I N T E R - O F F I C E M E M O R A N D U M

TO: ATTORNEYS & CLIENTS

FROM: W. Joseph Truce

DATE: December 29, 2006

RE: **George and Retroactive Utilization Review**

FROM THE LOBBY BAR AT THE HYATT:

When I arrived at the bar the treating physicians for George the Bartender, Dr. Ratbar and Dr. Nickelsberg, were in deep conversation. "How are we going to get around **Sierra Pacific"** Dr. Ratbar moaned to Dr. Nickelsberg. The good doctor was referring to the recent published Court of Appeal decision entitled **Sierra Pacific Industries v WCAB 71 Cal. Comp. Cas 714.**

Since both Dr. Ratbar and Dr. Nickelsberg were in distress over this decision I bought them both cocktails when ordering my usual martini. Dr. Nickelsberg thanked me and explained that his unhappiness was due to the Court's ruling in **Sierra Pacific finding** that Utilization Review was retroactive and applied to medical services even before the enactment of L.C. 4610 and Utilization Review on 1/1/04 as a result of the amendment to L.C. 4600 by SB 899.

I reminded Dr. Nickelsberg that at this same bar last month he told me he had found a way to beat UR by not asking for authority from the carrier (thereby commencing the UR process) and simply submitting his billings for payment knowing that carriers were not set up for retrospective UR and that without the trigger of a request for authorization the bills would by bypass the adjuster and be sent to bill review for payment pursuant to the fee schedule. Dr. Nickelsberg had told me proudly that the secret was not to trigger UR by calling or writing for authorization and that this method of getting around UR was fool proof as L.C. 4610 provide that the carrier only has 30 days to go through the UR process and this was never done as the bills that he submitted were never seen by the adjuster as they immediately went to bill review for payment.

As Dr. Nickelsberg had claimed this method of avoiding UR was absolutely ironclad I asked him what the problem was and he explained:
In Sierra Pacific the Court not only analyzed the UR statute, L.C. 4610, but also L.C. 4600 as amended by SB 899. As of 4/19/04 or the enactment date of SB 899 L.C. 4600 provides that the famous "cure or relieve" phase 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" or ACOEM. As the Administrative Director has now adopted the ACOEM Guidelines all treatment must comply with these guidelines.
In Sierra Pacific the applicant sustained an admitted industrial injury on 9/22/03 and benefits were provided. The applicant selected a chiropractor and commenced on a long and consistent regimen of chiropractic treatment. Defendant's disputed the reasonableness of the treatment and the applicant, who was in pro per, selected a QME (another chiropractor) who found that the applicant's lengthy treatment program was reasonable. The case was settled by C&R and the applicant's treating chiropractor submitted a lien for his services.

The defendant sent the bill to Utilization Review and, based upon the ACOEM Guidelines, it was determined that the treatment was not reasonable or necessary per ACOEM.

The applicant's chiropractor was incensed and took the case to trial where a trial judge determined that ACOEM was not controlling for medical services prior to the 1/1/04 UR statute and the WCJ's decision was affirmed by the Board. The Court of Appeal then granted defendant's Petition for Writ of Review and held that the amendment to L.C. 4600 is retroactive and all medical treatment must comply with ACOEM.

Somewhat confused I asked Dr. Nickelsberg how this decision squared with the 30 day time limit as contained in L.C. 4610 for retrospective review and he replied that the Court of Appeal addressed this issue and noted that the defendant, Sierra Pacific, did challenged the reasonableness of the treatment by a L.C. 4062 objection which was the only remedy available to them prior to the adoption of L.C. 4610 but "that there was no effect on the ability of (the defendant) to challenge the reasonableness of the medical treatment."

Dr. Nickelsberg complained that this decision would greatly affect his income from his multiple Outpatient Surgery Centers on Southern California as for the last decade he had routinely referred every patient that had back pain for epidural and trigger point injections and that his many physical therapy companies would suffer as now this treatment would have to comply with the ACOEM guidelines.

The concern of Dr. Nickelsberg is certainly justified by this decision. The "shake and bake therapy" programs or what is referred to as passive therapy (diathermy, heat packs, massage, etc.) is a no no under ACOEM which only allows aggressive therapy such as muscle strengthening exercise which, once learned, must be continued a home.

How many times have you received a lien for $50,000 plus from someone such as Dr. Nickelsberg for outpatient epidural steroid injections or trigger point injections. These treatment modalities are NOT allowed for back pain under ACOEM but only for true radicular pain. Let me say that again: "only for true radicular pain." According to ACOEM "radiating pain" down the leg is not radicular pain UNLESS it is accompanied by loss of reflex in the knee and ankle as well as a loss of muscle strength. How do we know this?--we go to the examination portion of the medical report to confirm that the applicant, aside from complains of radiating pain, has a concurrent loss of reflex and muscle strength.

Chapter 14 of the ACOEM Guidelines deals with low back pain and on page 20 indicates that epidural, trigger point, facet-joint and ligamentous injections are not recommended for back pain without radiculophy. Radiating pain, as opposed to true radicular pain, is an indication of stenosis which is treatable by aggressive therapy (probably no more than six visits) and definitely not by the above invasive treatment modalities.

In order to address these huge treatment liens we use a UR Physician who is in private practice and our doctor reviews these billings, liens and medical reports and reduces said billings, if not doing away with the bills entirely, pursuant to the ACOEM Guidelines and will testify at trial. Happy litigating. I wonder George? Are lien claimants really the crab grass on the lawn of life?
George, since it's New Year's Eve give me a bottle of Champagne! Happy New Year everyone from George, Kim, Dr. Ratbar and Dr. Nickelsberg.--joe truce

DISCLAIMER: To the California Highway Patrol: I plan to take a cab home.