ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE SLEEP DISORDER BONANZA

FROM THE LOBBY BAR AT THE HYATT:

As I approached the lobby bar I noticed that George the Bartender's attorney, Ron Summers, had just handed George's treating physician, Dr. Nickelsberg, some legal-looking document for analysis.

When I finally got George's attention and was served my usual Beefeater's Martini, straight up with two olives, I of course inquired as to why Dr. Nickelsberg and Ron were pouring over what appeared to be legal documents.

George told me that the reform laws of SB899, when combined with the utilization review mandate contained in Labor Code §4610, had forced the good doctor to close most of his outpatient surgery centers which operated under the name, S&M Surgery Centers.

George went on to explain that Dr. Nickelsberg and Ron were just putting the finishing touches on corporate papers turning Dr. Nickelsberg's S&M Surgery Centers into a new venture called **Sleep Is Fun - The Rest is Easy.**

Overhearing my conversation with George, Ron came over and told me that after analyzing the various chapters of the AMA Guides, he and Dr. Nickelsberg had decided there was a lot of money to be made in diagnosing and evaluating sleep disorders.

Ron explained that he was just finishing corporate papers changing Dr. Nickelsberg's S&M Outpatient Surgery Centers to sleep clinics where the sleep patterns of injured workers would be monitored during sleep.

I commented to Dr. Nickelsberg that he had lots of competition as most applicant treating docs were creating their own sleep clinics. I asked how his were different.

Dr. Nickelsberg smiled and told me that his sleep clinics allowed conjugal visits.

I remarked to Ron that this idea was somewhat strange as far as I was concerned. I told him in my 35 years of practicing workers' compensation no one had been really interested in diagnosing and curing sleep disorders caused by an industrial injury. A look of horror crossed Ron's features as he told me that he did not want to cure the sleep disorder, but simply wanted to identify the sleep disorder with the corresponding whole person impairment as set down in the AMA Guides.
Ron went on to indicate that he was absolutely positive that most, if not all, of his clients had problems sleeping as a result of their industrial injuries. Therefore, he had briefed Dr. Nickelsberg on how to give

the Epworth test to his clients and then refer these workers to one of Dr. Nickelsberg's new sleep clinics for a polysomnogram.[1]

At this point, Dr. Nickelsberg broke in to indicate that as soon as one of Ron's applicants told him that he had trouble sleeping with pain, he would immediately administer the Epworth Sleepiness Scale. The Epworth test is a subjective test which is designed to assess the likelihood of an applicant dozing off in different situations such as sitting, reading, watching television, sitting in a public place, riding as a passenger or driving a motor vehicle, taking an afternoon nap, sitting and talking to someone, etc.

Ron explained to me that he had poured through the AMA Guides last night and found that on page 317 a Class 1 impairment of a sleep disorder could command anywhere from 1% to 9% impairment of the whole person. This would then be added to and/or combined with the whole person impairment for the applicant's industrial injury.

Ron went on to tell me that if one of his injured workers hypothetically had a13% whole person impairment for, say, his low back, then it might be possible to add 1% to 9% for a sleep disorder before modification for age, occupation and FEC.

However, Ron emphasized that the real money in sleep disorders is getting above Class 1 and that was the reason for the creation of Dr. Nickelsberg's sleep study clinics. A Class 2 sleep disorder could take anywhere from a 10% to 29% whole person impairment, a Class 3 up to a 69% WPI and a Class 4 could go as high as a 90% impairment.

Ron told me that he had been told by a rating specialist for the Disability Evaluation Unit that in order to qualify for a Category 2 (or higher) sleep disorder he would need a polysomnogram and this would be obtained through Dr. Nickelsberg's sleep clinics.

I advised Ron that his plan had missed a necessary step. When I received blank looks from both Dr. Nickelsberg and Ron, I replied "a diagnosis."

I reminded Ron and Dr. Nickelsberg that Table 13.4 entitled **"Criteria for Rating Impairment Due to Sleep and Arousal Disorders"** appeared in Chapter 13 of the AMA Guides which was titled: **"The Central and Peripheral Nervous System."**

I observed that in order to proceed to a whole person impairment rating, Dr. Nickelsberg would have to have a diagnosis as to an actual sleep disorder such as sleep apnea.

Under the AMA Guides a complaint by an injured worker that he cannot sleep because of pain from a back injury would not qualify as an actual sleep disorder diagnosis, but simply a result of the diagnosis of a low back injury.

Ron looked at Dr. Nickelsberg and wanted to know whether or not a diagnosis of sleep apnea could be facilitated in such a case.

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[1] Polysomnography is defined as: "Simultaneous and continuous monitoring of relevant normal and abnormal physiological activity during sleep."

At this point I interjected that on page 105[2] of the AMA Guides it indicates that Obstructive Sleep Apnea is usually a product of obesity which interferes with sleep.

Moreover the Guides specifically proclaim as follows:

"A diagnosis of Obstructive Sleep Apnea is confirmed by nocturnal polysomnography in an accredited sleep laboratory. Once the diagnosis has been established, prescribe continuous positive airway pressure (CPAP) through a nasal device during sleep to maintain upper airway patency. Weight loss is the most effective means of long term management and a possible cure for Obstructive Sleep Apnea if a lower body mass index can be obtained . . ."

I told Ron that I doubted very seriously if the clinics that Dr. Nickelsberg will open, formerly outpatient surgery clinics, qualified as **"accredited sleep laboratories."**

At this point Dr. Nickelsberg told Ron that everything was going to be okay as he can come up with a **viable sleep disorder diagnosis** and the billings for the overnight stay in his laboratories would be between $5,000.00 and $7,500.00 per session.

I told Dr. Nickelsberg that these billings would never pass muster with **Utilization Review**.
Dr. Nickelsberg laughed and advised that most of the large employers and insurance companies he dealt with were only set up to perform prospective Utilization Review.

Dr. Nickelsberg went on to indicate that he knows **never** to call or write for authority as this would be a red flag to the adjuster to refer him to Utilization Review for denial.

Sadly, Dr. Nickelsberg is correct. As an industry we are still under the impression that we can object to medical bills which have not been pre-authorized.

This, of course, is incorrect as we have absolute liability to make payment of all medical treatment bills and/or diagnostic procedures in an admitted case.

Therefore, when Dr. Nickelsberg submits his outrageous billings for the overnight sleep study in the amount of $7,500.00, we have liability to pay and/or adjust this billing pursuant to the Official Medical Fee Schedule, ***unless*** we perform Retrospective Utilization Review. **Retrospective Utilization Review** is an extremely difficult concept for our industry to grasp as this involves a partnership between the claims administrator (adjuster) and the Utilization Review Department.

As soon as Dr. Nickelsberg's billing and/or reports come in to the adjuster and the adjuster is reasonably certain that Dr. Nickelsberg has performed the services of a **sleep study,** we have 30 days to perform Retrospective Utilization Review.

The recommended procedure (my recommendations) for performing Retrospective Utilization Review is as follows:

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[2]Contained in Chapter 5 entitled **"The Respiratory System"**.

1. As soon as the adjuster receives information and/or documentation from the treating doctor which makes it reasonably certain that the procedure has been done, Utilization Review has 30 days **(from that date)** to issue a Utilization Review Determination.

2. The Utilization Review Determination will probably be a request for more information to the treating doctor as to the diagnosis which compels the referral for a sleep study.

3. Based on my experience the treating doctor never responds and therefore a Utilization Review Denial will issue shortly.

4. All Utilization Review Determinations (seeking more information and the Utilization Review Denial) should be served by **proof of service** on the injured worker, the injured worker's attorney, the primary treating doctor and the treating doctor as the person who requests the authorization or performs the treatment is not always the primary treating physician. A copy of the Utilization Review Determination should be served on not only the treating doctor but also the primary treating physician if these two physicians are different.[3]

5. Remember, if there is a defense attorney representing the employer our Utilization Review Department should always make service on the defense attorney to let us know that the billing is not payable now or in the future, even as a lien.[4]

Although there are legitimate sleep disorder laboratories, they are few and far between. I can guarantee that doctors such as Dr. Nickelsberg have no idea where they are or whether or not they have been certified.

Depending on the sleep clinic, overnight stays are being charged back to insurance companies and employers from $3,500.00 all the way up to $10,000.00 and sometimes more. Although the authorities are investigating some of the more notorious sleep clinics, this sham will continue unless we cut off the flow of money now.[5]

Sleep clinics and/or sleep laboratories such as the mythical laboratories created by the mythical Dr. Nickelsberg cannot exist if we cut funding. There is no better way to cut off the money than by the proper utilization of Retrospective Utilization Review.

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[3]Labor Code §4610 (the Utilization Review Statute) mandates that the Utilization Review Determination be served only on the applicant and the treating physician but overkill is no sin and is more acceptable to workers' compensation judges. Therefore our recommendation is to make service on the primary treating physician, the treating physician, the applicant and the applicant's attorney.

[4]Alas in many cases, the defense attorney, like the husband, is usually the last to know.

[5]As D**eep Throat** said to Bob Woodward years ago in an underground garage in Washington, D.C., "Follow the money."

Once our proper Utilization Review Denial goes out (timely) with the appropriate proof of service, the UR Denial can only be appealed by the applicant and/or the applicant's attorney - not a lien claimant, doctor or medical provider.

Pursuant to the Board's en banc decision in ***Willette*** a Utilization Review Denial can only be appealed by the applicant and/or the applicant's attorney using the following procedures:

1. The applicant's attorney **must** object to the Utilization Review Denial within 20 days and offer to go through the AME/QME procedures of Labor Code §4062. When the denial is ***not*** issued within the 20-day deadline, the **UR Denial is final**.

2. Some applicant attorneys have their office programmed to send out an appeal within the 20 days, but then do nothing else. **The Board in *Willette* mandates that in addition to the denial, the applicant's attorney must go through the AME/QME procedure so when the case goes to trial there will be three medical opinions, i.e., the UR doctor, the treating doctor and the AME or QME. This also seldom happens.**

Once the UR Denial is final - that is that. The sleep laboratory or doctor making the referral cannot collect even on a lien basis.

DISCLAIMER:

The above story and characters are mythical. Unfortunately, Retrospective Utilization Review is also all but mythical in our industry as we have not quite grasped the concept which requires team work and communication between the claims administrator (adjuster) and the Utilization Review Department. Once we have grasped this rather simple concept we will be facing a world without lien claims. What could be more perfect than that?

Make mine a double, George.

WJT/dri