

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: GEORGE THE BARTENDER AND THE WORKERS' COMPENSATION GAME OF ILLUSION VERSUS REALITY

FROM THE LOBBY BAR AT THE HYATT

Ron Summers, George the Bartender's workers' compensation attorney, had been bragging for months about the money that was going to roll in when the Supreme Court affirmed the Court of Appeals decisions in *Dwight Smith* and *David Amar*, unearthing the Horn of Plenty for applicant attorneys' fees.

Therefore, I could hardly wait to get to the bar tonight to see Ron's reaction to the Court's decision filed on May 11, 2009, reversing the Court of Appeals and playing the popular workers' compensation game of "Illusion Versus Reality," this time involving the interpretation of Labor Code §4607.¹

THE RULES OF THE GAME:

The workers' compensation game of "Illusion Versus Reality" is quite simple:²

The "Illusion" is what the law actually states and the "Reality" is the application of the law by the Appeals Board.

ILLUSION VERSUS REALITY: LABOR CODE §4607

The Illusion: For the past couple of years the California Applicants' Attorneys Association (CAAA) and applicant attorneys, like Ron, have been arguing that Labor Code §4607 allows an award of attorney's fees for a successful reversal of a defendant's denial of a specific modality of medical treatment post award. This was somehow equated with an unsuccessful attempt to terminate an award of medical treatment.³

¹ Labor Code §4607 provides that when a party to a proceeding "institutes proceedings to terminate an award made by the appeals board to an applicant of continuing medical treatment and is unsuccessful...the appeals board may determine the amount of attorney's fees reasonably incurred by the applicant in resisting the proceedings to terminate medical treatment."

² Since I created this game I certainly can make up the rules.

³ As observed by the Supreme Court in *Smith & Amar* an attorney's fee may be awarded after an unsuccessful attempt to terminate an Award of medical treatment but not a challenge to a specific modality of treatment.

The Reality: In its decision filed on May 11, 2009, the Supreme Court expressed astonishment at this creative lawyering and held that the “unambiguous language” of Labor Code §4607 clearly shows that “an employer or insurer that disputes a specific treatment request cannot be said to have instituted proceedings to terminate an award.”

In light of the Supreme Court's decision in *Sandhagen*, a request by the applicant's treating physician can only be addressed by a Utilization Review determination pursuant to the procedures as set forth in Labor Code §4610. Therefore, going forward cases such as *Smith & Amar* will only involve Utilization Review denials and/or modifications pursuant to Labor Code §4610.

Although the decisions of the Court of Appeals in *Smith* and *Amar* did not make sense as it involved a rather tortured interpretation of Labor Code §4607, the Court's decisions metaphorically caused a chill to run down the spines of all employers and carriers in this State.

The Court's decisions were premised on an interpretation of Labor Code §4607 allowing applicant attorneys to obtain fees for the successful reversal of a Utilization Review determination denying a specific modality of medical treatment. The Court's real reasoning, which had absolutely nothing to do with statutory or case law, was that it is unfair for a defense attorney to receive payment for their legal services from the carrier/employer when the applicant's attorney has to work for free.

Thus, the Supreme Court has assured that the Illusion and Reality as to the interpretation of Labor Code §4607 have now become one. Unfortunately, this is not always the case as can be seen in our game of “Illusion Versus Reality.”

Ever since the filing of the decisions by the Court of Appeals in *Smith* and *Amar* allowing attorney fees per Labor Code §4607, Ron has been very tough to live with. He told everyone that would listen that this was the greatest decision since the enactment of Labor Code §5710, which created a slot machine mentality for an award of attorney's fees when the defendant takes the deposition of the applicant.

Before the Supreme Court put the brakes to the Pandora's box of attorney fees under the guise of a Labor Code §4607 issue, Ron bragged that since overturning a denial of a Utilization Review decision takes great expertise he would certainly be justified in charging a fee of between \$400.00 and \$500.00 per hour.

I pointed out to Ron that such a high hourly fee would certainly not be justified in this time of economic depression when law firms are contracting rather than expanding. I also pointed out to Ron that the average hourly fee of a defense attorney (a senior partner) caps out at around \$160.00 per hour.

Ron grinned and told me that hourly fees requested and issued pursuant to Labor Code §5710 bore absolutely no relationship to either the expertise of the attorney or economic conditions or what the market would bear as he usually sent a first year attorney to all depositions on his cases.

He told me gleefully that subsequent to the decisions of the Court of Appeals in *Smith* and *Amar*, the sky was certainly the limit.

In the weeks before the Supreme Court's reversal of the Court of Appeals decisions in *Dwight Smith* and *David Amar*, Ron and everyone's favorite primary treating physician, Dr. Nickelsberg, had been strategizing at the lobby bar as to the potential gold mine that Labor Code §4607 attorney's fees would unearth.

Ron and the good doctor had decided to revisit Ron's closed cases which had not been concluded by way of Compromise and Release in which the Board had made an award of medical treatment.

A decision was made that these injured workers would once again receive ongoing medical treatment by Dr. Nickelsberg and that physical therapy, chiropractic and acupuncture treatments would continue until a Utilization Review denial was received.

Ron told me that 95% of his cases were with Agreed Medical Examiners on his "list," and that it was a foregone conclusion that these Agreed Medical Examiners would overrule any Utilization Review denial thereby opening up the Pandora's box of attorney fees predicated on an hourly rate of at least \$400.00 per hour (reason #312 never to go to an Agreed Medical Examiner).

As you might expect, the Supreme Court's decision reversing the Court of Appeals decision in *Smith* and *Amar* came as a great shock to both Ron and Dr. Nickelsberg.

A collective sigh of relief emanated from the defense community as the Supreme Court, at least for now, put the genie back in his bottle.

OUR GAME CONTINUES:

THE ILLUSION OF LABOR CODE §5710:

Only last week Ron pointed out to me that all Appeals Board offices now universally ignore the statutory mandate of Labor Code §5710(b)(4), which provides in relevant part as follows:

"A reasonable allowance for attorney's fees for the deponent, if represented by an attorney licensed by the State Bar of this state. The fee shall be discretionary with, and, if allowed, shall be set by the appeals board, but shall be paid by the employer or his or her insurer."(emphasis added)

I smiled ruefully at Ron's comments as I knew this to be true. The unambiguous and clear meaning of Labor Code §5710(b)(4) mandates that an award of an attorney's fee is discretionary and furthermore the language of the section indicates that certainly a fee will not be allowed in all cases.

THE REALITY:

It has been clear for some years that the Board mandates that attorney's fees for a deposition shall be allowed in every case and discretion be damned.

The reality is that if the Board and/or WC judges were forced to read every deposition transcript and exercise their discretion as to whether or not to allow a deposition fee, substantial resources from all Board offices would be diverted from the goal of expeditiously resolving disputes between employers and employees and providing benefits to injured workers.

The illusion of Labor Code §5710 is that all workers' compensation judges would exercise their discretion by reading all transcripts of depositions taken from applicants and also consider other evidence before deciding whether or not a deposition fee should be awarded.

The reality is that immediately following the deposition and before the transcript is prepared applicant's attorney will "walk through" a stack of Labor Code §5710 Orders with self-destruct language contained therein for the signature and approval of workers' compensation judges who are not familiar with the case, have never read the file and certainly have not read the deposition transcript.⁴ Considering the volume of requests for deposition fees, it would appear that this reality cannot function without the current practice.

Thus, the reality has now replaced the illusion.

AND OUR GAME GOES ON:

THE ILLUSION OF VOCATIONAL REHABILITATION ATTORNEY'S FEES:

Immediately after the implementation of mandatory vocational rehabilitation an issue arose as to the entitlement of fees for applicant attorneys to assist in the vocational rehabilitation process. The Board squarely addressed this issue in *Rocha v. Puccia Construction Company* 47 CCC 37 and *Ponce De Leon v. Laser Brothers* 42 CCC 962.

In the *Ponce De Leon* case the Board determined that attorneys for injured workers are entitled to a fee for services in rehabilitation proceedings. In *Rocha* the Board gave protection to these fees

⁴ Ironically, I have received orders awarding deposition fees out of Board offices where the files are not even venued but where the applicant's attorney files most of his or her cases.

by mandating that the defendants withhold "reasonable attorney's fees" from an applicant's vocational rehabilitation disability benefits to ensure that attorney fees would be available when an applicant's attorney was able to demonstrate an entitlement to a fee by way of a Petition documenting work performed, a procedure that is referred to as "Quantum Meruit." Therefore, the applicant's attorney would be paid an hourly fee for work actually performed.

THE REALITY:

Pursuant to the Board's decision in *Rocha*, defendant adopted a practice of withholding anywhere from 10% to 15% from an applicant's weekly VRTD and/or VRMA benefits. Although some applicant attorneys continue to submit Quantum Meruit Petitions, most simply made a determination as to the amount withheld from their client's VRMA/VRTD checks and claimed that amount as attorney fees with no proof as to work actually performed.

Thus, once again the reality has replaced the illusion.

THE ILLUSION OF PRE-DESIGNATION PHYSICIANS:

Most of us have ignored the incredible amendment, courtesy of SB 899, to Labor Code §4600 with respect to the new law concerning an injured workers' ability to pre-designate a physician. Labor Code §4600 mandates that if an employee meets all of its statutory requirements for a pre-designated physician then the claims adjuster, upon learning of this, should quietly get up from his or her desk, walk to the window and open it, and let out a big yahoo!

Many of us have never read the complete amendment to Labor Code §4600 and specifically subsection c(3), which provides that upon a successful pre-designation "all medical treatment, utilization review of medical, access to medical treatment and other medical treatment issues should be governed by Chapter 2.2 (commencing with Section 1340) of Division 2 of the Health and Safety Code. Disputes regarding the provision of medical treatment shall be resolved pursuant to Article 5.55 (commencing with Section 1374.30) of Chapter 2 of Division of the Health and Safety Code."

Basically, these provisions of the Health and Safety Code would indicate that a successful pre-designation takes the issue of medical care outside of the workers' compensation system to be handled by the non-occupational health carriers of the employer. Appeals, depending on the policy, go either to the Bureau of Managed Care of the State of California or the Office of the Insurance Commissioner.

Imagine the joy we would feel explaining to a workers' compensation judge and applicant's attorney, in a case in which the applicant's attorney has pre-designated his physician, that the Board does not have jurisdiction over medical care. Good luck to the applicant's attorney in filling out the comprehensive state forms for the appeal.

THE REALITY:

Sadly, the reality is we continue to handle the issue of pre-designation in a "business as usual manner" and approve pre-designated physicians if they meet the requirements as set down in Labor Code §4600.

DISCLAIMER:

In the workers' compensation game of "Illusion Versus Reality" we have experienced a real triumph in the Supreme Court upholding the clear and unambiguous Labor Code §4607.

Although the above characters and story are a figment of my rather vivid imagination, especially after a Beefeater's martini, the potential Pandora's Box of litigation motivated by the goldmine of attorney fees per Labor Code §4607 is not.

Yes, applicant's attorneys should be compensated for legitimate efforts in overturning wrongful denials of medical treatment, but the tortured interpretation of Labor Code §4607 was not the way to do it.

The applicant's bar serves a legitimate purpose in this state in assisting in the provision of benefits to injured workers and in post-award cases the most important benefit, of course, is the delivery of timely and effective medical treatment.

If attorney fees are to be awarded in a post-award situation the legislation needs to build a better mouse trap, so that the post-award of attorney fees for enforcing a medical treatment award does not become an independent engine fueling litigation for its own sake.

Speaking of reality – the reality is that applicant attorneys **CAN** receive an attorney's fee pursuant to Labor Code §5814.5 by enforcing an existing award of medical treatment in cases in which the defendant has denied and/or delayed authorization for medical treatment in the absence of a timely utilization review determination.

I am extremely happy that Kim, the Hyatt's breathtakingly beautiful cocktail waitress, approaching me with a Beefeater's martini in tow, is a reality and not an illusion.

Make mine a double, George.

-Joe Truce