

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 LIVID LIEN CLAIMANT**

FROM THE LOBBY BAR AT THE HYATT:

As I eased into my usual barstool at the lobby bar after a hard day denying benefits, George the Bartender's workers' compensation attorney, Ron Summers, was trying to pacify a very angry Dr. Nickelsberg, who was gesturing wildly and yelling at Larry and Lenny Lien of the 8600 Group.

Although I could not quite make out the words that Dr. Nickelsberg was spewing forth with respect to Larry and Lenny Lien, the word **incompetent** was certainly audible.

In addition to being George's workers' compensation treating physician, I knew that Dr. Nickelsberg ruled an empire of acupuncturists and chiropractors. Larry and Lenny had been collecting the billings for this empire for many years on Dr. Nickelsberg's behalf.

After the yelling died down George explained to me that Dr. Nickelsberg's tirade concerned one of his acupuncture facilities which had filed a lien of over \$43,000.00. The lien was denied by a workers' compensation judge.

After Dr. Nickelsberg finally vented all of his anger, he left the bar in a huff. I asked George to set up another round of cocktails for Larry and Lenny as it appeared they really needed it. Besides, I certainly wanted an explanation as to what happened in the trial of the \$43,000.00 (plus) acupuncture lien.

Although the Lien Brothers were somewhat distraught over the prospect of losing their largest account, Lenny managed to describe to me just what went wrong in his lien claim trial. Lenny explained that Dr. Nickelsberg, as the primary treating physician, prescribed ongoing acupuncture treatments for the injured worker.

Due to the fact that the acupuncturists were located in a different geographical location than Dr. Nickelsberg, the acupuncture facility kept a stock of pre-written and signed prescription blanks for acupuncture treatments.

At this point, Larry interjected that due to the volume of Dr. Nickelsberg's practice it was not convenient to individually sign all of the prescriptions. As such, some of the prescriptions were stamped with his name and others were simply signed by individuals at the acupuncture clinic who had demonstrated a talent for copying Dr. Nickelsberg's signature. Therefore, all prescriptions for acupuncture treatment were signed by "Dr. Nickelsberg" without Dr. Nickelsberg actually personally signing any of the prescriptions. Each "pre-signed" prescription would then have the name of the injured worker added in a space left for this purpose along with the date.

Both Lenny and Larry assured me that this was common practice among applicant treating physicians.

At trial the defense attorney representing the insurance carrier had raised the following issues:

1. That Dr. Nickelsberg was not the primary treating physician as he had not complied with Administrative Rule 9785 by incorporating the reports of the applicant's acupuncturists as they are considered secondary treating physicians.
2. Objecting to the admission into evidence of all billings not certified under penalty of perjury by the physician performing the treatment pursuant to Labor Code §5703(a)(1).¹
3. That the lien claimant had not proved that the acupuncture treatment was a reasonable and/or necessary treatment modality pursuant to Labor Code §4600(b).²
4. That all acupuncture treatments had been timely denied by Utilization Review and said denial had never been appealed by the applicant and/or the applicant's attorney.³

After listening to the defenses raised in his lien claim trial, Lenny Lien wailed that the WCJ denied their entire lien of over \$43,000.00, after excluding all acupuncture bills from evidence as they were not certified under penalty of perjury. The judge ruled that even if the billings had been admissible the Utilization Review denials of the acupuncture treatment were final as they had not been timely appealed.

After telling me their woeful story Lenny and Larry wanted to know their chances on appeal and, after reflection, I advised them that unfortunately the WCJ was absolutely correct on the law and

¹Labor Code §5703 requires all billings be certified under penalty of perjury in addition to the reports of said physicians.

²Labor Code §4600(b) defines reasonable and necessary medical treatment as that treatment that complies with the Administrative Guidelines and the Administrative Director has now adopted the ACOEM Guidelines in full.

³Contrary to the popular belief of lien claimants and/or lien claimant representatives a Utilization Review determination and/or denial cannot be appealed by a lien claim representative, a lien claimant or a medical provider. Labor Code §4610 provides that the only person who can appeal a Utilization Review determination is either the applicant or the applicant's attorney. Due to the volume business of most applicant attorneys few actually successfully appeal Utilization Review denials thereby sealing the fate of the lien claimant.

We have found that a successful tactic in the case of suspected pre-signed prescriptions is to subpoena the file of the Primary Treating Physician(PTP) as the pre signed prescriptions will not appear in the PTP's file making it clear that the doctor never issued the prescription. Any legitimate prescription should also appear in the file of the PTP.

any appeal would be unsuccessful.

DISCLAIMER:

Although the above case and characters are heavily fictionalized the acupuncture lien claim trial bears a striking resemblance to one of our cases by the name of Jose Carrillo v. Decore Active Specialist, Inc. in which Mark Thomas of our Los Angeles office obtained a Findings and Order from the WCJ denying a \$43,046.89 lien on behalf of San Anita Acupuncture Center⁴. Mark raised the same defenses as presented against Lenny and Larry Lien of the 8600 Group. The Carrillo case can be brought to the attention of the Board pursuant to Labor Code §5703(d) entitled **Specified Additional Evidence Allowed** which provides in relevant part as follows: “The Appeals Board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute . . . (d) prior decision of the Appeals Board upon similar issues. . . ”

Make mine a double, George

- Joe Truce

WJT/dri

⁴Anyone requesting a copy of the **Carrillo** case should make the request by e-mail.