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[1] AND THE SIU AWARD OR "WAY #354 TO SKIN A CAT"

FROM THE LOBBY BAR AT THE HYATT:

In anticipation of the award ceremony being hosted at the Hyatt's lobby bar I was in my usual seat by 5:00 p.m. Tonight, Frank Falls, noted defense attorney, in conjunction with the vice president in charge of claims for his largest client, Integrity Insurance Company[2], were presenting "The Award."

As I arrived early I took the liberty of ordering my cocktail of choice, a Beefeater's martini, straight up with two olives, from Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

George and Kim both wanted to know the reason for my early appearance as they had no idea about Frank's little ceremony. I explained that tonight there would be a presentation of a special award.

A look of confusion took hold of George's face. In answer to this quizzical look I explained to both George and Kim that I did not know the purpose or the recipient of the award but I had been told to be here for the ceremony promptly at 5:00 p.m.

Shortly thereafter Frank and three strangers came into the bar and joined me at my table.

Introductions were made all around. The three strangers turned out to be representatives of Integrity Insurance Company: Vice President Mr. Pat Pennipincher, Ms. Dee Frauder and Mr. Doopé Egen. Mr. Pennipincher introduced me to what he referred to as the Team D & D, Dee and Doopé, who were the managers of the special investigation unit (SIU) of Integrity Insurance Company.

After the serving of the first round of cocktails by Kim the award ceremony began. With great fanfare Mr. Pennipincher presented Ms. Dee Frauder of their SIU with an award commemorating the unit as "SIU of the Year."

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[1] 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!

[2] At one time there apparently was an insurance carrier on the liability side called the Integrity Insurance Company but some years ago this company became insolvent.

The award itself was impressive as it was a plaque displaying a police officer holding a man in a business suit spread eagled against a wall with the inscription: "To the SIU of the Integrity Insurance Company, a Job Well Done."

Drinks then began to flow freely and I found myself sharing in the celebration.

As part of the workers' compensation reform laws passed over the last two decades, the California legislature mandated that every insurance carrier operating in California must have a special investigation unit.

The shorthand for this investigation unit is SIU and, as the name might imply, the function of the SIU is to investigate and report workers' compensation fraud and/or excesses to the proper authorities.

Dee and Doopé proudly told me that in 2009 their special investigation unit had submitted the greatest number of "fraud packages" to district attorneys in counties throughout the State. The dynamic duo had submitted no less than 500 fraud packages.

In answer to my question as to what constitutes a fraud package, it was explained to me that such a package contains the following:

1. Investigation reports as to suspected fraud by claimants or providers of services, including employers and licensed medical professionals.

2. A detailed list of witnesses for the criminal case and a summary of their testimony.

3. A listing of the California Penal Code violations.

4. A detailed schedule of documentary exhibits in support of the fraud allegations.

Dee and Doopé declared that this year they were on pace to easily eclipse last year's number.

My amazement and awe were growing by the minute. After ordering a round of drinks for Dee and Doopé to celebrate their award I asked how many of these cases had been prosecuted successfully and resulted in a conviction.

There was what I refer to as a "pregnant pause" and a spasm of coughing before Dee mumbled something under her breath. I asked her to repeat her answer and after another long "pregnant pause" Doopé answered for her, solemnly holding up his right hand and reluctantly showing me three fingers and said that all three involved claimants.

However, in an attempt to save some face, Dee and Doopé explained to me that the award was not predicated on the number of successful prosecutions and/or convictions but simply was based on the number of fraud packages submitted to district attorneys statewide.

The revelation of this paltry number of convictions sent me rapidly crashing back down to earth.

As in any benefit system we have provider fraud, recipient fraud and in our wonderful workers' compensation world, employer fraud. Employer fraud, which has been successfully prosecuted in the State Court system, usually involves an employer intentionally misrepresenting its employee classifications so as to obtain lower premium dollars.

In recent years employee fraud has been prosecuted, as well as employer fraud, with successful outcomes.

What about medical service provider fraud? Maybe we are aiming too high!

In evaluating a medical service provider that routinely has treatment programs without end we may be too quick to use the word "fraud." What we are really dealing with though are unjustifiable medical excesses that do not meet the legal definition of fraud.

In such a case what should our strategy be?

Given this frame of mind I told Mr. Pennipincher, Dee and Doopé about a recent decision by the Court of Appeal by the name of *Paul Jeffrey Davis v. Board of Chiropractic Examiners*, 2010 Cal. App. Unpub. LEXIS 2596 (Cal. App. 3d Dist. Apr. 12, 2010)[3]. Like most defense decisions by the Court of Appeal this case was not published and cannot be cited as controlling authority.

However, the analysis by the Court of Appeal can certainly be instructive as to remedies for employers and insurance carriers with respect to excessive medical treatment and questionable medical billing practices.

Although alleged medical service provider fraud has been routinely referred by carriers to district attorneys' offices statewide, few cases if any are prosecuted due to the high standard of proof required in criminal cases.

Moreover, billing errors and excessive treatment, while considered unconscionable by the defense, may not rise to the level of a felony under California law.

In such a case we might want to ask our SIU to consider the administrative remedies.

I then began to provide Mr. Pennipincher, Dee and Doopé with a little background on the *Davis* case. The plaintiff in the case was a chiropractor by the name of Paul Jeffrey Davis.

[3] Anyone wishing a copy of the Court of Appeal decision in *Davis* should request one by email.

At issue was over-billing and excessive treatment by Dr. Davis involving two separate insurance carriers but the same applicant.

Incredibly, neither carrier lodged a complaint with the Board of Chiropractic Examiners which conducted disciplinary proceedings against Dr. Davis for excessive treatment and over-billing.[4]

On page two of its decision the Court of Appeal noted as follows:

> The Board of Chiropractic Examiners (Board) spent over $72,000 in its disciplinary proceedings against Dr. Paul Davis, a 20-year veteran chiropractor in both neurology and orthopedics, for his treatment and billing of a single patient who suffered two industrial accidents at two places of employment with different insurers. Neither the patient nor the insurers accused Dr. Davis of unprofessional conduct. Dr. Davis had never had a workers' compensation patient with claims against two insurers simultaneously and he had never had a complaint filed against him by a patient or an insurer. The Board revoked his license but stayed the revocation, imposed a three-year term of probation, and directed him to reimburse the Board for costs in the amount of $ 72,242.80.

The decision by the Court of Appeal concerns the denial of Dr. Davis' Petition for a Writ of Administrative Mandamus seeking to overturn the Board's findings.

In denying his Petition the Court of Appeal held as follows:

> Because Board Regulation *section 317, subdivision (d) and section 725 of the Business and Professions Code* both define excessive treatment by reference to the standards adhered to by the local community of chiropractors, we reject Dr. Davis's contention that "excessive treatment" is too vague to pass constitutional muster.

In reaching its decision against Dr. Davis the Court of Appeal noted that the Board relied upon the expert testimony of Dr. Phillip Rake:

> Excessive treatment, according to Dr. Rake, violated the standard of practice, a standard that did not vary when chiropractors treated workers' compensation patients.

Does the above sound familiar? It should! This is taken directly from the Occupational Medicine Practice Guidelines (2nd Edition) better known as ACOEM.

[4] Although it is not clear from the decision as to how this complaint was reported to the Board of Chiropractic Examiners, it would appear from the decision that the defense attorney for one of the carriers, Mr. Cliff Sweet, brought this to the attention of the Board.

In rebuttal, Dr. Davis tried to argue that ongoing treatment is necessary if the patient needs said treatment to alleviate pain. However, the Court of Appeal dismissed this argument, finding:

> Neither the trial court nor the Board found, in derogation of former *section 4600 of the Labor Code*, which provides that an injured worker is entitled to treatments that "cure or relieve" the symptoms of an industrial injury, as a matter of law that any treatment to relieve pain alone was excessive.

The Court of Appeal went on to note:

> Dr. Davis and Dr. Martello opined that an industrially injured worker designated "permanent and stationary" was entitled to future medical treatments at the sole discretion of the patient. It is very different to argue that a patient is entitled to treatment to ameliorate pain than it is to contend a patient is entitled to unfettered access to massage and ancillary services.

The Court of Appeal further stated:

> As a matter of law, an injured worker may be entitled to future medical treatment to stabilize and maintain a permanent injury, but as a matter of fact, the patient may not be entitled to unlimited treatment to feel better.

I told Mr. Pennipincher, Dee and Doopé that in gauging the success of a special investigation unit we must conduct a “cost/benefit analysis;” the cost of investigating, analyzing and preparing 500 fraud packages with only three successful prosecutions to show for it.

At this point Dee, in full self-preservation mode, told her boss that perhaps it was time they rethink their strategy. Doopé chimed in and said that maybe some of their efforts might be better served in investigating medical service providers that bill erroneously and provide ongoing treatment with no end. These investigation packages could then be sent to the appropriate State Licensing Boards.

It would appear that Dee and Doopé got the message.

There is nothing more terrifying than receiving either a call or a letter from your state licensing board announcing the commencement of an investigation into your business practices which could result in the revocation of your license. Talk about a deterrent!

DISCLAIMER:

All characters at the lobby bar are a product of my imagination, aside from myself, Kim and George. The storyline is also imaginary although the lack of prosecution of provider fraud is not. Over-billing and excessive treatment by licensed medical professionals are cost drivers in this industry and always have been.

However, in light of the *Davis* case the resources that insurance carriers currently devote to SIU's examining cases of fraud may be better utilized in having them examine and report over-billing and excessive treatment to the appropriate state licensing boards.

George, Kim and I hope you all have a wonderful Thanksgiving holiday.

Make mine a double, George, and pass me the gravy while you're at it.

-Joe Truce