

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: **GEORGE THE BARTENDER AND THE RETURN TO PRESCRIPTION SANITY OR A COMMON SENSE CURE FOR WHAT AILS YOU**

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I took my usual seat at the lobby bar.

All was right with the world as Kim, the Hyatt's breathtakingly beautiful cocktail waitress, greeted me with my cocktail of choice, a Beefeater's martini, straight up with two olives.

The cause tonight for my cheerfulness and satisfaction was the issuance of the recent panel decision by the Appeals Board in *Ramon Mendoza v. J. Buckbinder Industry, Incorporated; Insurance Company of the West* (ADJ3069602).¹

As I was reading the Board's decision in *Mendoza* once again George the Bartender's workers' compensation attorney, Ron Summers, flanked by George's primary treating physicians Dr. Nickelsberg and Dr. Ratbar, walked into the bar as if they were bringing up the rear of a funeral procession.

Not far behind the good doctors were their lien claim representatives, Larry and Lenny Lien of The 8600 Group.

This was not a happy time for that group as the Board struck to the heart of the issue of "**re-packaged drugs**" in its panel decision in *Mendoza*.

The concept or designation of "re-packaged drugs" is a misnomer as this is just another way of getting around the fee schedule.

For years pharmacies have been subject to the Official Medical Fee Schedule until suddenly physicians like Dr. Nickelsberg and Dr. Ratbar realized that if they bought their drugs wholesale and sold them themselves to patients (re-packaged them) then they could set the price without having to bother with the fee schedule.

So as to get a better take on the reaction to the Board's decision in *Mendoza* I asked George to serve a round of drinks to this band of merry men, on my tab.

¹ Anyone that desires a copy of the full text of the *Mendoza* decision should request same by e-mail.

Although Drs. Nickelsberg and Ratbar were in no mood for chit-chat, I did get quite a reaction from Lenny Lien.

By this time Lenny was on his third shooter and looked like death warmed over.

Lenny explained to me that he and his brother, Larry Lien, had formed The 8600 Group to represent both Dr. Nickelsberg and Dr. Ratbar with respect to the prescription medication prescribed directly by the doctors to their workers' compensation patients.

Lenny explained that they bought their medications from a wholesale dealer in San Diego and as they dealt with this one wholesaler exclusively, the doctors did a land office business in receiving free samples.

By this time, Lenny was pretty wasted and told me that for every thousand pills purchased from this wholesaler the doctors would receive 100 free pills and these samples would be distributed to workers' compensation patients.

Lenny told me that before repackaged drugs were subjected to the fee schedule in 2003 Drs. Ratbar and Nickelsberg would "**set the price**" as to these medications that were dispensed and often this was five to ten times the cost to the good doctors of the pharmaceutical drugs. Therefore the profit margin for the good doctors would be the difference between the wholesale price and the price charged by Dr. Nickelsberg and Dr. Ratbar

Claims administrators would pay for these medications pursuant to fee schedule and Larry and Lenny would then go down to the Board claiming that they were not bound by the fee schedule as these were "re-packaged" as opposed to prescription drugs.

Lenny went on to tell me that even when the legislature closed this loophole they were doing a land office business as the profit margin was then the difference between fee schedule and the wholesale price which still netted a healthy profit---until the Board dropped the bombshell and issued its decision in *Mendoza* on April 15, 2010.

According to Lenny the part of the decision that drove a stake into their practice appears on page three of the decision as follows:

"Thus the rule requires that the provider (here, the physician) prove his usual charge, which means the amount that he or she paid for the pharmaceuticals . . . In this case, there is no evidence what Dr. Ahmed² paid for the pharmaceuticals that he dispensed to the applicant . . . LC³ must prove Dr. Ahmed's actual charges. If

² Dr. Ahmed was the applicant's primary treating physician.

³ LC was a lien representative representing Dr. Ahmed.

the pharmaceuticals dispensed were samples provided to him at no charge there can be no reimbursement.” (emphasis added)

As Lenny’s wailing continued I did a good job in disguising my glee and Lenny told me that ever since the issuance of this decision his clients, Dr. Nickelsberg and Dr. Ratbar were receiving subpoenas requesting copies of the invoices for the medication purchased wholesale by the doctors.

As I ordered my second martini from Kim I thought to myself: “It’s about time that the ‘re-packaged drugs’ bonanza was halted.”

Now that we have been given the ammunition by the Board our job as defense attorneys is to enforce the Board’s decision in *Mendoza* by not only issuing subpoenas for the invoices paid by those doctors who “re-package drugs” but by deposing both the doctors and the so-called wholesalers to determine the amount of free samples that goes with each order.

Justice has arrived at the same time as common sense.

DISCLAIMER:

All characters at the Lobby Bar with the exception of George, Kim, and me are a creation of my imagination as is the storyline. However, the Board’s common sense decision in *Ramon Mendoza* is not.

For those cases in litigation the issuance of subpoenas and the taking of depositions may well be appropriate.

However, I think that the Board’s decision in *Mendoza* allows the claims administrator, in an unrepresented case, to issue an appropriate objection withholding payment until such time as the physician issuing the “re-packaged drugs” complies with his burden of proof by submitting evidence as to the physician’s actual cost for the medications as well as information concerning “free samples” as referred to by the Board.

Make mine a double, George.

-Joe Truce