

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

For past installments of the *George the Bartender* series, please visit our web site at <http://www.kttlaw.us/memos.html>

### **RE: GEORGE THE BARTENDER AND THE BED OF BEGONIAS OR IS A GARDENER REALLY A LABOR CODE SECTION 4600 MEDICAL EXPENSE?<sup>1</sup>**

#### **FROM THE LOBBY BAR AT THE HYATT:**

I arrived at the Hyatt Lobby Bar at my usual time seeking, solitude and the comfort of my cocktail of choice, a Beefeater's Martini, straight up with two olives.

I would receive plenty of the latter but be denied the former!

After Kim, the Hyatt's breathtakingly beautiful cocktail waitress, served my martini, my zone of solitude was interrupted by the excited voices of Frank Falls, noted workers' compensation defense attorney, and his chief client, Mr. Paul Pennipincher, VP of Claims for Integrity Insurance Company.

It seemed that these two were upset which, as most loyal Lobby Bar patrons know, typically means bad news for the defense industry. As such, I quickly ordered a round of drinks for Frank and Paul and made my way to their end of the bar.

Frank thanked me for the drinks and began to explain to me the source of their acrimony. He had just received an adverse Findings and Award from a Workers' Compensation Judge (WCJ) wherein the WCJ not only awarded the applicant future medical treatment for his orthopedic injury, but also awarded him housekeeping services, gardening services and pool services pursuant to Labor Code §4600.

This was only the tip of the iceberg though as they were also hit with multiple Labor Code §5814 penalties (25% of the value of each service requested) for not providing these services on a timely basis.

Frank advised me that in his opinion these luxurious services were timely denied, as he objected to the provision of housekeeper services, gardening services and pool services (not to mention plant food!). He contended that these services did not constitute legitimate Labor Code §4600 expenses and even if they did there was no substantial evidence that these services were the type of medical services that would cure or relieve the effects of the applicant's industrial injury.

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<sup>1</sup> For those new patrons to the Lobby Bar, George the Bartender's workers' compensation case involves an injury to his elbow, lateral epicondylitis (tennis elbow), sustained from the repetitive serving of martinis to me. If there ever was an admitted industrial injury, this is it!

Frank went on to tell me that the WCJ in his opinion on decision contended that the defendant did not deny these services pursuant to Labor Code §5610 (Utilization Review) as explicitly required by the California Supreme Court in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Sandhagen)* (2008) 44 Cal.4<sup>th</sup> 230 (73 Cal. Comp. Cases 981).<sup>2</sup>

After hearing Frank's tale of despair, I wanted to know why the medical reports of the primary treating physician recommending these services were not immediately referred to Utilization Review (UR).

Even though services for housekeeping, gardening and pool maintenance are clearly not within the AMA Guidelines, I explained to Frank that all of this litigation and consternation could have been avoided by a simple referral to UR, who would have then immediately issued denials of all of these services on the basis that there was no medical evidence as to the medical necessity of housekeeping services, gardening services and pool services.

Frank had this blank and distant look on his face. There was an uncomfortable silence which was finally broken by Mr. Pennipincher who revealed to me that the Utilization Review Department of Integrity Insurance Company had their own specific standards as to what could be referred to UR.

Clearly embarrassed, Mr. Pennipincher told me that the Utilization Review Department, which was managed by a non-claim professional, took the firm view that requests such as housekeeping services, pool services and gardening services were not reviewable under Labor Code §4610.

I was dumbfounded! I told Mr. Pennipincher that whether or not a service request was ridiculous (such as housekeeping, gardening and pool services), we should always refer it to Utilization Review. It is a claims decision and should be made by claims professionals and certainly not by non-claims professionals, such as a manager of a Utilization Review Department. In this case, Mr. Pennipincher's applicant was 40 years old and such services for the rest his life could run easily into the hundreds of thousands of dollars, not to forget the aforementioned Labor Code §5814 penalties!

Furthermore, I explained to Mr. Pennipincher that the State Audit Unit piles on penalties (State administrative penalties) once they find out that a claims administrator (either a third party administrator or a carrier) has been ordered by the Board to pay Labor Code §5814 penalties.

I reiterated my point to Mr. Pennipincher and Frank that all claims decisions should only be made by claims professionals.<sup>3</sup>

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<sup>2</sup> The Supreme Court decision in *Sandhagen* is available via e-mail request.

<sup>3</sup> I had previously advised them of the same back in *George the Bartender and the Valdez Decision or the Medical Provider Network Loophole Closure, No Detour in Sight*

Both Frank and Mr. Pennipincher looked rather glum in contemplating a Petition for Reconsideration to the decision of the trial judge.

At this point I did offer a ray of hope, as I advised them about a recent decision of the Appeals Board in the case of *James Bishop v. Schindler Elevator Company; Zurich Insurance Company* (ADJ1768236).<sup>4</sup>

In *Bishop* the WCJ made basically the same adverse decision as in Frank's case ruling that as the defendant did not deny housekeeping services, gardening services and pool services by way of UR the defendant was not only liable for these services but the defendant was ordered to pay multiple Labor Code §5814 penalties at 25% per service delayed.<sup>5</sup>

Fortunately, on reconsideration, the Board granted time for further study and on April 22, 2011, it issued a 2 to 1 decision finding that services such as housekeeping services, gardening services and pool services were not subject to Utilization Review pursuant to *Sandhagen*.<sup>6</sup>

I explained to both Frank and Mr. Pennipincher that the decision of the Board was a razor thin victory for the defense in light of the decision by the California Supreme Court in *Sandhagen*.<sup>7</sup>

The Rules of Practice and Procedure of the Administrative Director defines a request for medical treatment. Administrative Rule 9792.6 (o) defines a request for authorization as a written request for a "specific course of proposed medical treatment pursuant to Labor Code section 4610(h)," which is understood to be medical treatment which will cure or relieve the effects of the applicant's industrial injury.

The so-called request for pool services, housekeeping services and gardening services did not qualify as a request for medical treatment as said request cannot be construed as a request for a course of medical treatment which is designed to cure or relieve the effects of an industrial injury.

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<sup>4</sup> The Board issued two opinions after reconsideration finding that housekeeping, gardening and pool services were not the types of medical treatment that needed to be referred to Utilization Review pursuant to Labor Code §4610. The initial decision after reconsideration was issued on May 5, 2010 and a second decision, in response to the applicant's Petition for Reconsideration was issued on April 22, 2011.

<sup>5</sup> The *Bishop* case is actually my case and may be addressed by the Court of Appeal as the applicant's attorney has filed a Petition for Writ of Review.

<sup>6</sup> Believe it or not, in *Bishop*, the applicant is not only requesting reimbursement for retroactive gardening services but also plant food, peat moss and of course, flats of flowers, including Begonias.

<sup>7</sup> When I refer to this decision as razor thin, I was referring to the fact that the Board issued two decisions after reconsideration on my Petition and the Petition for the applicant's attorney. Since the first dissenting commissioner (Commissioner Cuneo) retired, the Board then assigned another commissioner, Commissioner Caplan, and she also dissented.

It was on this basis that the Board issued their opinion after decision mandating that said services are not subject to Utilization Review pursuant to Labor Code §4600.

I told Frank and Mr. Pennipincher that as far as I am concerned an ounce of prevention is worth a pound of cure and certainly could do away with a lot of litigation expense and potential exposure to what could be incredible liability for the rest of the applicant's life.

In *Bishop*, at one time, there was a request made for a washer and dryer as a Labor Code §4600 expense. This request was subsequently withdrawn as an issue, the reason being I guess that it may have been viewed as too absurd.

### **UTILIZATION EXPENSE: A SWORD OR A SHIELD?**

With the passage of California Senate Bill 899 on April 19, 2004, the legislature and the Governor gave employers relief from what had become a \$30 billion plus headache.

The cost driver then, much as it is now, was runaway medical expenses.

Prior to SB899 we really had no way to curtail runaway medical expenses.

In short, we could go to an AME or a QME but by then the damage had already been done, i.e., the treatment had been provided by the applicant's primary treatment physician who, of course, was selected by the applicant's attorney.

### **UTILIZATION REVIEW - HOW IT'S SUPPOSED TO WORK:**

In the Integrity Insurance Company example we have non-claims professionals making claims decisions which can impact the bottom line profit of a carrier or self-insured employer, as well as expose the claims administrator to Labor Code §5814 penalties and severe audit penalties imposed by the State of California.

I think it is axiomatic in our industry that claims decisions must be made by claims professionals. Paul Pennipincher, the claims professional for the Integrity Insurance Company, should have had the ability to dictate to the Utilization Review Department what should be reviewed and this decision should never be made by non-claims professionals.

In *Sandhagen*, the California Supreme Court took a rather simplistic view of Labor Code §4610.

The Supreme Court recalled that employers and carriers for years had complained about runaway medical expenses and the fact that there was no quick, efficient and inexpensive way to reign in runaway medical treatment.

The Court made a point that employers and carriers were given in Labor Code §4610 the ultimate weapon (UR) they had hoped for to fight medical abuse. The Court wondered why employers and carriers were not using it, with the weapon sitting in the silos of some claims administrators collecting dust!

In my example with Integrity Insurance Company the reason was quite simple, i.e., there was a “turf war” between the Claims Department run by Mr. Pennincher and the Utilization Review Department run by a non-claims professional.

This should never happen in real life but unfortunately it does quite frequently.

In a perfect world Utilization Review is supposed to work like this:

1. The claims administrator should address all requests for medical treatment on the day they are received. Administrative Rule 9792.6 (o), as discussed earlier, defines a request for Authorization as follows: “a written confirmation of an oral request for a specific course of proposed medical treatment.”<sup>8</sup>
2. If appropriate, a request for authorization should be immediately sent to UR for determination of whether or not the request for medical treatment is within the evidence-based guidelines adopted by the Administrative Director or the ACOEM Guidelines.<sup>9</sup>
3. Pursuant to Labor Code §4610 the mandate of the Utilization Review physician is to determine whether or not the requested treatment is within the evidence-based guidelines (ACOEM).
4. If a determination is made that the requested medical treatment is not within evidence-based guidelines, then it is contemplated that there would be a peer to peer review; meaning that the Utilization Review physician would speak with the primary treatment physician and request that there be an explanation as to why treatment was being requested outside of evidence-based guidelines.

Unfortunately, due to the incredible volume of work in the workers’ compensation system, such peer to peer review almost never happens. When one party does try to contact the other party, they usually play an extended game of phone tag.

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<sup>8</sup> If the request for authorization is appropriate the claims administrator can approve the medical treatment requested or refer it to UR

<sup>9</sup> Pursuant to the Boards en banc decision in *Simmons* and also Labor Code §4600 (b) denied body parts can also be referred to UR.

5. If the UR physician makes a determination that the medical treatment is outside evidence-based guidelines and that there is no reasonable explanation for the treatment, a Utilization Review denial will be issued. Although the applicant and/or the applicant's attorney can appeal the Utilization Review denial, few attorneys bother to go through Labor Code §4062 and the AME/QME procedure, which is necessary for a valid appeal.

### **PICKING UP THE TAB AFTER A SUCCESSFUL UR DENIAL?**

Yes, it can happen to you, loyal Lobby Bar patron.

In Southern California, a great many medical providers couldn't care less whether or not their requests for treatment are denied by Utilization Review. These providers simply go ahead and provide the treatment and after the case has been settled, or it goes to Findings and Award, these medical providers then file their liens.

Therefore, employers/carriers have two burdens:

1. The defendant must timely deny the medical procedure by way of Utilization Review.
2. The defendant then has to send a defense attorney or hearing representative down to the Board to defend against the lien on the basis that it was timely denied by Utilization Review. Essentially this gives the medical provider two bites of the apple, i.e. the provider can still collect after a timely denial by way of Utilization Review by filing a lien which is not defended properly.

### **DISCLAIMER:**

Once again we find ourselves dealing with too many cooks in the kitchen with regard to Utilization Review Departments overruling a claims decision with respect to UR. In combating spiraling medical costs, we need to utilize our chief weapon, UR pursuant to Labor Code §4610, and follow this up by denying the same liens at trial that were denied by UR.

Make mine a double, George.

-Joe Truce