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 IMPACT OF THE COURT OF APPEAL'S *VALDEZ* DECISION OR *MY, HOW THE PENDULUM DOES SWING!*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I arrived at the Lobby Bar with my worn and coffee stained copy of the California Court of Appeal decision in *Valdez*, with visions of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, dancing in my head.[2]

A celebration was already in full swing, being put on by none other than that cartel of chicanery George the Bartender's attorney, Ron Summers, his treating physician, Dr. Nickelsberg, and Larry and Lenny Lien of the 8600 Group.

It was quite a scene. The song "Celebration" by Kool & the Gang was blaring on repeat. Balloons and streamers were all over the place, adorned with the phrases "We Won!" and "Reverse This!"

If this was not bad enough, Larry and Lenny Lien were handing out t-shirts with the slogan "We're in the money!" emblazoned on the front to a host of lien representatives.

Ron was in a joyous mood at the bar, as well as his in-house treating physician, Dr. Nickelsberg. The dukes of duplicity proclaimed that all of my martinis were now "on them."

The issue as enunciated by the Court of Appeal in *Valdez* embodied the right of an injured worker to choose his own treating physician.

The right of medical control has been a political football ever since the 1975 amendment to Labor Code §4600, which allowed an injured worker after 30 days of his or her notice to the employer of the injury to select their own treating physician.[3]

As you know I started as a defense attorney in workers' compensation in 1973, or as I commonly refer to it as "BFC" (Before Free Choice).

You see, loyal Lobby Bar patron, before 1975 Labor Code §4600 provided that the defendant would have lifetime medical control. For the life of the claim the carrier would be responsible for

---

[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] The Court of Appeal decision in *Elayne Valdez v. Workers' Compensation Appeals Board and Warehouse Demo Services* 2012 Cal. App. Unpub. LEXIS 4023 was filed by the Court of Appeal on May 29, 2012. *Valdez* was not certified for publication until June 18, 2012, meaning it is now the the law of the land.

[3] The amendment became effective on January 1, 1976.

seeing that the injured worker received the necessary treatment to cure or relieve them from the effects of the industrial injury.

Under this former law, the employee could seize medical control only if it could be shown that the employer had refused to provide the necessary medical treatment. This situation usually involved an employee self-procuring medical treatment from his own selected treating physician and then going to a hearing and demonstrating that the employer had refused to provide said medical treatment.

If successful, the control of medical treatment would be given to the injured employee and the defendant would have to make reimbursement to the applicant's selected treating physician for the prior self-procured medical treatment.

In response to pressure brought to bear by the California Applicants' Attorneys Association (CAAA) and a national commission on workers' compensation seeking reform in various states, the California Legislature amended Labor Code §4600 in 1975 to provide that an injured employee would have the right to select their own treating physician.

If one goes into the legislative intent behind this amendment, we would see an avalanche of letters from CAAA and various labor groups lobbying Governor Jerry Brown[4] to sign this amendment, as injured workers should be entitled to select their own "treating doctors" in whom they have confidence. These groups argued that the applicant's choice of physician would be a doctor that has been familiar with the patient's history as undoubtedly workers would choose doctors with whom they have had a long-time doctor/patient relationship.[5]

Governor Brown was urged to sign the bill as injured workers are entitled to be treated by kind and caring doctors, such as Dr. Marcus Welby or Dr. Kildare.[6]

However, instead of Dr. Welby and Dr. Kildare, we got Dr. Seuss.

Governor Brown signed the "Free Choice of Medical" amendment in 1975 and from that time onward we have seen that the so-called "free choice" of the worker has absolutely nothing to do with the workers' free choice.

---

[4] He's also the current governor of California, ironically.

[5] A canard if I ever heard one.

[6] For those of you under the age of 55, these names are probably unfamiliar to you. Dr. Welby was a fictional TV doctor in the early 1970's played by Robert Young who made house calls and devoted one hour each week to a single patient. Dr. Kildare was popularized in 1930's and 1940's films as a young doctor on staff at a mythical hospital who obtained miracle cures for his patients, and as a bonus solved their non-medical issues. Dr. Kildare's chief of staff and mentor was played by a crusty but kindly Lionel Barrymore, who you might remember as Old Man Potter in Frank Capra's film "It's a Wonderful Life." I probably should have gone with Dr. Grey of Grey's Anatomy fame in this reference but I digress.

The injured worker's "free choice" became a euphemism for the applicant's attorney is free choice and the *Valdez* case is a perfect example.

Although this case is presumably about the "free choice" of the injured employee, the Court of Appeal recited the facts as follows:

> On October 31, 2009 petitioner stopped treatment with the MPN physician and became a patient of "Advanced Care Specialists," specifically Mark Nario, D.C., at her own expense. **. . .** Her legal counsel referred her to Dr. Nario.

So much for the Marcus Welby syndrome!

In *Valdez*, the applicant was referred to a treating physician who was the applicant's attorney's choice and certainly was not a physician with whom the applicant enjoyed a long-term relationship or had established a good patient/doctor relationship.

THE DWC QME PANEL SYSTEM

As a result of SB 899 effective January 1, 2005, both parties lost the ability to select their QMEs (referred to as the "dueling docs syndrome).

Prior to this date the employer community saw these competing medical-legal reports as part of a problem which they felt would be resolved by the passage of SB 899. The employer community wanted to get rid of "dueling docs" where the applicant's QME would do battle with the defendant's QME, usually resulting in prolonged litigation.

This new Panel QME system was designed to end the issue of "dueling docs" once and for all.

Or so we thought.

A ROSE BY ANY OTHER NAME

SB 899 was supposed to be a panacea; one medical-legal report (not two) and the case would resolve on the basis of that one medical-legal report.

However, we still have two medical-legal reports when we end up at trial, as the applicant's attorney can still obtain medical legal QME reports. This medical-legal report is issued by what is referred to as a "treating physician" selected by the applicant's attorney.

The applicant's "QMEs" under the old system have now become "treating physicians." They "treat" the applicant and issue medical-legal reports called "treatment reports" but what is in a name?

THE BOARD'S EN BANC DECISION IN *VALDEZ*[7]

On a theoretical basis, I agree with the dissenting commissioners, i.e., yes, an applicant should have the chance to choose Dr. Welby.

However, from a practical standpoint, the majority opinion makes sense also.

Both the majority and dissenting opinions at the panel level were certainly better reasoned than the legal gymnastics exercised by the Court of Appeal in *Valdez*.

WHERE DO WE GO FROM HERE?

My journey down memory lane with respect to the odyssey of medical control in the state of California was interrupted by a beaming Ron Summers who offered me my third Beefeater's martini.

Although Ron had a very wide grin as he handed my drink to me, Dr. Nickelsberg and Larry and Lenny Lien were positively dizzy with delight over the prospect of sending all of Ron's clients to Dr. Nickelsberg's office.

I took this moment to remind the good doctor and the Lien Brothers that the issue of who was going to pay the bill of the applicant's choice of treating physician was not yet resolved.

I pointed out that the case would be remanded back to the Long Beach Office of the Appeals Board for a new decision in light of the Court's ruling.

I told Dr. Nickelsberg that Labor Code §4605 made it quite clear that his bill would have to be paid by none other than the injured employee, who by the way would have to agree to make payment. At this, Dr. Nickelsberg frowned and Larry and Lenny quit dancing.

Further, it has been made known that the defendant in *Valdez* is seeking review of the Court of Appeal decision by the California Supreme Court, and any "reprieve" given to the doctors may be short-lived.

WHAT IS THE SOLUTION?

Loyal Lobby Bar patron, this is something that I often ponder but I have to be honest I'll be darned if I know. When we as the defense had unlimited medical control in "BFC" 1973 there were undoubtedly abuses.

Giving medical control back to the injured employee, which in reality means his attorney, would not appear to be a perfect solution either.

---

[7] See 2011's *George the Bartender and the Valdez Decision or Medical Provider Network Loophole Closure, No Detour in Sight*

The amendment to Labor Code §4600 gave the injured worker the right to select their own treating physician after 30 days. In reality, it is a rare case where the injured worker actually makes the selection of their own doctor, and instead is led to a doctor selected by their attorney, likely someone they have never met before.

The California Legislature has proposed different solutions – all of which have contributed to substantial litigation, which most of us can agree is counter-productive.

In the mid 1990's the Legislature gave us the Health Care Organization (HCO) along with a packet of regulations which would choke a goat. Litigation ensued over the issue of whether or not the employer had complied with all of the HCO regulations and whether or not the employee could escape the HCO.

As this was not an ideal situation, we now have the concept of Medical Provider Networks (MPN) with a somewhat shorter list of regulations. However, regulations inspire litigation nonetheless.

With the exception of some employers, such as Safeway or Grimway Farms, employers and/or carriers have no interest in creating an MPN. If they do, they buy into a discount network which offers 89,000 plus physicians, some of whom are dead or, if alive, have no idea that they are in a MPN.

The MPN has worked better than the HCO but may not be the ultimate solution.

Rather than having both parties jump through the hoops of seemingly endless litigation fighting over whether or not a regulation has been complied with, a far simpler solution may be to extend employer control from 30 days to 90 days. This would seem to be a compromise that makes sense and does not rely upon a whole host of regulations.

DISCLAIMER:

All characters of the Lobby Bar, aside from Kim, George and myself are fictional as is the storyline. However, the seemingly endless fight over medical control and the costs associated with that fight are very real. Employers/carriers desire medical control primarily to offset ongoing medical expense and applicant attorneys desire medical control to maximize disability.

Make mine a double, George.

-Joe