## ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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## RE: GEORGE THE BARTENDER[1] AND THE SELECTIVE MEMORY ISSUE OR "CAN THE MPN DOOR BE CLOSED AFTER THE SELF-PROCURED HORSE IS OUT OF THE BARN?"

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

After a hard day denying benefits I arrived at the lobby bar seeking the solitude of my cocktail of choice, a Beefeater's martini, straight up with two olives, and the pleasure of being served by Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

However, Kim told me I would have to wait while she caught the attention of George the Bartender, who was in a heated conversation with his workers' compensation attorney, Ron Summers, and his Primary Treating Physician, Dr. Nickelsberg.

Kim told me that the only thing she knew about the conversation between George, Ron and Dr. Nickelsberg was that Dr. Nickelsberg had stomped into the bar telling both Ron and George that he had to talk to both of them concerning an impending medical crisis.

Knowing that Dr. Nickelsberg used the term "medical crisis" interchangeably with "financial crisis" I chuckled to myself knowing that Dr. Nickelsberg had probably just read the recent panel decision of the Board in *Helen B. Jakes v. State of California; Department of Corrections* (ADJ4087298) filed on July 9, 2010. This decision confirmed a defendant's right to transfer an injured worker back into their Medical Provider Network (MPN) despite having initially failed to give appropriate notice as to their MPN.[2]

Knowing that the Board's decision in *Jakes* was a threat to the financial empire of Dr. Nickelsberg I asked Kim to bring a round of drinks for the dynamic duo down at the end of the bar and I walked over to join in the conversation.

Once the cocktails arrived and after a deep sigh Ron explained to me that the so-called "medical crisis" referred to by Dr. Nickelsberg involved George's workers' compensation case.

Ron went on to explain to me that Dr. Nickelsberg had been continuously treating George over the years and at a hearing today the Workers' Compensation Judge (WCJ) had ruled that pursuant to the Board's decision in *Jakes* the charges of Dr. Nickelsberg would be

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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] A copy of the Board's decision in *Jakes* can be obtained via an e-mail request. Panel decisions of the Board can be brought to the attention of a Workers' Compensation Judge or the Board pursuant to Labor Code §5703(g).

considered self-procured medical treatment and would not be paid by the employer. Worse still, George must treat with a doctor within the Hyatt's MPN.

Ron believed that today's hearing would be a "slam dunk," as the Hyatt's defense attorney did not enter into evidence any of the numerous MPN notices initially sent to George.

However, the defense attorney did enter into evidence recent Notices of the Employer's MPN and the Continuity of Care policy sent to George three months ago. None the less Ron was confident of victory as he was certain that these recent notices could not cure the initial failure of the employer to send the MPN Notices as required by the Board's *en banc* decision in *Bruce Knight v. United Parcel Service* (2006) 71 Cal. Comp. Cases 1423.

The defendant produced the safety manager of the Hyatt who testified that notices as to the Hyatt's MPN were posted throughout the hotel and after George's injury a notice was included in his paycheck.

With a "wink" Ron told me that in rebuttal George had testified that he could "not remember" seeing any of the numerous notices posted around his workplace, nor did he "recall" receiving a notice of the MPN in his paycheck envelope.

As Ron was describing George's testimony to me I thought to myself that despite this lack of memory as to MPN notices, George probably had no problem in testifying with clarity as to the facts and circumstances surrounding his injury and his history of medical care with Dr. Nickelsberg.

Breaking in on my thought process Ron went on to indicate that he believed that once he had established an initial failure to send notice of the MPN to George he would win it outright pursuant to the Board's decision in *Knight*.

However, the WCJ in George's case ruled that the Board in *Knight* did not address the issue of whether or not an employer or carrier could cure the lack of notice as to an MPN by a subsequent notice as to its MPN and as to it's continuity of care policy.

This notice advised George that it was the Hyatt's intention to transfer him (the injured worker) into Hyatt's (the employer's) Medical Provider Network unless he met one of three exceptions pursuant to AD §9767.9:

1. Eminent surgery
2. Terminal condition
3. Chronic condition
4. An acute condition

The WCJ, much to Ron's consternation, explained that the Board's *en banc* decision in *Knight* was clarified by their panel decision in *Jakes*, in which this question was answered in the affirmative.

In *Jakes* there was conflicting evidence as to whether or not the injured worker was given the appropriate notices of the defendant's Medical Provider Network as required in the Board's decision in *Knight*. The panel then addressed the question of whether or not the failure of notice could be cured by a subsequent notice as to the MPN and an intention to transfer the applicant back into the MPN as follows:

> These letters show that applicant was ultimately placed on notice of the existence of the MPN and her right to select her treating physician was limited to physicians within the MPN . . . Thus, there is no basis for the WCJ's finding of a neglect or refusal to provide reasonable medical treatment.

With regard to the initial failure of notice, the Board went on to state as follows:

> Therefore, any defect that may have existed, due to a failure to establish the required notices prior to and at the time of injury concerning defendant's right to control applicant's medical treatment through the MPN, was sufficiently cured by proof of its subsequent notice in its correspondence to applicant and to her non-MPN physician after August 8, 2008.

The Board concluded as follows:

> "The defendant's lapse of proof of its initial notices at trial does not entitle applicant to continuous self-procured medical treatment at defendant's expense."

As I went back to my usual seat at the lobby bar I left Ron, Dr. Nickelsberg and George to ponder what had happened at today's trial. I thought to myself that those employers that have Medical Provider Networks are still in the game and can regain medical control even in the absence of the required initial MPN notices as required by the Rules of Practice and Procedure of the Administrative Director and the Board's *en banc* decision in *Knight*.

**DISCLAIMER:**

Aside from George, Kim and I, all characters appearing at the lobby bar, along with the storyline, are a product of my imagination. However, the failure of employers and/or carriers to utilize all of the weapons provided to us by Senate Bill 899 unfortunately is not.

Pursuant to the Board's decision in *Jakes* those defendants that have Medical Provider Networks can regain medical control even if the initial MPN notices are defective.

Medical control is a wonderful thing!

Make mine a double, George.

-Joe Truce