ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE PASSAGE OF SENATE BILL 863 OR *WHEN STARS ALIGN*[1]

FROM THE LOBBY BAR AT THE HYATT:

Another successful day of denying benefits behind me, I arrived at the Lobby Bar with my copy of Senate Bill 863, the latest reform to workers' compensation law in California. I was prepared to do an in-depth analysis of the new law but only after Kim, the Hyatt's breathtakingly beautiful cocktail waitress, arrived with my Beefeater's martini, straight up with two olives.[2]

Hoping to study the law in solitude my peace was broken by the sound of nervous chatter down at the end of the bar. I looked over and saw the entire cartel of chicanery present and accounted for. There was a lot of rending of garments and wringing of hands by George the Bartender's workers' compensation attorney, Ron Summers, as well as Ron's treating doctors that accompany him wherever he goes–Dr. Nickelsberg and Dr. Ratbar.

The anguish on the faces of Ron, Dr. Ratbar and Dr. Nickelsberg was nothing compared to the sight of a weeping Larry and Lenny Lien of the 8600 Group.

Although I could not make out much of their conversation, it was obviously morose but oddly animated. I did hear catch phrases like "downright unconstitutional" and, "What about our due process of law?"

I couldn't help but smile at the sound of this as it occurred to me that probably the only thing about "due process" that the Lien brothers understood was the word "due."

Ron finally saw me and came over to my side of the bar. I treated him with a cocktail and bought a round for the good doctors and the Lien brothers since I knew they would need them. I imagined another round would be in order if in fact they had not yet gotten into the details of Senate Bill 863, not to mention the Rules of Practice and Procedure that are sure to follow.

As Ron gulped down his cocktail, every other sentence started with, "It is just not fair" and, "We will attack the constitutionality of Senate Bill 863!"

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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] With the passage of Senate Bill 863 and the signature of Governor Brown, this new law takes effect on January 1, 2013.

Ron told me that he had attended an emergency meeting of CAAA (California Applicants' Attorneys Association) and they vowed that they were going to attack the constitutionality of some of the "more outrageous provisions of the new reform law."[3]

After Ron wrapped up his diatribe I managed to get a word in. I told him that I was somewhat astonished from a practical perspective that he would be against the new reform law as the law provided a substantial increase in permanent disability to claimants/applicants and a corresponding increase in attorney fees. I also pointed out to Ron that the string rating, even with the future incapacity (**FEC**) component having been deleted, would multiply upward all standard ratings by a factor by 40 percent.

At this point, Ron's words were becoming slurred and he told me in no uncertain terms that he and his doctors, as well as most attorneys at the CAAA, were up in arms against the passage of SB 863 mainly because of two of its provisions.

One of the provisions they took umbrage with was the independent medical review, or IMR for those of us who prefer alphabet soup. Ron complained bitterly that SB 863 provided that appeals of Utilization Review denials must now be submitted within 30 days by the applicant to the Administrative Director. These appeals are essentially requests for an independent medical review.

Once the Administrative Director has given notice to all parties that an independent medical review organization has been assigned, the burden shifts to the employer to provide documents to the review organization within ten days. This includes all documents regarding the employee's current condition, the medical treatment being provided by the employer and the disputed medical treatment requested by the employee.

The decision of the IMR is final except in rare circumstances such as fraud, conflict of interest, bias, etc. Ron complained to me that this was a denial of due process as he would no longer be able to have a due process hearing before a judge with rights of a Petition for Reconsideration and appellate appeal.

I looked at Ron and grinned. I told Ron that the Board had issued its en banc decision in *Michael A. Willette v. Au Electric Corp.* (2004) 69 Cal. Comp. Cas 1563 years ago providing an expeditious and inexpensive way of resolving a UR dispute guaranteeing due process of laws but no one had really availed themselves of this process. So, how could he complain?[4]

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[3] Ron's words, not mine.

[4] The Board's en banc decision in *Willette* provides that an applicant and/or applicant's attorney could object to a UR denial and go through the AME/QME process and obtain a third doctor's opinion (in addition to the UR doctor and the treating doctor). A workers' compensation judge would then decide which doctor to rely upon in resolving the dispute at a due process hearing. Although Utilization Review became law as of January 1, 2004, few if any applicant attorneys ever availed themselves of this due process tool.

Unfazed, Ron told me that the second part of the reform that he and his fellow applicant attorneys were firmly against was the independent bill review, or IBR. I explained to Ron that this would not affect his business in the slightest as this would simply ensure that workers' compensation judges no longer had the burden of listening to experts on both sides interpret the Official Medical Fee Schedule. The new law provides that fee schedule disputes would be submitted to an independent bill reviewer. Ron looked at me with a sad expression and wailed: "Yea, well, how do you think Larry and Lenny Lien of the 8600 Group feel about this?"

THE GAME OF MUSICAL CHAIRS THAT IS WORKERS' COMPENSATION REFORM

I commenced practice in workers' compensation on November 7, 1973 (or thereabouts), and since that time various bill reforms have passed the legislature and become law. The goal it seems has always been to streamline the system.

Aside from those who receive the benefits (injured employees) and those that pay the benefits (employers), the rest of us are vendors, or "cottage industries," that help promote the constitutional mandate of an expeditious delivery system with due process to all parties.

Once a "cottage industry" or vendor gets in the way of this balance, the California legislature from time to time moves to eliminate the problem.

The ongoing workers' compensation reform reminds me of the kids'game called musical chairs.

It starts off with more players than chairs. The music starts as we all dance around a circle of chairs, then suddenly stops and we scurry to grab a seat. The player left standing, usually the slowest, doesn't have a chair and is out of the game. Then one of the chairs is removed and the game continues.

It has always appeared to me that the workers' compensation system plays by similar rules. The California legislature gave us mandatory vocational rehabilitation as of January 1, 1975, with the goal of returning injured workers to the labor market. The failure of vocational rehabilitation to obtain its goal was finally recognized by the Legislature and as of January 1, 2004, vocational rehabilitation was ended, i.e., it was the "player" who wasn't quick enough to grab a chair and was out of the game.

A chair was eliminated and the music started up again and round and round we went. This time when the music stopped lien claimants (and treatment disputes) were the unlucky ones. The uptick in lien claims and the continuing Utilization Review disputes that were brought before the Board were not furthering the goal of promptly and expeditiously resolving disputes between employees and employers/carriers. The Legislature has chosen to replace the adjudication system for resolving disputes with an administrative remedy.

THE PERFECT STORM

You might be asking yourself, loyal Lobby Bar patron, how did this happen?

A good question. The perfect storm was realized by the influence of three individuals who played a part in the creation of SB 863.

Representing labor was Angie Wei who is the legislative director of the California Labor Federation, the State AFL-CIO. Sean McNally, vice president of Corporate and Government Affairs for Grimmway Farms, represented the employer view point.[5]

The moderator or person who wanted to make the system work was Christine Baker the present Director of the Department of Industrial Relations.[6]

The common thread binding Ms. Wei, Mr. McNally and Ms. Baker is that they all serve on the California Commission on Health and Safety and Workers' Compensation. It is assumed that these individuals developed a mutual trust in, respect for and reliance on one another in working toward a common goal--making the system work for employers and employees.

In fact, Christine Baker was the executive officer of the Commission on Health and Safety and Workers' Compensation from 1990-1994. The ongoing job of the Commission, or CHSWC as it has come to be known, is to study our workers' compensation system and to find out what works and more importantly what doesn't work.

The rest that went into the making of SB 863 is simply guesswork on my part, having been in the system for such a long time.

Although SB 863 seemingly came out of the woodwork only a few months ago, the wording of the reform act appears to have been carefully thought out. The presumption on my part is that SB 863 or a version of this has been in the works for quite some time.

It would also not surprise me that the drafting of the Rules and Regulations has also been similarly accelerated.

In reading SB 863 it would certainly appear that the stated goal is to eliminate delays in providing prompt and expeditious adjudication of disputes between employees and employers/carriers by elevating medical disputes and billing disputes to the administrative level.

Although the catch phrase now is "the devil is in the details," it would appear that the stars have aligned on this issue.

DISCLAIMER:

All characters at the Lobby Bar aside from Kim, George and myself are a product of my warped imagination. The story line is also fictional, including the emergency meeting at CAAA or for

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[5] Brief bios on these individuals, including Christine Baker, can be found here http://www.dir.ca.gov/chswc/Members.htm and here http://www.dir.ca.gov/DIRNews/2012/IR2012-20.html

[6] Since I have been practicing, we have had several excellent Directors of the DIR but if memory serves me correctly, Christine Baker is the only individual who actually had a background in workers' compensation.

that matter any references about the business of the CAAA (though the CAAA remains an actual organization in existence in our world, sadly). My reference to Angie Wei, Sean McNally and Christine Baker with regard to the creation of SB 863 is simply based on my guesswork.

You can bet our job as defense attorneys will now be accelerated. With the downsizing of disputes with regard to liens and medical treatment requests, disputes as to payment of benefits between employees and employers are going to be accelerated and our emphasis as defense attorneys will be on the swift investigation, evaluation and termination of claims.

After all, we don't want to be left standing when the music stops again.

Make mine a double, George.

-Joe Truce