral) restricting him from pushing, pulling, grasping, etc., can he be awarded a gardener as he cannot prophylactically perform these duties anymore?

In the case of *James Bishop v. Workers' Compensation Appeals Board, Schindler Elevator Company/Schindler Elevator Corporation,* 76 Cal. Comp. Cases 1192; 2011 Cal. Wrk. Comp.

[6] Other useful guidelines include Social Security, Medicare, AETNA, or Cochrane Collaboration among others.

LEXIS 156 the Board, in a split decision, held that a gardener was not a legitimate Labor Code §4600 expense.[7]

However, how is this really different from awarding a paraplegic a modified vehicle or home renovations to accommodate his disability?

Based on case law it would appear that the courts and the Board look at the type of disability, the extent to which it has affected the applicant's life and what activity is presumed to be a Labor Code §4600 expense.

The Board has not had much guidance on this troubling issue for decades - until the Court of Appeal decision in *State Farm Insurance Company v. Workers' Compensation Appeals Board (Pearson),* 192 Cal. App. 4th 51; 120 Cal. Rptr. 3d 395; 2011 Cal. App. LEXIS 86; 76 Cal. Comp. Cases 69.

In the *State Farm* case the 100% totally and permanently disabled applicant was awarded 24/7 home care at the rate of a licensed vocational nurse ($35.00 per hour) to perform such activities as cooking, cleaning, paying bills and running errands.

The Court of Appeal in *State Farm* reversed the Board's decision, making two important pronouncements:

1. Pursuant to Labor Code §4600 cooking, cleaning, accounting, running errands, etc. are not activities that qualify as Labor Code §4600 expenses.

2. It does not take the expertise of a licensed vocational nurse at the rate of $35.00 per hour to perform these activities.

HOW IS THIS DIFFERENT FROM AWARDING A CATASTROPHICALLY INJURED WORKER (A QUADRIPLEGIC) A MODIFIED VAN?

The Board and our workers' compensation community need guidance on this particular issue but the decisions throughout the years have apparently turned on the following issues:

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[7] The Board's decision in *James Bishop* was filed on April 22, 2011, and was discussed in *George the Bartender and the Bed of Begonias or Is a Gardener Really a Labor Code §4600 Medical Expense?* The applicant's attorney subsequently filed a Petition for Reconsideration as first aggrieved which was denied. The applicant then filed a Petition for Writ of Review which was denied. Pursuant to the Court of Appeal decision in *Wings West Airlines v. Workers' Compensation Appeals Board and Dept. of Industrial Relation*s (1986), 187 Cal. App. 3d 1047 (footnote on page 1053); 232 Cal. Rptr. 343; 1986 Cal. App. LEXIS 2321; 51 Cal. Comp. Cas 609, writ denied cases can be brought to the attention of the Board and also the appellate courts as an indication of contemporaneous interpretation and application of workers' compensation laws by the Board. A copy of the *Bishop* decision may be obtained via e-mail request.

1. Are we talking about a prophylactic restriction (meaning the applicant should not do it) or an actual restriction? The applicant with carpal tunnel syndrome bilaterally should not do gardening for fear of further injury but feasibly could. The quadriplegic simply cannot drive unless he has a modified van.

2. The extent of the injury. Clearly in cases of catastrophic injuries the courts have long since gone to bat for the catastrophically injured worker.

Applicant attorneys have the burden of proof on the issue of home healthcare and according to the Board's panel decision on May 28, 2010, in *Helen Bough v. Dana Manchester, DDS* (ADJ4305719) evidence must be produced as to what the caregiver actually does, the hours that the services are provided, etc. [8]

HOURLY FEE OF CAREGIVER

This was the real focus of the Court of Appeal decision in the *State Farm* case. The court wondered out loud why it took a nurse at $35.00 an hour to perform household duties for the injured worker.[9]

In the case of a home health aide (no nursing experience) applicant attorneys will claim that the reimbursement to the applicant's home healthcare giver (usually the spouse) should be equivalent to what the carrier/employer pays for the service that provides the home health aide which is in the ballpark of $30.00 an hour.

However, we on the defense claim that the home health aide should be paid exactly what the home health aide receives as a salary from their employer which usually is $9.00-$12.00 per hour.

ARE HOME CARE PROVIDERS LIEN CLAIMANTS AND ARE THEY BOUND BY THE STATUTE OF LIMITATIONS GOVERNING LIEN CLAIMANTS?

Yes, said the Board in the case of *Maria Medina v. Robinson May* (ADJ4457078) filed February 10, 2012.

In many cases, family members/spouses assume the role of a caregiver or at least that is what we are told.

[8] A copy of the *Bough* case may be obtained via e-mail request.

[9] A copy of the *State Farm* case may be obtained via e-mail request.

In many instances we are confronted with cases in which we learn that the applicant's wife has been a caregiver for years and there is a request to reimburse the previous decade of home care expenses. At this point the reimbursement usually reaches into seven figures.

In *Medina*, the Workers' Compensation Judge was faced with such a situation. The defendant raised the statute of limitations for lien claimants pursuant to Labor Code §4903.5(a). This section provides a "limitation of liens for services more than one year from the date the services were performed."

In the *Medina* case, services had been provided for several years and were continuing to the present but a lien hadn't actually been filed until the trial on June 14, 2011.

The Workers' Compensation Judge found in relevant part as follows: "Based on Labor Code §4903.5(a) the lien should be limited to one year prior to the filing of the lien, or from June 14, 2010 forward and continuing." The applicant's Petition for Reconsideration was summarily denied by the Board on February 10, 2012. [10]

CAN A QME OR AME REPORT RETROACTIVELY AWARD HOMECARE TO AN INJURED EMPLOYEE?

No, said the Board in the case of *Gloria Arana v Hawthorne School District* (ADJ3152522) filed December 5, 2011. [11]

In *Arana* the Board addressed a situation in which Dr. Reynolds not only stated that the applicant was entitled to home healthcare but also that the applicant had required home healthcare since a 2002 lumbar spine surgery.

The WCJ agreed in part with Dr. Reynolds' report and awarded home healthcare pursuant to his opinion but denied retroactive home healthcare on the basis that there was no medical report prior to that of Dr. Reynolds establishing the need.

In denying applicant's Petition for Reconsideration the Board held as follows:

> Defendant denies, however, that it is required to provide this care for any period prior to the date of a medical report establishing its need. We agree with defendant and with the determination made with the WCJ.

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[10] *Medina* can be cited to the Board or to a Workers' Compensation Judge pursuant to Labor Code §5703(g) which allows the Board to receive as evidence either at or subsequent to a hearing prior decisions of the Board on similar issues. This case was handled by Ted Hanf, one of my partners in our Los Angeles office, and anyone requesting a copy should do so by e-mail.

[11] A copy of the *Arana* case may be obtained via e-mail request.

DISCLAIMER:

All characters of the Lobby Bar, with the exception of George, Kim and myself, are fictional and a product of my warped imagination.

However, what I refer to as the home healthcare conundrum continues with no clear guidepost in sight.

The parties, as well as the Board, are hoping for some sure-footed guidance but it is doubtful that this will ever be provided by the appellate courts.

On the defense side we now have something to work with, i.e. the Court of Appeal decision in *State Farm*. However, our starting point should *always* be Labor Code §4600(b) and Utilization Review.

Though, I must admit that my preoccupation with this issue is waning as I am currently on vacation, enjoying the beautiful sandy beaches of Kauai, a place where every cocktail waitress is breathtakingly beautiful. I've been sipping on Mai Tais at the Grand Hyatt, with Georgia on my mind. Georgia, George's cousin, tends bar at the Grand Hyatt in Kauai. Hard days of denying benefits aren't too far away, so I'd better enjoy the reprieve while it lasts.

Make mine a double, Georgia.

Aloha.

-Joe Truce

P.S.: AN IMPORTANT UPDATE

Little did Joe know that while he was enjoying his first Mai Tai in Hawaii a very important panel decision was issued in the case of *Elizabeth Gonia v. Robin, Carmack & Gonia, LLP, State Compensation Insurance Fund* (ADJ1925946) dated February 2, 2012.[12]

Applicant, Elizabeth Gonia, worked for a law firm in 1996 as an attorney/driver. She sustained an industrial injury to her low back, neck, left hip, left lower extremity, left upper extremity and psyche while working for the law firm (who knew being a lawyer was so dangerous). Ms. Gonia was ultimately determined to be 100% permanently totally disabled, but the specifics of the injury are not set forth in the Board's opinion. In August 2011 the WCJ found after a trial that the applicant was entitled to compensation for retro costs for housekeeping services based upon medical necessity.

[12] A copy of the *Gonia* case may be obtained via e-mail request.

SCIF filed a Petition for Reconsideration, asserting that there was, first, a failure by applicant to timely object to a Utilization Review denial of housekeeping, and second, that there was no substantial medical evidence to allow the WCJ to conclude that the need for housekeeping was medically mandated.

The evidence that was entered into the record from applicant's treating doctor showed that, in part, the need for additional housekeeping services beyond that which was in place prior to the accident in 1996 was due to applicant's move to a larger home. While her medical condition limited her abilities (she was able to return to work in a sedentary capacity as an attorney), the majority of Commissioners concluded that the treating doctor, and the evidence taken as a whole, did not demonstrate actual medical necessity.

An important take away from this decision loyal Lobby Bar patron is that the Commissioners unanimously concluded that applicant failed to object to the UR denial of housekeeping of February 11, 2009, and that this failure to object to the UR denial and the failure to adhere to the required procedure as set forth in *State Comp. Ins. Fund v. WCAB (Sandhagen)* (2008) 73 Cal. Comp. Cases 981, was *fatal*. Citing *J.C. Penny Co. v. WCAB (Edwards)*(2009) 74 Cal. Comp. Cases 826, the Commissioners concluded that the failure to object meant that the UR determination stood for all time.

One cannot emphasize enough the need to undertake timely Utilization Review as mandated by Labor Code §4610 and the *Sandhagen* decision. This underscores the power of this vehicle for employers/carriers. It demonstrates that UR is not only mandated by statute, but also is a valuable tool for employers to manage and control medical care and treatment.