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 LIEN CLAIMANT CRISIS OR *LIEN CLAIMANTS GET THEIR DUE. PROCESS, THAT IS.* [1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar looking forward to my cocktail of choice, a Beefeater's martini, straight up with two olives, served to me by Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

While awaiting the arrival of my martini and Kim, I noticed what appeared to be a dark cloud hanging over the other end of the bar. Looking over I saw a council of war involving Ron, George the Bartender's workers' compensation attorney, Dr. Nickelsberg, George's primary treating physician, and Larry and Lenny Lien of the 8600 Group.

The group did not look happy and I had a hunch as to why.

On January 19, 2012, the Board issued its Panel decision in the case of *Dora Flores v. ABM Industries, Inc.* (ADJ3317042; ADJ2119234) which dealt lien claimants statewide a substantial blow.

From previous conversations with Larry and Lenny Lien, I knew that their dark empire was threatened by the fact that the Board was now going to insist that lien claimants adhere to the rules of due process as set forth in Labor Code §5502 once they became parties.[2]

As I always thoroughly enjoy the discomfort of lien claimants, I made my way over to the other end of the bar and bought a round of drinks for the cartel of chicanery. I was hoping to have my spirits brightened by their words of despair and to bear witness to the beginning of the end of the evil lien empire that is the 8600 Group.

Being privy to the operations of the 8600 Group I knew that they employed multiple lien representatives stationed at every Board throughout Southern California.

Once a case was settled or went to final decision, the matter would be set for a Lien Conference or a Status Conference. The lien claimants might or might not show up.

A lot of these liens were filed by medical providers who provided medical treatment outside a legitimate Medical Provider Network, or whose lien had been timely denied by Utilization Review.

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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] Pursuant to numerous decisions by the Board enforcing their own rules of practice and procedure, lien claimants become parties once the case-in-chief has settled or is finalized by a decision.

As there was no reason to settle these liens, the matter would be set for trial.

When the trial date rolled around, the lien claimants for the 8600 Group would bring to trial their evidence despite whether or not this evidence was disclosed on the Pre-Trial Conference Statement completed by the parties at the Lien Conference.

The reasoning according to Larry and Lenny was that lien claimants are not obligated by Labor Code §5502 to list stipulations, issues, exhibits and witnesses. They added that traditionally lien claimants were able to ignore either status or lien claim conferences and then bring their evidence to trial.

I was stirred from my musings by Lenny pounding the bar and complaining to Dr. Nickelsberg that it was so unfair to require lien claimants to adhere to Labor Code §5502 just like everyone else.

I smiled knowing that Lenny was dead wrong. Not only was it fair but it is mandatory for all parties (which include lien claimants after the case has settled) to adhere to the due process requirements of Labor Code §5502 at a Mandatory Settlement Conference, a Lien Conference or a Status Conference.

For years lien claimants have asserted that they have no obligation to follow the mandate of Labor Code §5502 as lien claims are usually never set for a Mandatory Settlement Conference, but rather are set for a Status Conference or a Lien Conference.

Unfortunately for Larry and Lenny, the Board addressed the issue of a "rose by any other name" in its Panel decision in *Flores.*[3]

In *Flores*, the lien claimant, Global Interpreting, appeared at a Lien Conference on August 11, 2011. They did not list any evidence or witnesses on the pre-trial conference statement and the matter was then continued for trial.

At the trial on September 2, 2011, the lien claimant naturally offered into evidence documents in support of its lien claim. Defendant objected as these documents had not been listed on the Pre-Trial Conference Statement.

The case was then submitted and the Workers' Compensation Judge (WCJ) issued his Findings and Order disallowing the lien of Global Interpreting. The WCJ held that the documents offered

at trial by the lien claimant were inadmissible. The WCJ also held that the lien claimant had failed to carry its burden of proof as to the reasonableness and/or necessity of the services it rendered.

[3] A copy of the *Flores* case may be obtained via e-mail request. Panel decisions of the Board can be brought to the attention of the Board or a Workers' Compensation Judge pursuant to Labor Code §5703(g) which provides as follows: "The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute . . . (g) . . . prior decisions of the appeals board upon similar issues."

Global Interpreting then filed a Petition for Reconsideration, claiming that it was not bound by Labor Code §5503(e)(3) as this section only applies to a Mandatory Settlement Conference and the case was set for a Lien Conference.[4]

In addressing the lien claimant's contention that Labor Code §5502 only applies to Mandatory Settlement Conferences and not a Lien Conference, the Board addressed this allegation as follows:

> That the conference on August 11, 2011 was denominated a "lien conference," does not allow lien claimant to avoid the consequences of being unprepared for a lien trial. The lien conference and settlement conference have the identical purpose, to frame issues and stipulations in preparation for trial . . . When the lien conference occurred after the settlement of the case-in-chief, lien claimant became a party subject to the same rules that apply in all cases (WCAB Rule 10364(a))

The Board concluded as follows in upholding the decision of the WCJ:

> Here, lien claimant did not follow the longstanding statutory requirement that it disclose its witnesses and evidence at the lien conference in advance of trial. Lien claimant filed a lien for payment of more than $27,000 in interpreter fees, yet upon notice of the lien conference on August 11, 2011, lien claimant did not show up at the conference prepared to proceed. Defendant's trial objection to the admissibility of lien claimant's evidence was properly sustained by the WCJ, as lien claimant failed to list any evidence at the time of the lien conference. In the absence of admissible evidence, lien claimant did not carry its burden of proof to establish that the services it rendered in this case were reasonable and necessary.

THE LIEN CLAIMANT CRISIS IN SOUTHERN CALIFORNIA

On January 24, 2012, Rosa Moran, Administrative Director of the Division of Workers' Compensation, advised that the "state needs to fix the lien problem plaguing Southern California to prevent the entire workers' compensation system from failing, and the fix might require 'draconian measures' that some people will not like."[5]

Director Moran, new to her duties as Administrative Director, has correctly analyzed the lien crisis facing our state.

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[4] Although the decision quotes Labor Code §5503(e)(3), it is assumed that this is a clerical error as the correct section is Labor Code §5502.

[5] AD Moran was quoted in an article published on January 24, 2012, written by Greg Jones entitled, "Moran Says Lien Problem Threatens Entire System" which can be found on the WorkCompCentral website. A copy of this article may be obtained via e-mail request.

However, the word "draconian" when applied to the ongoing onslaught of lien claims may not be adequate as the time for "draconian" measures was at the very least 15 to 20 years ago. Perhaps now the time is right for some serious austerity measures?

We had previously referred to the present day makeup of the Division of Workers' Compensation as the A-Team as the Board, Director Moran and the Director of the Division of Industrial Relations, Christine Baker, are all acutely aware of the issues facing our system, specifically the lien crisis, and appear more than capable of tackling it.[6]

BURDEN OF PROOF

In numerous decisions (both en banc and Panel) the Board has continually addressed the burden of proof as far as lien claimants are involved.

At Lien Conferences, Status Conferences and/or Mandatory Settlement Conferences, a lien claimant should have the burden of proof as to the following evidence to support their liens:

1. Labor Code §4603.2: This is the Labor Code section which gives the liability to claims administrators for payment of lien claims. At the Mandatory Settlement Conference or Lien Conference, lien claimants, in order to prevail, must submit a proof of service or mailing on defendants that they have complied with Labor Code §4603.2. They must also forward all documents and reports required by the Administrative Director to support their lien. If there is no compliance with Labor Code §4603.2, there can be no valid lien claim.

2. As part of the anti-fraud legislation, the California legislature amended Labor Code §5703 to provide that not only reports of attending and examining physicians be certified under penalty of perjury but also the billings. The specific section is Labor Code §5703(a)(1) which provides as follows: "Statements concerning any bill for services are admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician." Although not strictly enforced previously it is crystal clear that not only reports but the **billings** must be made under penalty of perjury. The section also provides who must make the statement under penalty of perjury, namely the physician.

3. Lien Trials must be given priority. One of the problems that foster the avalanche of lien claims is the fact that most defendants will agree to settle lien claims which have no value at all, such as non-MPN providers or lien claims that have been validly denied by Utilization Review rather than pay for multiple trial dates. At the first trial date liens issues should be settled or submitted for decision.

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[6] See discussion of the A-Team in *All George the Bartender Wants for Christmas is 100% User Funding Or a Visit from the Ghosts of Workers' Compensation* published on December 22, 2011.

DISCLAIMER:

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

However, as I've explained numerous times before, the lien crisis confronting our system is not and is extremely serious. In the article at WorkCompCentral quoted above, Director Moran advised that "she's worried about the problem 'creeping' into Workers' Compensation Appeals Board offices in Northern California, where liens are still relatively rare."

For Director Moran's sake, I hope this is a condition we can stave off. Or else I fear for some of you it might be time to start checking under your beds for lien claimants before you go to sleep.

Make mine a double, George.

-Joe Truce