

## **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 VALDEZ DECISION OR MEDICAL PROVIDER NETWORK LOOPHOLE CLOSURE, NO DETOUR IN SIGHT<sup>1</sup>**

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

After a hard day denying benefits I could not wait to get to the Lobby Bar to see the look on Ron Summers's face, George the Bartender's workers' compensation attorney, after he heard about the Board's en banc decision in *Elayne Valdez vs Warehouse Demo Services* (ADJ7048296) filed on April 20, 2011.<sup>2</sup>

Okay, okay – being able to gaze at Kim, the Hyatt's breathtakingly beautiful cocktail waitress, was also a motivating factor for my haste.

In *Valdez*, the Board addressed the longstanding issue of whether or not a report by a non-Medical Provider Network (MPN) physician is admissible as evidence. The Board ruled in the negative, stating that both California Labor Code §4605 and §5703(a) absolutely do not “justify the admission of unauthorized non-MPN medical reports.”<sup>3</sup>

Ever since California Senate Bill 899 (SB899) authorized the creation of MPNs, I knew Ron and his fellow Duke of Duplicity, Dr. Nickelsberg, George's primary treating physician, had developed a clever strategy for allowing Dr. Nickelsberg to provide treatment to Ron's clients even though Dr. Nickelsberg was not in the carrier's MPN.<sup>4</sup>

The strategy was simple. The California Labor Code allows an employee to treat with any physician he chooses, even a non-MPN physician, as long as the employee agrees to pay the physician's fee. Prior to the Board's decision in *Valdez* the Board had issued panel decisions

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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!

<sup>2</sup> A copy of the *Valdez* case may be obtained by an email request.

<sup>3</sup> En banc decisions by the Appeals Board are binding, as a matter of law, on workers' compensation judges and panels of the Board.

<sup>4</sup> The creation of Medical Provider Networks is a concept that allows employers and insurance carriers to control medical treatment by establishing a network of treating physicians to provide medical treatment to injured workers pursuant to Labor Code §4600.

indicating that such reports were admissible on the issues of disability and medical treatment, thereby creating a situation not contemplated by the legislature in mandating MPNs.

This was a loophole through which Ron and Dr. Nickelsberg drove a Mack truck.

In *Valdez*, the Board closed this loophole once and for all, declaring that these non-MPN reports are not admissible as evidence on any issue before the Board.<sup>5</sup>

Finding my customary seat at the Lobby Bar I ordered my drink of choice, a Beefeater's martini, straight up with two olives, from Kim. After receiving my drink and taking my first sip I stole another longing glance at Kim. I then beheld a nearly as beautiful sight; a very depressed and sullen looking Ron and Dr. Nickelsberg down at one corner of the bar.<sup>6</sup>

No sooner had I taken my eyes off the Dukes of Duplicity than I found myself in the company of Frank Falls, a noted workers' compensation defense attorney, who offered to pick up the tab on my current drink and buy my next round.

I thought this very gracious of him and who better to celebrate the victory for the defense in *Valdez* than Frank. However, he appeared less than jubilant given the current circumstances and I wanted to know why.

Frank told me that he just had a solemn conference call concerning the *Valdez* case with his chief client, Mr. Pat Pennipincher, Vice President in charge of claims for the Integrity Insurance Company.

Frank had initially called Mr. Pennipincher to share what he thought was good news about the Board's decision in *Valdez*.

Mr. Pennipincher then promptly rained on his parade.

### **TOO MANY COOKS SPOIL THE BROTH**

Frank explained to me that Mr. Pennipincher was an excellent claims technician and therein lies the rub.

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<sup>5</sup> When Ron initially explained this devious strategy to me I asked him how in the world Dr. Nickelsberg would get paid as payments certainly would not come from the injured worker. Ron explained that Dr. Nickelsberg would simply file a lien and as a cost of doing business the carrier would settle the lien for 50 cents on the dollar, thereby ensuring a profit for Dr. Nickelsberg.

<sup>6</sup> A Beefeater's martini straight up (which means no ice) is best served at 38° Fahrenheit.

Mr. Pennipincher told Frank that upon implementation of SB899 the higher-ups at the Integrity Insurance Company had created several different departments staffed by non-claims personnel. For example, the Integrity Insurance Company created a department with exclusive jurisdiction over the creation and function of the MPN, as well as a department for utilization review and still another department for medical cost savings.

Therefore, the decision on a claim would not be made by the claims expert, Mr. Pennipincher, regarding MPN physicians, a pharmacy network, utilization review, etc.

Mr. Pennipincher explained to Frank that these decisions are all made by the heads of these various departments. As Frank was telling me his tale of woe I thought to myself what a no brainer it was for all claims decisions to be made by claims professionals.

Frank was curious to know what this had to do with the great victory for employers and insurance carriers in the *Valdez* case and Mr. Pennipincher explained; the manager and non-claims professional of Integrity's Medical Provider Network department had contracted with a huge medical network discount company by the name of Second Health.

Long before MPNs were created by SB899 these medical partnerships functioned as a cost-saving mechanism and this procedure worked well.

Integrity Insurance Company, as well as most insurance companies, had used these types of partnerships to gain discounts over the years from hospitals, physicians, diagnostic facilities, etc. at approximately 20% below Fee Schedule.

With the implementation of SB899 Second Health came to the Integrity Insurance Company and indicated that they would provide an MPN, free of charge, to the Integrity Insurance Company.

The appeal of this was understandable. The carrier would not have to create its own MPN, going through the rigorous process of interviewing the physicians for admission into the MPN and then supervising the physicians once admitted and working in the MPN.

This would all be done by Second Health as the network of Second Health physicians would constitute the MPN.

So much for that theory!

Mr. Pennipincher told Frank that the head of Integrity's MPN department, over his objection, contracted with Second Health and adopted the Second Health MPN, which contained over 89,000 physicians and chiropractors in California.

Frank told me ruefully that Dr. Nickelsberg and Dr. Ratbar were within the Second Health MPN.

As a matter of fact Frank told me that his claim staff had been working diligently to identify the MPN physicians in the Second Health MPN and had discovered that a large number of the physicians are deceased.

Frank told me that the worst thing about the Second Health MPN was the fact that the Integrity Insurance Company thought they got a real deal because the MPN network of Second Health was *free*.

According to Frank, the truth of the matter was that Second Health billed each medical event/procedure at Fee Schedule to Integrity Insurance Company and then reimbursed the contracting physicians at 20% below Fee Schedule.<sup>7</sup>

### **THE CONCEPT OF MEDICAL PROVIDER NETWORKS**

The legislature did not create MPNs simply to save employers and insurance carriers money but certainly the fiscal crisis caused by runaway medical treatment was on their mind.

The concept of MPNs certainly allows the insurance carrier/employer to keep control of the applicant's medical treatment program but it was also predicated on the concept that appropriate medical treatment would be delivered on a timely and efficient basis to the injured worker with the goal of returning the applicant to employment. This is something that often escapes the grasp of Dr. Ratbar and Dr. Nickelsberg.

This cannot be accomplished by simply entrusting an MPN that blindly blankets a gross number of physicians within a state, like the example above with Second Health. This negligently puts quantity before quality.

Instead, employers and insurance carriers should devote ample resources to developing their own MPNs, which requires interviewing the physician, inspecting the medical provider's premises and ensuring the physician understands that the goal within the MPN is to give prompt, immediate and effective medical treatment to injured workers.

Paying physicians below Fee Schedule is *not* the way to do this.

At this point in my musings I looked over to observe the Dukes of Duplicity, Ron and Dr. Nickelsberg, and noted with satisfaction that Ron was wringing his hands and Dr. Nickelsberg was pounding the table in disgust.

I knew the source of their angst! Dr. Nickelsberg was Ron's *referral source* and Dr. Nickelsberg, by virtue of his blanket advertising, would refer those claiming to be injured workers over to Ron

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<sup>7</sup> One man's "free" is another man's fortune.

who would then return the favor by referring these applicants back to Dr. Nickelsberg for treatment. (A tangled web if I ever saw one!)

As most of Ron's defendant insurance carriers have their own MPNs, which didn't include the likes of Dr. Nickelsberg and Dr. Ratbar, Dr. Nickelsberg would have to treat the injured workers outside of the network and then file liens to collect his payment.

I knew from experience that Lenny and Larry Lien of the 8600 Group (Dr. Nickelsberg's "go to" lien team) had been extremely successful arguing that the reports of non-MPN physicians were admissible and have been settling Dr. Nickelsberg's bill for 50% to 60% of his usual and customary (read: exorbitant) charge.<sup>8</sup>

However, this practice would come to an end by virtue of the Board's en banc decision in *Valdez*, bringing an abrupt end to Ron and Dr. Nickelsberg's Mack truck joy ride. While I took some solace in this fact I recalled Frank's somber mood and realized at this point both Dr. Nickelsberg and Ron were probably unaware that Dr. Nickelsberg was one of the 89, 0000 physicians in the MPN of the Integrity Insurance Company, as well as all those other insurance carriers who did business with Second Health. These insurance carriers were in for a rude awakening.

### **MEDICAL PROVIDER RULES TO LIVE BY**

A legitimate MPN, in the long run, benefits the insurance carrier, the applicant and the applicant's attorney.

Unfortunately, we have few MPNs who actually perform as set forth by SB899. In order to maximize cost savings, here are the rules to live by in constructing an MPN:

1. The defendant carrier and/or employer must spend substantial resources in crafting the MPN by interviewing the physicians and visiting the medical facilities to make sure they are legitimate, clean and up to medical standards.
2. The MPN should include physicians in all specialties throughout California.
3. The MPN should be controlled by a manager who is able to interact with the medical providers and/or physicians on a regular basis and be able to

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<sup>8</sup> Dr. Nickelsberg owns 51% of the 8600 Group.

impart necessary medical information as well as the goals of the MPN to the providers.<sup>9</sup>

4. MPN physicians should be compensated for their services pursuant to Fee Schedule.
5. MPN physicians should be advised on a regular basis that their goal is to provide the best medical treatment to injured employees with the expectation of improving their lives and getting these employees back to work.

Quite frequently we have a situation in which a law firm like Ron's sends an injured worker to a physician such as Dr. Nickelsberg, or a non-MPN physician, even though the requisite notices as to the MPN have been repeatedly sent to the injured worker.

In these types of situations, the response of the defense industry has simply been to send out letters to the non-MPN physicians indicating they will not get paid as they are not within the MPN. Also, letters are sent to applicant attorneys pleading with them and/or the applicant and/or the non-MPN physicians that the applicant should treat within the MPN.

The latest MPN-related decisions from the Appeals Board not only require notice of the MPN to injured employees but emphasize that medical treatment should be immediately offered.

Therefore, I would suggest the best way to attack a non-MPN physician is as follows:

1. Send a notice to the applicant's attorney and the applicant stating that the applicant must treat within the MPN; also enclose a list of MPN physicians within the applicant's geographical area.
2. If the applicant has not made his selection within two weeks of this letter, we can then select a physician within the MPN, send out an appointment letter to the applicant and provide the requisite travel expense.
3. If the applicant fails to show up for his appointment with the MPN physician, then a Petition to Compel Examination pursuant to Labor Code §4053 should be filed.
4. If the applicant fails to appear for a medical examination despite a court order, then a suspension of benefits under Labor Code §4054 and at the

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<sup>9</sup> It is remarkable that so many physicians that are included within so-called MPNs do not even know that they are an MPN physician.

same time a Declaration of Readiness to Proceed can be filed on the MPN issue only.

**DISCLAIMER:**

All characters at the lobby bar, aside from Kim, George and I, are figments of my warped imagination.

While the scenario with Frank Falls and the Integrity Insurance Company is also fictional, unfortunately the huge Medical Provider Networks containing over 89,000 physicians are all too real.

We need to reinvent the way we handle the MPN issue because, as I have tried to hammer home in the example above, the goal of the MPN is to deliver the maximum and best medical treatment to the applicant and to return the injured worker to work.

There are two ways to accomplish this: the Integrity Insurance Company way or the right way. Choose wisely.

Make mine a double, George.

-Joe Truce