ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: LABOR CODE §4600(b) AND THE BURDEN OF PROOF

FROM THE LOBBY BAR AT THE HYATT:

As I prefer my Beefeater martinis straight up, George the Bartender had just finished his rendition of shaken, not-stirred, when I noticed a commotion down at the end of the bar. Between the intermittent pounding on the bar, sobs and cries of "It's not fair," I looked up expecting to see George's attorney, Ron Summers, wailing over the latest affront to his applicant's practice brought about by Senate Bill 899. To my surprise I did not see Ron at the bar as the commotion was being made by Larry Lien of the infamous 8600 Group.

Larry looked so distraught over something that I decided to buy him a drink to find out what his problem was. Larry explained that he had just come from a hearing that day in which the lien of one his clients, Shake and Bake, Inc., had been denied as the judge ruled that Larry had not sustained his burden of proof.

I pointed out to Larry that all medical providers stand in the shoes of the injured worker and in order to prove entitlement to their lien, lien claimants, like the applicant, must sustain their burden of proof in showing that medical treatment meets the definition of "cure or relieve" as mandated by L.C.§4600.

I told Larry that the injured worker and medical providers must demonstrate by a preponderance of the evidence that medical treatment meets the criteria of "cure or relieve" as defined by Labor Code §4600(b)[1] which was added to L.C.§4600 as part of the SB 899 reform.

Larry impatiently told me that he "knew that" but for years he was able to collect on his lien claims as his referral source, Dr. Nickelsberg, always indicated that the medical treatment (in this case the ongoing therapy from Shake and Bake, Inc.) at least provided short term relief, i.e., even for ten minutes. I explained to Larry that the "cure or relieve standard" was a standard that has bedeviled employers and insurance carriers for years as almost all injured workers claim that any type of therapy or passive modality **"relieves"** their pain and/or discomfort for at least a short period of time and prior to April 19, 2004 this was enough to sustain their burden of proof pursuant to Labor Code §4600.

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[1]**Labor Code §4600(b) provides in relevant part as follows:** As used in this division and notwithstanding any other provision of law, medical treatment that is reasonably required to cure or relieve the injured worker from the effects of his or her injury means treatment that is based upon the guidelines adopted by the administrative director pursuant to Section 5307.27 or, prior to the adoption of those guidelines, the updated American College of Occupational and Environmental Medicine's Occupational Medicine Practice Guidelines.

Prior to the implementation of Senate Bill 899 the governor and his advisors tried to craft a solution out of the **"cure and relieve"** dilemma and finally amended Labor Code §4600 by adding Labor Code §4600(b) which adds a hard and fast definition for the term "cure or relieve." Therefore, in order to establish the employer's liability for medical treatment pursuant to Labor Code §4600 an injured worker or a medical provider lien claimant **must** sustain the burden of proof that said medical treatment meets the definition of "cure or relieve" as set forth in Labor Code §4600(b) which provides that the phrase "cure or relieve" means that treatment which complies with the American College of Occupational and Environmental Medicine (**ACOEM**) until such time as the Administrative Director adopts rules and regulations setting forth her own medical protocols.[2]

As you might guess, my explanation did not make Larry Lien feel any better and Larry argued with me that Labor Code §4600(b) was superseded by Labor Code §4610 which set forth hard and fast guidelines and time limits for Utilization Review pursuant to the ACOEM Guidelines.

I told Larry that in my own opinion, Labor Code §4600(b) was the new law of the land as it represents the most recent expression of the Legislature as Labor Code §4610 became law on January 1, 2004, and Labor Code §4600(b) was added to the L.C. 4600 on April 19, 2004, courtesy of Senate Bill 899.

Up to this point Larry had been drinking white wine but upon reading the actual text of Labor Code §4600(b) (from a Labor Code that I always have handy) Larry changed from white wine to shooters.

DISCLAIMER:

The above analysis is my opinion and my opinion alone.

However, the wording of Labor Code §4600(b) would appear to be crystal clear and mandates that an injured worker or lien claimant must **first prove** that his/her treatment complies with the ACOEM Guidelines so as to meet the standard of "cure or relieve" thereby turning Labor Code §4610 on its head.

[2]The Administrative Director has now promulgated her Rules and Regulations as to medical protocols for treatment as required by Labor Code §4600(b) and the Administrative Director's Rules incorporate the ACOEM Guidelines in full.

Up to now we have all assumed that the defendant has the burden of proving that medical treatment does not comply with the ACOEM Guidelines but according to Labor Code §4600(b) the reverse is true, i.e., the injured worker or lien claimant as in this case must prove compliance with the ACOEM Guidelines in order to sustain the burden of proof pursuant to Labor Code §4600.

I now have a confession to make: I have the only non-industrial back injury in the State of California! As a matter of fact my back injury is not even a compensable consequence of anything. Since I could not tap in to the horn of plenty known as the Dr. Nickelsberg bonanza, I was referred by my non-occupational health primary treating physician for physical therapy.

Let's call the therapist, Heather (sigh). Heather explained to me the source of my back pain and also explained that I would have six therapy sessions consisting of muscle strengthening exercises that would help relieve or diminish my back pain.

I exclaimed to Heather: "What? No wet and cold heat packs, no diathermy, no massages, no fun....." The evidence based guidelines contained in ACOEM refer to so called shake and bake therapy as **"passive modalities**" which have no lasting effect.

The guidelines go on to indicate that a brief trial of active physical therapy or muscle strengthening exercises are warranted in the case of a soft tissue injury and that additional therapy visits may be warranted **provided** the patient shows definite functional improvement in terms of range of motion, etc.

ACOEM applies the same test to chiropractic and acupuncture treatments. The key here is whether the injured worked demonstrates "**functional improvement."**

Make mine a double, George.

- Joe Truce