ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE FORGOTTEN ANTI-FRAUD WEAPON AGAINST LIEN CLAIMS

FROM THE LOBBY BAR AT THE HYATT:

After a hard day of denying benefits, I eased into my usual seat at the lobby bar, only to be distracted by a loud argument between the Lien brothers, Larry and Lenny, and George the Bartender's primary treating physician, Dr. **Nickelsberg**.

After serving me my first Beefeater martini straight-up with two olives, George confided in me that this argument had been going on for the past hour.

George explained that Dr. Nickelsberg was the sole owner of the **S & M Outpatient Surgery Center** (23 locations in Los Angeles and Orange Counties), and following the settlement by Compromise and Release of a case involving a substantial lien by the S & M Surgery Center, the 8600 Group had taken the case to trial.

George told me that today the Workers' Compensation Judge (WCJ) had issued a decision adverse to the S & M Surgery Center and that the owner, Dr. Nickelsberg, was not pleased at the way the 8600 Group had handled this case.

The argument at the end of the bar finally concluded with Dr. Nickelsberg stomping out of the bar, leaving the Lien brothers distraught and in danger of losing a large client.

Any success by defendants against Outpatient Surgery Centers is good. I silently celebrated by offering to buy cocktails for Larry and Lenny Lien.

While George was pouring their drinks, Lenny, with a sad face, told me what had happened at trial.

The S & M Outpatient Surgery Center lien involved services rendered before Outpatient Surgery Centers were subject to the fee schedule.

Lenny explained that during this period most Outpatient Surgery Centers were charging a minimum of $15,000.00 for epidural injection and a series of three would cost $45,000.00.

In the case that prompted the argument with Dr. Nickelsberg, Lenny (who tried the case) had attempted to submit into evidence the billings of the surgery center and the billings of the physicians who performed the services.

On defendant's motion, the WCJ had excluded the billings of the physician, pursuant to Labor Code §5703(a)(1)[1], as said billings were not certified under penalty of perjury.

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[1] Seldom utilized, Labor Code §5703(a)(1) mandates that all billings for services (not just reports) are "admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician."

In his decision, the WCJ substantially reduced the lien claim of the S & M Outpatient Surgery Center and adopted the testimony of the defense expert, who testified that based on the current fee schedule for Outpatient Surgery Centers, as well as the amount that Medicare would pay for such services, the bill of the S & M Outpatient Surgery Center was not reasonable.

After gulping down his first drink, Lenny told me that it was manifestly unfair for the WCJ to predicate his decision on a fee schedule that did not cover the medical services at issue. Lenny added that it would have been impossible to find the physicians who rendered the medical services at the S & M Outpatient Surgery Center in order to have them sign the billings under penalty of perjury, as all of Dr. Nickelsberg's physicians at his surgery centers were what he referred to as "rent-a-physicians."

In secretly celebrating Larry Lien's sorrow at losing this case, I compared his defeat to a recent Appeals Board panel decision reported in the *California Workers' Compensation Reporter* entitled **Valencia v. California Indemnity Insurance Company, 36 CWCR 42.**[2]

The Board in the **Valencia** case, in affirming the decision of the WCJ, reaffirmed that a medical provider (including Outpatient Surgery Centers) has the burden of proving the reasonableness of its charges by a preponderance of the evidence, and that a defendant can then seek to rebut the showing of said lien claimant.

In this case, the Premier Outpatient Surgery Center[3] billed the defendant $17,500.00 for medical services on one date, July 21, 2003, and for the use of its facilities. The defendant paid $2,457.80, and the Premier Outpatient Surgery Center filed a lien for the balance.

At trial the lien claimant offered as evidence its billings, reports and a so-called comparative study summary "that was authenticated" by the unverified statement of the lien claimant's employee, Vivian Guajardo.

Pursuant to defendant's motion, the WCJ excluded the comparative study and reduced lien claimant's lien.

The WCJ relied on the defendant's expert witness, who offered evidence as to the reasonableness of the lien claimant's charges by citing the Official Medical Fee Schedule, which now covers Outpatient Surgery Centers, as well as what Medicare would have paid for similar services.

However, the most important part of the WCJ's decision was relying on Labor Code §5703(a)(1) in excluding the comparative study evidence offered by the lien claimant. This provision specifically provides that statements concerning a billing for services are "admissible only if made under penalty of perjury that they are true and correct to the best knowledge of the physician."

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[2] The Court of Appeal has held that a Board panel decision reported in the *California Workers' Compensation Reporter* is a properly citable authority, especially as an indication of contemporaneous interpretation and application of California workers' compensation laws: Griffith v. WCAB (1989) 209 Cal. App. 3d 1260; 54 CCC 145. Anyone wishing a copy of the Valencia case should please reply by email.

[3] Even though the name is similar, this has no relationship to **"The"** Premier.

Labor Code §5703(a)(1) was part of the anti-fraud provisions passed by the state legislature in 1993, and became effective on January 1, 1994.

Although most of us are aware that medical reports by attending or examining physicians must be signed under penalty of perjury, it is not generally well known that the actual billings must also be signed under penalty of perjury by the physician performing said services.

After Labor Code §5703(a)(1) became law on January 1, 1994, most defense attorneys started raising this section in lien claim trials.

However, the Board, in its initial decisions, would allow lien claimants time to submit their billings under penalty of perjury.

However, I have always felt that if one does not like the law, one should attempt to change the law by legislation and not ignore the law because it happens to be inconvenient.

In my opinion, the intent of the state legislature in implementing Labor Code §5703(a)(1) is clear and unequivocal. As part of its anti-fraud legislation, the legislature meant to require physicians who performed the services to review their billings before they went out, to check as to their accuracy as to value and content.

Most of us on the defense side have become aware of lien representatives who have **"resuscitated"** liens from the dead, i.e. liens from so-called medical providers specializing in newspaper advertisement post termination or stress claims.

Clearly, the **"accounts"** or **"paper"** have been sold to purchasers (dare we actually call them bona fide purchasers?) several times over, and these lien claims are now taking up the valuable time of Appeals Board district offices in Southern California. At certain Boards I have heard these lien claimant representatives who are resurrecting liens from the late 1980's referred to as "Lazarus" or "Grave Diggers."

These are precisely the lien claims that should be heavily scrutinized by our defense community and certainly we should require that all billings be verified and/or signed under penalty of perjury by the physician actually performing the services.

In the above hypothetical example it would have been impossible for Lenny Lien to run down the physicians who performed the services at the S & M Outpatient Surgery Center, as these physicians are constantly on the move.

In these days of computerized billing the physicians performing the services never see the bills.

Is it really practical to require physicians to not only review the bills for their services but to sign each bill under penalty of perjury? **The law says <u>Yes</u>!**

As Labor Code §5703(a)(1) has been in place since January 1, 1994, it is not up to our community to question the practicality or legitimacy of a law that is already on the books.

Any remedy should be in the legislature. It is our duty to enforce this law.

At all Mandatory Settlement Conferences and at trial, we demand that all lien claimants obey the law and we will object to the admissibility of all "statements concerning any bill for services" that are not signed under penalty of perjury by the physician performing said services.

DISCLAIMER:

The above **"rant"** is mine and mine alone. The non-use and lax enforcement of Labor Code §5703(a)(1) has been viewed by some as equivalent to the theory of **"adverse possession"** that we learned about in law school, i.e. if someone takes possession of someone else's real property and occupies same in open and notorious possession, then the real property moves to the ownership of the one who adversely possesses the property.

However, the concept of **"adverse possession"** does not apply to the law, and the simple non-use of the law does not mean it is not enforceable.

Even though Labor Code §5703 (a)(1) became the law on January 1, 1994, it would appear that the **Valencia** case cited above is the only case in which it actually has been enforced, at least as to my imperfect memory. Make mine a double, George.

WJT/jh