

## **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 REPACKAGED DRUG PREDICAMENT OR ENDING THE REFILL ON A PRESCRIPTION FOR DISASTER<sup>1</sup>**

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

After a hard day denying benefits I arrived at the Lobby Bar and was greeted by the lovely sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress. She was approaching me with my cocktail of choice, a Beefeater's martini, straight up with two olives.<sup>2</sup>

After the first sip of my martini I thought that all was well with the world and at that point my spirits brightened even more as my ears picked up on three familiar shouting voices. On my way in I noticed Dr. Nickelsberg and his in-house lien representatives, aka his henchmen for hire, Larry and Lenny Lien of the 8600 Group, were sitting over in one corner of the bar. Looking over in their direction now, I saw a heated exchange unfolding before my eyes.<sup>3</sup>

Hardly a believer in Schadenfreude I reasoned that anytime Dr. Nickelsberg and Larry and Lenny Lien were unhappy it meant good news for the defense.

As the argument was very loud and lively I soon learned the cause of the ruckus. Dr. Nickelsberg had written ongoing prescriptions for drugs, as well as for durable goods, on a case referred to him by Ron Summers, George the Bartender's workers' compensation attorney.

No payment had been received to date for these prescriptions by Dr. Nickelsberg. Even though these bills and lien claims had been objected to in a timely manner by the defense attorney, Dr. Nickelsberg felt that since the injury had been admitted by the employer there would be no problem in collecting at least 80% of his billings for the medications dispensed, as well as for the durable goods. So, he assigned Larry and Lenny Lien to collect these bills.

Apparently the Findings and Award issued today with regard to Dr. Nickelsberg's lien claim and the decision was a take nothing.

In between Dr. Nickelsberg's wild "*rants*" Larry and Lenny Lien tried to explain the situation to him. Dr. Nickelsberg would have none of it though and finally stormed out of the Lobby Bar shouting that he would hire new lien claimant representatives for his company.

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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> A Beefeater's martini straight up (which means no ice) is best served at 38° Fahrenheit.

<sup>3</sup> Dr. Nickelsberg owns 51% of the 8600 Group.

George the Bartender and the Repackaged Drug Predicament Or Ending the Refill on the Prescription for Disaster

July 07, 2011

Page 2

After the good doctor left I bought a round of cocktails for Larry and Lenny in the hope of hearing their side of the joyful event (the take nothing).

After his first drink Larry wailed that they tried to explain to Dr. Nickelsberg that it was not possible to collect any money at all on his lien claim from the employer involved in this case, a Fortune 100 retailer.

Lenny added that Dr. Nickelsberg failed to grasp why this Fortune 100 retailer should not be treated like all other defendants.

At this point I too failed to grasp why this Fortune 100 retailer should not be treated like any other defendant in California. I asked Larry for more details.

Larry explained that the employer in this case is one of the largest employers in the state of California. Unlike most carriers and employers in this state it has utilized to the maximum every weapon that has been afforded by the legislature to help contain medical costs.

He added that it has not only implemented a Medical Provider Network (MPN) but has a Pharmacy Benefit Network (PBN) fully in place and supported by the WCAB.

Now the light bulb went on in my head and I understood full well the cause of Larry and Lenny's consternation.

I recalled that California Labor Code §4600.2 provides that an employer, a group of employers, a carrier or a group of carriers may form a Pharmacy Benefit Network and once sufficient notice has been provided to injured employees all pharmaceuticals and/or durable goods obtained outside of the pharmacy network can be denied.<sup>4</sup>

Larry told me that fortunately for them most employers, third party administrators and carriers in this state either were ignorant of the provisions of Labor Code §4600.2. Or they had been told by their cost containment networks that they already had a PBN. Or that a PBN had to be included in the MPN. Or there is no way to stop payments for drugs once dispensed.

This Fortune 100 retailer's model is somewhat simplistic in its creation but devastating in its effect.

What's that, you say? Isn't it too cumbersome to create a PBN pursuant to Labor Code §4600.2 because of the complicated rules and regulations you may have to follow?

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<sup>4</sup> California Labor Code §4600.2 was enacted by the legislature in 2002 by way of Assembly Bill 749. For almost a decade employers and carriers have had the capacity to form a Pharmacy Benefit Network and put a tight lid on the ever growing costs of pharmaceuticals and durable goods but have failed to do so.

George the Bartender and the Repackaged Drug Predicament Or Ending the Refill on the Prescription for Disaster

July 07, 2011

Page 3

Ironically, since so few defendants have availed themselves of the PBN pursuant to Labor Code §4600.2 there has never been a motivation for the Department of Workers' Compensation Administrative Director to implement rules and regulations to govern the creation of a PBN.

This Fortune 100 retailer's model is predicated on mirroring the most reasonable MPN notices so that the injured employees, physicians and attorneys are aware of the effective date of the PBN implementation.

All Explanation of Reviews, or Explanation of Benefits, must incorporate notice of the PBN implemented pursuant to Labor Code §4600.2. No payments are approved by the bill review vendor to non-PBN providers, including physician offices which dispense medications. Through the use of Utilization Review (UR) and the PBN no compound medications or "medical food" items are paid to those non-PBN dispensing vendors.<sup>5</sup>

What's that, you say? Wouldn't it be too cumbersome to create a network of pharmacies to serve all injured workers in the state of California? Not necessarily. This employer has created coverage for close to 60,000 employees in all but 2 counties in the state using mileage access closer than the MPN requirements. What's more, they are willing to share this PBN with any other employer in the state.

What's that, you say? Aren't you disqualified from having a PBN because you do not have an MPN? Relax! A Medical Provider Network, although extremely valuable in controlling medical costs, is not a prerequisite for the implementation of a PBN.

Do you think you have an existing pharmacy network? Is your network really impacting the cost of prescription medications and durable goods? The proof of the pudding is in the eating.

Thanks to this model this employer only spends 5% of the total money they allocate for medical costs in California on pharmaceuticals and durable goods.

It's time for a math lesson, loyal Lobby Bar patron. Let's assume that the total annual amount that your business (employer) spends on medical costs is \$10 million. Now let's assume that your total pharmacy expense in California averages out to be approximately 10-15% of the total annual amount spent on all medical costs. Therefore, 15% of \$10 million would be \$1.5 million 10% percent would be \$1 million and 5% would be \$500,000.<sup>6</sup>

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<sup>5</sup> For those of us not familiar with the alphabet soup of workers' compensation the shorthand for Explanation of Review is EOR and Explanation of Benefits is EOB. A physician's office that dispenses medication refers to this medication as repackaged drugs.

<sup>6</sup> These facts and figures are based on my own private knowledge and experience in our wonderful world of workers' compensation.

George the Bartender and the Repackaged Drug Predicament Or Ending the Refill on the Prescription for Disaster

July 07, 2011

Page 4

One employer I am familiar with spends 40% of their total annual California medical care budget on pharmaceuticals and durable goods. Taking into account the \$10 million budget we used in our example, and now we're talking about \$4 million spent just on pharmaceutical and durable goods!

So, could anyone use an extra \$1 million-\$3.5 million in their risk management budget?

There is no need to "wait for permission" in the form of Regulations from the Division of Workers' Compensation (DWC) as there aren't any.

In the Board's panel decision in *Jose Brambila v. Vons, Inc.* (ADJ724329) the Board approved PBNs and mandated that the employer need not pay pharmaceuticals and durable goods vendors outside of the PBN.<sup>7</sup>

*Brambila* also demonstrates how a PBN impacts all pharmaceuticals, not just the repackaged drugs, compound drugs and "medical foods" dilemma.<sup>8</sup>

Employers should also take advantage of the Board's landmark decision in the case of *Ramon Mendoza v. J. Buckbinder Industry, Inc., Insurance Company of the West* (ADJ3069602). In *Mendoza* the Board addressed the issue as to the fair pricing of drugs issued not by a pharmacy but by the doctor himself. In this case the doctor was Dr. Khalid Ahmed.<sup>9</sup>

In denying reimbursement to Dr. Ahmed the Board noted that the fee schedule provided that in the case of repackaged drugs (or compound drugs for that matter) a physician issuing said drugs should be compensated at either the fee schedule or his actual cost of obtaining the drugs, *whichever is less*.

The Board held the defendant was entitled to Dr. Ahmed's invoices showing the cost that he paid for the drugs, medications, etc. Should part of this prescription constitute "free samples" then this could not be charged back to the defendant.

A formal request made on the medical provider for his/her invoices as to cost of medication usually results in an actual dismissal of the lien claim as disclosure of this information would create other issues which some providers might be hesitant to bring to light.

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<sup>7</sup> A copy of the *Brambila* case may be obtained by an email request.

<sup>8</sup> Repackaged drugs are any pharmaceutical product that is removed from its original packaging and then put into a new container with new quantities and a new pricing label. Companies that perform this procedure are referred to as "repackaging" parties. These new packages often lack an FDA approved National Drug Code number. Very often this results in inaccurate and overpriced medications because they are priced by the repackaging entity.

Compound drugs are any pharmaceutical product customized by the pharmacist who is preparing them. The pharmacist mixes the drug ingredients to suit the needs of the patient.

<sup>9</sup> A copy of the *Mendoza* case may be obtained by an email request.

George the Bartender and the Repackaged Drug Predicament Or Ending the Refill on the Prescription for Disaster

July 07, 2011

Page 5

With a PBN in place there is no issue as detailed above. The physician writes a script for the compound or drug and the employee fills it at the PBN pharmacy who is paid at the contracted rate for the active ingredients. The physician is not required to show costs and in fact is not incented to over-utilize drugs as an income generating aspect of business, which is a welcome outcome.

**DISCLAIMER:**

The characters at the Lobby Bar, aside from Kim, George and I, are imaginary, as is the story line. As many of you have probably guessed the Fortune 100 employer referred to above is Safeway Stores, Inc., which is under the stewardship of Mr. William Zachry.

The success of the Safeway Pharmacy Benefit network pursuant to Labor Code §4600.2 is all very real though. Anyone wishing for more information as to the Safeway Pharmacy Benefit Network can either contact Mr. William Zachry directly or send an e-mail to me which I will forward to Bill.

The legislature and the Board have given us ample weapons to fight excessive and unwarranted medical costs. It's up to us to utilize them!

Make mine a double, George.

-Joe Truce