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 NEW LOOPHOLE FOR LIEN CLAIMANTS OR DID ANYONE GET THE LICENSE PLATE NUMBER OF THAT MACK TRUCK?

FROM THE LOBBY BAR AT THE HYATT:

As I walked into the lobby bar, Larry and Lenny Lien of the infamous 8600 Group were telling Dr. Nickelsberg about their victory today at the Appeals Board.

I knew that Dr. Nickelsberg is the only client of the Lien brothers

George the Bartender's workers' compensation attorney, Ron Summers, was listening intently with a broad smile on his face.

When lien claim representatives are happy it means that it is not a good day for the defense down at the Board. In bracing myself to hear the story of the latest victory of Larry and Lenny Lien I ordered my favorite cocktail, a Beefeater Martini straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

Lenny and Larry were ecstatic over the results of a lien trial today involving billings from Dr. Nickelsberg's outpatient surgery centers, the S&M Surgery Centers.

Frankly, I was puzzled. I knew that for services performed by outpatient surgery centers prior to January 1, 2004, there was no fee schedule and for those services the outpatient surgery centers in southern California had been reaping a veritable fortune.

However, once the legislature caught wind of this exception to the Official Medical Fee Schedule the loophole was closed for all outpatient surgery center services on or after January 1, 2004.

From that date forward all services, including the services by outpatient surgery centers, were controlled by the Official Medical Fee Schedule.

From what I heard from Lenny and Larry in their story to Dr. Nickelsberg all services in their case were performed after January 1, 2004, and therefore were subject to the fee schedule. Moreover, it appeared from what I was hearing that all charges were, in fact, paid pursuant to fee schedule.

I finally could not contain my curiosity and I broke in and asked Larry and Lenny the source of their happiness if all the charges of Dr. Nickelsberg's S&M Surgery Centers were correctly paid pursuant to fee schedule.

Larry looked at me, smiled, and replied with one word "penalties."

I was still confused as Larry told me that all charges of the S&M Surgery Centers were paid not only by fee schedule but were paid within the statutory time (45 working days) as required by Labor Code §4603.2(b).

I told Larry that I was still mystified as to how he would be awarded a penalty for charges that were paid pursuant to fee schedule on a timely basis.

Larry told me that the answer is contained in the Labor Code §4603.2(b) which provides in relevant part as follows:

> Payment for medical treatment provided or authorized by the treating physician. . . shall be made at reasonable maximum amounts in the official medical fee schedule, pursuant to Section 5307.1, in effect on the date of service. Payments shall be made by the employer within 45 working days after receipt of each separate, itemization of medical services provided, together with any required reports and any written authorization for services that may have been received by the physician. If the itemization or a portion thereof is contested, denied, or considered incomplete, the physician shall be notified, in writing, that the itemization is contested, denied, or considered incomplete, within 30 working days after receipt of the itemization by the employer. A notice that an itemization is incomplete shall state all additional information required to make a decision. Any properly documented list of services provided not paid at the rates then in effect under Section 5307.1 within the 45-working-day period shall be increased by 15 percent, together with interest at the same rate as judgments in civil actions retroactive to the date of receipt of the itemization, unless the employer does both of the following:
>
> (A) Pays the provider at the rates in effect within the 45-working-day period.
>
> (B) Advises, in the manner prescribed by the administrative director, the physician, or another provider of the items being contested, the reasons for contesting these items, and the remedies available to the physician or the other provider if he or she disagrees.

At this point the light bulb went on and I knew exactly what had happened in Larry and Lenny's case. When the carrier made the payments to the S&M Surgery Center the carrier's bill review

company concurrently issued letters and/or documents referred to as explanation of benefit letters (EOB's).

The EOB's not only provide information to the medical provider as to the portion of the billing that is not being contested and is being paid, but also provides an explanation as to the amounts of the bill that are not being paid and the remedies available to the medical provider.[1]

I realized immediately that in the case involving Larry and Lenny and the S&M Surgery Centers the defendant did not introduce into evidence the EOB's but only provided information that the billings were paid pursuant to fee schedule.

A smiling Larry told me that he considered this a loophole in Labor Code §4603.2(b) and he and Lenny were driving a Mack truck through it.

Larry went on to indicate that the S&M Surgery Centers would generate billings three or four times that of fee schedule. Although they knew that they would not be awarded in excess of fee schedule, they would, however, be awarded penalties and interests on the portion of the billings not paid as there was a failure of proof as required by Labor Code §4603.2(b).

Larry further boasted that as he had a brother who worked for a large insurance company Larry knew that most carriers and third party administrators retain independent contractors for their bill review and that the adjuster seldom has the EOB's in their hand and/or file to provide to the defense attorney.

The Lien brothers told me that in a majority of cases defense attorneys appear without the EOB's and therefore without any evidence that there has been compliance with Labor Code §4603.2(b).

DISCLAIMER:

Although the above characters at the lobby bar as well as the story are fiction, unfortunately the "loophole" referred to by the Lien brothers is not. The Board recently issued a Panel Decision entitled *Jerry Naranjo v. Southern California Edison* (2009) ADJ186123 which awarded a lien claimant penalties and interest for failure by the defendant to submit evidence of compliance with Labor Code §4603(b).

[1]Anyone who has ever seen an EOB will note that it provides that a specific billing event is being paid and under which billing code. Usually the notice provides (in fine print) down at the bottom language which complies with Labor Code §4603.2(b), advising that the amount over and above fee schedule is being denied and the remedies available to the provider. Yes, the explanation may be in small print but it is there just the same and will satisfy the requirements of Labor Code §4603.2(b).

In *Naranjo* the Board declared as follows:

> Here, there is no dispute that defendant paid a portion of each of lien claimant's billings in the amount of $928.61 for each epidural, within 60 days after receipt of lien claimant's billing. However, the record does not show that defendant advised lien claimant of the items being contested, its reason for contesting these items, and the remedies available to the lien claimant as required by Labor Code §4603.2, subdivision (b). Because the record lacks evidence that defendant so advised lien claimant as required, the WCJ properly imposed a 10% increase in compensation and interest. Based on the language of the statute, it is defendant's burden to establish that it complied with the statutory requirements to avoid imposition of penalty and interest. (emphasis added)[2]

In light of the mischief by the mythical Lien Brothers and the Board's decision in *Naranjo* it is mandatory in any lien claim trial that the EOB's be submitted as evidence that defendants have complied with Labor Code §4603.2(b). Usually the language on your basic EOB is as follows:

> Amounts billed above the recommended allowance are hereby objected to as being in excess of the amounts authorized under section 5307.1 of the California Labor Code. Remedies available for contesting this recommendation include filing a lien or Application for Adjudication with the WCAB.

EOB's vary and sometimes the language is more detailed.

If EOB's with the above or similar type language had been entered into evidence in *Naranjo* the defendant presumably would have escaped the awarded penalty and interest.

In sipping my martini I thought, "For want of a nail, the shoe was lost. For want of a shoe, the horse was lost. For want of an EOB, the case was lost."

A costly mistake for sure.

Make mine a double, George.

- Joe Truce

[2]The Board's panel decision in *Naranjo* is available by email on request