ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE RAPIDLY CLOSING WINDOW FOR A SECOND SURGERY OPINION OR WHY ARE "THE MISSILES" STILL IN THEIR SILOS?

FROM THE LOBBY BAR AT THE HYATT:

The celebration was in full swing by the time I arrived at the lobby bar and ordered my first Beefeater martini, straight up with two olives.

The celebration had been orchestrated by George the Bartender's workers' compensation attorney, Ron Summers, George's Primary Treating Physician, Dr. Nickelsberg, and Larry and Lenny Lien of the 8600 Group.

Even before Dr. Nickelsberg advised everyone at the bar that "drinks were on him" I knew the basis for the celebration.

The Appeals Board had just issued an en banc decision in the case of *Jesus Cervantes*,[1] which will now serve as guidance to the entire workers' compensation community on the requirements for obtaining a second surgical opinion for spinal surgeries pursuant to Labor Code §4062(b).

The second opinion surgery option had been promulgated by the California legislature in 2004, resulting in the rapid downturn of spinal surgeries, most of which (in my opinion) were unnecessary in the first place.

At the time the section was enacted Dr. Nickelsberg had a veritable empire of outpatient surgery centers (30 in all) throughout the Southern California area, which averaged three to four spinal surgeries per day.

The income generated by Dr. Nickelsberg's surgery centers, appropriately named the S&M Surgery Centers, greatly enhanced his bank account.

As a matter of fact, everyone benefitted from these multiple surgeries. Ron's cases settled for the maximum amount, meaning he would receive a windfall in attorney fees. Larry and Lenny Lien would collect on sizeable lien claims for each of the surgery centers. Dr. Nickelsberg would have an income far in excess of seven figures.

Everyone was happy except the defense attorneys and, oh yes, lest we forget those injured workers that were the recipients of needless surgeries and disabled for life.

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[1] Anyone wishing a copy of the *Cervantes* case should request one via e-mail.

At this point Dr. Nickelsberg approached me sporting a broad smile with my second cocktail in tow.

After thanking Dr. Nickelsberg for my cocktail I told him that I was certainly puzzled by his reaction to the Board's decision in *Cervantes*. I had just read the opinion and certainly the Board did not strike down the second opinion surgery law but set out definitive guidelines for its implementation.

The good doctor explained that the S&M Surgery Centers[2] would be busy once again as the Board's decision had made it virtually impossible for claims administrators to timely object to a request for spinal surgery and to request a second opinion from the Administrative Director.

Ron, who had been listening to our conversation, explained that the Board in *Cervantes* had expressly overruled its previous significant panel decision in *Brasher vs. Nationwide Studio Fund* (206) 71 Cal Comp 1282,[3] which had contributed to the downturn in spinal surgeries.

Ron went on to note that in *Brasher* a three member panel of the Appeals Board had held that a defendant, once having received a request for a spinal surgery, had the option of either submitting this request to Utilization Review pursuant to Labor Code §4610 or, in the alternative, requesting a second opinion on spinal surgery from the Administrative Director pursuant to Labor Code §4600(b).

Ron went on to note that the worst part of the decision was that in the event of a UR denial the applicant (not the defendant) would have the legal obligation to go through the ten-day window of Labor Code §4062(b) and request a second surgical opinion.

Ron told me in confidence that ever since the venue rules passed the legislature in the early 1990s he, as well as other applicant attorneys, was able to file all of his cases at one Appeals Board office. Ron was then able to handle three times as many cases on his diary.

As Ron was never in the office there was no chance to react to mail such as a Utilization Review denial. These were instead handled by his paralegals who really did not have the legal training to react within such a small window, such as the ten-day period as mandated by Labor Code §4062(b) within which to request a second opinion on spinal surgery.

Therefore, ever since the Board had issued its opinion in *Brasher* Ron was not able to get his objections out on a timely basis. Therefore, the UR denial became final and Dr. Nickelsberg and his band of merry surgeons were precluded from performing the recommended spinal surgery.

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[2] In a prior George the Bartender memo it was explained that when the horn of plenty decreased in the volume of spinal surgeries performed at the S&M surgery centers, Dr. Nickelsberg changed the surgery centers to sleep study facilities and changed the name to: "Sleep is Fun, the Rest is Easy"

[3] As *Brasher* was overruled by the Board in *Cervantes* I wonder if this makes *Brasher* an insignificant panel decision?

Ron went on to complain that to make matters worse the Board designated the *Brasher* case as a significant panel decision.

I did not tell Ron I had applauded the Board's decision in *Brasher*. As a defense attorney I had always thought it was unfair that the defendant had all of the timeline responsibilities and it was about time that some of this was shared equally.

However, I told Ron that even though the Board overruled *Brasher* I was still not sure why this was good for him and Dr. Nickelsberg.

Ron grinned and told me that the Board had set down guidelines that made a Labor Code §4062(b) objection and request for a second surgery opinion virtually impossible.

Ron explained that in *Cervantes* the Board clearly defined the duties and responsibilities of the defendant and more importantly the deadlines for taking action. Ron then outlined the requirements of the Board on my cocktail napkin as follows:

1. First, the Board recited the mandate of Labor Code §4062(b) that the objection and request for a second opinion must be made within 10 days from receipt of the spinal surgery request. <u>This means ten calendar days, not ten working days.</u>

2. In disapproving *Brasher* the Board ruled that an employer must first submit the request for spinal surgery to Utilization Review pursuant to Labor Code §4610.

3. If UR approves and/or certifies the spinal surgery the defendant <u>must</u> approve the spinal surgery immediately.

4. If UR issues a denial the defendant is not out of the woods yet. The defendant must then file its written objection with the Administrative Director and the timeline is still the <u>same ten days from the initial request for spinal surgery</u>. (I began to see the time problem here that Ron was referring to, i.e., if the adjuster submitted the spinal surgery request to Utilization Review and UR took the entire five working days not to exceed fourteen days then there would be little or no time for the Labor Code §4062(b) objection. This prompted my call for a third martini.)

5. Lastly, Ron pointed out that it was virtually impossible for the defense attorney to help out. In *Cervantes* the Board made it crystal clear that any objection and request for a second opinion pursuant to Labor Code §4062(b) must be on the form prescribed by the Administrative Director or Form 223.[4] <u>Ron pointed out that Form 223 excludes the attorney involvement, as it requires a statement under</u>

[4] A copy of Form 223 is attached

> penalty of perjury by the Claims Administrator as to when the surgical request was received by the adjuster along with a date stamp for verification. Ron pointed out to me with some glee that it was impossible for a defense attorney to make this type of statement under penalty of perjury.[5]

In going back to my own table at the lobby bar I had to admit to myself that the Board's decision in *Cervantes* was well-written and certainly is an accurate and fair analysis of our obligations on the defense with respect to Labor Code §4610 and §4062(b).

The Board has now given us a sign post as to how to prevent unnecessary spinal surgeries and as an industry it is now our duty and burden to follow the law.

As we all know our industry is paper driven and one can only imagine the amount of documents that greet an insurance company and/or Claims Administrator daily.

This avalanche of paper usually contains PR-2 reports by the applicant's Primary Treating Physician requesting authorization for treatment and in many cases spinal surgery.

Therefore in order to assist the Claims Administrator we recommend the following:

1. When we receive a legal referral we not only advise the parties as to our representation but we also request (by phone call, e-mail, mail and fax) that the applicant's treating physicians place us on their service list. Most treating physicians are glad to do so as the general perception is that service on the defense attorney may speed up the appropriate payment of their billings as treating physicians pursuant to Labor Code §4603.2.

2. Once we are on the address list of the applicant's Primary Treating Physician or secondary physicians, we receive the reports concurrent with the receipt by the Claims Administrator.

3. When a request for spinal surgery is received we should scan this on a rush basis and forward it to the Claims Administrator and, in light of *Cervantes,* we should request that the request for spinal surgery immediately be referred to Utilization Review. It is very important in our e-mail that we emphasize the short timeline to obtain a Utilization Review determination, and if a denial is issued, then a Labor Code §4062(b) objection.

4. We then should scan and send Form 223 to the Claims Administrator for completion or, in the alternative, we can fill out the relevant portions and fax it to

[5] When Form 223 was first promulgated some years ago by the Administrative Director we saw the problem referred to by Ron. We called the Administrative Director's office and we were "assured" that a defense attorney could sign Form 223 in place of the adjuster. Right! That advice and $3.85 will get you a latte at Starbucks.

> the adjuster for signature. Now that *Brasher* has been overruled our window of time to object has been narrowed.

In 2004 the California state legislature and the Governor gave the employers and insurance carriers of the State the appropriate weapons to combat all the ills of our industry which we as the defense have been complaining about for years.

Unfortunately, for most of our industry these weapons, or "missiles," still remain in their silos.

We, as an industry, complained that we had no control over medical issues as applicant attorneys were allowed to designate such liberal treating doctors as Dr. Nickelsberg. In response the legislature in SB 899 created a medical provider network allowing carriers or employers to carefully select and build their own network of treating physicians. Unfortunately, <u>for the most part</u>, we do not use the medical provider network as envisioned and those defendants that do utilize an MPN joined an existing network of physicians which houses 50,000 or more doctors, including doctors such as Dr. Nickelsberg and Dr. Ratbar.

When we complained that prescription medication and durable goods were out of control the legislature gave employers and insurance carriers the power to designate their pharmacy network, which would restrict injured workers from going outside the network for their pharmaceuticals. This weapon, sad to say, is seldom used effectively.

We complained about runaway medical expense and we were given Utilization Review per Labor Code §4610.

In the landmark California Supreme Court decision *Sandhagen* the Court wondered out loud why claims administrators were not taking advantage of this fairly inexpensive weapon in combating medical abuse.

The Board has now given us our marching orders to cut down on needless surgeries pursuant to Labor Code §4062(b) and §4610 and it is now our challenge to comply.

<u>DISCLAIMER</u>:

With the exception of George, Kim and myself all of the characters at the lobby bar are mythical and a product of my imagination. The story line is also my creation.

However, our industry's ability to meet the timelines as required by Labor Code §4062(b) and Labor Code §4610 are not. We now have the weapons against medical abuse. Let's use them!

Make mine a double, George.

-Joe Truce