

## 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 YEAR'S EVE MELTDOWN OF EAMS OR *HAS TIME FINALLY RUN OUT ON FRIVOLITY?*<sup>1</sup>**

#### **FROM THE LOBBY BAR AT THE HYATT:**

Another hard day of denying benefits behind me I entered upon what can only be described as a fantastical and raucous scene at the Lobby Bar. A colorful kaleidoscope of confetti and balloons was strewn across the floor, more balloons hanging in the air in between a colorful array of decorative streamers. A string of lights was draped along the length of the bar. A banner was hung, proclaiming "Happy New Year! Goodbye 2012! Hello 2013!" Even a champagne fountain had been set up!

Needless to say it was difficult to find my favorite bar stool through this explosion of color and crowd of patrons. I felt an overwhelming wave of anxiety washing over me when I spotted Kim, the Hyatt's breathtakingly beautiful cocktail waitress, heading toward me, parting the sea of people and coming to my rescue. Wearing a smile she had my cocktail of choice, a Beefeater's martini straight up with two olives, in tow.

The anxiety subsiding I thanked Kim and made a mental note to find her as midnight drew closer in the hopes of being the recipient of an amorous embrace as the ball dropped and ushered in the New Year. One last fleeting look at her as she walked away, I now turned my attention to the celebratory patrons. Although it was early, small groups of Lobby Bar patrons were ready to welcome in the New Year.

My survey of this merry lot brought my attention toward the end of the bar, where I spotted that dastardly duo: Ron Summers, George the Bartender's workers' compensation attorney, as well as Dr. Nicklesberg, George's primary treating physician and the house physician for Ron.

Nearby these two the most boisterous celebration in the bar was underway, orchestrated by none other than those wonderful brothers and partners in crime Larry and Lenny Lien of the 8600 Group.<sup>2</sup>

I could not understand the merriment presently expressed by Larry and Lenny as just a short time ago they were singing the blues over the passage of California Senate Bill 863, which, among other reforms, took dead aim at frivolous lien claims.<sup>3</sup>

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<sup>1</sup> 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!

<sup>2</sup> The 8600 Group as you know loyal Lobby Bar patron is owned and operated by none other than the esteemed and aforementioned Dr. Nicklesberg.

<sup>3</sup> Most recently discussed in our last visit to the Lobby Bar in: *George the Bartender and the Passage of Senate Bill 863 or When Stars Align*

Sipping my drink I caught Kim's attention and motioned to her to bring me three more drinks and made my way toward the Lien brothers. What I didn't know was that the Lien brothers had been at the Lobby Bar for quite some time and when I reached them they were more than willing to open up to me about their current elated state.

Larry explained that Dr. Nicklesberg had been anointed as the primary treating physician on all of Ron's cases, which didn't seem like breaking news to me. Then Larry explained that whether or not the reports of Dr. Nicklesberg were timely denied by Utilization Review, were outside the Medical Provider Network or were denied because injury AOE/COE had been denied, the Lien brothers still filed liens and Declarations of Readiness to Proceed on all of Ron's cases after the matter was settled.

Lenny happily chimed in, adding that for liens filed on or after January 1, 2013, Dr. Nicklesberg would have to pay a statutorily imposed fee for filing a lien in any case. Moreover, once a Declaration of Readiness to Proceed was filed (even though a lien had been filed prior to January 1, 2013), Dr. Nicklesberg would have to pay an additional lien activation fee.

This all sounded pretty standard to me and by the book. With some bewilderment I told the Lien brothers that anyone who has read SB 863 already knew all this.

Larry smiled and told me that he and Lenny had figured out how to beat both the fee for filing a lien in the first place and the lien activation fee.

Larry, well into his cups by now as those drinks I ordered the Lien brothers arrived and his was now half drunk, went on to explain that after consultation with Ron and Dr. Nicklesberg they opted to file liens in all of their cases in which liens had not been filed, along with Declarations of Readiness to Proceed.

All these documents were filed en masse on New Year's Eve. Lenny and Larry, in unison, told me that they had saved Dr. Nicklesberg thousands of dollars by filing both lien claims and the Declarations of Readiness to Proceed concurrently on New Year's Eve.<sup>4</sup>

With some consternation I wanted to know from Larry and Lenny if they had carefully analyzed each case to see if services had been timely denied by Utilization Review, whether injury AOE/COE had been denied by a judge, that they had made good faith efforts to resolve the dispute as mandated by the wording of the Declaration of Readiness to Proceed and that they had promulgated evidence in support of their lien claims.

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<sup>4</sup> For those of you that are E-filers you probably know that so many any of these types of documents were filed on New Year's Eve that the EAMS website crashed and electronic filings could not be made. The only filing that could be accomplished when the system is down would be by hand filing the appropriate documents at the Appeals Board Office.

Larry explained gleefully that it did not matter as once these documents were filed the Board had jurisdiction and that the defendant carriers would settle rather than go to the expense of defending these lien claims.

And here it was loyal Lobby Bar patron, with the last fleeting hours of 2012 ticking by my very last opportunity of the year to squash the Lien brothers' aspirations yet again. Don't think for a moment I was going to let it pass me by. I pulled from my trusty briefcase the recent case of *Martha Aguire v. Two Star Personnel* (ADJ7003833) filed on November 26, 2012.<sup>5</sup>

Having extra copies I gave one to Larry and Lenny, as well as to Ron and Dr. Nicklesberg. I wanted them all to be able to follow along as I recounted the findings of the Board in this particular case.

In *Aguire*, a lien claimant by the name of Safety Works, Inc. had filed Declarations of Readiness to Proceed in multiple cases and like the New Year's Eve filings of the Lien brothers these liens and the accompanying Declarations of Readiness to Proceed were without merit.

In this case the Workers' Compensation Judge (WCJ) prepared a report on lien claimant's Petition for Reconsideration as follows:

. . . lien claimant wasted significant time and resources. (See 4 Report, pp. 3-4.) Many hours were squandered when the WCJ and District Office Staff were forced to respond to DORs that were "frivolous" and "indisputably without merit" and which violated workers' compensation laws and/or regulations.

In addressing lien claimant's Petition for Reconsideration, the Board observed:

Even if the petition were not subject to dismissal, the sanction imposed by the WCJ was justified. We would therefore be inclined to deny lien claimant's petition and incorporate the WCJ's Report, especially since the petition misrepresents material facts by stating that lien claimant was "never directly served with [the WCJ's] original Notice dated 8/23/2012" (Petition, p. I) despite a proof of service showing that the document was served on lien claimant on August 23, 2012.

In granting lien claimant's Petition for Reconsideration, the Board went on to observe:

. . . a hearing is set on January 24, 2013 at 10:00 AM before WCJ Darcy Kosta at the Van Nuys District Office on lien claimant's motion to consolidate thousands of cases in which Safety Works, Inc. filed improper DORs. In light of the upcoming hearing-and the possibility of a global resolution-we will grant

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<sup>5</sup> Anyone wishing a copy of the *Aguire* case should request same by e-mail.

reconsideration, rescind the September 26, 2012 Order, and return the matter to the Van Nuys District Office for the upcoming hearing and a decision by WCJ Kosta. Our decision *does not* affect any requests for attorneys' fees and costs that may be filed in any of the cases discussed in the September 26, 2012 Order.<sup>6</sup>

The Board ended their opinion with the following flourish:

Finally, we note that Labor Code section 4907 will be expanded on January 1, 2013. Beginning on that date, a lien representative may lose the privilege of practicing before the WCAB for violating workers' compensation laws or procedures, failing to pay an order of sanctions, or other good cause.

During my reading of this opinion to the cartel of chicanery I noticed an odd hush had fallen over this once jovial bunch. Looking up at them now I saw that they had become quite sullen, with all of their bravado from just a few minutes ago dissipated. I thought to myself that if I were in their shoes the only thing going through my mind now would be: "Tonight we want to party like it's 1999."

**DISCLAIMER:**

All the characters of the Lobby Bar aside from George, Kim and myself are imaginary and products of my warped imagination. However, the ongoing and almost ceaseless war against a lien claimant's ability to file frivolous liens is not. *Aguire* is only one in a myriad of cases in which the Board has sent a signal to the entire lien claimant population that frivolous actions by lien claimant representatives will not be tolerated.

The Board has seen the repeated abuses of lien claimant representatives trying to collect on frivolous lien claims and the Board has taken the appropriate action.

Cheers to the New Year!

Make mine a double, George.

-Joe Truce

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<sup>6</sup> When the Board referred to the possibility of a global resolution I did not think they were referring to a global settlement but maybe global sanctions.