ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER CONTEMPLATES A WORLD WITHOUT LIEN CLAIMANTS or THE TRIUMPH OF THE RULE OF LAW

FROM THE LOBBY BAR AT THE HYATT:

It is usually not until my third martini at the lobby bar that I contemplate a perfect world and that, of course, is a world without lien claimants.

Unfortunately, I almost never reach that pinnacle as my thoughts are routinely interrupted by the appearance of Larry and Lenny Lien of the 8600 Group boasting about their latest recovery at the Appeals Board.

However, tonight would be an exception as the Court of Appeal had denied the Petition for Writ of Review brought by the infamous SB Surgery Center, thereby affirming the Board's *en banc* decision in *Maria Tapia v. Skill Master Staffing and Liberty Mutual Insurance Company*.[1]

I knew Larry and Lenny would be devastated by the Court's decision as they had been very optimistic that the Board's *en banc* decision in *Tapia* would be overturned.

In *Tapia*, the Board made it crystal clear that lien claimants were held to the same standard of proof as other parties appearing before the Board. It also mandated that lien claimants have the burden of proof in not only proving all elements of their case (including injury AOE-COE) but most importantly that lien claimants, not defendants, have the burden of showing that their charges are reasonable.

Like a lot of other defense attorneys, I had assumed that this issue had been resolved by way of the Board's *en banc* decision in *Kunz v. Patterson Floor Covering Incorporated* (2002) 67 Cal.Comp.Cases 1558*,* which I had considered a resounding victory for defendants everywhere.

In some of the most creative legal gymnastics ever seen, lien claimants, especially the lien claim representatives for SB Surgery Center, argued that the Board's decision in *Kunz* was actually a victory for lien claimants.

Talk about snatching victory from the jaws of defeat!

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[1] As *Tapia* is an en banc decision of the Board, it's holding is binding on all parties, workers' compensation judges and Panels of the Appeals Board. Anyone wishing a copy of the *Tapia* case should make the request by email.

In *Tapia,* lien claimant SB Surgery Center made a like argument:

> **"SB contends that defendant did not present evidence of fees accepted for the same services by outpatient surgery centers in the same geographic area as described in the *en banc* decision of the Appeals Board in *Kunz* . . . and that in the absence of such evidence from a defendant, *Kunz* requires that the full amount of an outpatient surgery center's lien be allowed as a reasonable fee."**

Under this reasoning, SB Surgery Center argued that their absurd billing of $23,529.00 for a one day non-complicated right wrist surgery was reasonable as defendants did not prove otherwise.

In *Tapia,* lien claimant SB Surgery Center argued that the Board was bound to rule in their favor pursuant to the Board's en banc decision in *Kunz*.

This was a somewhat absurd circular argument as *Kunz*, under any interpretation or maybe I should say "reasonable" interpretation, did not relieve a lien claimant of the burden of proving that their billing was reasonable and the Board in *Tapia* said just that.

In rejecting the claim of SB Surgery Center, the Board held as follows:

1. That lien claimants' interpretation of the *Kunz* decision was flat out wrong;

2. That the billing submitted by SB Surgery Center does not establish that the claimed fee is "reasonable;"

3. That rebuttal evidence "is not limited to the fees accepted by other outpatient surgery centers in the same geographic area for the services provided."

At this point in my analysis two events happened contemporaneously at the lobby bar:

1. First, I ordered another Beefeater martini straight up with two olives from Kim, the Hyatt's breathtakingly beautiful cocktail waitress; and

2. Second, Larry and Lenny Lien walked into the lobby bar looking like they had just lost their best friend.

I am always happier when Larry and Lenny are upset. To get their "take" on the *Tapia* case, I bought them a round of cocktails and listened to their wailing.

In his anguish over the Court of Appeal's summary dismissal of the Petition for Writ of Review filed by SB Surgery Center in the *Tapia* case, Lenny complained that the Appellate Court simply did not understand the real benefit that lien claimants provided in the workers' compensation system.

Lenny told me that prior to *Tapia* becoming the law of the land he and Larry took the position with defendants that the only way that surgery center liens could be rebutted was by a presentation of evidence as to what other outpatient surgery centers charged in the same geographical area.

At this point, Larry commented that all outpatient surgery centers basically were charging rates similar to that of SB Surgery Center, thereby making defendants' burden an impossible task.

I advised Larry and Lenny that the Board's decision in *Tapia* did not simply apply to outpatient surgery centers but was a binding precedent on all lien claimants, i.e., that all medical providers had the burden of showing that their charges were reasonable.

Lenny complained bitterly to me that even though the medical services in *Tapia* were before January 1, 2004, that the expert witness presented by the defendants in *Tapia* testified that "the new fee schedule for this procedure would be $1,770.34." Even though the fee schedule only applied to services after January 1, 2004, this evidence was submitted and accepted by the Board on the issue of reasonableness.

Additionally, the defendants in *Tapia* introduced evidence as to what the billing of SB Surgery Center would have been had the surgery been carried out in a hospital as the Board commented as follows:

> **"Therefore, SB's $23,529.00 billing for its outpatient services covering three hours of operating room and 1.7 hours of recovery room time was over four times as great and nearly $18,000.00 more than the amount allowed by law for inpatient hospitals in the same area, even if substantially longer stays were involved."**

The defendant in *Tapia* also introduced evidence that the "Medicare Fee Schedule for DRG codes involved would have allowed an outpatient surgery center that provided services at that time for the same procedure a fee of $1,214.68 or approximately 95 % *less* than the amount billed by SB."

THE RISE AND FALL OF OUTPATIENT SURGERY CENTERS:

In the 1970's, 1980's and the early part of the 1990's, we seldom dealt with services from outpatient surgery centers, as most surgeries, epidural injections, and procedures requiring a general anesthetic were performed in hospitals.

For years hospital services were not subject to the Official Medical Fee Schedule. The fee schedule was eventually amended to bring hospital charges into line with other charges and treatment reimbursements in the workers' compensation system.

As soon as hospital services were bound by the Official Medical Fee Schedule, we saw the birth of a new industry - outpatient surgery centers. By mere coincidence these surgery centers took the position that they were not bound by any fee schedule.

Although the surgery centers were held as a breakthrough in modern medicine and of considerable convenience to patients, the fact remains that the growth of outpatient surgery centers did not really hit its stride until it was realized that their charges were not subject to the fee schedule. This caused an outbreak of outpatient surgery centers to spring up throughout Southern California.

While some surgical procedures certainly lend themselves to being performed in outpatient surgery centers, I have seen complicated spinal surgeries, such as fusions, performed in these one-day-and-you-are-home centers. As commented on by the Board in *Tapia*, the charges of these surgery centers can be approximately 95% higher than similar charges for the same surgeries and/or procedures performed in a hospital setting.

Now that we do have a fee schedule for outpatient surgery centers for procedures performed on or after January 1, 2004, lien claimants, such as SB Surgery Center, are rushing to collect medical billings for outpatient surgery center procedures performed prior to the fee schedule taking effect.

Up to the time of the *Tapia* case, lien claimants were arguing that their usual and customary fee and/or billing should control in the absence of specific evidence offered by defendants, pursuant to *Kunz*, i.e., rebuttal evidence consisting of similar charges by outpatient surgery centers in the same geographical area.

In *Tapia,* the Board reiterated its decision in *Kunz* to the effect that lien claimants have the burden of proof in showing that their charges are reasonable even in the absence of rebuttal evidence. The Board explicitly stated that defendants could also enter evidence as to what the outpatient surgery procedures would cost under the new fee schedule or for that matter what similar services would cost if they had been performed in a hospital setting.

BEATING A DEAD HORSE:

Numerous George the Bartender memos have dealt with one of the most incredibly useful defense weapons in our arsenal against runaway medical expense, i.e., prospective and/or retrospective Utilization Review pursuant to Labor Code §4610.

In *Tapia,* the procedure performed was right wrist surgery and I assume that this would have certified as coming within the ACOEM Guidelines by Utilization Review.

However, surgery centers throughout Southern California charge outrageous fees for epidural injections, trigger point injections, ligamentous injections, facet-joint injections, etc. Most of these injections are a response to complaints of low back pain, neck pain or radiating pain.

In reviewing the ACOEM Guidelines, and specifically page 309, these injections are not recommended in the absence of radiculopathy.

Radiculopathy is not just radiating pain down the left leg and can only be diagnosed by way of a clinical examination with objective signs of loss of reflex (knee and/or ankle), loss of muscle mass and/or atrophy.

A timely Utilization Review determination/denial exempts an employer/carrier from going through the same time and expense that the defendant obviously incurred in the *Tapia* litigation.

DISCLAIMER:

Lenny and Larry Lien, as well as their employer, the 8600 Group, are fictional creations of my imagination. However, the ongoing litigation involving lien claims is not and appears to be becoming more pronounced.

Let us add the *Tapia* decision as a weapon in our defense arsenal against lien claims but remember that our greatest defense is Utilization Review pursuant to Labor Code §4610.

Make mine a double, George!

– Joe Truce