ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE CHALLENGE OF THE NEW WCAB RULES

FROM THE LOBBY BAR AT THE HYATT:

Upon arriving at the lobby bar after a hard day denying benefits, my attention was diverted to the end of the bar and to an animated conversation between George the Bartender's workers' compensation attorney, Ron Summers, and Larry and Lenny Lien of the 8600 Group.

In serving me my first Beefeater's martini, straight up, with two olives, George explained that Larry and Lenny Lien were extremely concerned about the Rules of Practice and Procedure of the Appeals Board, which were amended and published on November 17, 2008.

George explained that the 8600 Group owned and operated by Larry and Lenny represented various medical providers with respect to collecting for medical services rendered to injured workers. They had also recently purchased the **"accounts receivable"** for several medical providers who practiced in the late 1980s and early 1990s.

These medical providers never fully collected on their billings and/or lien claims. As such, as the medical providers were leaving the business or retiring, they sold their accounts receivable to collectors for a substantial discount (up to 70% or 80%).

Some of the **"debts"** or "**accounts receivable"** had been sold several times and some of these accounts had recently been purchased by the 8600 Group. It was the accounts that had been purchased and repurchased several times that greatly troubled Larry and Lenny.

Specifically, new WCAB Rule 10550 entitled **Proper Identification of Parties and Lien Claimants** was extremely troubling as far as the Lien brothers were concerned as Subsection (d) provides in relevant part as follows:

> **"If a lien is being filed or amended, or if a lien claimant is appearing, the lien claimant shall state whether it is the original owner of the alleged debt or whether it has purchased the alleged debt from the original owner or some subsequent purchaser."**

As George's comments piqued my interest, I moved down so I could clearly hear the conversation between Ron and the Lien brothers.

Ron wanted to know why Larry and Lenny were concerned about this particular amendment. Larry told Ron that a smart defense attorney, after learning that the debts or accounts receivable were purchased from either the original owner or a subsequent purchaser at far less than their value, may be able to establish this.

Larry and Lenny hurriedly told Ron that they did not want anyone to find out that they had purchased (or I should say re-purchased) accounts receivable of $100,000.00 – for $5,000.00.

Lenny looked at Ron and wailed that he and his brother had contemplated settling the $100,000.00 of accounts receivable and/or debts for anywhere from $50,000.00 to $70,000.00 and possibly more.

At this point Larry gave Ron a copy of the new Rules and Ron pored over WCAB Rule 10550(d) and suddenly brightened and told the Lien brothers that they did not have to worry one bit.

Ron observed that these Rules have been in effect since November 17, 2008, and, to his knowledge, have never been raised as an issue by any defense firm or Workers' Compensation Judge.

Ron went on to indicate that it appeared that our entire community was oblivious of this change in WCAB Rules and that as far as Larry and Lenny Lien were concerned it was **"business as usual."**

Sadly, Ron is correct.

We as an industry have yet to take advantage of WCAB Rule 10550 even though in Southern California we are experiencing an explosion of lien representatives attempting to collect on billings and/or debts going all the way back to the 1980s.

No one is going to do our job for us and a suggested procedure is as follows:

1. As soon as we have knowledge of a lien claim we should immediately make a demand in writing that said lien claimant and/or lien claimant's representative comply with WCAB Rule 10550, specifically Subsection (d).

2. At a lien conference where lien claims are being adjudicated this demand should also be made on the Pre-Trial Conference Statement on the issues page, i.e., a demand that lien claimants comply with WCAB Rule 10550.

3. Once a lien claimant and/or lien claimant representative has conceded the **"debt"** or **"account receivable"** has been purchased or repurchased from the original owner, then a demand should be made for the value placed by the current purchaser as to the so-called debt which would be the price paid for the debt or account receivable.

In thinking about Ron's comments that no one has ever raised WCAB Rule 10550 since the Rules were amended last November, this brought home the importance that we all know what is required under the new WCAB Rules, which are basically our Court Rules.

The Rules of Practice and Procedure of the Workers' Compensation Appeals Board as amended November 17, 2008 contain the following significant changes:

1. WCAB Rule 10840: This Rule concerning Petition for Reconsideration, Removal, etc., returns us to the 1970's which allowed a party to file a Petition for Reconsideration and/or Removal at any Board office, not just the office that issued the Award and/or Order.

   I never really understood why the Board changed this Rule to allow filing **only** at the WCAB office which issued the decision and/or Award. This rule, of course, produced much litigation with respect to

appeals that were filed at the wrong Appeals Board District Office resulting in rather harsh criticism from the Court of Appeal in denying a litigant substantive rights for an administrative and, otherwise, harmless error. This is a welcome change.

2. WCAB Rule 10397: This Rule confirms that Applications for Adjudication of Claim, Petitions for Reconsideration, a Petition to Reopen or any other petition documents subject to a statute of limitation cannot be rejected for filing solely on the basis that it was not filed with the proper office of the Appeals Board, has been submitted without the proper form or does not have the requisite cover sheet or document separator sheet. **This Rule essentially ensures that form over substance will not be the determining factor in adjudicating the rights of the parties.**

3. WCAB Rule 10507: This Rule puts to rest our fears that simply because we are served by fax and/or email our time for responding to official decisions and/or duty to act will not be extended for five calendar days from the date of service. This Rule specifically provides that whether the service is by mail, fax or email our time to respond is, in fact, extended by five calendar days from the date of service.

PROPER IDENTIFICATION OF PARTIES AND LIEN CLAIMANTS:

This WCAB requirement that troubled Larry and Lenny Lien is new and is also contained in Rule 10550. Any lien claimant appearing at a hearing "shall set forth its full legal name." However Subsection (b) would appear to be an issue as this subsection provides as follows:

> **"If an adjusting agent or third-party claims administrator is appearing, it shall disclose: (1) whether it is appearing on behalf of an employer, an insurance carrier, or both; (2) the identity or identities of the party or parties it is representing; and (3) if it is representing an insurance carrier, whether the policy includes a high self-insured retention, a large deductible, or any other provision that affects the identity of the entity or entities actually liable for the payment of compensation;"**

The above provision, undoubtedly, was placed in the Rules as a result of one case which was designated as an *en banc* decision by the Appeals Board.

In the case of **Cheryl Coldiron vs Compuware**[1] filed on March 20th, 2002, the claims adjuster for a third-party administrator referred a case to defense counsel identifying only the name of the employer and not the insurance company.

In the 1970's accounts handled by TPA's were often self-insured and the assumption by everyone was that cases referred by a TPA involved permissibly self-insured employers.

[1] Anyone wishing a copy of the Coldiron case, please send your request via e-mail.

However, when premiums for insurance policies went through the roof, insurance companies often designed creative insurance policies with affordable premiums in exchange for the employer agreeing to a high deductible or a retention agreement.

As such, the defense industry continued business as usual, treating cases referred from TPA's as involving self-insured employers, even if the employer was insured.

After all, we reasoned, what could go wrong?

When it was time to pay the award the adjuster would simply go to his or her payment instructions, notice for the first time that payment was to issue from the employer's carrier and then simply have the carrier pay the award. Even though the insured was identified as permissibly self-insured, payment of the award would be made by the carrier and no one would be the wiser, unless the carrier became insolvent.

In **Coldiron** the case was resolved by way of a Stipulated Findings and Award. The defense attorney, not realizing that the employer was insured, stipulated that the employer was permissibly self insured.

In paying the Findings and Award, the adjuster referred to her client instructions for payment of an Award and discovered for the first time that the employer was actually insured by the Reliance Insurance Company and that payment should be made out of the account of this insurance carrier.

If Reliance had still been solvent at that point, payment would have been made and, even though the employer was designated self-insured, our industry would have continued business as usual.

However, Reliance had become insolvent and its claims were subsequently administered by the California Insurance Guarantee Association (CIGA) and the vigoro hit the mix master when an attempt was made to join CIGA to pay the Award.

The Board came down on the third-party administer like a ton of bricks and in some very embarrassing language out loud (I would classify an *en banc* decision as out loud) wondered how the adjuster, much less an attorney could be ignorant as to the identity of his client. The unnamed client in this case was the Reliance Insurance Company and the reality was that this practice had been going on for years and no one was ever caught as most insurance companies remained solvent.

In my opinion, identification to the Board of a carrier's deductible and retention level is unnecessary when one reads the full text of the Rule and especially Subsection (c) that ends with the sentence, i.e., ". . . that affects the identity of the entity actually liable for the payment of compensation;"(emphasis added)

Hypothetically, let's say the ABC Insurance carrier writes a policy for workers' compensation insurance to the Widget Company and the Widget Company executes a separate agreement with the carrier for a $100,000.00 deductible and provides excess insurance over a retention level of $300,000.00.

In the above scenario all payments would be made by the ABC Insurance carrier out of its own resources. However, from time to time the carrier's adjuster would request that the employer replenish its trust account until the $100,000.00 deductible has been reached. **Regardless of whether or not the employer follows through with this agreement to replenish the carrier's trust account, the ABC Insurance carrier remains liable for all workers' compensation benefits.**

When the case hits the retention level of $300,000.00, the ABC Insurance carrier continues to be primarily liable to the injured worker but will request reimbursement as appropriate from the excess carrier.

Therefore, even if the employer does not contribute its $50,000.00 deductible or if the excess carrier does not follow through and reimburse the ABC carrier, the carrier still remains primarily liable to the injured worker and is legally obligated to provide all benefits.

In issuing its **"INFORMATION DIGEST"** as to the reasons for changes to WCAB Rules, the Board in its finest "render unto Caesar what is Caesar's" commentary goes into the history of the creation of the position of Court Administrator in 2002 giving the **"Court Administrator"** certain rule-making authority over certain issues. The new rules go on to specify that certain rule making power, previously in the province of the WCAB, now resides with the Court Administrator.

It has never been clear as to the rule-making power of the Court Administrator and whether such rule-making power overlaps the traditional function of the Board. However, in reading these Rules it would appear that a compromise has been reached as certain rule-making powers have been delegated to the Court Administrator.

DISCLAIMER:

While the above story and characters are fictionalized, the lack of our familiarity with the new WCAB Rules is not. Remember, the Workers' Compensation Judges (WCJs) are not going to do our job and it is up to us to enforce these Rules by requesting compliance by all parties.

Make mine a double, George.

– Joe Truce

To view the new WCAB Rules, please visit the links section on our website www.kttlaw.us .