ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE NON-MPN PHYSICIAN FEE-ASCO OR *DID YOU REALLY AGREE TO PAY FOR THAT?*[1]

FROM THE LOBBY BAR AT THE HYATT:

After another exhausting day of denying benefits I was very much looking forward to the wondrous sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my cocktail of choice, a Beefeater's martini straight up, served with two olives.[2]

Upon my arrival to the Lobby Bar I received the aforementioned libation from Kim. My thirst quenched, all I craved at this particular moment was some reprieve and solitude whilst sipping on my martini and reveling at the beauteous Kim.

Unfortunately, as is wont to happen at the Lobby Bar from time to time, my dream of peace was shattered by loud muttering down at the other end of the bar. The cartel of chicanery had convened in what can only be described as a council of war - featuring none other than Ron Summers, George the Bartender's workers' compensation attorney, George's primary treating physicians, Dr. Nickelsberg and Dr. Ratbar, flanked by Larry and Lenny Lien of the 8600 Group. They appeared to be conspiring and formulating their next nefarious scheme.[3]

Without asking I knew what had prompted this gathering of the good Dr. Nickelsberg and his band of merry men.

For some weeks now Ron and Dr. Nickelsberg had become extremely defensive about the coming California labor law reform known as Senate Bill 863.

As Dr. Nickelsberg, Dr. Ratbar and their referral sources (various acupuncturists, chiropractors, durable goods providers, etc.) were not approved members of any Medical Provider Network (MPN), Dr. Nickelsberg from the onset was naturally concerned about getting paid or obtaining reimbursement for unauthorized treatment to applicants.

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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 Beefeater's martini, straight up, is best served at 38° Fahrenheit.

[3] In developing this fictional company name years ago it strikes me now that I could have opted for the 4500 Group. However, "86" seems to be an appropriate numeric formula for lien claimants in a bar.

My best guess was that this council of war was called together to strategize how to best receive payments from carriers and employers despite the fact that Dr. Nickelsberg and his cohorts were not MPN approved.

At this point in my musings I noticed that Dr. Nickelsberg and Dr. Ratbar were shaking hands with Larry and Lenny Lien so I knew that some diabolical strategy had been approved by the good doctors.

Eager to learn what mischief this cartel of chicanery was up to I decided to buy them a round of cocktails. Two rounds later, Larry was the first to succumb to my charm and offered to explain to me their dastardly plot.

Larry advised me that since Ron settled nearly all of his cases by way of Compromise and Release Agreement (despite the fact that in a majority of his cases the defendant carrier/employers had MPNs), Dr. Nickelsberg and Dr. Ratbar would still run up medical expenses like nobody's business as non-MPN physicians. Ron would inform them when settlement was imminent, and they and their fellow non-MPN physicians would file lien claims lickety-split.

In my mind I added up the number of medical providers that received referrals from Dr. Nickelsberg, including Dr. Ratbar, acupuncturists, chiropractors, physical therapists, Epidurals for Everyone and Scans R Us, as well as the transportation companies and interpreters. I came up with approximately 20 lien claimants which were probably running up somewhere between $20,000.00 and $30,000.00 per provider.[4]

Larry interrupted my mental calculations by indicating that as soon as the Workers' Compensation Judge (WCJ) issued the approval of the Compromise and Release Agreement all 20 lien claimants would concurrently file liens and Declarations of Readiness to Proceed to hearing.

Larry confided in me that most insurance companies did not want to spend the money to fight these liens so from past experience they estimated that the non-MPN physicians would get at least 50% of their billings by way of reimbursement from the defending carriers.

After giving me his entire strategy Larry beamed, daring me to find a hole in it.

[4] Two of these outfits were companies set up by Dr. Ratbar and run by Dr. Ratbar's brother in-law, Lenny Lien. I will leave you to guess which.

Taking a sip of my drink I prepared to perform my mental rain dance, bringing an abrupt end to this parade. I reached into my trusty briefcase, which I always take with me to the Lobby Bar, and pulled out the Board's decision in the case of *Maria Lazarte v. American Honda* (ADJ6949453) filed on September 27, 2012.[5]

I pointed out to Larry that the non-MPN physicians in *Lazarte* had already tried to implement their masterful strategy similar to the one just outlined by Larry Lien.

In *Lazarte* the parties had settled the case-in-chief for a lump sum of $40,000 with a provision that the liens were '"to be reviewed, settled, or litigated by defendant through any remedies available under the law."'

In noting that there were approximately 30 lien claimants listed in EAMS[6] the WCJ approved the Compromise and Release Agreement but inserted the following language in the Order Approving Compromise and Release:

> All proceeds from this order approving C&R, including attorney's fees, are to be withheld by defendants and held in trust by them until determination of liability of non-MPN [Medical Provider Network] lien claimants is determined, as liens per 4605 of Labor Code are liens against compensation.

The applicant attorney then filed a Petition for Reconsideration and the WCJ, in his Report and Recommendation, used the applicant attorney's Petition as a vehicle for once again bringing the lien claimant crisis to the attention of the Board as follows:

> The negative impact of an overwhelming number of cases flooding the District Offices of the WCAB in the Southern California region on the issue of liens cannot be overstated. This present case before the Appeals Board is an example of how many cases end up with many lien claimants resulting in multiple lien conferences and lien trials which is having a crippling effect on the District Office's ability to effectively exercise its function to ensure that **all** participants in the workers' compensation system have timely access to hearings. This present case is not an anomaly in this regard, nor is it limited to this particular applicant law firm. Rather, it is a standard course of conduct by which some firms routinely object to defendant's medical provider network (MPN) and, without litigating that issue in good faith, instead direct applicant to proceed with self procured medical treatment at multiple non-MPN medical facilities pursuant to Labor Code Sec. 4605 . . . these lien claimants, in turn, file liens for this treatment. (emphasis added)

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[5] Much like Marry Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of *Harry Potter* fame) my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice. Anyone wishing a copy *Lazarte* as well as the articulate report by the Workers' Compensation Judge (WCJ) on the applicant's Petition for Removal should submit their request via email.

[6] For the uninitiated amongst us, the California's Department of Workers' Compensation Electronic Adjudication Management System. More alphabets for our soup.

Although the Board certainly didn't need any no more red flags as to the lien crisis in Southern California, the WCJ brought this to their attention, citing it as an extremely egregious utilization of non-MPN physicians.

Although agreeing with the WCJ as to the inappropriate utilization of non-MPN physicians and the deleterious effect on the Board's resources, the Board granted reconsideration finding that the liens of non-MPN physicians cannot be considered as liens against compensation as indicated by the WCJ.

The Board went on to point out that liens against compensation can be self-procured medical expenses pursuant to Labor Code §4600.

In cases like this if the lien claimant and/or the applicant can prove a denial or refusal to provide medical care then self-procured medical expense can constitute a lien against compensation pursuant to Labor Code §4903.

On page five of their decision, the Board defined a lien against compensation as follows:

> . . . a lien against compensation for medical treatment that is subject to section 4903 is based upon the *employer's obligation* under section 4600 to provide reasonable medical treatment.

In comparing this to Labor Code §4605, the Board stated in relevant part as follows:

> If applicant in fact self-procured medical treatment pursuant to section 4605, as averred by applicant's attorney in the Petition for Reconsideration, she is personally liable for the cost of that treatment and the Appeals Board has no jurisdiction to determine its reasonable value or to hold defendant liable for it as part of applicant's workers' compensation.

It is my perception that the WCJ's intention in this case was to make the Board aware of what was actually going on in cases such as *Lazarte* and to this end their purpose was certainly served.

In granting applicant's Petition for Reconsideration, the Board sent the case back to the trial judge to determine whether or not applicant is liable to these 30 non-MPN lien claimants pursuant to Labor Code §4605.

At this point in my dissertation I paused to take a sip from my drink and noticed that all of the color had seeped out of Larry's face. Taking some sense of joy in this I picked up where I left off, quoting directly from the Board's direction to the WCJ as follows:

> . . . the WCJ should conduct a hearing and receive applicant's testimony concerning any agreement she made to personally pay the fee of any lien claimant pursuant to section 4605 and her understanding of her personal liability to one or

> more lien claimants under section 4605, and to receive copies of documents that may be relevant to the issue such as any fee agreements made between applicant and a lien claimant.

Can you imagine this, loyal Lobby Bar patron? Actually asking the applicant if they had agreed to pay the non-MPN physicians? The response I would expect to hear would be, "Are you kidding? Of course not!" should it even come to that.

At this point Ron Summers came over and tried to resuscitate Larry Lien, who had fainted. Managing to do so, Ron then told me that the Board's decision was simply wrong and it was only a panel decision. Ron would be claiming on behalf of Dr. Nickelsberg that liens of non-MPN physicians were liens against compensation that should be defended by the defendant carriers and/or employers.

I pointed out to Ron that if the liens of non-MPN physicians were not liens against compensation then, after the case had been concluded by way of settlement, the only remedy pursuant to Labor Code §4605 would be for the non-MPN physicians to collect money directly from the applicant. This, of course, is expressly prohibited by Labor Code §3751, which provides in relevant part as follows:

> If an employee has filed a claim form pursuant to Section 5401, a provider of medical services shall not, with actual knowledge that a claim is pending, collect money directly from the employee for services to cure or relieve the effects of the injury for which the claim form was filed, unless the medical provider has received written notice that liability for the injury has been rejected by the employer and the medical provider has provided a copy of this notice to the employee. Any medical provider who violates this subdivision shall be liable for three times the amount unlawfully collected, plus reasonable attorney's fees and costs.

Ron was somewhat nonplussed at my memory of this ancient Labor Code gem and suddenly brightened. He indicated that Labor Code §4605 was a relatively new statute with relatively new language about the employee's obligation to pay for attending physicians or treating physicians.

I pointed out to Ron that this was not true at all. The actual numbering of the statute might be new but this prohibition goes back to at least 1931. From my trusty briefcase I then pulled out a copy of the 1931 Labor Code and read aloud from §9(a) which contained language that is now found in Labor Code §4600. In 1931 the following language was included:[7]

[7] Now, I know what you're thinking loyal Lobby Bar patron and no, contrary to popular belief I *did not* start practicing law in the 1930's. Let the record show that I in fact started practicing law in 1973, but being a pseudo-legal scholar I am well versed with most former versions of the California labor code. Also, our firm was originally the Hanna Brophy office in Southern California in the late 1960's and early 70's. When we bought out Warren Hanna we also purchased his law library which included the 1931 Labor Code.

> Nothing contained in this section shall be construed to limit the right of the employee to provide in any case, at his own expense, a consulting physician or any attending physicians. . . .

Sound familiar?

At this point the cartel had ceased their celebration as the storm clouds were now gathering rather quickly.

Sipping my martini, I smiled as I knew I had done my job.

DISCLAIMER:

All characters at the Lobby Bar aside from my George, Kim and I are purely fictional and are a product of my warped imagination, as is the story line.

In *Lazarte* the problem, as in a whole host of other cases we encounter, was that there was no vehicle for defendants to obtain early approval of their Medical Provider Network.

Unless the case was actually tried there was no record that defendants had a legitimate MPN.

However, Senate Bill 863 has basically solved this problem by indicating that defendants can now file (as of January 1, 2013) expedited hearings to determine the validity of their MPN and once determined said decision can be served on all non-MPN physicians.

In several of its recent panel decisions the Board has taken the opportunity to point out the inappropriateness of the various positions taken by applicant attorneys, defense attorneys and lien claimants.

When the Commissioners really want to make a point, they actually mention the individual by name as they did in *Lazarte*.

May we all be spared such a fate.

Make mine a double, George.

-Joe Truce