## ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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## RE: GEORGE THE BARTENDER PONDERS THE UNTIMELY UTILIZATION REVIEW DENIAL OR *HOW TO TURN A LOSS INTO A WIN!*[1]

**FROM THE LOBBY BAR AT THE HYATT**

After an exceptionally hard day denying benefits fresh off my return from Hawaii, I made my way to the Lobby Bar contemplating my favorite cocktail, a Beefeater's martini[2] straight up with two olives, being served by Kim, the Hyatt's breathtakingly beautiful cocktail waitress.

As I settled into my usual seat Kim made her way to me with my martini in tow. I could feel the stress of the day alleviating.

As I was lifting my glass to my lips, anticipating the cool relief of my martini, I was startled by angry voices at the other end of the bar.

Turning my head toward the commotion I saw Frank Falls, noted defense attorney, and his chief client, Pat Pennipincher, claims manager for Integrity Insurance Company. They were in a heated discussion with Ron Summers, George the Bartender's workers' compensation attorney, and Ron's "go to" Primary Treating Physician (PTP) and fellow duke of duplicity, Dr. Nickelsberg.

As their voices started rising I thought it best to try to calm the combatants and mediate the situation, so I signaled to Kim to prepare them a round of drinks.

Judging from what I could overhear from their heated discussion, I was acquainted with the history of their issue. Allow me to illuminate you, loyal Lobby Bar patron. Frank, on behalf of Integrity Insurance Company, was defending a case brought by Ron in which Ron's client had sustained an admitted low back injury. Dr. Nickelsberg had submitted to Integrity a Request for Authorization (RFA). Utilization Review (UR) issued a denial.

Ron and Frank had been disputing for days as to whether or not the UR was timely.

I made my way over to them just as their drinks arrived. Frank immediately pulled me aside and told me in very hushed tones that after further investigation both he and Pat had determined that unfortunately the UR denial was, in fact, untimely. Regrettably, they had not communicated this information to Ron or to Dr. Nickelsberg.

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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, epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

[2] A Beefeater's martini, straight up, is best served at 38˚ Fahrenheit.

Frank whispered that they were going to tell Ron and Dr. Nickelsberg that they were set to approve the low back surgery even though the UR determination found that the low back surgery did not comply with the guidelines as set forth by the Division of Workers' Compensation (DWC) in the Medical Treatment Utilization Schedule (MTUS).

I pulled away from Frank for a second so that he could better see the smile on my face and waved Pat over. I asked them whether or not Dr. Nicklesberg had complied with Labor Code §4600(b). Both Frank and Pat looked at me like I had antennae on my head and was speaking an alien language.

I reached into my trusty briefcase and pulled out my copy of the Workers' Compensation Laws of California (2016 Edition), which I always carry with me just in case of emergency as one can never be too sure of when you'll be called on to mitigate labor code disputes, but I digress. I opened the page to Labor Code §4600 and read subsection (b) to them:

> As used in this division and notwithstanding any other 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.

Pat looked at Frank for an explanation, who in turn looked at me for assistance.

I told Frank that the "guidelines" referred to in subsection (b) were none other than the MTUS. I added that the burden was on the applicant, not the defendant, to prove the recommended treatment complies with the MTUS and to establish the reasonableness and necessity of the proposed treatment.

Frank had regained his composure at this but pressed me on whether this still rang true in the case of untimely UR denial.

I grinned as I saw Ron was eavesdropping on our discussion and he did not look too pleased. I seized this opportunity to dash Ron's hopes.

I told Frank and Pat that the California Supreme Court in its famous *Sandhagen*[3] decision had put the burden squarely on the applicant, not the defendant, in proving that the recommended treatment would be reasonable and/or necessary.

Pat leapt with glee at this. Frank, however, wasn't moved as he advised me that he considered *Sandhagen* a loss for the workers' comp community as the loser was the defendant, State

[3] Last discussed in a 2014 edition, *George the Bartender and the Limitations on Medical Treatment in Labor Code §4600(b) or How Authorizing Home Healthcare is Liable to Push Us the Brink*. The full site is *State Compensation Insurance Fund v. Workers' Compensation Appeals Board (Sandhagen)* (2008), 44 Cal. 4th 230; 186 P.3d 535; 79 Cal. Rptr. 3d 171; 2008 Cal. LEXIS 7905 filed by the Supreme Court July 3, 2008. A copy of this case can be obtained by email request.

Compensation Insurance Fund. On the contrary, I told Frank, *Sandhagen* was the best friend of the defense.

At this point, I again reached into my trusty briefcase[4] and pulled out a copy of *Sandhagen* and referred Pat and Frank to the following statement on page 5:

> The Legislature amended section 3202.5 to underscore that all parties, including injured workers, must meet the evidentiary burden [**542] of proof on all issues by a preponderance of the evidence. (Stats. 2004, ch. 34, § 9.) Accordingly, notwithstanding whatever an employer does **(or does not do)**, an injured employee must still prove that the sought treatment is medically reasonable and necessary. That means demonstrating that the treatment request is consistent with the uniform guidelines (§ 4600, subd. (b)) or, alternatively, rebutting the application of the guidelines with a preponderance of scientific medical evidence (§4604.5) (emphasis added)

I then asked Frank and Pat whether or not Dr. Nickelsberg had addressed the MTUS in his report or in the alternative scientific evidence rebutting the MTUS. Before they could answer I could see by the nervous look on the faces of Ron and Dr. Nickelsberg that Dr. Nickelsberg had in fact not addressed Labor Code §4600(b) in his reports.

I then told Frank and Pat (for Ron's benefit really) that this same language appeared in the Appeals Board's en banc decision in *Jose Dubon v World Restoration, Inc., State Compensation Insurance Fund* (2014) 79 Cal. Comp. Cases 1298 (filed October 6, 2014) , aka *Dubon II*.[5]

Frank looked baffled, but Pat remained overjoyed. Ron and Dr. Nickelsberg were grimacing. I advised Frank here was his defense against the treatment recommended by Dr. Nickelsberg, what more could he ask for?

Frank remained unmoved. I was feeling a bit flustered myself as I thought I had just presented Frank a perfect defense to combat Ron and Dr. Nickelsberg on a silver platter.

It was then that I recalled a recent Workers' Compensation Appeals Board panel decision that would be the cherry on top. Once again I reached into my trusty briefcase and pulled out copies of *Connie Shepherd Thompson v. County of Los Angeles* (ADJ1369119)[6] filed on

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[4] Much like Mary Poppins's seemingly bottomless carpetbag (of Disney fame) and Hermione Granger's bottomless handbag (of Harry Potter fame), my briefcase possesses magical powers, granting me the ability to pull out any decision at a moment's notice.

[5] Discussed at length in a 2015 edition, *George the Bartender and the Late Decision of the Independent Medical Reviewer (IMR) Or Determination Delivered in 45 Days or Your Pizza is Free!*, the Appeals Board properly held in *Dubon II* that the only issue to be addressed by the Board was one of timeliness, i.e. was the Utilization Review carried out in a timely manner?

[6] A copy of *Thompson* can be obtained by email.

February 17, 2016. In *Thompson* the Appeals Board upheld the applicant's burden for proving that requested medical treatment is reasonable and/or necessary pursuant to the MTUS.

In this case the applicant's treating physician, Dr. Eric Spayde, recommended right L4-5 laminectomy and microdiscectomy. Also, like Frank's case, there was little question that the UR denial was untimely.

At Trial, the Workers' Compensation Judge (WCJ) found that since the UR denial was untimely the applicant was entitled to the medical treatment as recommended by Dr. Spayde. However, on defendant's Petition for Reconsideration, the Board reversed as follows:

> In this case, we conclude that substantial medical evidence does not support a finding that the low back surgery recommended by Dr. Spayde is reasonable and necessary. Therefore, we will grant reconsideration, rescind the WCJ's decision, and substitute our decision that applicant is not entitled to the surgery . . . However, a dispute over whether a proposed medical treatment is reasonably required must be determined by resort to evidence-based standards and medical opinion. (See Lab. Code, § 5307.27 [authorizes development of a medical treatment utilization schedule (MTUS) that "shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care"]

Labor Code §4610.5(c)(2) defines "medically necessary" and "medical necessity" according to a hierarchy of standards:

> A) The guidelines adopted by the administrative director pursuant to Section 5307.27. (B) Peer-reviewed scientific and medical evidence regarding the effectiveness of the disputed service. (C) Nationally recognized professional standards. (D) Expert opinion. (E) Generally accepted standards of medical practice. (F) Treatments that are likely to provide a benefit to a patient for conditions for which other treatments are not clinically efficacious.

The Board then referred to *Dubon II*:

> In addition, the Board held in *Dubon II* that any determination of medical necessity by the WCAB following an untimely UR determination must be based on substantial medical evidence. Under *Dubon II*, an applicant must present substantial medical evidence establishing that the proposed medical treatment is reasonable and necessary.

The Board concluded as follows:

> Based on our review of Dr. Spayde's reports, it is clear that he failed to justify his recommendation for this lumbar surgery by reference to MTUS, which adopts Chapter 12 of the ACOEM Practice Guidelines for low back complaints.

I had not noticed but my analysis of *Sandhagen*, *Dubon II* and *Thompson* had now drawn a little crowd, including Larry and Lenny Lien of California Settlement Holdings, LLC (aka CASH).

I pointed out to all of them that the same is true with respect to lien claims. Most medical providers do not justify their treatment by reference to the MTUS and these liens should be denied as a matter of law.

Seeing the dejected look on the faces of Ron, Dr. Nickelberg, Larry and Lenny Lien, I knew my job was done and that I could finally enjoy my martini.

**DISCLAIMER:**

Aside from Kim, George and I, all characters of the Lobby Bar are fictitious, as is the storyline, and are products of my vivid and warped imagination.

However, Labor Code §4600(b), *Sandhagen* and *Dubon II* are seldom-used weapons in our defense arsenal. It's time to put them to good use.

Make mine a double, George.

-Joe Truce