ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE MEDICAL TREATMENT/ MEDICAL-LEGAL SERVICES EXPENSE PREDICAMENT OR *EVEN THE RIDDLE OF THE SPHINX WAS EASIER TO SOLVE* [1]

FROM THE LOBBY BAR AT THE HYATT

As I made my way to the Lobby Bar after a rather hectic day of denying benefits I looked forward to peace and solitude, as well as the vision that is Kim, the Hyatt's breathtakingly beautiful cocktail waitress. Not to mention my libation of choice, a Beefeater's martini served straight up with two olives.[2]

Upon walking through the entrance though, I could see that my night was going to be anything but peaceful. A bevy of lien claimants, led by the duplicitous duo of Larry and Lenny Lien, were loudly singing along to the O'Jays's hit "For the Love of Money," [3] made famous by the refrain, "Money, money, money, money, money! Money!" I found this apt considering Lenny and Larry had been recently kicked out of their prior lien claim company and incorporated themselves under the name, "California Settlement Holdings, LLC" or CASH for short.

Sadly, I knew that their elation was over a panel decision in the case of *Joshua Hubbard v. United Parcel Service; Liberty Mutual Insurance Company* (ADJ4142754) filed on April 21, 2015.

After a **"take nothing"** issued on the case in chief, the liens were adjudicated and the major question boiled down to, "What's the difference between medical-legal services and medical treatment?" The answer is extremely important to lien claimants, as the answer could result in a big payday.

As we all know, medical treatment is subject to Utilization Review and even before Utilization Review became the law a take nothing in the case in chief is automatically a denial of payment for all treatment expenses. The employer cannot be liable for medical treatment expenses if there is no industrial injury. It is as simple as that.

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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] An epic seven-minute classic funk tune from 1973. Worth a listen alone for the one minute bass intro, but I digress.

What is not so simple (for the defendant) is that reimbursement for medical-legal service expenses may be awarded even in the successful defense of a case resulting in a finding of no injury.[4]

In *Hubbard* the Board discussed the following facts:

1. Both claims were timely denied.

2. The issue at trial was AOE/COE.

3. Defendant also served a notice of the applicant's asserted good faith personnel action per labor code §3208.3.

4. Mr. Hubbard last worked on December 1, 2006, was subsequently treated at San Antonio Hospital and was then an in-patient at Casa Colina for a year.

5. Mr. Hubbard was treated for problems with his memory and cognitive skills.

6. The Findings and Order issued on June 21, 2013, declaring that the applicant had sustained a cumulative industrial injury to his neuro, psyche and internal systems but did not sustain his burden of proof to show that he sustained industrial injury on December 1, 2006.

7. On August 26, 2014 the issue of the lien claimant, Southern California Psychodiagnostics, proceeded to trial as to the lien in the amount of $3,602.50.

The Workers' Compensation Judge (WCJ) found that the lien claim was for medical treatment and was denied as a matter of law. The lien claimant sought reconsideration of the Findings and Order which was granted by the Appeals Board. The Appeals Board in a 2-to-1 decision found in favor of the lien claimant based on the long-established principle that expenses for medical-legal services "may be reimbursed even though the applicant's claim was unsuccessful."

A BRIEF HISTORY OF MEDICAL-LEGAL SERVICES

Holding an employer liable for medical-legal services expenses used to be a legitimate goal in the days before the Panel QME system, established by SB899 on January 1, 2005.

[4] I usually do not mention the defense attorney involved in panel decisions but the Law Office of Lynn Peterson defended the employer in this case of huge potential and obtained a take nothing decision. This was a huge win for the employer and obviously the applicant probably took a Petition for Reconsideration which was unsuccessful, but this is not reflected in the decision at bench as this involves litigation of one of the lien claims.

Prior to this momentous date applicants and defendants were allowed to obtain partisan medical-legal examinations by forensic specialists selected by their respective attorneys. Applicant and defense physicians could submit medical-legal reports (with a corresponding medical-legal bill and lien) advocating that the injury was industrial or non-industrial.

The system decided it was necessary to level the playing field for the applicant as opposed to defendant in terms of obtaining medical evidence to prove entitlement to benefits. Therefore, case law evolved so that even if an applicant was unsuccessful in proving his claim was compensable, their "expert witness" or medical-legal services physician would still be reimbursed for their costs. With the advent of the Panel QME system defendants are still mandated to make payment to Panel QMEs regardless of the outcome of the case, but the applicant is not able to select any QME that they might desire in order to obtain medical evidence to prove disputed issues in their case.

The old system of awarding reimbursement of medical-legal services expenses if a case was held to be non-industrial is generally irrelevant since defendants pay for the bills of a Panel QME, or an AME if there is an agreement to go to an Agreed Medical Examiner. The creation of the Panel QME system further leveled the playing field as the concept of "dueling docs" was abolished.

A GLINT OF HOPE

Getting back to our present situation, in *Hubbard* the applicant's treating physician was Dr. Dimmick, who recommended neuropsychological evaluation for reassessment and psychological testing. The neuropsychological evaluator, Dr. Ross, took a history from the applicant, administered diagnostic testing and concluded that applicant had a 26% whole person impairment. The Appeals Board's majority held that the psychodiagnostic testing was a medical-legal service and the expenses should be reimbursed- even though the Board found that the applicant had suffered no injury.

Don't fret, loyal Lobby Bar patron, for if this decision does not make any sense to you you're not alone. It makes little sense to me as well. The dissenting opinion of Chairwoman Ronnie Caplane makes much more sense. She states in relevant part as follows:

> I emphasize that lien claimant stipulated-that applicant was referred by his treating physician Dr. Dimmick. Moreover, lien claimant never contended that any other provider recommended neuropsychological evaluation for the purposes of determining whether applicant's claimed injury arose out of his employment.

I understand this to mean that if you give one lien claimant a break where there might arguably be extenuating circumstances, you will get a thousand others looking for similar treatment.

Larry and Lenny spotted me and headed towards me. When they arrived they immediately handed me a copy of *Hubbard*, which they had laminated and bound.

It wasn't until holding this nauseating thing in my hand that it hit me. There was a contradictory decision issued by the Appeals Board not more than three days after *Hubbard*!

I reached into my trusty briefcase and pulled out a copy of *Juana Ponce de Mauleon v. Harris Woolf California Almonds; Zenith Insurance Company* (ADJ8118127) issued on April 24, 2015. I pointed out to Larry and Lenny that the lead commissioner in *Hubbard* also signed the *Ponce de Mauleon* decision, which identified the issue in that case as follows[5]:

> Defendant contends that EMG/NCS diagnostic testing is medical treatment subject to UR and Independent Medical Review (IMR), and not medical-legal expenses adjudicated by the Workers' Compensation Appeals Board (WCAB).

In finding that the EMG/NCS diagnostic testing was medical treatment the Board defined medical treatment as follows:

> Medical treatment includes, "Medical, surgical, chiropractic, acupuncture, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonable required to cure or relieve the injured worker from the effects of his or her injury ... " (§ 4600(a).)

The Board concluded as follows:

> Defendant contends that the EMG/NCS diagnostic testing requested by Dr. Robson and applicant is medical treatment subject to UR and IMR, and not medical-legal costs subject to adjudication by the WCAB as found by the WCJ and contended by applicant.

The Board went on to note that:

> Dr. Robson requested bilateral upper and lower extremity EMG/NCS diagnostic testing to determine whether nerve damage was causing applicant's complaints of back pain and radiculopathy. Dr. Robson requested the EMG/NCS diagnostic testing using the Primary Treating Physician's Progress Report PR-2 and Request for Authorization, which is utilized to request authorization for treatment by the treating physician. During this period Dr. Robson provided applicant continuous treatment including examinations and prescriptions for various medications, and did not report applicant permanent and stationary. This record establishes that Dr. Robson's request for EMG/NCS diagnostic testing is for treatment which is subject to UR and IMR under sections 4600 and 4610 et seq.

[5] 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. Copies of *Ponce de Mauleon* and *Hubbard* may be obtained by email request.

After I recited the facts and conclusion of the Appeals Board in *Ponce de Mauleon* the Lien brothers' grins began to fade. Looks like I would get to enjoy some peace and quiet after all.

DISCLAIMER:

Aside from Kim, George and I, all characters of the Lobby Bar are fictitious, as is the storyline, and are products of my vivid and warped imagination. However, the ongoing lien claim frenzy is very, very, very real despite the legislature's attempt to adjudicate liens outside the litigation system of the Appeals Board.

Make mine a double, George.

-Joe Truce