ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE LIVID LIEN CLAIMANT II OR *WHAT PART OF OFFICIAL MEDICAL FEE SCHEDULE DON'T YOU UNDERSTAND?*[1]

FROM THE LOBBY BAR AT THE HYATT:

After an especially stressful day of denying benefits, I arrived at the Lobby Bar looking forward to the sight of Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with my Beefeater's martini straight up with two olives in tow.

I had just gotten out of a grueling trial and was in much need of what I commonly refer to as an "attitude adjustment hour."

However, on this night my attitude wasn't the only one in much need of an adjustment as there was a group down at the other end of the bar which badly needed theirs adjusted too.

The group in question was none other than the infamous cartel of chicanery: George the Bartender's workers' compensation attorney, Ron Summers, along with George's primary treating physician, Dr. Nickelsberg, and Larry and Lenny Lien of the 8600 Group.

Before my martini glass even touched my lips I could hear Dr. Nickelsberg lambasting Larry and Lenny Lien.

As I knew that Larry and Lenny were the exclusive collection agency for Dr. Nickelsberg's lien claims, I surmised that they had been unsuccessful in one of Dr. Nickelsberg's cases and that he was a very unhappy camper.

To get away from Dr. Nickelsberg's yelling, Larry and Lenny came over to my end of the bar and told me their tale of woe.

Larry explained that Dr. Nickelsberg, like most applicant primary treating physicians, billed out his fees at his usual and customary charge notwithstanding the mandate of the Official Medical Fee Schedule.[2]

Lenny told me that for years they would arrive at a lien claim trial with only the reports and billings of Dr. Nickelsberg. I knew from prior experience that Dr. Nickelsberg's so-called "usual and customary charges" were charges that he applied to workers' compensation cases without benefit of any accounting in terms of overhead, etc. In other words, the "usual and customary charge" was what Dr. Nickelsberg decided to bill.

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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] What's in a name, really?

Larry advised that in these other cases the defendant would settle for something less than Dr. Nickelsberg's usual and customary charges but above the Official Medical Fee Schedule.

Most defendants did not even bother to bring down a bill review person to adjust Dr. Nickelsberg's bills pursuant to the Fee Schedule. Larry and Lenny always felt that this was the "defendant's burden."

I thought to myself that in theory all medical providers are obligated, if not mandated, to submit billings to payers pursuant to the Official Medical Fee Schedule. However, the reality is that few medical providers do so and submit what they refer to as their "usual and customary billings" and leave it to the defendant to adjust the charges pursuant to Fee Schedule.

As this "kabuki" between medical providers and defendants had been going on for years, I wanted to know from Larry and Lenny what the problem was.

In unison, the Lien brothers wailed: "It's over."

As much as I was cheered up by the obvious agony of the Lien brothers, I still needed specifics.

After taking a long drink of his cocktail, Lenny explained that this morning a workers' compensation judge had dismissed all liens by Dr. Nickelsberg as Larry and Lenny only offered into evidence the actual bills of Dr. Nickelsberg along with the reports.

The workers' compensation judge (WCJ) advised Larry and Lenny that they needed more than the bills. The WCJ insisted that Larry and Lenny produce evidence that said billings complied with the Official Medical Fee Schedule.

When the Lien brothers told the WCJ that this was the defendant's burden, the judge advised that he was relying on a significant Panel decision by the Board in the case of *Ramon Armienta v. Mertz/Del Amo Mobile Park* [and the California Insurance Guarantee Association] (ADJ360272) filed on December 2, 2011.[3]

The WCJ advised Larry and Lenny that pursuant to the Board's en banc decision in *Maria Tapia v. Skill Master Staffing* (2008) 73 Cal. Comp. Cases 1338; 2008 Cal. Wrk. Comp. LEXIS 279, that lien claimants "failed to meet their burden of proof to establish reasonableness of the fees charged" if they did not actually submit evidence as to the reasonableness of their fee.

The WCJ went on to advise that the Board in *Armienta* held in relevant part as follows:

[3] A copy of the *Armienta* case may be obtained via e-mail request. Panel decisions can be brought to the attention of a workers' compensation judge or the Board by virtue of Labor Code §5703(g) which states that decisions of the Board on similar issues can be received into evidence.

> Accepting the parties' stipulation as to the necessity for the services rendered, the WCJ failed to require lien claimants to establish the reasonableness of their charges. Lien claimants' bills established only the amount it billed for the services, and defendant accepts it is liable to lien claimants for the amounts allowable under Official Medical Fee Schedule (OMFS). The WCJ states that the bills were adjusted to the OMFS, but there is no evidence in the record to establish this. These bills alone are not evidence of their reasonableness or that they meet the OMFS.

Larry handed me a copy of the *Armienta* decision. After reading and analyzing this very well-written Panel decision, I advised Larry and Lenny that the days of lien claimants simply submitting their billings into evidence was over and that lien claimants now had the burden of producing evidence that said billings complied with the Official Medical Fee Schedule.

However, loyal Lobby Bar patron, this isn't where the story ends.

When the Board issued their decision in the *Armienta* case on December 2, 2011, the case was returned to WCJ for further proceedings and the matter was once again set for hearing.

The lien claimants, Advance Health Medical Group and Spine Care Ortho Physicians, again appeared with only their bills and no evidence that their bills complied with the Official Medical Fee Schedule.

The WCJ issued a decision requiring the defendant to pay the bills of lien claimants and also issued a notice of intention to issue costs and sanctions against the defendant.

Once again the Board granted the defendant's Petition for Reconsideration, rescinded the decision of the WCJ and again held that lien claimants had not sustained their burden of proof as to whether or not lien claimants' bills complied with the Official Medical Fee Schedule.

Furthermore, the Board ordered the WCJ to appoint an independent bill reviewer (I guess we can call that IBR) and that the lien claimant would be liable for the one-half of the cost of the IBR.

I handed this decision to Larry and Lenny Lien and remarked, "Finally, some justice in the world!"

DISCLAIMER:

All characters at the Lobby Bar aside from Kim, George and myself are fictional and a product of my imagination, as is the storyline.

However, the daily (and voluminous, if I may say so) practice of medical providers seeking reimbursement on the basis of whatever the medical provider charged is over.

In addition to the charges of the medical provider, lien claimants have the added burden and responsibility of presenting evidence that said bills comply with the Official Medical Fee Schedule. All is right with the world.

Make mine a double, George.

-Joe Truce