ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE LIMITATIONS ON MEDICAL TREATMENT IN LABOR CODE §4600(b) OR *HOW AUTHORIZING HOME HEALTHCARE IS LIABLE TO PUSH US TO THE BRINK*[1]

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits, I arrived at the Lobby Bar with visions of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, dancing in my head … not to mention a Beefeater's martini straight up with two olives. Kim, as usual, did not disappoint as she brought my cocktail as soon as I sat down in my usual seat.[2]

After my first sip I was joined at the bar by none other than Frank Falls, noted workers' compensation defense attorney, as well as Pat Pennipincher, claims manager for Integrity Insurance Company (Frank's largest client). Judging from their furrowed brows and grimaces on their faces I knew the situation must have been dire for Integrity Insurance Company.

Frank told me that he and Pat wanted a "second opinion" on a vexing problem that was facing them at an upcoming trial and I was more than happy to help them. Taking another sip of my martini, I sat back and listened.

Frank got to the crux of the matter. The applicant had not yet reached the point of maximum medical improvement and every time that Frank did something that the applicant did not like, the applicant would threaten suicide by jumping off an overpass.

Pat interjected that the case involved an admitted psychiatric claim for which all appropriate benefits had been provided.

Frank continued to explain the dilemma. Whenever the applicant threatened suicide Frank would receive a fax from the applicant's psychologist, Dr. Freud Ian Slippé, with the phrase "Crisis Intervention – Recommend Emergency Hospitalization" on the top of the report in large font and all caps.[3]

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[1] For those new patrons to the Lobby Bar, located in the Hyatt Regency Long Beach on South Pine Avenue, George the Bartender's workers' compensation case involves an injury to his elbow, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] A Beefeater's martini, straight up, is best served at 38˚ Fahrenheit.

[3] Raise your hand if this sounds familiar.

Pat interrupted Frank again to state that Integrity Insurance Company, to avoid penalty, had immediately acquiesced to each psychiatric hospitalization so this was not the issue.

The issue according to both Frank and Pat was the fact that Dr. Slippé had made a recommendation on the Primary Treating Physician's Permanent and Stationary Report five months ago that the applicant required 24/7 attendant care by a skilled technician because of his suicidal tendencies. This was to prevent the applicant from going through with the act of suicide.

Pat ruefully told me that his Utilization Review Department upon referral of this request conveyed to him that they would not review a request for home care as home care was not covered by either the American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines (Third Edition)[4] or with the treatment guidelines of the Administrative Director of the Division of Workers' Compensation.

Therefore, the request for home care was never reviewed and/or denied by the Utilization Review Department. As home care was not voluntarily provided by Integrity Insurance Company, the case was coming up for trial not only on this issue but also on a petition filed by the applicant's attorney for a Labor Code §5814 penalty for not providing the medical treatment as recommended by Dr. Slippé.

The applicant's attorney in this case was none other than the infamous Ron Summers. Ron told Frank that Integrity Insurance Company was in violation of the law by not providing 24/7 home care as recommended by Dr. Slippé, that Ron's Labor Code §5814 penalty petition was a "slam dunk" and that any workers' compensation judge would award the full 25% penalty. Frank looked miserable and told me that he did not see any way out of this predicament other than to voluntarily provide the 24/7 home care and try to negotiate the penalty with Ron.

Having finished listening to their symptoms, I knew exactly the "prescription" that both Frank and Pat needed. I reached into my trusty briefcase and pulled out my handy 2014 Workers' Compensation Laws of California, aka Labor Code, and turned to Labor Code §4600. I advised the despairing duo that subsection (b) was added to Labor Code §4600 in 2004 as part of the SB 899 reforms and that this section limited our obligation to provide medical treatment as follows:

> (b) As used in this division and notwithstanding any other 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.[5]

[4] More commonly known as ACOEM Guidelines, in the workers' comp tongue

[5] Pursuant to the mandate of Labor Code §5307.27, the Administrative Director in 2007 adopted medical treatment guidelines which incorporated the ACOEM Guidelines and are now known as the Medical Treatment Utilization Schedule, or MTUS. They were last updated in 2009. More info on the MTUS can be found here - https://www.dir.ca.gov/dwc/MTUS/MTUS.html

I advised both Frank and Pat that my reading and understanding of this subsection is that it was the intent of the California legislature to limit medical treatment to treatment that complied with the guidelines "adopted by the administrative director pursuant to Section 5307.27" and all other treatment (including home care) should be *reviewed and denied* by utilization review as not falling within the guidelines.[6]

At this point, Pat's face became even redder and he explained to me that in the Integrity Insurance Company's superstructure the Utilization Review Department was set up as a separate entity and the manager of the department mandated which medical requests would be reviewed and which would not.

I was astonished to hear this and reminded Pat that the Labor Code and "Subchapter 1. Administrative Director-Administrative Rules" in the *California Code of Regulations, Title 8 Chapter 4.5. Division of Workers' Compensation* mandated that the adjuster, not an official with a UR department, is the person that should be making all claims decisions on specific cases. So, when the adjuster says jump, the UR Department should ask, "How high?" Pat replied that the power to remedy this situation was above his pay grade.

Frank now wore a look of utter desperation and wanted to know if there was anything he could do to avoid liability. I reached into my trusty briefcase once again and pulled out their second "prescription" - the Board's decision in the case of *Elvin Salguero v. Charles Gemeiner Cabinets* (ADJ6989761) 2013 Cal. Wrk. Comp. P.D. LEXIS 450 filed on September 30, 2013.[7]

As I was starting to explain the Board's rationale in *Salguero*, Frank interjected that the California Supreme Court in *Sandhagen*[8] mandated that an employer had an absolute obligation to provide medical treatment on the request of the treating doctor if utilization review was not conducted pursuant to Labor Code §4610. I corrected Frank and told him that although many attorneys believed that *Sandhagen* said that, they were incorrect.

In *Sandhagen*, the Supreme Court went to great pains to indicate that if a defendant does not submit a treatment request to utilization review or if the utilization review is untimely, this does not mean that the defendant must provide the treatment requested. The Court reminded us that all medical treatment, in order to be reasonable and/or necessary, must comply with the ACOEM Guidelines or the medical guidelines "adopted by the administrative director pursuant to Section 5307.27," which we now know as the MTUS.

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[6] If I can quote from the Department of Industrial Relations MTUS webpage for a second, this means treatment(s) that are "scientifically proven to cure or relieve work-related injuries and illnesses."

[7] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice. A copy of *Salguero* can be obtained by an email request.

[8] The full site is *State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Sandhagen)* (2008), 44 Cal. 4th 230; 186 P.3d 535; 79 Cal. Rptr. 3d 171; 2008 Cal. LEXIS 7905 filed by the Supreme Court July 3, 2008. A copy of this case can be obtained by an email request.

In other words, as is evident in *Sandhagen* and several subsequent decisions by the Board, the medical opinions of primary treating physicians and secondary physicians are not enough to establish that the recommended medical treatment is necessary.

I pointed out to Frank and Pat that this principle of law was spelled out in the Board's decision in *Salguero* as the Board denied and incorporated the decision of the Workers' Compensation Judge, the Honorable Daniel A. Dobrin, in denying the applicant's Petition for Reconsideration. In his Report and Recommendation on the applicant's Petition for Reconsideration, Judge Dobrin summarized the applicant's complaints as follows:

> On reconsideration, applicant contends, in essence, that the denial of the home care request was an abuse of the trial judge's discretion, particularly where no competent medical evidence was presented in rebuttal to the request articulated by Dr. Elena Konstat, PhD, a psychologist, and affirmed by Dr. Fred Hekmat, M.D., an orthopedist. More specifically, applicant contends that the home care request was supported by substantial evidence, that the trial judge employed his own unqualified lay opinion to defeat a valid medical request, and engaged in speculative and invalid reasoning to deny the treatment request.

I then told Frank and Pat that the facts in *Salguero* were similar to the facts in their case. The applicant, according to his psychologist, Dr. Konstat, qualified for 24/7 home care because he wanted to commit suicide "by jumping onto a freeway." Judge Dobrin noted that the applicant testified on cross-examination that he wanted to kill himself and had a specific plan to do so.[9]

Following trial, Judge Dobrin found that the applicant had not sustained his burden of proof by showing that 24/7 home care was reasonable and/or necessary pursuant to Labor Code §4600(b) and quoted the Supreme Court in *Sandhagen* as follows:

> The California Supreme Court has recently made clear that "[N]otwithstanding whatever an employer does (or does not do), an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (*§ 4600, subd. (b)*) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence. (*§ 4604.5*.)" (*Sandhagen v. WCAB, 73 CCC 981, 990*.)

I advised Frank and Pat that in my opinion Labor Code §4600(b) was crafted by the legislature in reaction to a runaway medical benefit delivery system and that this subsection was meant to limit rather than expand medical treatment.

During my lecture, Frank had been busily reviewing his medical file and gleefully announced that Dr. Slippé had not even mentioned the ACOEM Guidelines or the guidelines of the

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[9] Believe it or not on this cross exam of the applicant the defense counsel actually offered to call 911 on her cell phone "because the applicant's imminent suicide risk" but was told by Judge Dobrin she couldn't interrupt the trial but she was free to use her phone once the trial was completed. Oh, to be a fly on the wall in that court room!

Administrative Director. In fact Dr. Slippé did not try to rebut these guidelines by referring to any other scientific evidence and/or guidelines.

I completed my summarization of *Salguero* by pointing out that Judge Dobrin had done a masterful job in reviewing the MTUS and concluding that nothing in these guidelines authorized home healthcare made the following comment in his Report and Recommendation on the Petition for Reconsideration:

> There is no reference to any treatment guidelines or discussion of such guidelines in any of the reports submitted, nor do I find any support in any of the applicable guidelines for Dr. Konstat's rather unusual request for 24/7 home care as a modality of care for severe depression. There is no mention of any such modality of care in Chapter 15 of the ACOEM guidelines regarding stress complaints.

At this point having finished administering my treatment, I observed that both Frank and Pat looked extremely relieved and cured.

DISCLAIMER:

All characters at the Lobby Bar aside from George, Kim and I are fictional and the storyline is simply a product of my warped and vivid imagination.

Senate Bill 899, which became effective on April 19, 2004, was emergency legislation that was in reaction to the rising cost within the California workers' compensation system, which had ballooned to more than $30 billion a year.

The drafters of Senate Bill 899 attempted to revise Labor Code §4600 which mandated 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."

The word "cure" is not a problem. The problem is with the word "relieve." I put it to you Loyal Lobby Bar patron, can any type of treatment be denied or withheld if it "relieves" one from the effects of an injury, i.e., such as massage treatment on the back, even if it relieves the pain for only a few seconds?[10]

It is my understanding that the framers of Senate Bill 899 originally wanted to take out the word "relieve" from Labor Code §4600 but as this was impractical, subsection (b) was created to mandate that all medical treatment must comply with the guidelines adopted by the Administrative Director.

Somehow, we on the defense side have not gotten this message. We wring our hands when there is an untimely utilization review decision, or if there is no utilization decision at all as in the

[10] This is a topic discussed at length in an episode from 2012 - George the Bartender and the Home Healthcare Conundrum or *Is Flipping the Mattress and Fluffing the Pillow Really Considered Medical Treatment?*

mythical case that I presented above. We must concentrate on the burden that the Legislature has placed on the applicant to demonstrate that treatment is really necessary and reasonable. A doctor's opinion is no longer sufficient.

Make mine a double, George.

-Joe Truce